AFRICAN-AMERICAN FARMERS BENEFIT RELIEF ACT OF 2007, AND THE PIGFORD CLAIMS REMEDY ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 558 and H.R. 899

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AFRICAN-AMERICAN FARMERS BENEFIT RELIEF ACT OF 2007, AND THE PIGFORD CLAIMS REMEDY ACT OF 2007

THURSDAY, JUNE 21, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:05 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Davis, Ellison, Conyers, Scott, Cohen, Franks, and King.

Staff Present: David Lachmann, Majority Staff Director; Keenan Keller, Majority Counsel; Susana Gutierrez, Professional Staff Member; and Paul Taylor, Minority Counsel.

Mr. NADLER. Good morning. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Today's hearing will examine legislation introduced by two of our colleagues on the Subcommittee that will deal with the persistent injustice perpetrated against African-American farmers by the United States Department of Agriculture.

[The bill, H.R. 558, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 558

To provide relief for African-American farmers filing claims in the cases of Pigford v. Veneman and Brewington v. Veneman.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 18, 2007

Mr. DAVIS of Alabama (for himself, Mr. CONYERS, Mr. THOMPSON of Mississippi, Mr. BUTTERFIELD, Mr. SCOTT of Georgia, Mr. BISHOP of Georgia, Mr. CLAY, Mr. MOORE of Kansas, and Mr. COHEN) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Agriculture, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide relief for African-American farmers filing claims in the cases of Pigford v. Veneman and Brewington v. Veneman.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "African-American Farmers Benefits Relief Act of 2007".

SEC. 2. EXTENSION OF DEADLINE FOR FILING CLAIM IN PIGFORD V. VENEMAN.

(a) FINDINGS.—Congress finds the following:

(1) In 1998, a lawsuit was filed against the Department of Agriculture (referred to in this subsection as the "USDA"), the second largest agency of the Federal Government, alleging that the USDA had violated the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) and the Administrative Procedure Act (5 U.S.C. 551 et seq.) by maintaining a pattern and practice of discrimination against African-American farmers. Such pattern and practice delayed, denied, or otherwise frustrated the efforts of African-American farmers to obtain loan assistance and to engage in the vocation of farming.

(2) In January 1999, the United States District Court of the District of Columbia approved the largest civil rights settlement in the history of the United States. Following the settlement, the African-American farmers and the USDA entered into a five-year consent decree.

(3) In April 1999, the court approved the settlement and assigned four entities to facilitate implementation of the consent decree.

(4) According to a USDA Inspector General report, many discrimination complaints were never

processed, investigated, or otherwise resolved, and the discrimination complaint process at the Farm Services Agency lacked "integrity, direction, and accountability".

(5) Delays in processing the discrimination claims of many African-American farmers resulted in numerous farmers losing their right to file claims.

(6) As of July 14, 2000, the statute of limitations provided under the Equal Credit Opportunity Act has run on many of the claims.

(7) On November 18, 2004, the Subcommittee on the Constitution of the Committee on the Judiciary of the House of Representatives received sworn testimony that alleged serious violations of the right to notice as it applied to the consent decree and to all those who had viable claims of discrimination against the USDA.

(8) Such testimony further alleged that although the consent decree notice campaign was deemed to be effective by the court, that campaign proved deficient because approximately 66,000 potential class members submitted their claims in an untimely fashion.

(9) Approximately 73,800 petitions were filed before the September 15, 2000, late filing deadline, of which only 2,131 were approved.

(10) Of the approximately 21,000 timely requests for reconsideration, 10,745 of those requests have been decided, but only 140 have been approved.

(b) DE NOVO REVIEW OF CERTAIN CLAIMS FILED IN PIGFORD V. VENEMAN.—A person who submitted a petition for redress in the settlement of the relevant case before the date of the enactment of this Act may obtain de novo consideration of the petition before an adjudicator assigned by the facilitator of the consent decree of such case if—

(1) the petition was denied on the grounds of untimely filing;

(2) not later than one year after the date of the enactment of this Act, such person submits a subsequent petition for redress in such settlement; and

(3) such person submits an affidavit to the adjudicator asserting that such person did not receive effective notice of the filing deadline in such consent decree.

(c) NOTICE TO USDA.—Not later than 30 days after a person submits a petition pursuant to subsection (b)(2), the facilitator of the consent decree of the relevant case

shall provide notice to the Secretary of Agriculture of such petition.

(d) LOAN DATA.—

(1) REPORT TO PERSON SUBMITTING PETITION.—Not later than 60 days after the Secretary of Agriculture receives notice pursuant to subsection (c) of a petition filed pursuant to subsection (b)(2), the Secretary shall provide to the person that filed such petition a report on farm credit loans made within the claimant's State by the Department during the period beginning on January 1, 1992, and ending on the date of the enactment of this Act. Such report shall contain information on all persons whose application for a loan was accepted, including—

(A) the race of the applicant;

(B) the date of application;

(C) the date of the loan decision;

(D) the location of the office making the loan decision; and

(E) all data relevant to the process of deciding on the loan.

(2) NO PERSONALLY IDENTIFIABLE INFORMATION.—The reports provided pursuant to paragraph (1) shall not contain any information that would

identify any person that applied for a loan from the Department of Agriculture.

(e) LIMITATION ON FORECLOSURES.—Notwithstanding any other provision of law, the Secretary of Agriculture may not foreclose a loan if the borrower makes a prima facie case to an adjudicator assigned by the facilitator of the consent decree of the relevant case that the foreclosure is proximately related to discrimination by the Department of Agriculture.

(f) NOTICE.—

(1) KNOWN CLASS MEMBERS.—Not later than 45 days after the date of the enactment of this Act, the Secretary of Agriculture shall provide to all known members of the class in the relevant case notice of the de novo review available under subsection (b).

(2) ADVERTISEMENTS.—The Secretary of Agriculture shall announce the de novo review available under subsection (b) by arranging to—

(A) broadcast 40 commercials on the cable, Internet, network, and radio broadcast outlets throughout the United States with the largest African-American audiences during a 30-day period;

(B) broadcast 40 commercials on the cable, Internet, network, and radio broadcast outlets in the relevant region with the largest African-American audiences during a 30-day period;

(C) broadcast 50 commercials on the cable, Internet, network, and radio broadcast outlets with the largest national audiences during a 30-day period;

(D) have one-quarter page advertisements placed in 27 general circulation newspapers and 115 African-American newspapers in the relevant region during a 14-day period;

(E) have a full page advertisement placed in the editions of the magazine TV Guide that are distributed in the relevant region; and

(F) have half-page advertisements placed in the national editions of magazines with the highest percentages of African-American readership.

(g) MONITOR.—

(1) SELECTION.—Not later than 45 days after the date of the enactment of this Act, the parties to the relevant case shall select an independent Monitor who shall report directly to the Secretary of Agriculture. If the parties are unable to agree on a Mon-

itor after good faith negotiations, the plaintiffs and the defendants shall each submit two persons to the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit who shall appoint a Monitor from among such persons.

(2) DUTIES.—The Monitor—

(A) not later than 180 days after the date of the enactment of this Act, and at least semi-annually thereafter, shall submit to the Secretary of Agriculture and make publicly available on the Internet a report detailing the implementation of this Act and whether such implementation is being done in good faith;

(B) if the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of a claim and such error has resulted or is likely to result in a fundamental miscarriage of justice, may direct the adjudicator or facilitator to review the claim;

(C) shall be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any complaints relating to this Act or the consent de-

cree of the relevant case and to expedite the resolution of such complaints; and

(D) if the Monitor is unable to resolve a problem brought to the attention of the Monitor pursuant to subparagraph (C), may file a report with the counsels of the parties who may then seek enforcement of this Act and such consent decree pursuant to paragraph 13 of such consent decree.

(3) TERM.—The Monitor shall remain in existence for a period of 5 years and shall not be removed except for good cause.

(4) EXPENSES.—The Secretary of Agriculture shall pay the fees and expenses of the Monitor.

(h) DEFINITIONS.—In this section:

(1) LARGEST AFRICAN-AMERICAN AUDIENCES.—The term "largest African-American audiences" means those audiences determined to have the largest number of African-American listeners, viewers, or users as determined by the Arbitron or Nielsen rating systems.

(2) LARGEST NATIONAL AUDIENCES.—The term "largest national audiences" means those audiences determined to have the largest number of lis-

teners, viewers, or users as determined by the Arbitron or Nielsen rating systems.

(3) RELEVANT CASE.—The term ''relevant case'' means the consolidated class action lawsuits entitled Pigford v. Veneman and Brewington v. Veneman (United States District Court for the District of Columbia, Civil Action Numbers 97–1978 and 98–1693).

(4) RELEVANT REGION.—The term ''relevant region'' means the States of Alabama, Arkansas, California, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia and the District of Columbia.

○

[The bill, H.R. 899, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 899

To provide a mechanism for the determination on the merits of the claims of claimants who met the class criteria in a civil action relating to racial discrimination by the Department of Agriculture but who were denied that determination.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2007

Mr. SCOTT of Virginia (for himself and Mr. CHABOT) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To provide a mechanism for the determination on the merits of the claims of claimants who met the class criteria in a civil action relating to racial discrimination by the Department of Agriculture but who were denied that determination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Pigford Claims Remedy Act of 2007".

SEC. 2. DETERMINATION ON MERITS OF PIGFORD CLAIMS.

(a) IN GENERAL.—Any Pigford claimant who has not previously obtained a determination on the merits of a Pigford claim may, in a civil action, obtain that determination.

(b) INTENT OF CONGRESS AS TO REMEDIAL NATURE OF SECTION.—It is the intent of Congress that this section be liberally construed so as to effectuate its remedial purpose of giving a full determination on the merits for each Pigford claim denied that determination.

(c) DEFINITIONS.—In this Act—

(1) the term "Pigford claimant" means an individual who previously submitted a late-filing request under section 5(g) of the consent decree in the case of Pigford v. Glickman, approved by the United States District Court for the District of Columbia on April 14, 1999; and

(2) the term "Pigford claim" means a discrimination complaint, as defined by section 1(h) of that consent decree and documented under section 5(b) of that consent decree.

○

Mr. NADLER. Normally at this point we would go to opening statements but since our first witness, the distinguished Senator from Iowa, has a hearing to attend, we will come back to the opening statements after Senator Grassley testifies.

Our first witness is the distinguished Senator from Iowa, Charles Grassley. He needs no introduction. Suffice it to say that the Senator is himself is a family farmer. He served in the House from 1974 to 1980, when he was elected to the Senate. He was, among other achievements, the author of chapter 12 of the Bankruptcy Code, which provides special relief for distressed family farmers. While we have long disagreed on many other issues having to do with the Bankruptcy Code, I am proud to have worked with Senator Grassley to make chapter 12 a permanent part of the Code.

I would add that our purpose today is not to talk about bankruptcy but to do all we can to protect family farmers who have been treated unjustly by our Government and keep them away from bankruptcy.

I want to welcome our colleague from the other body to the Subcommittee today. Senator, your written statement will be made a part of the record in its entirety. I would ask that you now summarize your testimony in 5 minutes or less. To help you stay within that time limited, there is a timing light at your table. When 1 minute remains the light will switch from green to yellow and red when the 5 minutes are up. Thank you, and we await your testimony.

TESTIMONY OF THE HONORABLE CHARLES E. GRASSLEY, A UNITED STATES SENATOR FROM THE STATE OF IOWA

Mr. GRASSLEY. Well, thank you very much, Mr. Chairman, and I would also thank Chairman Scott, Chairman Conyers and Congressman Davis for their support of this very important issue, and I would also thank Congressman Chabot and his staff for the hard work that they have put into this legislation.

I know only one Black farmer in Iowa, but justice knows little about State lines and my State has a long history of supporting fairness and support for farmers. My efforts for this bill is in that tradition.

Ironically, the Department of Agriculture has expanded in size and influence in the last several decades. The number of Black farmers in this country has declined dramatically. In the 1920's there were more than 900,000 Black farmers owning or operating more than 16 million acres of land. Today statistics reveal that fewer than 18,000 Black farmers own or operate less than 3 million acres.

In 1997, aggrieved Black farmers came together to hold the Department of Agriculture accountable for systemic discriminatory treatment in the administration of loans and other credit opportunities under the Equal Credit Opportunity Act and the Administrative Procedures Act. Unlike previous unsuccessful lawsuits, the U.S. District Court certified and consolidated the *Pigford* and *Brewington* cases as one class action lawsuit, giving aggrieved plaintiffs hope for the first time in many decades.

This decision prompted the U.S. Department of Agriculture to agree to resolve these claims expeditiously, the result of which is the *Pigford* consent decree.

At the time the consent decree was the largest racial discrimination settlement in our Nation's history and expectations were very high once again that a turning point in the documented plight of the Black farmer had occurred. The consent decree was intended to provide a swift resolution for the claims of discrimination that had gone unaddressed for far too long.

Despite these good intentions, the expeditious resolution of tens of thousands of claims has not occurred. Testimony before the House Constitution Subcommittee revealed many unanticipated problems with the consent decree, some of which have impacted the ability of many farmers to file timely claims. In particular, the Committee was made aware that more than 65,000 potential claimants who requested entry into consent decrees by the court ordered September 15, 2000 deadline, that more than half did not have actual notice of the settlement and were denied the opportunity to have determinations made on the merits of their claim.

Thus, more than 75,000 farmers once again have been shut out of the process that was created to address their discrimination complaints and are left without any recourse or opportunity to pursue those claims. H.R. 899 provides those aggrieved claimants who filed late claim petitions with the court appointed arbiter before December 31st, 2005 with a new and needed opportunity. This bill is intended to provide some measure of justice to remedy past injustices.

With this bill, it is my hope that the U.S. District Court would embrace this opportunity and construe it in a remedial spirit in which it was intended. In his latest opinion District Court Judge Friedman stated, quote, that legislators can take steps that judges cannot. If Congress believes that burdens are unfair or that a significant number of African-American farmers, despite extraordinary efforts to reach them, never received notice, then it surely has the means—meaning the Congress—has the means at its disposal to correct these wrongs. Legislative solutions are not unprecedented. The court is confident Congress could devise a means to provide relief for these farmers, end of quote.

With this opinion in mind, it is my hope that the court would liberally construe the cause of action, apply the same substantial evidence standard that was utilized in the consent decree and affording those farmers who meet the criteria with an opportunity to expeditiously resolve their complaints through a process similar to and within that process established by that consent decree.

In 1998, Congress waived the applicable statute of limitations that would have barred eligible claimants from filing a complaint under the original consent decree. The bill, H.R. 899, provides similar assistance enabling those with meritorious claims to have their day of justice.

I offer a Senate companion to H.R. 899 along with Senators Obama, Kennedy and Biden.

Thank you, Mr. Chairman, for allowing me to testify this morning and one final note: I want to recognize the hard work of Dr.

John Boyd, President of the National Farmers Association, in this effort as well. Thank you very much.

Mr. NADLER. Thank you, Senator. Now mindful of the press of legislative business, it is usually not the practice to question our colleagues and their witnesses here. Unless there is objection, the Senator is excused with thanks.

Mr. CONYERS. Much thanks.

Mr. GRASSLEY. Thank you, Mr. Chairman.

Mr. NADLER. Thank you, Senator. We will now return to our normal order of business and the Chair will recognize himself for 5 minutes for an opening statement.

The injustices perpetrated against African-American farmers by officials of the United States and its agents have resulted in the dispossession of countless family farmers and the near ruination of thousands of others. The settlement of the *Pigford* case was intended to have provided a remedy for these terrible injustices. Unfortunately, for a variety of reasons, including mismanagement and apparent continuing resistance by the Department of Agriculture and the Department of Justice, that remedy remains elusive for many.

This injustice has gone on for far too many years and quite frankly I find deeply disturbing that this matter could have been solved years ago had the agencies responsible for protecting the rights of family farmers not done their best to undermine those rights. The longer this drags on the more farmers will be pushed into bankruptcy and off the land their families have farmed for generations. That is unacceptable.

Our colleagues, the gentleman from Virginia, Mr. Scott, and the gentleman from Alabama, Mr. Davis, have each introduced legislation to deal with their unacceptable situation. I want to commend them for their hard work and dedication. This is truly a just cause.

I want to welcome all of our witnesses and thank them for participating today. I look forward to your testimony. I yield back the balance of my time.

I now recognize our distinguished Ranking Member the gentleman from Arizona, Mr. Franks for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman. And thank you for holding this hearing on this very important issue.

Mr. Chairman, the United States Department of Agriculture is responsible for the farming programs that provide loans, credit, and other benefits to farmers. A Federal court has found that the USDA's loan program was plagued by discrimination by the elected county committee and supervisors who administered the program who systematically denied certain farmers loans and other credit opportunities based on the race of the applicants. The collective effect of these actions contributed to the dramatic decline in the number of Black farmers in the United States.

The U.S. District Court for the District of Columbia noted in its opinion approving the consent decree resulting in the litigation *Pigford v. Glickman*, that the number of minority farmers and farm ownership has declined from nearly a million strong and 16 million acres of farmland in the 1900's to fewer than 18,000 minority farmers owning less than 3 million acres of land today.

While it is true that the number of American farmers of all races have declined by large percentages the court's findings suggested that racial discrimination was at least in part the cause for the numbers that declined within the minority community.

Since the consent decree's opinion, however, criticism has ensued over the fairness of the process to adequately resolve past complaints of discrimination. On September 28 of 2004, this Committee under Chairman Steve Chabot held an oversight hearing on the status of the implementation of the *Pigford* settlement. The hearing closely examined the consent decree, particularly focusing upon whether the intent of the parties has been fulfilled, whether procedure requirements prescribed for the settlement were adequate and whether the civil rights issues that led to the settlement had been properly addressed and what actions may be further necessary to address the outstanding issues.

On November 18, 2004, the Subcommittee held an additional oversight hearing on the notice provision of the consent decree to better determine whether the intent of the parties to the settlement has been fulfilled in light of the substantial numbers of late filing claimants and what may be done to address the more than 75,000 late filers.

Chairman Chabot and Congressman Scott introduced H.R. 899, the Pigford Claims Remedy Act of 2007. Section 2(a) of the bill grants a new Federal cause of action to those *Pigford* claims who submitted late filing requests with the arbitrator of the *Pigford* consent decree but who were denied entry in the settlement. The new cause of action would provide those late filers who meet the class criteria and who have meritorious complaints of discrimination in the administration of USDA farm loans with the opportunity to have those complaints resolved before a neutral party. Without H.R. 899, late claim petitioners will be time barred from pursuing their claims.

A second bill H.R. 558, the African-American Farmers Benefits Relief Act of 2007 has also been introduced by Chairman Conyers and Representative Davis of Alabama. H.R. 558 addresses the same general problem addressed by H.R. 899. I have, however, constitutional concerns with the way that H.R. 558 is structured as it may unduly micromanage subsequent judicial proceedings.

Testimony taken by the Subcommittee on the Constitution during its hearings confirmed that Congress lacks the constitutional authority to intervene in a judicially approved settlement, and this is precisely what H.R. 558 is structured to do. The testimony from the November 18, 2005 hearing, however, supports Congress' authority to create a new cause of action for those *Pigford* claims who never had a substantive determination made on the merits of their claims, and this is done by Representative Chabot's bill, H.R. 899.

It is worth noting that this is not the first time Congress has assisted Black farmers subject to the *Pigford* consent decree. In 1998, Congress waived the applicable statute of limitations that would have barred putative class members from even participating in the consent decree and the *Pigford* court itself has noted potential need for official congressional action. In the last opinion the District Court found that judicial power reaches only so far. Legislatures, however, can take steps that judges cannot. If Congress believes

that burdens imposed by the administration of the consent decree are unfair or that a significant number of African-American farmers never received notice, then it surely has means at its disposal to correct these wrongs. The Court is confident that the Congress could devise the means to provide relief for these farmers, and I believe that too, Mr. Chairman. And I look forward to exploring those means today and hearing from all of our witnesses. Thank you.

Mr. NADLER. Thank you. Normally in the interest of proceeding to our witnesses and mindful of our busy schedules I would ask that other Members submit their statements for the record. In this instance since two Members of the Subcommittee have introduced the bills that we are considering today, I think it appropriate that Members of the Subcommittee who wish to make a statement be recognized for that purpose. And so I will ask the Members of the Subcommittee in order if they wish to make opening statements, starting with the distinguished Chairman of the full Committee.

Mr. CONYERS. I think that I would like to make a very brief statement.

Mr. NADLER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. Thank you very much. This is a great deal and I just want to take the time and compliment the tremendous interest that has been generated around this subject that is bipartisan in nature. And the reason that this becomes important, because after a number of years in Congress very few things get out of here that are not bipartisan. I mean that is the only way we can make laws. This comes as a shock to some people who would rather go down in a partisan way rather than achieve victory by working together.

And so in addition to all my colleagues on this side of the aisle of whom I am so proud, the Chairman himself, Bobby Scott, and many others, I lift up for some special thanks, not only the Republican Senator that was just here, but also Congressman Chabot and the Ranking Member of this Committee, Mr. Franks, I am very grateful to you, and others that are joining us.

This is a cause that, because of my seniority, I can claim to have been here first and been in here longer than anybody else, but that does not get me any points unless we are bringing people with us. And now, thanks to the Judiciary Committee of the House, that is happening. And it is so important that we examine carefully how we are going to proceed.

The front page of yesterday's Washington Post tells it all, doesn't it? There are very few people in this room right now that did not notice that with great detail. In the Mississippi Delta 95 percent of the agricultural subsidies went to large commercial farms primarily, if not exclusively, owned by White farmers despite the fact that the majority of residents in the region are African-Americans. And what is so impressive to me is that in the Senate and in the House all the Members have recognized that the question of race has played the determining factor in this. Exactly what we are trying to eliminate in our society has been compounded in the history and the experience of Black farmers in America.

It is a huge American tragedy that begs to be corrected. We have two ways suggested to do it. And what I want to pledge is that we are going to work this out between the legislative proposals. But

the more important thing is that in this 110th Congress we achieve the success that we thought we had accomplished in 1999 when we thought that we had really done something. The intransigence inside the Federal Government in the USDA and to the agencies that have control over agriculture is astounding. They are really not ready for the 21st century of a color-free, color-blind way of farming, which is one of the largest businesses still in the country, after all that had been done to them. And I lift up a special plea in the case of the family farmer, the small farmer. Black and White. They are all disappearing, but the African-American farmer has been mistreated by its own Government. Even when we thought we had victory in our hands, it was snatched out at the last minute.

And this is why Chairman Nadler, the work that you and the Ranking Member are doing in this Committee is so far important to see that that is corrected. And I am so proud that we have all of the great leaders here with us today. And I thank you very much for this time.

Mr. NADLER. I thank you. Does the gentleman from Iowa seek recognition?

Mr. KING. Briefly, Mr. Chairman.

Mr. NADLER. The gentleman is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I am going to keep this brief, but I do want to express that I am not yet convinced and I am going to want to hear on both sides of this argument. I am concerned about some statistics that I see, just going through right now 96,000 total filers compared to 20,000 African-American farmers. That is hard for me to equate that and not wanting to have some response and answers as to what would bring about such a statistic like that.

I think this Committee knows that I am actively and aggressively against prejudice and bias on either side, and I appreciate the Chairman of the overall Committee's remarks regarding that. And so I am going to listen to this with open ears and open mind and I am going to ask perhaps some skeptical questions and I ask the witnesses to be prepared to answer that. And hopefully we can come to a consensus conclusion here.

And I would thank the Chairman and yield back the balance of my time.

Mr. NADLER. Thank you. The gentleman from Minnesota. Do you seek recognition?

Mr. ELLISON. No, I don't, Mr. Chairman, thank you.

Mr. NADLER. Thank you. The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I want to thank you for holding this hearing and for your steadfast support in supporting efforts to obtain justice for Black farmers generally and particularly those who are seeking redress for being denied a determination of the merits of their claims of discrimination through the *Pigford* litigation. You have done what you could do to assist the efforts both as Ranking Member of the Subcommittee in the last Congress and now as Chairman.

I want to recognize also the efforts of the full Committee Chairman, Mr. Conyers, and the efforts of the gentleman from Alabama,

Mr. Davis, in also seeking justice. I want to further recognize the former Chairman of the Subcommittee, Mr. Chabot from Ohio, for his efforts to seek justice for Black farmers in holding hearings and sponsoring legislation he sought to get passed in the last Congress and in cosponsoring legislation this year which was filed simultaneously with the bill in the Senate by Senators Grassley and Obama.

Both bills before us today seek a measure of justice for Black farmers. One, H.R. 899, which I am the lead sponsor, is a rifle shot effort to provide late filers in the *Pigford* case an opportunity to have their claims heard on the merits. The other bill before us, H.R. 558, is a more comprehensive bill which I also support, yet it requires consideration by another Committee, the Committee on Agriculture, and has provisions directing actions by courts which raise problematic issues of separation of powers between the legislative and judicial branches.

While we are working toward a more comprehensive approach, I would hope that we can still proceed with the part that is exclusively within the Judiciary Committee's jurisdiction, giving late filers a simple chance to have their claims heard on the merit.

As indicated already, some 94,000 claims were filed but only 22,000 of those were or are slated to be considered on the merits. Of the remaining claims only 2,100, less than 3 percent, were accepted for determination on the merits. While the merits of all 2,100 late filers accepted have not been determined, some have been and, according to reports of the court appointed monitor of the settlement, some of those considered were found to warrant payment under the settlement agreement, which indicates that there may well be many others among the late filers also entitled to awards.

The large part of the problem in the settlement appears to be that nobody realized there would be a potential for so many claims to be filed. Early estimates ranged from a few hundred to a few thousand. But it does not seem reasonable to believe that the court would twice extend the period for late filers simply to tell all of the late filers, and almost 97 percent of them, that they too filed late. Nor does it appear reasonable to believe the court or anyone would have knowingly designed a process that would leave 75 percent of those who filed a claim without any way do get their cases heard on the merits.

It certainly does not seem reasonable to conclude that 75 percent of those who filed a claim knew before the deadline that they could file but intentionally waited after the deadline to file their claim. With the vast majority of claims being filed after the deadline had passed, it is not unreasonable to conclude that effective notice did not reach most of the claimants in a manner that allowed them to file their claims on a timely basis. We do not have to determine whose fault it was, but we should recognize the fact that 75 percent in fact filed late.

The court in trying to accommodate the situation gave the arbiter carte blanche authority to determine whether late filers' claims should be considered due to extraordinary circumstances. Unfortunately, the arbiter established a process that resulted in most claims not being able to show extraordinary circumstances and it

prevented them from being able to file on time. Rather than apply a standard so narrowly that 97 percent of those claims were left out, the arbiter should have considered it to be an extraordinary circumstance that 75 percent of the claims in the class action were not considered on the merits and he should have allowed all of them to be considered.

Now, obviously not all of the claims will be found meritorious. But it would be a travesty of justice on top of a travesty of justice not to allow those claims to have been resolved on their merits.

So, Mr. Chairman, while I filed H.R. 899 simply to allow the farmers to have an opportunity to have their cases heard on the merits, I would hope that we would see this swiftly passed into law. I would like to thank you for scheduling this hearing.

As you know, Mr. Chairman, farmers are losing their farms every day while this legislation is pending. So I look forward to the testimony of witnesses and hope that we can move this bill as expeditiously as possible.

Thank you.

Mr. NADLER. I thank the gentleman. I now recognize the gentleman from Tennessee for 5 minutes for an opening statement.

Mr. COHEN. Thank you, Mr. Chairman. I just want to thank Mr. Davis and others who brought H.R. 558 originally, of which I am an original cosponsor. I became aware of this issue from then representative, now county commissioner Henry Brooks, who brought a resolution to the Tennessee legislature concerning the plight of the African-American farmers and the *Pigford* claims and all. Before that I wasn't aware of it and opened my eyes and during the campaign I had several people talk to me about these issues. And my district is about 100 percent urban, but there are folks in Fayette County, right outside of Shelby, that are affected and other people throughout the Delta. And of course as those people prosper, people in my area prosper. But it is a justice issue, regardless of the economic issue that it brings upon the city.

The articles in the paper the last few days about how so many subsidies have gone to the large White farm owners, the big folks, just indicated to me again the disparity that we have had in this country with people. And it is a thing that has been over the years and what we have done with justice with Emmett Till, what we need to do in so many areas, is to try to bring this country together and it is not just social justice, it is economic justice. And economic justice isn't just an urban thing. It is a rural thing too.

So I am pleased to be a sponsor, and I hope we can have some success. And I thank the Chairman and particularly Representative Davis for bringing this initial legislation. I yield the balance of my time.

Mr. NADLER. I thank the gentleman, and the Chair the now recognizes the gentleman from Alabama for 5 minutes for an opening statement.

Mr. DAVIS. Thank you, Mr. Chairman. And Mr. Cohen, thank you for your comments and thank you for your cosponsorship of the bill. I know that our Committee Chair, John Conyers, has to leave because he has a hundred other things that he needs to do, but Mr. Conyers, while you are here I do want to acknowledge you at the outset.

This hearing has been a long time coming, ladies and gentlemen. We have been talking, as we tend to do in this institution, for a long time about relief for African-American farmers. We have been talking, as we tend to do in this institution, for a very long time about dealing with the practical inequities in the *Pigford* case. We have been talking for a very long time about fixing *Pigford*.

Well, today we move from talking to having a hearing on a bill to a markup to enacting legislation. And I am convinced, I know, Mr. Chairman, you prefer us to be as nonpartisan as we can be in these settings but let me say the obvious. Elections have consequences. We would not be conducting this hearing but for the results of November 6th and John Conyers becoming the Chair of this Committee. Mr. Chairman, if you will indulge me that comment.

Now if I can, turning to the substance, let me thank my very good friend, one of my best friends in the Congress, Bobby Scott, for the good work that he has done on this issue. Let me thank Steve Chabot from Ohio for the work that he has done. For that matter, let me thank George Allen for the work that he did. The Scott-Chabot bill was introduced in the Senate last term by Senator Allen. And I thank him for his interest in this issue.

Let me talk about the bills that I have introduced, a number of people have cosponsored, which is H.R. 558. It is very simple. It revives the *Pigford* administrative process. It says to farmers who did not get notice that this time the Government will have to provide the notice and pay for it. It says to the many *Pigford* litigants who were thrown out because their claims were untimely filed, and Mr. Scott mentioned all the issues with the notice process. He mentioned all the issues with the timing.

This bill says to them that they will now have their opportunity to come back in and have their claims heard. This bill says to farmers who were facing foreclosure or default that if you can show that your foreclosure or default is proximately connected to discrimination, that it stops, and I think it is a good comprehensive approach.

Some say that we should simply let African-American farmers file a civil claim and simply go into court. I want to point out two problems with that. The first one is anyone in this room who has practiced employment law knows, and I see at least one good friend of mine, Byron Perkins of Birmingham, Alabama, who runs the Johnny Cochran firm, there are other lawyers in the room, one of whom, Mr. Fraas, will testify. As these gentlemen know very well when you file a civil rights case in this country you get your day in court. It is the day you file the complaint, and that is it.

For the overwhelming majority of cases, 90-some percent of civil rights cases filed in this country never make their way to a jury trial. The overwhelming majority of them go out on summary judgment or dismissal. The ones that settle don't settle at a very high value. Frankly, in this litigation climate most cases don't have a very high settlement value. As I am sure Mr. Fraas will tell you cases on behalf of poor farmers who don't have resources, who often don't have the resources to stay the course in civil litigation, those cases I guarantee you don't have a high settlement value. So a new cause of action for African-American farmers in my opinion does not do enough to protect their rights.

The final point I will make, let's put all of this in perspective. Ninety percent of the claims filed under *Pigford* were denied on their merits or dismissed as untimely. Nine out of ten. Ladies and gentlemen, as everyone in this room knows as a matter of common sense, the Federal Government would not have settled a case if 90 percent of the claims had no merit. The Government wouldn't have given money away. The Government wouldn't have settled the case on the theory that nine out of 10 claims had no value.

There is proof positive that *Pigford* has not worked. The fact that 90 percent of those who tried to go through the process has been denied. Yes, Mr. Cohen, Mr. Scott, this is about justice. It is not about special treatment for anybody. It is about the Government keeping its promise. The Government promised through the *Pigford* process that these individuals would have their shot at a hearing. All we simply want to do is make the Government keep its promise.

And Mr. Chairman and the Chair of the Subcommittee, I thank you for convening this hearing.

Mr. NADLER. I thank you, sir. And I now recognize the gentleman from Arizona.

Mr. FRANKS. Mr. Chairman, I would just like to submit for the record the statement of Steve Chabot by unanimous consent.

[The prepared statement of Mr. Chabot follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO, AND MEMBER, COMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Statement of Congressman Chabot
on H.R. 899,
A bill to provide a mechanism for the determination on the merits of the claims of claimants who met the class criteria in a civil action relating to racial discrimination by the Department of Agriculture but who were denied that determination

Thank you Chairman Nadler. I would like to thank the Chairman of the Crime Subcommittee, Chairman Scott, as well as the Chairman of the full Committee, Chairman Conyers, and Congressman Davis for their support of this important issue. Mr. Scott and I have worked together over the last three years in trying to craft a remedy for the injustices that the *Pigford* Consent Decree left behind. I would also like to thank the distinguished Senator from Iowa, Senator Grassley, for his support of the companion bill to H.R. 899 that he introduced in the Senate with Senator Obama.

The struggle of the Black farmer dates back to our nation's beginnings. Hopes were raised at the end of the Civil War that our nation had turned a corner and would go to the lengths necessary to ensure that each of its citizens would have an equal opportunity to be

economically self-sufficient. Despite President Lincoln's pledge and vision, Black farmers have faced increasing hardships and struggles in this country.

Ironically, as the United States Department of Agriculture has expanded in size and influence over the last several decades, the number of Black farmers in this country has declined dramatically. In 1920, there were more than 900,000 Black farmers owning or operating more than 16 million acres of land. Today, statistics reveal that fewer than 18,000 Black farmers own or operate less than 3 million acres. In his opinion approving the *Pigford* Consent Decree, U.S. District Court Judge Paul Friedman held – quote – "the Department of Agriculture and the county committees to whom it delegated so much power bear much of the responsibility for the dramatic decline."

In 1997, aggrieved Black farmers came together to hold the United States Department of Agriculture accountable for the systematic

discriminatory treatment in the administration of loans and other credit opportunities under the Equal Credit Opportunity Act and the Administrative Procedures Act. Unlike previous unsuccessful lawsuits, the U.S. District Court certified and consolidated the *Pigford* and *Brewington* cases as one class action lawsuit, giving aggrieved plaintiffs hope for the first time in many decades. This decision prompted USDA to agree to resolve these claims expeditiously, the result of which is the *Pigford* Consent Decree. At the time, the *Pigford* Consent Decree was the largest racial discrimination settlement in our nation's history and expectations were high once again that another turning point in the documented plight of the Black farmers had occurred. The Consent Decree was intended to provide a swift resolution for the claims of discrimination that had gone unaddressed for far too long.

Despite these good intentions, the expeditious resolution of tens of thousands of claims has not occurred. Testimony before the Constitution Subcommittee, which I chaired for six years, on September

28 and November 18, 2004, and a field hearing that was held in my district in February 2005, revealed many unanticipated problems with the Consent Decree, some of which have impacted the ability of many farmers to file timely claims. In particular, the Committee was made aware that more than 65,000 potential claimants who requested entry into the Consent Decree by the court-ordered September 15, 2000 deadline, more than half who did not have actual notice of the settlement, were denied the opportunity to have determinations made on the merits of their claims. In addition, a document submitted by one of the court-appointed neutrals revealed more than 9,000 additional farmers filed after the September 15, 2000 deadline and were denied entry.

I ask unanimous consent to submit this document for the record.

Thus, more than 75,000 farmers once again have been shut out of a process that was created to address their discrimination complaints and are left without any recourse or opportunity to purse their claims.

H.R. 899 provides those aggrieved claimants who filed late claim petitions with the court-appointed Arbitrator before December 31, 2005, with a new opportunity as Mr. Franks has described. H.R. 899 is intended to provide some small measure of justice to remedy past injustices.

In creating this new cause of action, it is my hope that the U.S. District Court would embrace this opportunity and construe it in the remedial spirit in which it was intended. In his latest opinion, District Court Judge Friedman stated that - quote - " Legislatures . . . can take steps that judges cannot. If Congress believes that burdens are unfair or that a significant number of African-American farmers despite extraordinary efforts to reach them - never received notice . . . then it surely has the means at its disposal to correct these wrongs. Legislative solutions are not unprecedented . . . the Court is confident Congress could devise the means to provide relief for these farmers."

With this opinion in mind, it is my hope that the Court would liberally construe this cause of action, applying the same "substantial evidence" standard that was utilized in the Consent Decree and affording those farmers who meet the criteria with an opportunity to expeditiously resolve their complaints through a process similar to, or within, that process established by the Consent Decree.

As Mr. Franks has noted, this is not the first time Congress has assisted the Black farmers in the *Pigford* Consent Decree. In 1998, Congress waived the applicable statute of limitations that would have barred eligible claimants from filing a complaint under the original Consent Decree. H.R. 899 provides similar assistance enabling those with meritorious claims to have their day of justice.

Again, I thank my colleagues for holding this important. I believe it is a step in the right direction. I yield back the balance of my time.

Pigford v. Johanns
5(g) Late Claim Affidavits Filed After the 9-15-2000 Deadline

Month/Year Late Claim Affidavit Received	Count of People Who Filed	% of All Late Filings
9/16/00 - 9/31/00	4198	45.32%
Oct-00	1207	13.03%
Nov-00	427	4.61%
Dec-00	584	6.31%
Jan-01	234	2.53%
Feb-01	110	1.19%
Mar-01	76	0.82%
Apr-01	68	0.73%
May-01	73	0.79%
Jun-01	62	0.67%
Jul-01	130	1.40%
Aug-01	52	0.56%
Sep-01	118	1.27%
Oct-01	58	0.63%
Nov-01	213	2.30%
Dec-01	809	8.73%
Jan-02	418	4.51%
Feb-02	134	1.45%
Mar-02	114	1.23%
Apr-02	83	0.90%
May-02	59	0.64%
Jun-02	10	0.11%
Jul-02	1	0.01%
Aug-02	3	0.03%
Sep-02	3	0.03%
Oct-02	1	0.01%
Nov-02	2	0.02%
Dec-02	1	0.01%
Jan-03	2	0.02%
Feb-03	2	0.02%
Oct-03	2	0.02%
Dec-03	1	0.01%
Jan-04	1	0.01%
Oct-04	4	0.04%
Nov-05	2	0.02%

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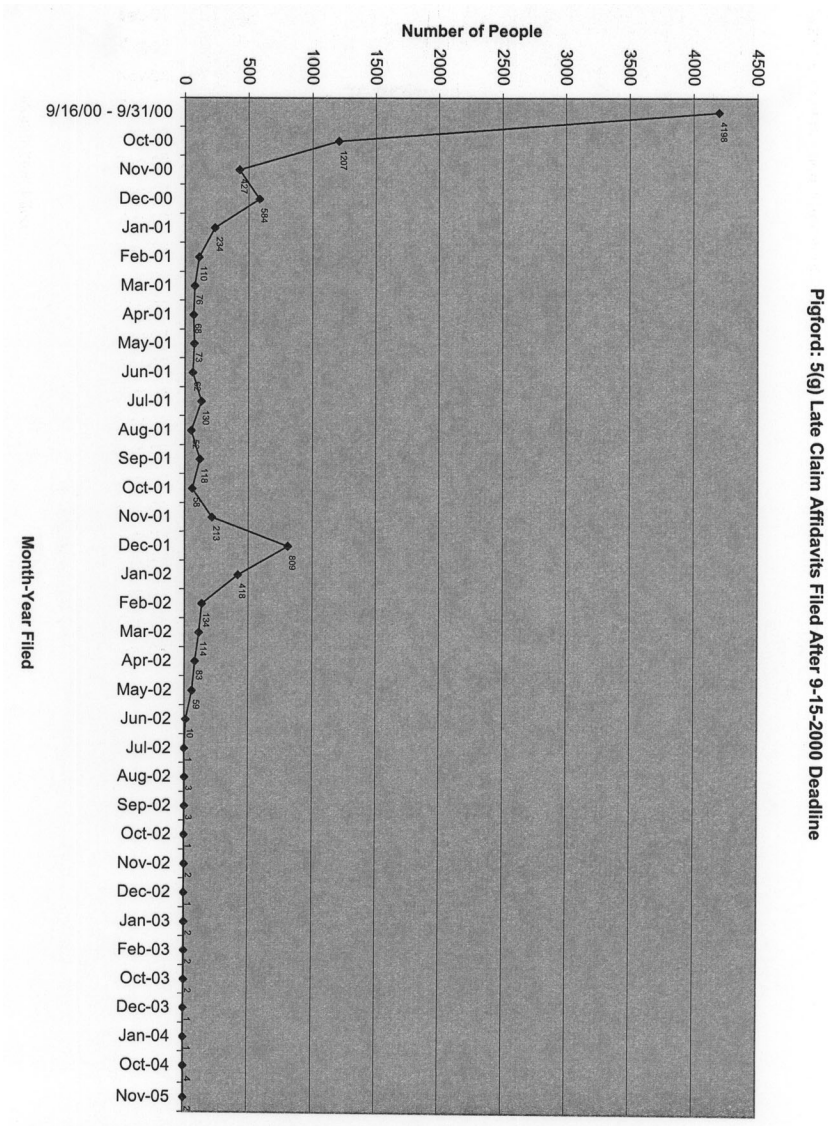
Pigford: 5(g) Late Claim Affidavits Filed After 9-15-2000 Deadline
Number of People
0
500
1000
1500
2000
2500
3000
3500
4000
4500
Month-Year Filed
9/16/00 - 9/31/00
Oct-00
Nov-00
Dec-00
Jan-01
Feb-01
Mar-01
Apr-01
May-01
Jun-01
Jul-01
Aug-01
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Mr. NADLER. Without objection, the statement will be admitted into the record.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record, anyone who did not read their statement already.

Without objection, the Chair will be authorized to declare recess of the hearing. As we ask questions of our witnesses the Chair will recognize Members in the order of their seniority on the Subcommittee alternating between the majority and the minority, providing that the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unvoidably late or only able to be with us for a short time.

I will now ask the witnesses to come forward and sit at the witness table.

I would now like to introduce our second panel. Our first witness is John Zippert, Director of Program Operations of the Federation of Southern Cooperatives Land Assistance Fund. He has headed the Federation's team to assist member farmers with claims, late claim petitions, and appeals in the *Pigford* case. Mr. Zippert is a graduate of the City College of New York. He and his wife Carol are copublishers of the Greene County Democrat, a weekly newspaper in their home rural community.

Our second witness is Cassandra Jones Havard, Associate Professor of Law at the University of Baltimore Law School. In addition to her many publications and accomplishments, she is the author of African-American Farmers and Fair Lending: Racializing Rural Economic Space, which appeared in the Stanford Law Policy Review. Professor Jones Havard is a graduate of Pennsylvania School of Law. She clerked for Judge A. Leon Higginbotham of the U.S. Court of Appeals for the Third Circuit.

Our next witness is Philip Fraas. Mr. Fraas is an attorney here in town who has worked on the *Pigford* case since 1997. He is a graduate of the University of Missouri Kansas City School of Law.

The next witness is the Honorable A. Donald McEachin——

Mr. SCOTT. Mr. Chairman, Mr. McEachin is in the building. He will be here presently.

Mr. NADLER. I figured he will arrive, so I will introduce him. He represents the 74th District in the Virginia House of Delegates. He is a graduate of the University of Virginia School of Law and currently is a candidate for a Master's of Divinity at Virginia Union University.

Our final witness is Dr. John Boyd, the President and founder of the National Black Farmers Association. Dr. Boyd nearly lost his poultry farm in Virginia as a result of discriminatory practices by the USDA and has been an outspoken advocate for African-American farmers.

I am pleased to welcome all of you. As a reminder, each of your written statements will be made part of the record in its entirety. I ask that you summarize your testimony in 5 minutes or less. To help you stay within that time there is a timing light at the table.

When 1 minute remains the light will switch from green to yellow and then red when the 5 minutes are up.

The first witness is Mr. Zippert.

TESTIMONY OF JOHN ZIPPERT, DIRECTOR OF PROGRAM OPERATIONS, THE FEDERATION OF SOUTHERN COOPERATIVES LAND ASSISTANCE FUND

Mr. ZIPPERT. Good morning. I want to thank the Members of this Committee and also especially my home Congressman, Congressman Artur Davis, for inviting me to this hearing to speak on this very important issue.

The Federation works with 20,000 African-American rural families throughout the Southeast, about half of them engaged in farming, the others members of credit unions, housing co-ops, fishing co-ops, et cetera.

We assisted over 5,000 of our members across the South to file claims in the *Pigford* lawsuit by the original deadline date. We also assisted thousands more in the process of filing late claims. We have heard a lot here this morning about the statistics. One of the most interesting statistics is that 20,000 or more of the 65,000 late filers filed a second petition explaining in detail their reasons for being late. And Michael Lewis, the chief arbitrator in the case, only accepted 141 of those petitions.

So the overwhelming number of people who really expressed interest in having their case heard were not able to have their case heard. And so we are appreciative of this hearing, of considering these proposals. We strongly support H.R. 558, the proposal by Congressman Davis and Conyers and other Members of the Committee.

We do this because we feel it incorporates most of the concerns we have about the *Pigford* process and it provides a comprehensive way of addressing the problems in this case. And we are a little concerned about going back to Federal court without real clarity of what procedures and how these *Pigford* late filers and people who did not get notice in the *Pigford* case will get their problems redressed. And so we feel the 558 is a more comprehensive approach that includes many of the concerns of the injustice that was in the case.

We are sitting here today 8 years after the original consent decree, and I feel that unless we address this in a comprehensive way we will be back here numerous times again trying to address the efforts you made to correct the case. So I think we ought to go for the most comprehensive review and consideration.

In my statement, we also indicated some things that maybe should be added to 558 to make it stronger and something to be included in terms of some kind of attorneys fees or some kind of ways to pay the attorneys for handling these claims on behalf of late claim filers, because many of the lawyers who were involved in this case the first time around have become discouraged by all that has happened in the *Pigford* case.

Also there are some groups of people who through no fault of their own did not get to file appeals with the monitor and other steps along the way in this case, and we feel those people should be entitled to a second chance for justice in their situation.

We want to see a time limit of 6 months placed once we get into this, that the Government would respond to these cases within a time limit.

I think lastly to express some sense of Congress that the Administration and USDA should settle the other discrimination cases that are out there by Native Americans, Hispanics and women farmers.

Thank you very much.

[The prepared statement of Mr. Zippert follows:]

PREPARED STATEMENT OF JOHN ZIPPERT

On behalf of the more than 20,000 rural member families of the Federation of Southern Cooperatives/Land Assistance Fund, many of whom are African-American farmers and landowners, we are pleased to present testimony at this hearing on corrections in the Pigford Class Action Lawsuit.

The Federation staff assisted over 5,000 of our members across the rural South to file claims in the Pigford lawsuit by the deadline of October 12, 1999. We further assisted a similar number to file "late claims" in the case by the second deadline of September 15, 2000. We helped many of the late filers to submit affidavits explaining their reasons for filing late. We have also assisted our members in filing appeals for issues in the case with the Monitor, especially issues dealing with the identification of "similarly situated white farmers" which was a required element of a successful claim.

Of the 65,989 claimants who filed a late claim petitions by the September 15, 2000 deadline, only 2,119 petitions have been approved to allow claimants to file actual claims in the case. Another approximately 7,000 people filed their late claim within thirty (30) days of the late claim deadline. These 71,000 people received Tracking Numbers in the case, from the Facilitator in Portland, Oregon. Their names and addresses, at the time of their claim, are known and available in the case.

20,688 of the 65,989 late claim petitioners filed additional documentation with Michael K. Lewis, Arbitrator, in the form of a reconsideration of their petition to file a late claim and give additional information on their reasons for filing late, e. g., illness, family member's illness, lack of notice, lack of information, failure to sign their original petition, etc. Lewis approved only 141 of these petitions, turning down the overwhelming majority of 20,544 petitions.

Many farmers say that they did not receive adequate notice of the case in 1999 during the initial six months public notification period. This Subcommittee has held previous hearings that established that the notice given Black farmers in this historic case was inadequate. Many farmers say they did not know of the case until the official claims period had ended.

The Federation because of our work with our constituent members in the case and work with the Chestnut, Sanders, Sanders law firm in Selma, Alabama, have been involved in every step of the case. We developed suggested legislation in 2005, which we entitled

"The Black Farmers Judicial Equity Act of 2005", which we submitted to members of this Committee and other interested members of Congress, including our Congressman, Artur Davis from the Alabama 7th District. In our suggestions, we submitted a comprehensive set of

recommendations to improve the situation and provide more equity for Black farmers involved in the case.

We are here today to support H. R. 558, the "African American Farmers Benefit Act of 2007" because it incorporates most of the elements and recommendations proposed by the Federation to remedy the problems in the Pigford Class Action Lawsuit.

We support this legislation because it would provide a second chance for persons who filed claims in the Pigford Black Farmers Class Action Lawsuit but whose claims were never heard and adjudicated on their merits. The 71,000+ people who have been denied a hearing on their merits and potentially thousands of others who never received adequate notice of the case would be able to get their petitions and claims heard.

H. R. 558 preserves many of the advantages and benefits of the original Pigford Class Action Lawsuit by using it as the contextual framework for continuing reviews in the case. Farmers who apply for a Track A case would still get the benefits of the more lenient standards of proof of discriminatory treatment and documentation

in Pigford. The provisions of H. R. 899 require farmers to go back to Federal court for redress with no certainty of the procedures, which will apply. This requirement also potentially will limit the number of claimants who can get their cases heard.

H. R. 558 provides a new notice requirement and procedures to inform perspective claimants of the case and the new opportunities to

petition. The legislation provides for providing information on similarly situated white farmers needed to file successful complaints. The legislation provides for naming a new Monitor to provide independent oversight for the process in the case.

H. R. 558 also provides some remedies for ongoing discrimination by USDA since the filing of the Pigford v. Glickman lawsuit. The USDA is required to report information on loans from January 1, 1992 until the enactment of the legislation by race of the borrower to help determine patterns of discriminatory lending. The bill also prevents USDA from foreclosing on loans if the borrower makes a prima facie case to an adjudicator that the foreclosure is proximately related to discrimination by the U. S. Department of Agriculture. H. R. 899 does not have similar protective provisions for the claimants.

H. R. 588 could be strengthen by adding some of the provisions included in the Federation's suggested legislation, among them are:

- Provisions for providing attorney's fees and ways that attorneys can be paid for handling claims for late claim filers in this case; many of the original attorneys in the case have become discouraged by the payment system under Pigford;
- Provisions to allow persons whose petitions for Monitor review, under Pigford, that were filed late through no fault of their own, to get their petitions heard;
- Allow seven (7) Track B claimants, whose lawyer missed deadlines to have their claims heard;
- To suspend offsets during the claims process;
- To require that re-adjudications in the case be completed in six (6) months;
- To express the sense of Congress that the Administration should settle other USDA discrimination cases filed by Native American, Hispanic and women farmers.

More information on the positions of the Federation of Southern Cooperatives/ Land Assistance Fund can be found on our website at: www.federation.coop. This includes The Black Farmers Judicial Equity Act of 2005 and our Position Paper on Pigford Legislation, dated March 2, 2007.

Mr. NADLER. Thank you. Professor Havard.

TESTIMONY OF CASSANDRA JONES HAVARD, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Ms. HAVARD. Thank you, Chairman Nadler, Ranking Member Franks, Members of the Subcommittee, thank you for inviting me. Let me first tell you about my interest in the *Pigford* litigation.

In my academic work I often study Federal Government programs and evaluate them for fair access to credit. My particular interest in *Pigford* has a familial background. My father started his career at the USDA as a negro county agent. When I first heard about the litigation, though my father was by then deceased, I was quite interested in looking at the USDA programs to try to understand how the system of Federal farm credit loans and credit and benefit works.

Today's hearing is very important to reviving the claims of the Black farmers who have alleged discrimination in connection with the USDA programs. Without a doubt, Congressman Davis and Congressman Scott should be applauded for tenaciously fighting for Black farmers who have not had their claims resolved. The only question is now how to best resolve those claims.

Certainly everyone thought that the *Pigford* consent decree would be an efficient process but it has been anything but that.

Any legislation redressing the failed claim process of *Pigford* should have certain key features. And let me make it clear that I think both bills have very good features. I think the remedy should be comprehensive. I think it is important to avoid the types of proof that are required—that are too stringent for farmers to prove their claims and be successful.

I think it is important to think about the economic consequences of whatever remedy is put in place, whatever redress is put in place. And I think it is also important to think about the risk of whatever reliefs are put in place.

I want to very briefly address three key features of any legislation that I think should go forward. They are the presumption of discrimination, the appointment of multiple monitors should it be the administrative process, access to comparable data, the statute of limitations, appeal rights, and notice.

Starting with the presumption of discrimination, the issue of proof in the original consent decree provides a presumption of discrimination is a less stringent standard than usually in a trial proceeding. I think that is very important in this particular case because of the date of many of the claims. Because of the date, it will be very difficult for plaintiffs to prove their cases to a higher standard of proof. And it is important to remember that the reason a consent decree was entered into originally was to hasten the resolution of claims and to have both parties receive what they expected.

Assuming that an administrative consent decree goes back to the administrative process, I agree with Mr. Zippert that it ought to be a swift process. The resolution ought to put in place, I think, multiple monitors and multiple administrators. Optimally there would be monitors and administrators put in for each State. If not, if cost is too prohibitive for that, I think certainly they ought to be put in regionally.

Additionally, when the *Pigford* claim was filed, it was unclear how many claimants there were. That is no longer the case. And so in order to again hasten the process and to have their claims examined and resolved quickly, Mr. Zippert has suggested 6 months. I won't suggest a time but certainly to have them resolved quickly would mean that the staff ought to be increased.

A key provision in H.R. 558 speaks to the access to comparable data. This is very important. Unfortunately, the way the FSA is set up, the county committee structure, it appears to dictate or control access to information that is described as having privacy concerns. It is very important in limited discrimination cases that comparable data be made available for comparison. And so in this regard if there is any concern about privacy I think that those materials ought to be redacted so they don't identify the person, but in no way should the FSA county committee structure, because it is local and because the comparable data is coming from neighbors and friends, in no way should that limit the access to critical information.

Because my time is moving swiftly ahead let me say that I think it is important to have a statute of limitations. Certainly one of the features of H.R. 899 is that it preserves the appeal rights. One of the things that *Pigford* has shown the importance of the claims is

that perhaps the appeal rights ought to be preserved. And so certainly if that bill were passed, that would give claimants who have decisions that are adverse to them the right to go into Federal courts of appeal to have them reviewed again.

Finally, I think the notice requirement in H.R. 558 is very specific. It is very comprehensive. It would go out to all the known class members. And this has been something that was bitterly contested and seems to be the source of why so many claims were filed late. And so I think that the fact that the bill provides such a specific notification requirement as well as funds, it certainly would address a very intense point of contention.

Let me again commend the sponsors of the legislation and thank the Committee for this is leadership in holding the hearing today. I look forward to working with the Committee if the opportunity were to arise on this important piece of legislation, and I welcome questions at the appropriate time.

[The prepared statement of Ms. Havard follows:]

PREPARED STATEMENT OF CASSANDRA JONES HAVARD

Chairmen Nadler and Conyers, Ranking Member Franks and Members of the Subcommittee:

I am very pleased to be here today to discuss the proposed legislation that would provide relief to African-Americans Farmers covered by the *Pigford* Consent Decree. Today's hearing on *H.R. 558, the African-American Farmers Benefits Relief Act of 2007* and *H.R. 899, Pigford Claims Remedy Act of 2007* discusses ways to revive the claims of black farmers who alleged discrimination in connection with the Farm Service Administration's (FSA) farm credit and benefit programs at the United State Department of Agriculture's (USDA). The expectation of the *Pigford* consent decree was that there would be a good and fair claims process. Yet the settlement provided relief to only a minuscule of black farmers. Early in the settlement process, Congressional action was necessary because the vast majority of black farmers were denied relief due to the statute of limitations. Congressional action is needed once again because the vast majority of black farmers have been denied hearings on the merits of their claims due to untimely filings.

Introduction

In my academic research and writing, I often study federal programs and evaluate whether the underlying structure of the programs provide fair access to credit. I have studied *Pigford* [1] and concluded that USDA's farm credit system is structurally flawed and fails repeatedly and immeasurably to provide access to credit for minority farmers. My work on *Pigford* was published in the *Stanford Law and Policy Review in 2001.* The article is published in the Appendix to my testimony.[2] I urge both Congress and USDA to redouble their efforts to eliminate the substantial and widespread abuses that the farm credit and benefit programs of USDA have visited upon African American farmers for decades. Essentially, this requires significant structural changes in the delivery of credit service programs to minority farmers.

My testimony today will give my conclusions on the best process for resolving complaints based on the *Pigford* Consent decree and will address what I think should be in any legislation of redress.

The Litigation

The *Pigford* Consent Decree has failed in actuality to provide the redress that either the Department of Justice as USDA's lawyer or, indubitably, the black farmers expected. The Consent Decree became final in February, 1999. Due to the unexpectedly large number of claims, the court extended that initial deadline twice. Of the approximately 73,000 filed, less than 3%, or about 2,100, were accepted for determination on the merits. The Monitor determined that 66,000 class members' claims were untimely. Class members contend that this inordinately high percentage, 75%, of late filers was due to a severely flawed notification process. The Monitor, acting within its discretion, did not agree and established a process that resulted in no relief for late filers.

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[1] *Pigford v. Veneman Consent Decree,* 185 F.R.D. 82 (D.D.C. 1999).

[2] *African-American Farmers and Fair Lending: Racializing Rural Economic Space*,12 STANFORD LAW AND POLICY REVIEW 333 (2001).

Re-evaluation of the Merits of the Claims of African-American Farmers

Any legislation redressing the failed claims process of *Pigford* should re-examine several key features.[3] These include:

Presumption of Discrimination—A prima facie case of discrimination should be relatively easy for the class members to prove, thus allowing the defendants who should have access to records and documents to rebut the prima facie case, if they can. It would be similar to what plaintiffs have to prove in their *prima facie* case in a Title VII suit.

Access to Comparable Data—In order to prove a claim of lending discrimination, class members need access to comparable data by identifiable characteristics, such as race, sex and marital status. Concern about records identifying particular individuals can be answered by redacting information that ostensibly identifies the person. The structure of the FSA system, e.g., the county committees, requires that this comparison be made among neighbors and friends. The legal requirements of proving the claim based on the comparison cannot be accommodated to that structure.

Statute of Limitations—There must be an identifiable time period in which class members may exercise their rights. Otherwise, there may be confusion about the viability of a claim and in the end deny a claimant the ability to recover. Any legislation must provide for a statute of limitations that fits the circumstances of the class members whose claims go back a number of years.

Appeal Rights to Federal Appellate Court—Federal trial court and administrative proceedings usually provide a disappointed litigant or claimant with the right to appeal a decision that is adverse to their interests to a federal appellate court. The *Pigford* consent decree precludes appeals of individual claim determinations. Yet, the importance of the claims in *Pigford* suggest that appeal rights should be preserved and not cut-off. H.R. 889 would provide appeal rights to class members.

Appointment of Multiple Monitors—Factors that attend the timeliness of a claim are based on regional conditions and culture that often cannot be easily explained nor understood. At this juncture, assuming the administrative process is left in place, it would seem wise to appoint facilitators, adjudicators or arbitrators for each state in which the class members reside.[4] Likewise, a single monitor should be appointed in each state to supervise the claims procedure in that state. Admittedly, decisions of multiple monitors might not be uniform. Of course the desire for uniformity in determining the merits of claims as well as other procedural matters might argue against having multiple monitors. However, if the parties can exercise appeal rights, uniformity is enhanced as these cases go up the appellate ladders.

Notice Requirement—The class members complained most bitterly about the failure to receive notice of the claims procedure. Local media outlets, including radio, television and newspapers, apparently were not used to notify class members of the class action. While there seems to be a difference of opinion as to whether the notice requirement was adequate or arbitrary and poorly-funded, H.R. 558 outlines six specific media outlets in which notice shall be given to all known class members. This is a good provision.

Conclusion

What happened to class members in *Pigford* should never happen again. It is a mockery of our judicial system's settlement process to have a negotiated agreement that yielded such poor results when the expectation of the consent decree was that the claimants would actually and swiftly receive the relief envisioned.

Systemic Racism and FSA

Congress must intervene and require the USDA to become accountable by monitoring and enforcing civil rights standards throughout the agency. USDA has failed to institute effective procedures that will ensure compliance with all applicable statutes and regulations prohibiting discrimination. This failure is especially apparent and bizarre in the very FSA programs subject to the *Pigford* consent decree: The inherently flawed county committee system remains in place.

The *Pigford* consent decree never meant to address all of the needs of African-American farmers regarding the discriminatory practices at FSA. The need for accountability and transparency in administering farm credit and non-credit farm benefit programs remains and the inherently biased system of delivery of federally funded programs cannot be ignored. The decentralization of the federal program unavoidably means that local discriminatory attitudes may effect the determination of who receives the massive amounts of federal tax dollars designated for these programs. Congress, at some point in the near future, must provide forward-looking re-

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[3] Equally important, but not addressed are debt relief, tax relief and injunctive relief.

[4] The states are: Alabama, Arkansas, California, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina,. Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia and the District of Columbia.

lief and mandate a different operational structure at FSA. All farmers, regardless of race, deserve the meaningful access to FSA loans and benefit programs as the law requires.

Let me conclude by again commending the sponsors of both bills, Congressmen Davis and Scott, for re-examining this issue and the Committee and its leadership for holding today's hearing. I would gladly accept an opportunity to work with the Committee as it moves forward in this area, and welcome any questions that members of the Committee have.

ATTACHMENT

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*333 AFRICAN-AMERICAN **FARMERS** AND **FAIR LENDING: RACIALIZING RURAL ECONOMIC SPACE**

Cassandra Jones Havard [FNa1]

In the context of small farm policy, two core democratic principles-- federalism and neutrality--are ultimately flawed as applied.

"[T]he rules and the law may be color-blind, [but] people are not.'

-J. L. Chestnut, Plaintiffs' Attorney Pigford v. Glickman. [FN2]

I. INTRODUCTION

The relationship of the federal government to the economic development of the minority-owned farm as a business raises issues of political authority. [FN3] The United States Department of Agriculture's (USDA) loan qualification scheme allows locally elected farmers--who, with few exceptions, are white--to make substantive decisions regarding an applicant farmer's creditworthiness. For many African-American farmers, this structure has resulted in a sustained lack of access to USDA's low-cost funds and, eventually, to land loss. [FN4]

The congressional decision that local farmers are able to make the best determinations concerning borrower eligibility for federal agricultural loan funds leads to concerns as to whether Congress' federalism objective of delegation of authority to local constituents can ever be met. As an issue of political authority, the balance of power in the USDA loan scheme between the federal government and local citizens is unique and uneven. The USDA process-- calling for the election of local representatives among the population of farmers within a particular county--gives elected farmers both critical discretion regarding loan eligibility and an opportunity for self-aggrandizement. Racial minority farmers' lack of access to credit--the by-product of this long-standing federal scheme--provides fertile ground for challenging the devolution of authority to local landowners. In the context of small farm policy, two core democratic principles, federalism and neutrality, are ultimately flawed as applied. The ideal of federalism--that state and local governments can share power with the federal government--is lost when programs are not monitored for compliance with stated goals and objectives. The presumed neutrality of the USDA's process for disbursing federal funds raises questions about the congressional purpose given a result that is, at best, described as the deleterious sacrifice of land owned by minority small farmers. [FN5] Negative biases that should not color a neutral governmental process have been given the aura of federal approval.

This article focuses on how to measure loss when racial discrimination dominates economic

policies and results in identifiable economic injustice. [FN6] More importantly, it draws a nexus between credit availability and intergenerational property transmission. [FN7] This article concludes that the loss of African-American owned ***334** farmland due to discriminatory credit decisions decreases opportunities for inheritance of real property. The proposed changes in federal law set forth in this article can help to remedy the cumulative effects of USDA's financing inequities.

Part I of this paper presents an overview of USDA's role as a financial intermediary. It identifies the goals of the federal agricultural lending program and explains the authority and policy choices given to locally elected farmers. It illustrates the direct competition between friends and neighbors for low-cost loan funds and summarizes the recent class action settlement of claims between African-American farmers and USDA. Part II describes USDA's approach as one with federalist and economic underpinnings. It identifies the arguments supporting devolution of power from the federal government to local jurisdictions. It also examines the competing theories of information costs, transaction costs, and agency costs as they relate to USDA as a financial intermediary. Finally, it critiques both the federalism and economic justifications of USDA's decision to allow local farmers to make credit decisions. Challenging the fairness to minority constituent concerns of locally controlled political processes, the article suggests that local constituencies that do not mandate accountability for minority interests may unfairly influence the supposedly democratic majoritarian regime. Given the absence of monitoring for compliance within the federal programs, there is inadequate justification for the role of the county committee in the lending process.

Part III discusses fair credit law and concludes that the applicable statute, the Equal Credit Opportunity Act (ECOA) is an inadequate remedy when credit discrimination affects small businesses. That section proposes an alternative way to measure the harm and to correct the authority and operational imbalances. It recommends a change in the make-up of the county committee by allowing locally qualified citizens, who are not farmers, to make the credit decisions. Next, it argues for more stringent monitoring, record keeping and reporting requirements in order to determine promptly whether discriminatory lending patterns exist. Finally, the article recommends an alternative way to measure actual loss by allowing compensation for loss of prospective inheritance.

II. USDA AS LENDER

As a financial intermediary, USDA's credit-granting procedures are atypical. First, in contrast to a traditional lender, there is a lack of neutrality in the lending process. The local farmers charged with determining eligible borrowers are themselves eligible for the same USDA loan funds. Second, unlike a traditional lender, the denial of a USDA loan request entitles the applicant to an administrative review of that decision. The administrative review process becomes a proxy for the inherent conflict of interest in the loan eligibility scheme. For African-American farmers, the lack of neutrality in the decision-making process and the suspension of the administrative process used to challenge denials combines to create a political system that limits their economic rights.

A. In Theory: The Loan Determination and Review Process

The 1935 Soil Conservation and Domestic Allotment Act [FN8] governs USDA's current financial assistance and loan distribution scheme. The primary objectives of the statute are to

facilitate and provide agricultural credit to the country's farmers. As discussed below, that credit is distributed largely through a decentralized process of local- and state-elected farmers whose job is to promote USDA's policies and programs. Through the Farm Service Agency (FSA), USDA is the key intervener in the farm economy, providing price and income support and loans at a below-market rate to the country's farmers. [FN9]

USDA lends both directly and indirectly. [FN10] The direct loan program awards insured loans to borrowers who have been denied credit elsewhere. [FN11] Eligible borrowers are those who have training or experience in farming, operate a family farm, and are unable to obtain credit elsewhere at reasonable rates and terms. [FN12] The indirect lending program uses similar criteria but issues guarantees to non-government lenders who make farm ownership and operating loans. [FN13]

Small farmers favor USDA loans for several reasons. First, most small farmers tend to be unable to obtain credit from commercial institutions. [FN14] Second, the interest rates on USDA loans are generally lower than rates from commercial lenders. Finally, USDA has a special interest rate for 'low-income, limited-resource' borrowers, and subsidized interest rates are available for guaranteed loans. Limited resource borrowers are low-income farmers who do not qualify even under normal USDA loan programs and who need to maximize their incomes from farming. [FN15]

USDA uses the county committee system to determine who will participate in its direct lending and benefit programs. All farmers residing in a county elect three to five local farmers to a committee that USDA authorizes to make these determinations. [FN16] The members of the county committee in turn elect a county executive who has the responsibility to assist farmers in applying for and receiving program funds and who makes recommendations to the committee on who should receive those funds. USDA pays both the county committee ***335** members and the county executive for their services, although neither are federal government employees. [FN17]

The loan process is seemingly straightforward: the County Executive Director must assist the farmer in completing his application; the County Executive Director also does an initial review of the application. If the county committee approves the application, the farmer receives the subsidy or loan. If the application is denied, the farmer may appeal to a state committee and then to a federal review board. [FN18] Because USDA borrowers are unable to get loans from other lenders, the proper implementation of these programs and appeal of determinations is crucial. [FN19] As a federal government program, USDA has established procedures for review of loan denials when applicants' requests are rejected. In 1980, however, USDA dismantled its Civil Rights Division. Consequently, the complaints and appeals of black farmers whose loans were denied were never processed, investigated or forwarded to the appropriate agency. Most African-American farmers who used the USDA appeals process never received a response. USDA admits that its staff discarded some discrimination complaints without ever responding to or investigating them, [FN20] while others received a finding of discrimination, but no relief. [FN21] The lack of response by USDA to claims of racial discrimination in the loan eligibility process led to a national class-action lawsuit and the on-going settlement of claims by African-American farmers. We turn to a discussion of this case now.

B. In Practice: The Class Action Settlement of Claims

A national class action suit involving minority borrowers challenged USDA's dismantling of

its civil rights investigation division as discriminatory. USDA responded to the lawsuit by announcing that there would be no foreclosures where the farmer had a pending discrimination claim. [FN22]

The Pigford v. Glickman class action suit arose after the plaintiffs, four hundred and one African-American farmers, alleged that USDA willfully discriminated against them when they applied for farm operating, ownership, disaster, and emergency loans. [FN23] When a farmer's loan application was denied on the basis of race or some other discriminatory basis, the farmers were to file an administrative claim with the Equal Opportunity Office and also with the USDA Secretary or the Office of Civil Rights Enforcement and Adjudication (OCREA). [FN24] Minority farmers allege that with the dissolution of OCREA in 1983, the complaints filed failed to be processed, investigated, filed, or forwarded. At best, farmers received a cursory denial to the claim, but most received no response whatsoever. Some farmers alleged that their claims were not investigated because they were lost, destroyed, or thrown away. The Office of Inspector General of USDA determined that minority farmers lost land and farm income due to the agency's discriminatory practices. In addition, the Office of the Inspector General stated that the agency failed to act in good faith, that the process for resolving complaints failed or was too delayed, and that many favorable decisions were reversed. [FN25]

The Pigford v. Glickman class certification was eventually granted for all African-American farmers who: (1) farmed, or attempted to farm between January 1, 1981 and December 31, 1996; (2) applied for participation in a federal farm credit or benefit program with USDA during that time and who believed that they were discriminated against on the basis of race in USDA's response to the application; and (3) filed a discrimination complaint on or before July 1, 1997. [FN26]

After almost two years of litigation, a consent decree was issued. [FN27] First, all class participants waived their right to appeal the decision of the adjudicator as well as to seek further review of these matters before any court or tribunal. [FN28] Second, the consent decree divided parties eligible for compensation into two different classes based on the amount of evidence the claimant possesses, Track A and Track B, to prove that the discriminatory action occurred. 25,105 claims were filed under the consent decree as of March 14, 2001, with 21,285 (or 99.4%) accepted under Track A, and 196 or .06% of the claims accepted for processing under Track B. However, 3,636 claims were rejected for processing as not being class members. [FN29]

Under Track A, claimants must meet the class definition and provide substantial evidence of credit discrimination to the adjudicator. The claim, which may provide direct or indirect proof of discrimination, is submitted in a written form describing the discriminatory conduct. USDA has the right to respond to every claim, with the adjudicator's decision being final. Of the 21,285 claims accepted for processing in Track A, 8,025 (39.6%) rulings were decided against the claimant and 12,253 (60.4%) rulings were decided in favor of the claimant. [FN30]

Under Track B, claimants that have better evidence of discriminatory action by USDA (i.e., documents and witnesses) may elect to have a hearing before an arbitrator to present evidence that discrimination occurred. [FN31] USDA also has an opportunity to present evidence in its favor. Track B claimants must meet a higher standard of proof--a preponderance of the evidence. They present their individual circumstances seeking actual damages and forgiveness of outstanding USDA loans affected by the discriminatory conduct. [FN32] As of January 17, 2001,

the arbitrator had issued five rulings--three in favor and two ***336** against--out of the 198 claims accepted for processing. In addition, seven cases had been dismissed including two of which had been settled. [FN33] While the settlement of claims will provide a measure of monetary compensation for aggrieved farmers, the court's decree neither provides for nor critically examines how a supposedly neutral process became one of racial subordination and domination.

III. THE COMPOSITE OF FARM LENDING POLICY: THE DEVOLUTION OF POWER FROM USDA TO LOCAL FARMERS

Federalism in the United States offers a unique scheme of power sharing between the federal and state governments. As part of this system of federalism, the federal and state governments delegate their power to a diverse range of institutions that design and implement federal and state policies.

The devolution of design and implementation authority, especially within the federal sphere, critically affects the development and viability of economic markets at local levels--at those levels where local officials have significant implementation authority and/or influence, there is legitimate concern over federal policy being unduly slanted by the mores, traditions, and political realities of the local communities. [FN34] Knowing that judicial scrutiny of legislation intensifies where 'prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes . . . relied upon to protect minorities,' [FN35] it is legitimate to inquire as to whether a local community's prejudices curtail fair operation of federal policies so as to deprive the community's 'insular minorities' of benefits that otherwise would be theirs.

Using the plight of small minority-owned farms under the 1934 Soil and Conservation Act as the basis for our discussion, this section reviews the intersection of political power and economic markets in the context of the small, minority-owned farm. It concludes that, while political decentralization has a capacity for providing an adequate and fair process, when that process is flawed sectors of the affected economic markets can be and often are damaged.

A. Political Power: Cooperative Federalism and Civic Republicanism

One of the underlying premises of the 1934 Soil and Conservation Act is that locally elected agents are more appropriate decision-makers than federal government bureaucrats when handling agricultural financing issues. New Deal era reforms [FN36] delegated power to the states to implement federal programs. [FN37] This restructuring allows states to exercise discretion in federal allocations, limiting the federal government's role to creating national standards and disbursing funds. [FN38]

Under a devolved power regime, the local or state authority is free from the rigidity of a federal system that may be unresponsive to the specific needs of its local constituents. [FN39] Such a regime has the decided advantage of allowing quick response when change is either proposed or imminent. States invariably argue for freedom to determine what solutions are best suited without the overlay of federal discretion. When federal program goals are broad, states can attain the program goals within federal guidelines, but without explicit federal direction.

Secondly, in theory, decentralization protects democratic principles. The notion is that representational governance allows for a truer determination of public choice. Civic

republicanism, by encouraging citizen participation, seeks to join together the common interests of citizens. The theory suggests that the guarantees of liberty and the protection of property are best guarded by local citizens, who have the most to lose if these principles erode. Citizens who participate in non-federal governance expect that they will have the ability to express their choices free from federal interference. [FN40] Because the power of the government is made direct, accessible and less impersonal, citizens gain access that may be denied when they have to negotiate the bureaucratic maze of federal government.

Finally, when state and local governments are given discretion in allocating federal funds, they allow citizens bound by geography the opportunity to participate in the democratic process. [FN41] It is important to note that this construct presupposes that those citizens who choose to participate in the democratic process represent all factions of their diverse communities and not simply their own narrow interests. When this notion fails, the federal government's policy is at risk of not meeting its objectives and goals; consequently, as one scholarly argument posits, federalism becomes a concept which espouses a theoretical increase in citizen participation but does not necessarily lead to an actual increase in such participation. [FN42]

1. Flawed Representational Democracy and Critical Race Theory

A solid justification for local control and decision-making requires a mechanism for accountability of minority interests. [FN43] Although representational democracy presumes participating citizens will use the democratic process to fairly represent the best interests of fellow citizens, opponents of localism argue that the minority can become "voiceless" if elected citizens are swayed to partial considerations. The concern that local prejudices ***337** may go unchecked by outside force underscores the need for a political process that recognizes competitive forces exist at the local level that can undermine guarantees of liberty and protection of property. Weaknesses in representational democracy are apparent when constituents become increasingly disenfranchised and silenced. [FN44]

In the case of small minority-owned farms, representational democracy as evidenced in the race-neutral process of the County Committee system has contributed significantly to the loss of African-American owned farmland. In this instance, I posit that critical race theory provides a basis for understanding how flawed representational democracy presents an example of political space and its consequences. [FN45] In other words, critical race theory provides a basis for examining the construction of race as a neutral, accepted dominant norm. [FN46] While there is a tendency to view what is really a failed attempt at power sharing between the federal and local government as successful cooperative federalism, I argue instead that the geographical space (the county) defines the political space (who becomes representatives or members of the county committee). The all-white composition of those committees turned the race-neutral process of determining loan eligibility into one of domination and subordination.

2. Defining Space

In current legal discourse, the term "space" denotes geographical communities of people with similar characteristics. [FN47] Often these geographical areas have become racialized [FN48] because of the groups of people that live within them. In many contexts, race and place have converged to represent a certain geographic pathos--places where low-income and/or marginalized people live and work. [FN49] As one noted scholar has written, "[a]n analysis of racialized space is complex for many reasons, as it involves at least the consideration of politics and public policy, racially signified and symbolized conflicts, and aspects of hegemony, such as

the construction of our 'common sense' understandings of everyday life." [FN50]

The notion of geographic space raises questions about the allocation of power within communities and how that power is used to determine the community's cultural and social practices. [FN51] The basic inquiry focuses on whether conditions within geographic spaces have simply evolved due to private choices of individuals or whether they have been perpetuated through public laws and policy. [FN52] The evolution of almost exclusively white ownership of farmland suggests it is important to look at how the considerations of politics and public policy converged to define farmland ownership as simply a consequence of rational economic considerations. The circumstantial change in farmland ownership was not incidental, but developed because of the social and political forces that transformed the otherwise neutral USDA structure into a system that adversely affected African-American farmers.

3. The County Committee Structure as Political Space [FN53]

As a model of federalism, the county committee is made up of community representatives making decisions about the use of farmland in the communities in which they farm. They lose their individual identifications and become representatives or agents of USDA charged with making neutral, ideally self-effacing decisions about credit. County committee members are not asked to consider, nor do they seem concerned about, the impact of those decisions on minority farmers. They are instead allowed to make credit decisions in a vacuum, not assessing the impact on minority land ownership nor their own inherent self-interestedness. [FN54] Yet, the historical functioning of the county committee raises issues about how that structure has politically defined the ownership of property for African-American farmers.

One of the justifications for USDA's county committee structure is that it represents a balanced sharing of power. This line of reasoning argues for decentralized government because it provides the average citizen with an opportunity to participate in democratic functions. Such a theory posits that the county committee structure represents an appropriate mixture of local autonomy and control. As a political institution, the county committee structure emphasizes the values of citizen participation, market responsiveness, and managerial efficiency. [FN55] The optimal political structure involving local citizens, however, involves these citizens without creating group boundaries. [FN56] While USDA may argue that the county committee structure is a microcosm of democracy, an appropriate balance of federal and local control must be present to guard against the exercise of unfettered discretion by non-federal governing units. Any exercise of governmental power must be done in a way that is not captive to a biased dynamic.

Given the theory of civic republicanism, it is physical geography and the coincidence of residence that determine the boundaries of the county committee. Since its representatives are drawn from local counties and elected from local property owners, it is assumed that they are representative of the community at large. This creation of a democratic unit based on pre-existing geographical boundaries presumes similarities among citizens that may not in fact exist. Thus, as one scholar has argued, geography may haphazardly create a structure that is impenetrable by legal doctrine. [FN57] In this instance, ***338** geography legitimizes the creation of a political unit that may not in fact be representational.

One of the effects of the county committee structure is that the county committee uses its decision-making power to create white space. Using facially neutral policies and procedures, the county committee structure allows the competition for scarce resources--USDA's yearly

allocation of farm loans and subsidies--to determine the committee's operation as a governance mechanism. By making biased decisions about creditworthiness, county committees fail to render rational decisions about credit. [FN58] In this context, as in so many others, the transparency of race becomes evident.

Moreover, as a political unit, the County Committee is not accountable to the people it serves. While local farmers may withhold their power to vote for certain nominees, the real overseer of political responsibility in this case is USDA. A system of governance where decisions can be reviewed on the merit for bias or unfairness, but in fact were not, again creates a political unit that has an uncontrollable dynamic. The political unit becomes, in reality, self-perpetuating, with little regard to USDA policy. To the extent that the geographical boundaries create and give license to a political structure of citizen participation whose very nature impacts the market economy, one can ill afford to conclude that this political body's failure to account for the needs of all of its citizens is sanctioned simply because of the manner in which the political body was chosen. The long and sordid history of racial subordination in this country, especially in the Deep South, makes ludicrous any claim that the mere provision for a democratic ideal, such as an election, could ever rise above the narrow interests of the few who stood to benefit from discrimination against others. The system of agricultural financing through the county committee may have been designed primarily as an administrative function. The justification for the continuance of such a system falls far short, however, given USDA's failure to monitor the operations; it must be forced to hold accountable those elected locally to defend the democratic ideals and principles in action.

B. Local Economic Markets

USDA plays a central and unique role in providing financing to small farmers for several reasons. First, the small farm, as with other small businesses, faces difficulty in securing credit in the traditional financing market. [FN59] Second, the atypical valuation of agricultural products makes USDA an expert lender. [FN60] It has developed the capacity to base economic predictions on crop values and yields that more adequately balance the risk in the business of farming. Third, USDA functions as a lender to compensate for market shortages. As a lender of last resort, it closes the financing gap for borrowers who are unable to obtain credit from traditional financial institutions. [FN61] Given this country's general history of racial discrimination, with specific focus on issues of credit access, this third function makes USDA's procedures even more astonishing.

Why then did USDA not provide credit to minority-owned small farms? How does USDA perform its role as a financial intermediary, given market imperfections and frictions? Three costs--transaction, information, and agency--are the foundation of financial intermediation and provide an explanation of the role that USDA plays in lending to small farms, including those that are minority-owned. Identifying the informational disadvantages about USDA-guaranteed loans highlights the limits on access of minority-owned farmers have to capital.

1. Information costs

Information costs are incurred when lenders evaluate a borrower's creditworthiness. The lender evaluates the riskiness of the borrower's project before and after the grant of credit. In markets that operate in perfect efficiency, lenders have complete information, allowing well-advised decisions about a borrower's ability to repay. In less-than-perfect markets, lenders must

incur costs to determine whether the borrower will perform as expected under the lending agreement.

To avoid incurring the information costs that accompany lending, theorists posit that lenders ration credit, making less credit available at lower rates of interest. [FN62] The lower rate of interest, however, attracts more borrowers to the lender. The lender then must determine how it will determine the less risky projects that are entitled to a lower interest rate. [FN63] Credit rationing is a way to attain equilibrium in the market. A lender raises and lowers the rate of interest according to the amount of risk that the borrowers' project presents. [FN64] Under this theory, all small farms, including minority-owned farmers, have unlimited access to credit at an interest rate that appropriately reflects the riskiness of their project. Credit rationing theory posits that because lenders have asymmetrical information about a borrower's ability to repay an obligation, the lender uses the borrower's profit projections to measure two different effects: the risk adverse effect and the moral hazard effect. These effects measure two separate types of behavior in which the average high-risk borrower is likely to engage: adverse selection and moral hazard. [FN65]

The adverse selection effect screens out potential borrowers before the loan is made. [FN66] It identifies the risk-adverse borrower by drawing a correlation between the borrower who is willing to pay a higher rate of interest with the riskiness of the project. [FN67] This borrower presents ***339** contradictory information on expected profits, e.g., she is willing to borrow at a high interest rate because she expects profits to increase with risk. The low-risk borrower, by contrast, will find higher interest rates prohibitive, and will look for credit at a lower cost. Lenders, who are not privy to sufficient information regarding the borrower's business operations, may thus limit the amount of credit that they are willing to extend to risk-adverse borrowers. [FN68]

The moral hazard effect refers to the borrower's behavior after the loan is made. [FN69] This effect measures the incentive that the borrower has to engage in risk-free behavior. This borrower is willing to pay a high interest rate because of the potential for a high return. The borrower's project, which is extremely risky, has a low probability of success. Should the project succeed, its return will be great. The lender is willing to lend to this type of borrower at a higher rate of interest to protect against default.

To the extent that there is asymmetrical information between lenders and small farmers, credit-rationing theory suggests that small farms with projects calculated to yield positive earnings may be unable to obtain financing at any cost. Thus, an intermediary such as USDA becomes a significant lender to the small farm market. USDA has arguably created a structure that provides it with screening and monitoring advantages that reduce the risks of adverse selection and moral hazard. The county committee structure allows USDA to become an "inside" lender, as compared with a public market lender, who operates with more limited information in making arms-length transactions. [FN70] Arguably, this relationship benefits the lender, who is able to ease the information asymmetry with some advantage accruing to the borrower who can benefit from financing terms that more realistically meet her needs. [FN71]

The USDA decision-making structure places a strong reliance on the county committee system. Theoretically, the task of local farmers is to abate informational deficiencies by providing informational advantages when screening credit applicants and monitoring borrowers.

What is required is more circumspection into the adequacy of this structure given its composition of local landowners, who are engaged also in the business of farming.

The question becomes whether small, minority-owned farmers are getting all of the credit that is available to them, given the benefits of this "inside" informational advantage. Minority farmers would argue that within this efficiently operating system, credit rationing exists not in price increases but in reduced quantity or availability rationing. [FN72] While the county committee may be a crucial link to the production and transfer of information reducing information asymmetry and credit rationing, the next issue is whether the county committee plays a role in limiting transaction costs, which also tend to limit the supply of credit.

2. Transaction costs

Transaction costs are the costs of acquiring and verifying information and arise primarily through interactions between individuals. [FN73] To some extent, the difficulty that many small farmers have had in obtaining credit from private sources is due to transaction costs, which is why those farmers then turn to USDA for financing.

Credit is available from various sources, some of which are able to finance it more cheaply than others. Financing costs include the charges that the intermediary incurs for the credit review and documentation process. The financial intermediary incurs financing costs when it identifies and contacts borrowers and investors and when it negotiates, verifies and enforces the contracts. [FN74] These functions can be prohibitively costly and interfere with credit availability because they price the buyer out of the market. [FN75]

The transaction costs that a lender incurs and passes on to the borrower through the pricing of the loan are most likely less than those that the borrower would incur if the borrower were to find investors on her own. [FN76] There are several reasons why these costs are incurred. First, the typical borrower will have difficulty finding investors willing to invest in an illiquid asset, such as a small business. [FN77] Second, the illiquidity of the investment also contributes to its lack of diversification as an investment. [FN78] Finally, investors cannot be protected from the credit risks that accompany this unique investment. [FN79] Thus, because the borrowers' inability to identify investors willing to take on the risks of default, small farm borrowers are especially disadvantaged in the credit economy. Similarly, an intermediary's transaction costs will be less than those that the individual borrower may incur if she were to seek her own investors. Although a lender may have concerns about financing farm operations, banks, in particular, are able to attract investors who are willing to leave their funds on deposit with the bank for a variety of funding needs.

For qualifying borrowers, USDA as a lender reduces search costs. [FN80] Many farmers, including small farmers, seek financing from USDA because it is a readily identifiable source of funds. Although USDA, as a specialized lender, is concerned with the liquidity of its assets, its concerns are different because it is a governmental entity. [FN81] Unlike a bank, which must be concerned about the liquidity of a loan because of the investors who fund it, USDA has no similar concern. ***340** USDA has no investors. Its primary concern is in maintaining congressional approval and confidence that the fund is well administered. The U.S. Treasury protects the solvency of USDA's guaranteed loan funds. [FN82]

Functionally, in its role as a financial intermediary, USDA's performance is enhanced through the use of the county committees. Its procedural structure operates to minimize

transaction costs. [FN83] Financial intermediaries routinely diversify risk, evaluate investments, and provide liquidity to the investors. The county committee serves this function through its decision-making structure. To the extent that the county committee makes decisions about the availability of credit, it arguably makes those decisions based on predictors about loan performance. An adequate assessment of transactions costs develops a diversified portfolio among eligible borrowers. The committee has discretion to make awards based on the potential borrower's request or to determine that a lesser amount is more manageable for the particular borrower. Similarly, its cautious considerations on loan servicing for troubled borrowers allows it to determine which borrowers are less risky among the group of those that are financially troubled and deserving of debt restructuring. Thus, the county committee develops some expertise in determining who is most eligible for benefits, given some implied conditions. It also determines who actually receives benefits based on its translation of the information about the borrower and her ability to perform as promised. [FN84] These functions overlap with the agency costs (or the lender's costs) in managing the loan once the borrower actually receives the funds.

3. Agency Costs

Agency costs represent the cost that lenders must incur in determining whether the borrower performs as expected under the lending agreement. One way of doing this is to evaluate the business manager's acumen and character. [FN85] The business of farming, as in many other small businesses, requires a borrower who will advance the business through hard work and great effort. [FN86] The lender's manager must be able to assess the specific abilities of the borrower as farmer.

Small business borrowers who do not have equity will find it difficult to obtain credit from a lender. This is due in part to the moral hazard effect. [FN87] The borrower who has insufficient assets at risk has little incentive to refrain from dishonest conduct or to exert maximum effort. [FN88] The lender needs the ability to limit the borrower's moral hazard. This requires the lender to find alternatives to closely supervising the borrower, which is itself a cost that may not have a corresponding benefit. [FN89] Debt financing requires the lender to determine the net returns of the business in order to assess the ability to repay the obligation. [FN90] A part of this evaluation involves assessing the business manager's reliability. By relying on the borrower or her manager to carry out the business plan, the manager becomes the agent of the financing source. [FN91]

The desire to avoid agency costs may be implicit in the county committee structure. By delegating loan review function to local farmers, USDA is trying to improve its predictions about borrower performance. Its ability to monitor loan performance may provide some insight into the prominent role that USDA has assumed in financing small, minority-owned farms.

USDA loans are designed for borrowers who do not qualify for loans in the traditional market. Eligible borrowers are those who often are unable to obtain financing because they do not have sufficient collateral for the loan and equity investment in the business. [FN92] The high-risk borrower's actions are difficult to control and it is therefore unrealistic to think that she will behave as an agent of the lender in monitoring the business' adherence to its proposed plan. The borrower has little reason not to adopt a "win big, lose big" strategy. [FN93]

It is possible that the county committee, in its deliberations regarding minority farmers, is considering the agency costs of the loan. Appropriately, under agency theory, the committee may

find that many farmers who come to USDA as a lender of last resort have little to lose or inadequate skill in business management, either of which would make them poor debt risks. [FN94] While this is a function of the committee, it is implicit at best, arising out of the economic justifications of the county committee structure.

If this is the case, the county committee is not applying the proper eligibility requirements to the loan application process. It is substituting its judgment of eligibility for the federal standard. The county committee may be using what it deems the standard should be and thereby creating a more onerous standard. By qualifying borrowers to receive USDA loans that have equity capital to invest, [FN95] collateral to put up, [FN96] or the ability to give personal guarantees, [FN97] the county committee as lender is safeguarding USDA funds against default but also is making loans to borrowers who would be eligible in the traditional market.

The county committee structure is a social and political force that makes race seem like a natural phenomenon rather than a social construction. [FN98] The exclusion of African-American **farmers** who should have qualified for USDA loans constructs segregated farming communities. As a result, race and **space** converge to impact the community in two ways. First, African-American **farmers** become defined by the members of the county committee as those who are not successful in their occupation. Second, the loss of income from farming ***341** identifies African-American **farmers** as unworthy of loans, which begins the vicious cycle that can lead eventually to the loss of farmland for these **farmers**. This conduct by the county committee breeds the continuation of the white dominant norm. Because the exclusion of **black farmers** feels neutral to the members of the county committee and other local USDA officials, the perpetuation of whiteness and disappearance of eligible African-American **farmers** for USDA loans may be unapparent. The **economic** consequences are positive for those white **farmers** who themselves benefit from the domination of a race-conscious process that the white **farmers** can label as neutral and rational. In fact, the white **farmers** have **racialized** the neutral process to dominate **economic** access to USDA funds.

C. The Intersection Between Politics and **Economics:** Lack of Access to Credit as Reacialized **Economic Space** [FN99]

Because the business of **lending** is one of wealth maximization, the rationales of **economic** efficiency, capitalism, and the free market are more than adequate justifications for credit and **lending** decisions. Denial of credit based upon race or geographic location of property, [FN100] presuming the applicant is otherwise creditworthy, is clearly irrational because the lender would forego a favorable transaction. [FN101]

The county committee, acting on behalf of the lender, USDA, adheres to the principles of self-interest and wealth maximization. [FN102] As lenders, its rationalizations for lending based on race or geographic location of the person or property are arguably justifiable based on poor underwriting conditions, increased information costs, additional opportunity costs, and perceptions of risks. Given the facially neutral regulations that govern the eligibility for USDA credit, why are county committees reluctant to provide credit to eligible African-American farmers? A fundamental assumption is that as lenders, the county committees are engaging in the practice of redlining, a term that refers to making credit decisions based on the borrower's geographic location or the geographic location of the loan. [FN103]

First, it is reasonable to conclude that the county committees as lenders have decided to avoid

entire geographical areas, e.g., African-American owned farmland. The county committee's presumption that the borrowers are not creditworthy and that they are risk-averse leads to the conclusion that the property has a declining value. Using USDA procedures, those who did receive loans could be required to over-collateralize them. Loans made to African-American farmers were considered potentially unprofitable because of the threat of collateral depreciation or failure to repay. A failed credit obligation was presumed. Thus, when the county committees did make loans to African-American farmers, they were considered profitable only if credit was extended on unfavorable terms. [FN104]

Second, county committees could argue that higher monitoring and administrative costs justify failure to lend to African-American farmers. By identifying loans that might be unprofitable, USDA avoids the costs of collecting on bad debt. [FN105] The information costs of screening and monitoring make these loans more costly and less profitable. The extraordinary type of evaluative mechanism resulting in more processing serves as an adequate justification for failure to lend. Yet, this is precisely the type of informational advantage that a localized lending structure should yield. [FN106]

Third, county committee members rely on "risk stereotypes." [FN107] Their lending decisions are based on their subjective perceptions regarding the loan's profitability given their personal knowledge of the applicant and the applicant's financial status. Race and farming skill become indicators. Undoubtedly, county committee members would defend these perceptions as a needed dimension to determining the borrower's creditworthiness. [FN108] Presumably, this is one of the informational advantages that close the lending gaps instead of widening them. Subjective perceptions may directly impact the borrower's ability to secure the amount of credit she actually wants. [FN109] Inaccurate perceptions result in lower loan amounts, which in turn contribute to loan failure. [FN110]

Decentralized lending offers some inherent structural advantages. It appears, however, that the county committee system has failed to consider the need for fair lending. One of the advantages that localized lending should have alleviated is racial credit rationing and its justifications. [FN111] An underlying presumption of localized lending is that the decision-makers will assess the dynamics of lending to their communities. While this requires recognition of risks associated with lending, it also should alleviate lending disparities by developing more information about the communities and the borrowers that better predict loan performance. By devoting more resources to screening and monitoring, information costs are increased, but more reliable indicators of loan performance are also developed. [FN112]

Additionally, members of the county committees, unlike bankers, are not acutely concerned with the impact of the lending decision on the bank's solvency. A bank's profit increases with each profitable loan made. Unlike a bank, USDA's ability to lend is based only in small part on the performance of its loan portfolio. [FN113] FSA's congressional funding, while concerned with loan profitability and delinquencies, does not use loan ***342** performance or yields as a sole determinant for access to federal monies. Borrowers are deterred from defaulting on these obligations because they are barred from receiving additional loan funds. [FN114] Thus the primary factor that defines irrational redlining (competitive market pressures) is absent in the federal agricultural **lending** sphere since it operates in a unitary market, providing loans to borrowers who are unable to receive credit elsewhere. [FN115] The geo-**lending** that results in credit denials to minority neighborhoods is less evident in the **rural** areas where white-owned or

occupied farms may be adjacent to **black**-owned or occupied farmland. [FN116] Yet, a pattern in **lending** disparities persists, perhaps due to irrational **racial** redlining.

The failure to connect federalism and **economic** theories as having a combined impact limits the measures of needed reform. While local agrarian interests have received federal support as an institution, USDA's actions elevated the role of the county committee to that of a political institution that has the power to affect economic policy and development. Political institutions that rest on the attitudes and preferences of citizens as informed, unbiased decision-making but which are in fact operating with bias and self-interest are abusing majoritarian power. Any remedy addressing this type of abuse must recognize and compensate for the true nature of the economic harms.

IV. THE PROPOSAL: AN ALTERNATIVE MEASURE FOR THE LOSS OF DISCRIMINATORY ACCESS TO CREDIT IN THE SMALL BUSINESS CONTEXT

Legislation alone will not ameliorate the racial disparities in farm lending. Perceptions must be changed. Uniform federal laws and effective enforcement can, however, begin the process. In this section I recommend two changes that have the potential to decrease farm lending discrimination, improve the accountability of local leaders involved in the decision-making structure, and accurately meaure the complexities of the losses.

This section begins by explaining the deficiencies of existing anti-discrimination statutes as remedies and then recommends several modifications to the current USDA credit-granting policy towards small farm lending. First, it recommends changes in small business loan reporting requirements, particularly in the recording and publication of loan approval rates on small business loans to make county committees more accountable. The second recommendation calls for a change in USDA's eligibility criteria for service on county committees. This proposed change aims to cure the inherent conflict of interest among committee members that perpetuates bias and self-interest in lending practices. The third recommendation proposes a theory of prospective loss of inheritance when small business owners can prove a nexus between business failure and lack of access to credit.

A. The Equal Credit Opportunity Act: An Inadequate Remedy

The Equal Credit Opportunity Act ("ECOA") [FN117] allows an individual to challenge discrimination in economic or credit transactions based on intentional conduct and subtle acts and policies that amount to discrimination. [FN118] It applies to consumer as well as business lending. [FN119] ECOA would appear to provide the appropriate remedial approach for black farmers, given that small businesses were involved. The ECOA, however, has a narrower standing.

Under the act, a plaintiff may prove that a lender has unfairly discriminated by showing either disparate treatment or disparate impact. [FN120] Disparate treatment is established through explicit and unambiguous statements of hostility towards persons protected by ECOA. [FN121] Those statements must prove discrimination without inference or presumption. [FN122] The burden then shifts to the lender to prove that it would not have made the loan in the absence of impermissible criteria. [FN123] In a direct evidence case, a lack of qualification may be asserted as a means of evidence refuting causation. [FN124] Thus, the plaintiff must show that given the financial institution's lending policies, her proposed loan fell within those guidelines.

[FN125] In a plaintiff's prima facie case, she must demonstrate that she was otherwise minimally qualified for a loan. The creditor then has the burden to raise as an issue of fact a legitimate, nondiscriminatory reason for the credit denial.

A disparate impact analysis makes it unnecessary for the plaintiff to show evidence of a discriminatory motive. [FN126] To prove a disparate impact case, a credit applicant must show that the lender's practices or patterns of behavior have a discriminatory effect and cannot be supported by a business necessity. Even though the policy or practice may appear facially neutral, the test measures whether the statistical effect disproportionately excludes or injures an applicant who is a member of a protected class. [FN127] The burden then shifts to the creditor to prove that the practice has a manifest relationship to the credit in question. The creditor's explanation must be specific and direct. [FN128] After such a showing, the burden then shifts back to the plaintiff to show that the practice is a pretext for discrimination. [FN129] The loan applicant has the evidentiary burden of proving that she was qualified for the loan, regardless of the theory of proof asserted. [FN130]

The lack of minority applicants in many of the counties demonstrates the disparate impact of USDA's marketing and **lending** committees in the Southeastern United States. Reported incidents included both overt acts ***343** of discrimination and experience with latent policies that have the effect of either not **lending** to African-American **farmers** or **lending** to them on different terms than their white counterparts. This unwritten policy of **racial** discrimination is without solid business justification and has prevented **black farmers** from seeking or receiving USDA loan funds without regard to the qualification of the applicants. Statistics on the number of loan applicants received from white **farmers** and the number received from African-American **farmers** show the **racial** impact of these policies. [FN131] Yet, even in a successful case, the applicability of the remedy would be greatly limited.

B. Changes in USDA's Regulatory Structure

1. Uniform Applicability of **Fair Lending** Requirements

Regulatory uniformity in **lending** practices can address USDA's systemic failure to eliminate discrimination and its lack of accountability in the county committee structure. Aggressive enforcement of the existing discrimination laws must be augmented by initiation of new enforcement mechanisms. More specifically, implementing criteria similar to the Home Mortgage Disclosure Act's (HMDA) [FN132] data-collection requirements would allow small lending advocates to uncover and investigate lending bias. [FN133] Only consistent and uniform records for review can allow fair decisions about who is receiving USDA loan funds. [FN134]

HMDA's primary purpose is to uncover redlining by lenders. It requires lenders to provide sufficient information for public inspection. [FN135] Lenders must report the number and total dollar amount of mortgage loans originated or purchased by the institution during each fiscal year, along with the overall approval and rejection rates for each lender. [FN136] The statute does not require the lender to disclose the reasons for rejection. Therefore, it is difficult to uncover intentional discrimination without a review of the complete loan file of a rejected individual. [FN137]

HMDA is effective because it allows fair lending advocates to use the data to show the disparities in the lending process. By exposing a lender's unwillingness to make objective decisions about lending based on income and ability to repay instead of geographical sites of the

residential property, fair lending advocates have been able to become more vocal about the limited credit access in minority residential areas. [FN138]

Incorporating HMDA-like requirements into USDA's regulatory structure could provide a multi-faceted solution. First, it would require USDA as a lender to have adequate record-keeping and reporting requirements, alleviating some disparities in lending by using the reporting requirements to provide a basis for applicant comparisons. Implementing a HMDA-like scheme would provide a basis for minority applicants to demonstrate that they are being treated differently than non-minority applicants on credit determinants like farming experience, projected crop yields, and ability to repay. USDA needs to develop the internal capability to determine whether there is consistency in the loan approval process based upon statistical evidence. It can then become more accountable to its constituent farmers despite its decentralized lending scheme.

Furthermore, requiring the reporting of the reason for a denial of a USDA loan request can provide the basis for more efficient investigation into credit access. By requiring USDA to disclose the reasons for rejection, more appropriate comparisons can be made between minority and white applicants. Such a system would make possible a review of loan approvals with loan denials. Accordingly, USDA should be required, when requested by a rejected applicant, to make comparisons between the loans denied and those that were approved by similarly situated applicants. [FN139] The data then becomes a distinguishing basis for comparisons with other counties lending on size of the farms and income levels. These types of analysis will help unearth lending disparities.

Finally, unlike HMDA, the USDA legislative scheme should provide a private right of action to farmers experiencing discrimination in lending practices. This would allow the data to be used in a meaningful way by those who are directly impacted. [FN140]

HMDA relies upon regulatory examinations and supervision for compliance. The possibility of individual enforcement actions focuses the lender on the seriousness and immediacy of potential violations. The proposed schematic creates a relationship between the lender and the individual applicant. Thus, the threat of financial exposure, should a lending violation be found, creates incentives for more cautious lending determinations. [FN141] Moreover, a private right of action provides a fuller remedy because it creates direct accountability by the lender to the applicant.

2. Monitoring the County Committee

ECOA prohibits creditors from engaging in discrimination in any part of the lending process. [FN142] Although the statute does not specifically address unfair marketing practices, discouraging minorities from applying for credit is barred under the statute. This can be read to include a prohibition not only on the way that USDA identifies and assists borrowers in filling out loan applications, but potentially to reach the composition and authority of the county committees.

Local farm agents' differential treatment of minority applicants constitutes a discriminatory credit practice. ***344** Under ECOA, USDA and its county committees are creditors and may be subject to violations of the statute for pre-application marketing and discrimination. [FN143] Under FSA guidelines, USDA employees at the local level are responsible for assisting farmers with the FSA loan application. The failure to assist minority farmers, many of whom tell tales of

being denied an opportunity to even receive an application, reflects the USDA officials' influence over the applicant pool: it is difficult to assess the denial rate of minority farmers if they are not even given an opportunity to apply. This type of treatment by USDA representatives has served as an effective deterrent to minority farmers from low-interest, federally guaranteed loan funds.

The common discriminatory practices of the county committees may be effectively remedied under ECOA and through changes in USDA's regulatory structure. USDA needs a more rigorous means to identify appropriate borrowers and make the county committee system accountable for irregularities in its distribution of agricultural benefits and loans. [FN144] Mandatory changes can be as basic as requiring USDA to send notices in advance of yearly funding allocations to all farmers. It could also monitor the guidance and assistance that local USDA agents provide to individual farmers to ensure that it is provided in a non-biased way. A more significant change would be to establish an agricultural ombudsman that systematically and randomly reviews credit determinations for disadvantaged farmers. This type of self-enforcement can bring much-needed credibility to a prejudiced process.

USDA should address conflict of interest situations as well. It is problematic for those making the credit decisions to also be the ones who are in direct competition with potential borrowers for loan funds. [FN145] It should be a violation of credit discrimination laws for a member of the county committee, or his or her family, to purchase property that is subject to sale based on a denial of credit that has occurred within two years. [FN146] Instead of a county committee made up of local farmers, USDA should institute a committee system composed of disinterested persons who are qualified for make agricultural lending decisions. In order to draw upon a qualified pool of persons able to serve, USDA should offer a training and certification process that provides the opportunity for competent local citizens to assume these decision-making roles. [FN147]

Recognizing the unique nature of agricultural lending, there should be an expedited review at the national level of minority farmers' denied loan requests. By creating an immediate right to appeal, minority applicants who may have been unfairly discriminated against in the past will feel that the process is more sensitive to their concerns. Furthermore, unnecessary delays in planting and harvesting crops could potentially be avoided. The review can be based on previously collected information from prior years' determinations. If the information is readily accessible, the review process need not be unnecessarily prolonged. Finally, an opportunity for a review at the federal level gives farmers a better chance of assessing whether there is a pattern of lending disparity among the local decision-makers.

C. Measuring the Intangible Business Losses: Recovery for Prospective Loss of Inheritance

One of the complexities of the loss of a business is that it is an economic loss. [FN148] In tort law, economic harm unaccompanied by physical injury is not usually recoverable. [FN149] When there is pure economic loss due to negligence, however, the law recognizes a remedy. [FN150] Such are the rationales of statutes recognizing discrimination as compensable wrongdoing. [FN151] Actual losses in an ECOA case may be minimal. [FN152] Compensating the business that suffers credit discrimination allows recovery for the consequential losses of income or profits. Compensation for credit discrimination when the federal government is a defendant is limited to actual damages. [FN153] The question becomes whether that

compensation alleviates the economic injustice.

For the small farm that has been put out of business by the federal government's complicity in a discriminatory lending scheme, there needs to be recognition that the discrimination wrongfully interfered with a business' development. In the case of the failure or insolvency of the business due to the discriminatory credit decisions, actual damages should include compensation for the loss of prospective inheritance. Such a contextual examination could result in a fuller remedial measure by recognizing the future stream of income that has been lost because of the discriminatory conduct.

1. Loss of Prospective Inheritance

ECOA creates a duty for creditors to make lending decisions in a non-discriminatory manner. In this regard, tort law defines its duties and remedies. [FN154] The statute allows compensation for actual damages and for punitive damages up to $10,000. [FN155] Although the statute is meant to halt discrimination for discriminatory lending to individuals and small businesses, its remedial scheme is flawed in that it fails to require a specific focus on the decline in the business' net worth as it affects beneficiaries and their loss of prospective inheritance. [FN156]

a. An analogy to the wrongful death recovery for loss of prospective inheritance

***345** Special damages are those that are peculiar to each individual case. [FN157] A damage award is held to be 'special' if it arises naturally, yet not necessarily, from a wrongful act. [FN158] Damages for loss of inheritance are an example of the expanded scope of pecuniary damages currently available in wrongful death actions. [FN159] Loss of inheritance damages are generally defined in terms of the pecuniary advantage the decedent would have bestowed upon the beneficiary. [FN160]

Loss of inheritance as a damage remedy captures the rationale in tort policy that the injured plaintiff should be fully compensated for her injury. [FN161] Had the decedent lived a full and normal life, she would have accumulated property that would have passed to beneficiaries. [FN162] Loss of inheritance damages generally consist of the present value of property and earnings which the deceased reasonably would have been expected to add to the estate and, at natural death, would have left to her statutory beneficiaries. [FN163] Despite their speculative nature, the role of the jury in determining the propriety of a loss of inheritance award provides a proper balance. [FN164]

To prove loss of inheritance damages, the plaintiff must show that the decedent, but for her wrongful death, would have accumulated an estate and that the plaintiff would have been alive at the conclusion of the decedent's natural life to receive this inheritance. [FN165] Furthermore, the plaintiff must demonstrate that she would be one of the natural recipients of the decedent's estate. [FN166] Loss of inheritance presumes an increase in the pecuniary value of an estate, which the beneficiary must prove. [FN167]

b. Compensating discriminatory lack of access to credit that results in business failure

Property ownership, including ownership of a small business, represents authority and empowerment and thus entitlement. [FN168] Access to capital is crucial to the continuous ownership of any small business. Capital is needed to both stabilize and expand the business production. The issues surrounding entitlement and lack of access to credit combine to define

future interests in failed business property. [FN169]

The loss of a business due to discriminatory lending practices is similar to the death of a party by tort. In place of bodily injury is economic injury. A past harm has occurred that warrants compensation because the tortfeasor owed a duty to the decedent. In this case, USDA is the tortfeasor because it had a duty to provide financing as a lender of last resort to farmers who qualified for USDA loans. Its actions--ceding authority to the county committees who made discriminatory decisions regarding minority farmers--proximately caused the injury suffered by those farmers. [FN170] Many minority farmers are limited resource farmers by definition who would qualify for USDA loans because they are unattractive to lenders on the open market. [FN171]

African-American farmers who lost their farms because they could not secure adequate financing owned an asset that was both business property and inheritable property. To the extent that the economic remedy for business loss seeks fairly and adequately to compensate the injured parties, there should be a recovery for the full economic loss and the loss to the injured parties, e.g., the survivors. [FN172]

Moreover, farmland represents a business asset that is often bequeathed, making its loss more than just economic. Thus, a theory of loss recovery must value as a pecuniary interest the relationship between the small farm as a business entity, the owners of that entity, and the testamentary value of the property. The relationship should recognize the unique nature of land as property, the income-producing character of which is a business.

Analogizing further, the decedent is the small farm. The landowner is the beneficiary whose rights have been lost and should be compensated. What the landowner as beneficiary has lost is both the income of the farm and survivor rights that allow a choice about how the future interests of the small farm should be distributed.

This is similar to what occurs when owners dissolve a business. While the owner of a business has the right to receive its present income while in operation, that same owner has the right to receive future income that the business creates once it is dissolved. [FN173] Those rights are not extinguished because the business has ceased to operate; rather, they survive until there is no income produced by the business. While the length of this wind-up phase may be indefinite, what is significant is that the attachment of the right to the owner cannot be severed as long as there is an income-producing nature to the property. [FN174] Thus, the dissolved business owners' right to recoupment of the business' value, including income and profits, is a vested right independent of the actual legal existence of the business.

Defining property loss more broadly in this context gives value to all of the economic benefits that property ownership brings. By viewing discriminatory restrictions to credit as a pecuniary loss, the law is recognizing that racial disparity, in this context, affects federal agricultural finance. This theory compensates the value of the tangible and intangible assets of property ownership. In assessing the market value of the subsequent loss, it compensates for the fundamental harm suffered by black landowners because of USDA's discriminatory practices: loss of testamentary rights. [FN175] In conduct that intentionally harmed without justification, the lender pre-empted fair considerations and financially injured businesses. Thus, as a special damage, the loss of prospective inheritance ***346** equalizes the real loss of land and the future interests that the land as a business income-producing entity represents. Discriminatory loss of

credit becomes a lost business opportunity, re-defined for this specific context.

2. Policy Rationales Supporting Compensating Prospective Inheritance Rights

Considering inheritance rights as property might meet with resistance for several reasons. Among the concerns raised are: (a) inheritance rights are intangible property; (b) there is no entitlement nor expectation to an inheritance nor are heirs identifiable at the time of the loss; (c) the value of inheritance rights is too speculative for courts to determine the amount the parties should receive accurately; (d) future earnings are allowed in a business loss; and (e) awards based on loss of inheritance rights would be windfalls. None of these considerations should present a significant barrier to recovery in this instance.

a. Inheritance rights are a tangible loss

Some may argue that inheritance rights are intangible to the extent that they represent an initially unquantifiable loss. However, whether those losses are in fact immeasurable is a matter of perspective. [FN176] Property rights that ensure that the injured party is fairly and adequately compensated can be made tangible. The failure to recognize intangible rights because they appear to be based on conjecture does not mean that they do not exist but that the law has not developed a workable matrix for recovering them.

Inheritance rights represent compensation that is adequate and fair for injuries and losses. In determining the economic and legal bases for compensation, it is important to focus on the rationale for tort recovery. To the extent that the law intends to ensure that injured parties are compensated adequately and fairly for their injuries and losses, its optimal result is for the injured party to receive compensation equivalent to the full amount of her loss as well as the compensation that is proportional to the loss.

b. Proof of expectation in inheritance is not critical

The inability of the prospective heir to prove that she would receive anything is another stated objection to recovering for prospective inheritance loss. While there is no entitlement to an inheritance in our society, most property is inherited. [FN177] Recognizing a loss based on an established legal norm is admittedly broadening the definition of pecuniary loss, but the limitations on that remedy are established by the burden of proof that the heir assumes in establishing a right to a recovery under the theory.

What beneficiaries must prove in a future wrongful death context is again instructive. A plaintiff must prove that the decedent: (1) was a thrifty person; (2) would have accumulated an estate in excess of what they left at death; and (3) would have left this estate to the statutory beneficiaries as heirs. [FN178] In the business loss context, a beneficiary should be able to recover for loss of this inheritance if it can be established that: (1) the beneficiary has received in the past support or income maintenance; (2) the estate has the potential for an accumulated or appreciated value; and (3) inheritance is a pecuniary loss. [FN179] Inheritance rights, although not based on an expectancy theory, constitute compensation that is adequate and fair for the injuries and losses because it allows beneficiaries to recover the full amount of their loss as well as compensation that is proportional to the loss.

c. The value of inheritance rights can be determined with accuracy

Critics of inheritance rights base their objections on the uncertainty of the amount the parties should receive as well as the potential inability of the courts to determine that amount accurately. Critical to recovery are the heirs' proof of income and the prospect of its accumulation and

appreciation. In this context, the plaintiff must demonstrate that the resulting losses were attributable to the defendant's tortious interference. Forseeability in tort law is assessed at the time that breach of duty occurs. Again, the limitations imposed on the beneficiary by the burden of proof serve as a control. Speculation is removed by requiring that the beneficiary adequately prove the accumulated value of the property, along with identifiable and intended beneficiaries.

d. Future earnings may deny appropriate recovery

Measuring business losses presents an array of options, depending on the financial status of the business at the time of the injury. These are losses that extend beyond the current asset value, some argue, and should be calculated based on lost future earnings. Lost future earnings measure the income that the injured party will not be able to receive because of the injury. Confining the measure to lost earnings, however, is inadequate compensation when there are limited assets. Those same limited assets are financially dependent on the sustained financial loss, since the farm needs the loan to survive. Thus, an award based on future earnings alone might be reduced because it fails to recognize how the income generating potential might have affected the financial need.

By measuring the present value of future increased earnings, courts must project the increased earnings over the business' existence expectancy and make an award ***347** based on that projected amount. [FN180] This theory determines the actual economic value of the business and awards the beneficiary a fair share. [FN181]

e. Prospective loss of inheritance is not excessive

A basic principal of remedial law is that the injured party should be restored to the status quo but should not receive more than is necessary to do that. As a remedy, opponents of inheritance rights argue that it represents a windfall because they seem to go beyond what is actually loss--the present income. However, that view does not take into account that tort injury also projects future losses that are impacted by the negligent behavior. To the extent that the recovery for injury serves a deterrent function, the measure for present as well as future losses serves to make the injured party whole.

Requiring the tortfeasor to pay the full cost of the harm done provides an economic incentive to prevent future harm. Compensating the prospective beneficiaries of the business that has failed should be an independent loss and injury when it can be proven that discriminatory access to credit resulted in the financial demise of the business. [FN182] This claim is especially needed when there is not an action for lost future earnings. [FN183] In the case of a failed business due to discriminatory lack of access to credit, there would be no basis for making a future earnings calculation.

In determining the economic and legal bases for compensation, it is important to focus on rationale for tort recovery. To the extent that tort law intends to ensure that injured parties are compensated adequately and fairly for their injuries and losses, its optimal result is for the injured party to receive compensation equivalent to the full amount of the loss, as well as the compensation that is proportional to the loss.

While this theory arguably expands the compensation rights of business owners in credit discrimination cases, failing to fully measure small business loss when racial discrimination dominates economic policies results in economic injustice. Economic discrimination through loan disbursement may affect not only present owners but prospective future owners as well.

Specifically, compensating the intergenerational loss of land requires measuring the loss in terms of what the property truly represents--a testamentary and an income-producing asset. This measure is a more accurate measure of economic capacity at the time of actual loss. [FN184]

V. CONCLUSION

> [S]omewhere there should be reparations. It's good to know that you're saying that we're not going to have foreclosures, but what are you going to do about those hundreds of thousands of acres of land that have been lost, hundreds of thousands of black farmers who have been put out of business because of policies that were adverse to them? [FN185]

There is an inherent presumption in the USDA's funds distribution scheme that local jurisdictions are the most appropriate venue for determining federal agricultural assistance for small farmers. This presumption operates to make locally elected farmers federal agricultural policymakers. It is questionable whether this chosen operative is consistent with USDA's objectives. Beyond question is that the scheme has resulted in an indefensible reliance on the local county political consensus to meet the department's goals. Politically weak constituents, such as minority owners of small farms, are not fairly represented in a system of local governance that is captured by the participation of self-interested parties.

An economic analysis clarifies how the existing local structure is used. Yet economic principles, when viewed in isolation, disregard the legal and relational aspects of agency, authority, and hierarchy. A contextual examination of economic theory reveals that the small minority-owned farm is discriminated against as an economic unit. The county committee system allows biased decision-making to flourish.

USDA's current structure raises significant federalism concerns. Local control is not an adequate means of implementing national policy and goals because local farmers cannot be expected to execute national policies and goals without maximizing their own self-interest. The dire need for uniform and fair eligibility for, decision-making about, and accessibility to USDA funds can be remedied by more direct federal involvement in the distribution of agricultural financing. USDA must implement more stringent monitoring of credit availability and denials.

Critical to any review of USDA's credit structure is recognition of the economic disadvantages for the small, minority farmer. The remedial goal should fairly compensate those identifiable losses that are connected to the harm. In this regard, intergenerational loss recognizes that the damage extends beyond the immediate harm in discriminatory lending practice and is the needed counter-balance to a failed participatory governance scheme. USDA is uniquely situated as a financial intermediary. It must be held accountable.

[FNa1]. Cassandra Jones Havard is Associate Professor of Law at Temple University Law School. Professor Havard holds a B.A. from Bennett College and a J.D. from the University of Pennsylvania. The author dedicates this article to the memory of her father, Robert Fulton Jones, a beloved "street lawyer" for the African-American farmers of central and southern Alabama.

I dedicate this article to the memory, life, and work of my father, Robert Fulton Jones, who jokingly referred to himself as a "book farmer" having earned a B.S. in agri-economics from Tuskegee Universtiy and a M.S. from North Carolina State University. My father's professional career at the United States Department of Agriculture spanned over 30 years. His first job assignment with USDA's Cooperative Extension Services was as a "Negro County Agent" in

Wetumpka, Alabama in 1954. For many black farmers and their families living in central and southern Alabama, he was their "street lawyer," a compassionate friend, and their only contact with a fair and just USDA.

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[FN2]. Pigford v. Glickman, 185 F.R.D. 82, 87 (D.D.C. 1999).

[FN3]. Since 1935, the Secretary of Agriculture has enjoyed wide discretion to appoint county committees to implement agricultural credit programs under the Soil Conservation and Domestic Allotment Act (Parity Act) (Soil Erosion Act). 16 U.S.C.A. § 590h (2000).

[FN4]. Most minority-owned farms are classified under USDA programs as limited resource farms. Congress created the Limited Resource Program (LRP) in 1978, allowing the Farm Service Agency (FSA) to make real estate and operating loans at low, subsidized rates to small and family size farmers. See generally, Agricultural Credit Act of 1978, Pub. L. No. 95-334, 92 Stat. 420, 7 U.S.C. § 1934 (2000). A limited resource farmer is defined as:

> [A] producer or operator of a farm: (a) with an annual gross income of $20,000 or less derived from all sources, including income from a spouse or other members of the household, for each of the two prior years; or (b) With less than 25 acres aggregated for all crops, where a majority of the producer's gross income is derived from such farm or farms, but the producer's gross income from farming operations does not exceed $20,000.

7 C.F.R. § 457.8.

Small farm is defined as:

> [A]ny farm (1) producing family net income from all sources (farm and nonfarm) below the median nonmetropolitan income of the State; (2) operated by a family dependent on farming for a significant though not necessarily a majority of its income; and (3) on which family members provide most of the labor and management.

7 U.S.C.A. § 2666(c).

See also U.S. Dep't of Agric., A Time to Act: A Report of the Commission of the USDA National Commission on Small Farms, 27 (Miscellaneous Publication 1545, 1998) available at http://www.reeusda.gov/agsys/smallfarm/ncosf.htm [[hereinafter A Time To Act] (describing small farms as those "with less than $250,000 gross receipts annually on which day-to-day labor and management are provided by the farmer and/or the farm family that owns the production or owns, or leases, the productive assets").

[FN5]. As used in this article, the word "farmers" refers to farmers and ranchers as defined under USDA statutes and regulations. I use interchangeably the terms African-American and black.

[FN6]. The growing decline of small farms represents a significant detriment in agricultural production. First, small farms are beneficial because of their diversity in production. Larger farms have mono-cropping operations, while smaller farms are able to offer crops in rotation and livestock production that results in both biological diversity and ecological resilience. See A Time To Act, supra note 4, at 35. Secondly, the discriminatory credit denial negates USDA's

mandate to assume a significant role as lender of last resorts. USDA's credit granting function is critical because of its expertise in farming. Farming is described as a "narrow-margin and high-risk business." Id. at 34. For this reason, many traditional financial intermediaries are not readily available as lenders for farmers. Id.

[FN7]. African-American farmers account for about 3% of American farmers, owning less than four million acres of land as of 1991. There are reported annual losses of an average of fifty thousand acres resulting in a projected net loss of $2.5 million. This compares to ownership in 1920, when African-Americans owned fifteen million acres of land and 17.4% of farm operators were black. Lack of capital and access to financing and additional technological changes are cited as primary reasons for the decline. See Pigford v. Glickman, 185 F.R.D. 82, 83-84 (D.D.C. 1999).

[FN8]. Soil Conservation and Domestic Allotment Act (Parity Act) (Soil Erosion Act) Act, April 27, 1935, c. 85, 49 Stat. 163, as amended, Pub. L. No. 106-274, 16 USCA § 590h.

[FN9]. Money is specifically available for rural farming operations. Rural areas are defined in the statute as any place with a population of less than 50,000. 7 U.S.C. § 1932(d) (2000). See generally David Westfall, Agricultural Allotments as Property, 79 Harv. L. Rev. 1180 (1966) (questioning as sound policy the continuous use of agricultural subsidies by farmers and arguing that they create an entitlement); and Christopher R. Kelley, Rethinking the Equities of Federal Farm Programs, 14 N. Ill. L. Rev. 659 (1994).

[FN10]. FSA is a federally created lending institution within USDA, which makes and guarantees loans to farmers and businesses in rural areas. It is often referred to as USDA throughout this section.

[FN11]. Direct and guaranteed farm ownership and operating loans are granted to farmers who are temporarily unable to meet all their expenses and unable to obtain private or commercial credit, who lack sufficient financial resources, who have limited resources, or who have suffered financial setbacks from natural disasters. Direct loans are the more limited with a maximum loan size of $200,000 and are made and serviced by FSA officials who provide supervision and credit counseling. These direct loans are typically farm ownership, operating, and emergency loans but may also include youth project loans for agricultural students interested in pursuing a career in farming. A portion of direct loan funds is set-aside for minority applicants and beginning farmers. Guaranteed loans, however are made by conventional agricultural lenders for up to 95% of the principal and then guaranteed by FSA. The maximum loan size is $700,000 and is used for farm ownership and operating. As with the direct loan funds, a portion of the guaranteed loan funds is targeted at minority applicants and beginning farmers. See FSA Online, Farm Loan Programs (http:// www.fsa.usda.gov).

[FN12]. Borrowers may use the loans to acquire, enlarge, or improve farms and recreational facilities, to supplement farm income, to refinance existing indebtedness, or for loan closings. 7 U.S.C. § 1942. Amendments in 1996 eliminated the availability of both operating and ownership loans for small nonfarming business enterprises in rural areas and for other purposes. Pub. L. No. 104-127, §§ 602, 612(a), 110 Stat. 888, 1085, 1087, amending §§ 1923, 1942. Loans for small businesses are available from the SBA. See also 7 C.F.R. § 1941.

[FN13]. USDA must target 25 percent of its farm operating and ownership loan awards or

guarantees to beginning farmers and ranchers. 7 U.S.C. § 1994(b)(2) (1992). Government-backed debt interests are sold to generate funds to make insured loans to farmers. Insured loans are made to eligible borrowers, who are unable to obtain credit from commercial financial institutions and agree to ongoing supervision of their farming operations. Insured borrowers may eventfully become eligible for guaranteed loan funds through the USDA's indirect lending program. Under this program, USDA guarantees loans made to farmers by commercial lenders. The guarantee is for up to 90% of the lender's exposure. 7 U.S.C. § 1929(h); 7 C.F.R. pt. 1980 (1998).

[FN14]. See Food, Agriculture, Conservation, and Trade Act of 1990, S. Rep. No. 101-357 (1990).

[FN15]. 7 U.S.C. § 1934(a). The limited resource rate is half the interest rate on U.S. Treasury obligations with 5-year maturities, but with a statutory minimum of 5%. Limited resource rates, annual rates, and borrowers are reviewed annually for eligibility. 7 U.S.C. § 1927(a)(3)(B) (for low-income farm ownership loans under § 1934) and § 1946(a)(2) (for operating loans). If they are ineligible, borrower's loan rates are increased to the regular interest rate. Dodson & Koenig, The Farm Service Agency's Limited Resource Interest Rate Program in the 1990s, in ERS, USDA, Agricultural Income and Finance Situation and Outlook Report (AIS-64, Feb. 1997) at 38, 39 [[hereinafter ERS, AGRICULTURAL]. Because the FSA is a lender of last resort, the limited resource loan rates have been used by large numbers of borrowers. Between 1991 and 1995, 41% of operating loans and 65% of farm ownership loans carried limited resource rates, but more recently fewer dollars were loaned at those rates. During some time periods, limited resource borrowers have tended to carry greater debt loads and have lower net worth than regular rate borrowers, but in recent years there has been little significant difference between limited resource and regular borrowers. Id. at 39-41. In recent years, limited resource loan rates have been at the 5% statutory minimum for both farm ownership and operating loans, and since 1990 these loans have been targeted for beginning farmers. Id. at 38. For comparison, on January 1, 1996, limited resource rates were 5%; regular operating loans, 6.5%; regular farm ownership loans, 7%. Id. at 46.

[FN16]. Congress re-authorized the committee's functions as recently as 1982, stating:

> 'Congress finds that agricultural stabilization and conservation county and community committees have served, and should continue to serve, a vital function in implementing, at the local level, farm commodity, soil conservation, and related programs; and that, by assisting the United States Department of Agriculture to conduct such programs effectively, such committees provide substantial benefits to agriculture and the Nation. Congress further finds that the agricultural stabilization and conservation county and community committee system has developed, over the years, into a highly efficient mechanism for implementing such programs at the local level. Therefore, it is the sense of Congress that the Secretary of Agriculture should ensure that the structure and operations of the agricultural stabilization and conservation county and community committees, as heretofore developed to enable such committees to meet the responsibilities assigned them under section 8(b) of the Soil Conservation and Domestic Allotment Act [subsection (b) of this section], and related statutes and regulations, be preserved and strengthened.' Pub. L. No. 97-218, tit. IV, § 401, 96 Stat. 216 (1982) (emphasis added).

[FN17]. See Pigford v. Glickman, 185 F.R.D. 82, 86 (D.D.C. 1999). One of the

recommendations of the USDA's Civil Rights Action Team (CRAT) Report was to make these federal government positions, but to date that recommendation has not been adopted by USDA.

[FN18]. FSA has a statutory obligation to provide its borrowers with detailed notices and appeals related to any 'adverse action' of the agency. 7 C.F.R. § 1962.47 (1993). Congress conducted hearings investigating the independence of the FSA appeals branch. Although the National Appeals Staff is designed to be an independent body, the Administrator of the FSA appoints the Director of the National Appeals Staff. 7 U.S.C. § 1983b (2000); 7 C.F.R. § 1900.51-.100 (1993). The congressional concern led to a provision contained in the 1990 Farm Bill, which was intended to reinforce that independence. Pub. L. No. 101- 624, § 1812, 104 Stat. 3821 (1990).

[FN19]. For example, when a farmer applies USDA funds or its benefits program, the County Executive Director is to assist him or her in completing the application; the County Executive Director also performed an initial review of the application.

[FN20]. See Pigford, 185 F.R.D. at 86.

[FN21]. Id. at 90.

[FN22]. "No acceleration of loan repayment or foreclosure will take place on a claimant who has a claim pending." Pigford v. Glickman, 185 F.R.D. 82, 91 (D.D.C. 1999) (citing Consent Decree at P 7).

[FN23]. The court denied a previous attempt at certification of a class on the basis of lack of commonality. Williams v. Glickman, Civil Action No. 95- 1149, Memorandum Opinion of February 14, 1997, at 7, WL 74547. The proposed class was all African-American or Hispanic-American individuals who had suffered from racial or national origin discrimination in the application or servicing of FSA loans, which caused them to sustain economic loss and/or mental anguish and/or distress damage. Id. This class was denied certification as being overly broad and too amorphous with claims that were not typical or representative of potential class members. Williams v. Glickman, 182 F.R.D. 341, 344 (D.D.C. 1998).

[FN24]. This claim was to be filed with the Farmer's Home Administration (FmHA) Equal Opportunity Office. In 1994, FmHA was consolidated into FSA.

[FN25]. Another 1997 report by the Office of Inspector General of USDA stated that USDA had a backlog of discrimination complaints that had not been processed or investigated and that the FSA program for discrimination complaints lacked "integrity, direction, and accountability." See Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), Plaintiff's Motion for Class Certification Exhibit A (Evaluation Report for Secretary on Civil Rights Issues) at 6.

[FN26]. See Pigford, 185 F.R.D. at 92 (citing Consent Decree at P2).

[FN27]. The court, in approving the settlement agreement, considered the objections of numerous groups and individuals. Those objections focused on the fairness of the settlement negotiations; the amount of discovery completed; the definition of the class; inquiries into collusion between class counsel and counsel for the federal government, and adequacy of notice and opportunity to be heard on the proposed settlement. Pigford, 185 F.R.D. at 82.

[FN28]. Id. at 92 (citing Consent Decree at P 9(a)(iv)).

[FN29]. U.S. Dep't of Agric., Pigford v. Glickman: Consent Decree in Class Action Suit by African-American Farmers, Latest Statistics on Claims (last modified March 14, 2001) available at (http://www.usda.gov/da/status.htm).

[FN30]. Id.

[FN31]. Id.

[FN32]. Id.

[FN33]. Id.

[FN34]. See generally Barry R. Weingast, The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development, 11 J.L. Econ. & Org. 1, 19 (1995) (explaining that a limited federal government's role in the markets facilitates the political and economic rights of citizens).

[FN35]. United States v. Carolene Products Co ., 304 U.S. 144, 152-153 (1938).

[FN36]. Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663, 668 (2001) (describing the New Deal era as the beginning of the "modern administrative state" in which federal statutes provide for state regulation to meet federal policy goals).

[FN37]. As in several areas of federal governance currently, there is a tendency to vest state governments with federal political powers. Daniel L. Rubinfeld, Federalism and Economic Development, 83 Va. L. Rev. 1581, 1592 (1997) (describing cooperative federalism as congressional programs that combine federal and state authority). See also Sheryll D. Cashin, Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities, 99 Colum. L. Rev. 552, 552 (1999) (discussing how the ideals of federalism that suggest giving states policy authority contributed to the 1996 welfare reform legislation).

[FN38]. See New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[FN39]. See, Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1905 (1994) (explaining the intersection between private entities which perform governmental purposes and racially identified space) [hereinafter Ford, The Boundaries of Race].

[FN40]. Boraas v. Village of Belle Terre, 476 F.2d 806 (1973) (upholding town's zoning ordinance with a restrictive definition of 'family').

[FN41]. Akhil Reed Amar, Five Views of Federalism: "Converse --1983' in Context, 47 Vand. L. Rev. 1229 (1994).

[FN42]. See Edwin L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 915 (1994) (arguing that decentralization allows for many of the benefits of federalism).

[FN43]. The authorization of citizen participation may in fact render license for abuse of minority interests. James Madison envisioned that local and popular biases could undermine a

government designed to serve all of its citizens. See James Madison, The Federalist No. 10; John Jay, The Federalist No. 3.

[FN44]. In a somewhat similar context, one scholar has argued that the majoritarian regime does not always represent the interests of citizens and that representational democracy is weakened when the interests of all citizens are not considered. Lani Guiner, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077 (1991) (arguing that black electoral success may not result in more responsive government because result of winner-take-all elections confines the successes to a geographically and socially isolated constituency).

[FN45]. Martha R. Mahoney, Symposium Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite, 85 Cornell L. Rev. 1309, 1322 (2000) (arguing that most whites fail to perceive whiteness as a separate and distinct phenomenon that results in racial power and subordination against the racial minorities).

[FN46]. Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988); and Jerome McCristal Culp, Jr., Toward a Black Legal Scholarship: Race and Original Understandings, 1991 Duke L.J. 39 (1991).

[FN47]. Keith Aoki, Race, Space, and Place: the Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification, 20 Fordham Urb. L.J. 699, (1993) (positing that geographic communities of marginalized people have not developed haphazardly simply because similar people have come to congregate in the same area but have been created through zoning regulations and government acquiescence in its placement of public housing and development of urban programs).

[FN48]. The process by which racial meaning is assigned to a previously race-neutral social practice or group. John O. Calmore, Racialized Space and the Culture of Segregation: 'Hewing a Stone of Hope From a Mountain of Despair' 143 U. Pa. L. Rev. 1233, 1235 (1995) (describing racialization as a 'dialectical process of signification').

[FN49]. Audrey G. McFarlane, Race, Space, And Place: The Geography of Economic Development, 36 San Diego L. Rev. 295 (1999) (arguing that the Empowerment Zones Program cannot properly be classified either as a tool to achieve social justice or as a neutral, rational, and beneficial program for poor, inner-city communities because of the limits it places on economic development); Jerry Frug, The Geography of Community, 48 Stan. L. Rev. 1047 (1996) (discussing how urban policy has resulted in the homogeneity of communities thus denying residents of the opportunity to associate with people whose opinions, values, and culture are radically different from their own); and Martha R. Mahoney, Segregation, Whiteness, and Transformation, 143 U. Pa. L. Rev. 1659 (1995).

[FN50]. See Calmore, supra note 48, at 1237.

[FN51]. Culture here is used to mean group ethos. Scholars have taken differing views about how culture should be determined in ways that are representative of the entire group. See Linz Audain, Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness, 70 Ind. L.J. 709, 781 (1995). Critical cultural law and economics is "the manner in

which law and economics informs and is informed by culture." The study of this area has brought to light a culture of deindividualization, "the attribution of psychological characteristics on the basis of apparent and immutable physical characteristics." Due to the fact that the very idea of race is itself racist and thereby necessitates racial classifications and the psychological attribution, Audain proposes a radical theory of non-race.

[FN52]. Ford, The Boundaries of Race, supra note 39, at 1844. As Ford explains, "political geography--the position and function of jurisdictional and quasi-jurisdictional boundaries--helps to promote a racially separate and unequal distribution of political influence and economic resources."

[FN53]. As discussed in this section, the term" space" refers to the mental imagery that one conjures when certain geographical places become the primary residence of certain groups of people. See Akoi, supra note 48, at 819-825.

[FN54]. See, infra Section IV. B.2.

[FN55]. Ford, The Boundaries of Race, supra note 39, at 1886.

[FN56]. See generally Richard Briffault, Our Localism: Part II--Localism and Legal Theory, 90 Colum. L. Rev. 346 (1990). See also Ford, The Boundaries of Race, supra note 39, at 1886.

[FN57]. As Ford explains, when legal doctrine fails to inquire either whether boundaries should exist or how they came into being, it permits a legal geography that is opaque because that theory fails to address how the social and economic consequences have created local jurisdictions. See Ford, The Boundaries of Race, supra note 39, at 1841, 1858.

[FN58]. This system has created racially identified space--white space. I use that term advisedly since the effects of the county committee system was actually to create virtually all "white" agricultural land ownership. See discussion infra at Section III.A.2. See also Keith Aoki, Direct Democracy, Racial Group Agency, Local Government Law, and Residential Racial Segregation: Some Reflections on Radical and Plural Democracy, 33 Cal. W. L. Rev. 185, 197-198 (1997).

[FN59]. See Ronald J. Mann, The Role of Secured Credit in Small-Business Lending, 86 Geo. L.J. 1 (1997).

[FN60]. Martin H. Redish, The Constitution as Political Structure 135-36 (1995).

[FN61]. See A Time to Act, supra note 4, at 1.

[FN62]. See Joseph E. Stiglitz & Andrew Weiss, Credit Rationing in Markets with Imperfect Information, 71 Am. Econ. Rev. 393 (1981).

[FN63]. Credit rationing consists of several models including divergent views on rationing, price rationing, redlining, and quantity/availability rationing. See Dwight Jaffee & Joseph Stiglitz, Credit Rationing, in 2 Handbook of Monetary Economics 837, 847-49 (1990). The discussion that follows is based on the last two elements.

[FN64]. See generally Larry T. Garvin, Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation, 44 UCLA L. Rev. 247, 284 (1996).

[FN65]. Credit rationing in the debt market presumes that the borrower, not the bank, is the optimal source of information regarding ability to repay obligations. See Helmut Bester, Screening vs. Rationing in Credit Markets with Imperfect Information, 75 Am. Econ. Rev. 850 (1985) (suggesting that banks can limit credit rationing with informational advantages about borrowers that effectively screen them for riskiness of repayment). But cf. Joseph E. Seidlitz & Andrew Weiss, Asymmetric Information in Credit Markets and Its Implications for Macro-Economics, 44 Oxford Econ. Papers 694, 697n.7 (1992).

[FN66]. See Lan Cao, Looking at Communities and Markets, 841 Notre Dame L. Rev. 841 (1999) (arguing that community market formation can help to solve the problem of adverse selection).

[FN67]. See generally George Akerlof, The Market for 'Lemons': Quality Uncertainty and the Market Mechanisms, 84 Q.J. Econ. 488 (1970).

[FN68]. Lenders operate under a model of equilibrium return, which can be achieved by combining the desired level of risk with lending at the risk-free rate. Thus, even loans with differing levels of risk can function as perfect substitutes given the 'risk-adjusted" rate of return. See generally William F. Sharpe, Capital Asset Prices: A Theory of Market Equilibrium Under Conditions of Risk, 19 J. Fin. 425, 436-42 (1964) (discussing the development of the Capital Asset Pricing Model); John Lindner, Security Prices, Risk, and Maximal Gains from Diversification, 20 J. Fin. 587, 597-601 (1965); and Jan Mossing, Equilibrium in a Capital Asset Market, 34 Econometric 768, 769-783 (1966).

[FN69]. Moral hazard refers to the tendency of those who are protected from loss through insurance or some other type of guarantee to have reduced incentives to prevent or minimize the cost of loss. See Kenneth J. Arrow, The Economics of Moral Hazard: Further Comment, 58 Am. Econ. Rev. 537 (1968). See also Tom Baker, On the Genealogy of Moral Hazard, 75 Tex. L. Rev. 237 (1996).

[FN70]. See, e.g. Douglas W. Diamond, Monitoring and Reputation: The Choice Between Bank Loans and Directly Placed Debt, 99 J. Pol. Econ. 689 (1991); Raghuram G. Rajan, Insiders and Outsiders: The Choice between Informed and Arm's-Length Debt, 47 J. Fin. 1367 (1992).

[FN71]. Numerous studies have examined the relationship between inside lenders and borrowers, concluding that the relationship results in the lenders having information that grants screening and monitoring advantages not otherwise obtainable. See, e.g., Christopher James, Some Evidence on the Uniqueness of Bank Loans, 19 J. Fin. Econ. 217 (1987); Scott L. Summer & John J. McConnell, Further Evidence on the Bank Lending Process and the Capital-Market Response to Bank Loan Agreements, 25 J. Fin. Econ. 99 (1989). Arguably, USDA policy replicates the empirical studies that indicate that inside lenders may have valuable information about firms. In this regard, county committees may produce valuable information about borrowers that USDA would not otherwise have.

[FN72]. Congress appropriates money for FSA farm loans as part of the USDA budget each fiscal year. See generally Agriculture Appropriations: Before the Subcommittee on Agriculture, Rural Development, and Related Agencies, 107th Cong. (2000) (statement of Keith Kelly, Administrator), available at 2000 WL 11068714. Each state receives an allocation of money from FSA yearly. When funds in a loan program become depleted, FSA will usually pool funds,

taking all of the unused loan money from the states and placing it in a national pool. See generally Agriculture Credit Outlook: Before the House Agriculture Subcommittee on General Farm Commodities, Resource Conservation and Credit, 106 th Cong. (1999) (statement of Dale Leighty), available at 1999 WL 8084766. This allows FSA to move money from areas where it is not being used to areas where it is needed, with states being able to request funding on a loan-by-loan basis. FSA allocates money based on the number of farmers in each state, the value of farm assets, and net farm income. Id.

[FN73]. Transaction costs comprise three different expenses that a lender incurs in making the loan transaction: 1) identification costs or the cost involve in the business partners identifying and contacting one another; 2) negotiation costs and 3) enforcement costs. See Eugene Faa, Banking in the Theory of Finance, 6 J. Monetary Econ. 39 (1980). See also Lisa Bernstein, The Silicon Valley Lawyer as Transaction Cost Engineer? 74 Ore. L. Rev. at 239, (1995) (distinguishing between transaction and information costs).

[FN74]. There is disagreement about the significance of transaction costs. As one author has said,

> "[O]n one side, the economic theorists have not focused on the practical significance or implications of the theory of transaction costs. On the other side, the more practically minded market-based law and economics scholars have failed to discuss seriously the theoretical implications of their conceptualization of transaction costs in terms of the ad hoc categories. The theory and practice of transaction cost analysis thus remain disconnected. And the concept of transaction costs thus remains something of a black hole."

Pierre Schlag, The Problem of Transaction Costs, 62 S. Cal. L. Rev. 1661, 1674 (1989).

[FN75]. See generally Christopher James, Some Evidence on the Uniqueness of Bank Loans, 19 J. Fin. Econ. 217 (1987); Christopher James & Peggy Weir, Borrowing Relationships, Intermediation, and the Cost of Issuing Public Securities, 28 J. Fin. Econ. 149 (1990); Scott L. Summer & John J. McConnell, Further Evidence on the Bank Lending Process and the Capital-Market Response to Bank Loan Agreements, 25 J. Fin. Econ. 99 (1989).

[FN76]. See Amy Bushaw, Small Business Loan Pools: Testing the Waters, 2 J. Small and Emerging Bus. L., 197, 216 (1998) (explaining that prohibitive costs deter small businesses from seeking their own investors independently of organized financial structures such as banks).

[FN77]. Id.

[FN78]. See Mann, supra note 59, at 28.

[FN79]. Id.

[FN80]. As USDA recognizes, "As is true for nearly all USDA direct loan programs, funding levels for direct [farm operating] loans have historically been less than farmers' demand for them. Many of these farmers are minority and beginning farmers who are without the resources to obtain credit from a commercial lender, even with a guarantee." Agriculture Appropriations: Before the Senate Appropriations Subcommittee on Agriculture, Rural Development, and Related Agencies, 106th Cong. (1999) (statement of August Schumacher, Jr., Under Secretary for Farm and Foreign Agricultural Services United States Department of Agriculture) a vailable at 1999 WL 8085171.

[FN81]. However, note that as with private lenders, USDA requires collateral for its loans. See, 7 C.F.R. § 762.130 (loan approval and issuing the guarantee).

[FN82]. In this regard, USDA's performance is subject to yearly monitoring by Congress. Its present loan performance rate is extremely good: it represents 38% of all non-tax debt owed to the treasury and its average delinquency rate of all debts is about 6%, compared to a Government-wide average (excluding USDA) of 23%. House Agriculture Department Financial Management Committee, 107 th Cong. (2000) (statement of Sally Thompson, Chief Financial Officer, U.S. Department of Agriculture) available at 2000 WL 23833112. As with other government-sponsored enterprises, its debt is backed by the U.S. Treasury. See generally Carrie Stradley Lavargna, Government-Sponsored Enterprises Are 'Too Big to Fail': Balancing Public and Private Interests, 44 Hastings L. J. 991 (1993).

[FN83]. A traditional bank may seek to minimize transactions costs on the asset side of the bank through exploiting economies of scale, amassing and evaluating a diversified portfolio of loans, or on the liability side through issuing demand deposits and developing expertise in providing related payments services. See Eugene Faa, Banking in the Theory of Finance, 6 J. Monetary Econ. 39 (1980).

[FN84]. See infra notes 132-141 and discussion in Section IV.B.1. arguing that USDA needs HMDA-like requirements because of lack of record keeping and the inability to assess whether county committee structure actually abates transaction costs.

[FN85]. By focussing on the manager's ability, the lender can evaluate the borrower's ability to achieve the stated goals and objectives in the loan proposal.

[FN86]. See generally Steven H. Hobbs, Toward a Theory of Law and Entrepreneurship, 26 Cap. U. L. Rev. 241 (1994); Donald R. Korobkin, Vulnerability, Survival, and the Problem of Small Business Bankruptcy, 23 Cap. U. L. Rev. 413 (1994).

[FN87]. See supra note 69 and accompanying text.

[FN88]. See Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 308 (1976).

[FN89]. Id.

[FN90]. Id.

[FN91]. See Bushaw, supra note 76.

[FN92]. 7 C.F.R. § 762.120 (loan applicant eligibility).

[FN93]. See generally Howell E. Jackson, The Expanding Obligations of Financial Holding Companies, 107 Harv. L. Rev. 509 (1994).

[FN94]. FSA regulations require that the borrower must have some limited, successful farming experience as a condition of loan eligibility. See 7 C.F.R. § 762.102 (2000).

[FN95]. See Mann, supra note 59, at 37.

[FN96]. The use of collateral and the possibility of foreclosure is yet another way to deter the moral hazard that accompanies guaranteed lending. See Yuk-Shee Chan & Anjan V. Thakor, Collateral and Competitive Equilibria with Moral Hazard and Private Information, 42 J. Fin. 345, 347 (1987); see generally John D. Leeth & Jonathan A. Scott, The Incidence of Secured Debt: Evidence from the Small Business Community, 24 J. Fin. & Quantitative Analysis 379, 380-82 (1989) (applying theories of secured lending to small businesses); see also Robert E. Scott, A Relational Theory of Secured Financing, 86 Colum. L. Rev. 901 (1986).

[FN97]. See Douglas G. Baird, Security Interests Reconsidered, 80 Va. L. Rev. 2249, 2263-66 (1994) (discussing the probability that an owner-manager's personal guarantee will be secured by the personal assets of the owner-manager).

[FN98]. See Mahoney, supra note 45, at 2005.

[FN99]. As used in this context, economic space refers to the acquisition of farmland by white farmers through the denial of USDA financing to black farmers.

[FN100]. More generally, redlining refers to inappropriate behavior on the part of lenders who use differential treatment in the lending process to assess the creditworthiness of whites and non-minorities. See Jack M. Guttentag & Susan M. Wachter, Redlining and Public Policy 5 (1980). See also David E. Runck, An Analysis of the Community Development Banking and Financial Institutions Act and the Problem of 'Rational Redlining' Facing Low-Income Communities, 15 Ann. Rev. Banking L. 517 (1996); Stephen Trzcinski, The Economics of Redlining: A Classical Liberal Analysis, 44 Syracuse L. Rev. 1197 (1993).

[FN101]. See Robin Paul Malloy, Law And Economics: A Comparative Approach to Theory and Practice 60 (1990). Foregoing economically favorable transactions is not only irrational but inefficient behavior on the part of the county committees.

[FN102]. Many lenders who complain about the scope of regulatory compliance within the banking industry argue that less government regulation would lead to greater economic growth. See generally, Robert G. Boehmer, Mortgage Discrimination: Paperwork and Prohibitions Prove Insufficient--Is It Time for Simplification And Incentives? 21 Hofstra L. Rev. 603 (1993).

[FN103]. Redlining is defined in two ways: rational and irrational. Rational redlining describes a lender's determination of the creditworthiness of a loan based on the geographic location of the borrower or the property. Irrational redlining describes a lending philosophy that ignores the borrower's creditworthiness since a presumably creditworthy borrower would yield loan performance that would increase the bank's profit margin, regardless of the location of the borrower or the property in a low-income community. A. Brooke Overby, The Community Reinvestment Act Reconsidered, 143 U. Pa. L. Rev. 1431, 1451-52 (1995).

[FN104]. See Runck, supra note 100, at 1203. Common reasons cited include collateral decline, the borrower's creditworthiness, and the higher incidence of collateral depreciation or the poor quality of the surrounding neighborhood.

[FN105]. See Jonathan R. Macey and Geoffrey P. Miller, The Community Reinvestment Act: An Economic Analysis, 79 Va. L. Rev. 291, 319-24 (1993).

[FN106]. Lenders cite high agency costs as a reason to avoid lending in low-income

neighborhoods. Borrowers from low-income neighborhoods tend to seek low dollar amount loans. The administrative costs of lending small amounts of money make it unfeasible for large profit center banks to pursue too many small loans since these administrative costs must be paid for each individual loan. Typically, the result is a strategy that declines to make any loans within a geographical area because an insignificant number of the loans made ultimately would be profitable. See Peter Swire, The Persistent Problem of Lending Discrimination: A Law and Economics Analysis, 73 Tex. L. Rev. 787, 818 (1995).

[FN107]. Risk stereotyping is costless in that lenders are able to identify which loan opportunities to pursue and which to forego. See Phillips G. Gay, Jr., Credit Discrimination: Significant Risk for the Unwary, Bank Mgmt., July 1991, at 53, 54. For example, it is very difficult, if not impossible, to use purely objective factors in determining whether an applicant has the character, attitude, and motivation to repay a mortgage loan. Consequently, lenders are often forced to rely on their personal values (which may encompass biases) when assessing an applicant's willingness to repay a mortgage loan. Risk stereotyping is prevalent. A 1990 study found that 62% of whites rated blacks as lazier than whites, and 78% thought them more likely to prefer welfare to being self-supporting. See Jeannye Thornton et al., Whites' Myths About Blacks, U.S. News & World Rep., Nov. 9, 1992, at 41, 43.

[FN108]. One scholar calls this 'unconscious racism.' Charles R. Lawrence, III, The ID, the Ego, and Equal Protection: Reckoning with Unconscious Racism, in Critical Race Theory 235, 237-38 (Kimberle Crenshaw et al., eds., 1995) ("We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions."). Taibi argues that because credit decisions are based on subjective determinations of the applicant's creditworthiness, perceived cultural differences often factor into an examination of creditworthiness, making even the most well-meaning white loan officers to perceive minority borrowers as riskier than they really are. Anthony D. Taibi, Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice, 107 Harv. L. Rev. 1465 (1994).

[FN109]. Swire, supra note 106, at 791.

[FN110]. In the context of small business lending, one researcher has identified that the smaller extensions of capital to minority-owned firms results in a higher failure rate. See Timothy Bates, Impact of Preferential Procurement Policies on Minority-Owned Businesses, 14 Rev. Black Pol. Econ. 51 (1985).

[FN111]. The much-awaited reforms of the Community Reinvestment Act (CRA) recognized this principle. Among the benefits of changing the CRA examination component from a process oriented to a result-oriented one, is that lenders were required to develop the information networks and provide more lending in previously neglected neighborhoods. For examples of the type of activity which the CRA has encouraged, see, CRA Lending Can Bring a Profit, Nat'l Mortgage News, Apr. 27, 1992, at 8; Roger R. Fross et. al., CRA Is No Threat to Banks that Do Their Homework, Am. Banker, Dec. 13, 1990, at 5; Francis X. Grady, CRA Success Starts with a Plan, Am. Banker, July 30, 1991, at 4; Donald Mullane, A CRA Success Story: To Bank of America, Investing in the Community Isn't a Requirement, It's a Way of Doing Business, Mag. of Bank Mgmt., Sept. 1991, at 37; Georgia Steele, Seafirst Doing $1.5B CRA Program After SecPac Merger, Nat'l Mortgage News, July 20, 1992, at 10. But, a negative effect of the CRA is

reflected in the stories of some minority banks. See, e.g., Nanine Alexander, Tough CRA Rules Hurting Minority Banks, U.S. Banker, Sept. 1991, at 70 (describing the concern of many specialized lending institutions that they will lose customers to mainstream lending institutions entering their markets in response to a strengthened CRA).

[FN112]. Swire, supra note 106, at 833.

[FN113]. See discussion supra in text accompanying notes 81-82.

[FN114]. See 7 C.F.R. § 762.102 (2000).

[FN115]. According to Guttentag and Wachter, anti-redlining legislation, community pressures, and adverse publicity are significant factors that keep irrational redlining at bay. Guttentag & Watcher, supra note 100, at 11.

[FN116]. Banking laws prohibitions against redlining do not apply to USDA because it is not a federally regulated financial institution.

[FN117]. Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 (2000). The Equal Credit Opportunity Act, implemented by the Federal Reserve Board ("FRB") through Regulation B, seeks to prevent discrimination in credit transactions. ECOA prohibits creditors from discriminating against any person seeking credit, 'on the basis of race, color, religion, national origin, sex or marital status, or age." The statute defines 'creditor' as 'any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit ....' The fair lending laws apply to commercial banks, financial intermediaries, such as mortgage companies and credit unions, and to the federal government. The statutes each focus on different, but complementary aspects of providing credit to eligible borrowers.

[FN118]. See generally General Accounting Office, GGD-96-145, Fair Lending: Federal Oversight And Enforcement Improved But Some Challenges Remain (Aug. 1996) (an assessment of the enforcement efforts by the federal agencies charged with ensuring the fair and equitable access to credit for minorities); Taibi supra note 109, at 1470 (arguing that the ECOA is flawed in its suitability for ensuring fair credit access to minorities); Craig E. Marcus, Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low-and Moderate-Income Lending, 96 Colum. L. Rev. 710 (1996) (discussing improved enforcement of the CRA and attempts by the DOJ to expand the reach of the anti-discrimination laws); Keith N. Hylton & Vincent D. Rougeau, Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act, 85 Geo. L.J. 237 (1996).

[FN119]. The statute applies to 'extensions of credit to small businesses, corporations, partnerships, and trusts.' 15 U.S.C. § 1691 (2000).

[FN120]. See generally Susan Smith Blakely, Credit Opportunity for Women: The ECOA and its Effects, 1981 Wis. L. Rev. 655 (1981).

[FN121]. Brown v. E. Miss. Elec. Power Ass'n, 989 F.2d 858, 861-62 (5th Cir. 1993); EEOC v. Alton Packaging Corp ., 901 F.2d 920, 923 (11th Cir. 1990); Barabano v. Madison County, 922 F.2d 139, 145 (2d Cir. 1990); de la Cruz v. NY City Human Res. Dep't, 884 F. Supp. 112, 116

(S.D.N.Y. 1995), aff'd, 82 F.3d 16 (2d Cir. 1996), cert. denied, (1997).

[FN122]. See Moore v. U.S. Dep't. of Agric., 55 F. 3d 991 (1995).

[FN123]. See Price Waterhouse v. Hopkins, 490 U.S. 228, 276-77, (O'Connor, J., concurring) (1989).

[FN124]. In a plaintiff's prima facie case, she must demonstrate that she was otherwise qualified for a loan. The creditor then has the burden to come forward with a legitimate, non-discriminatory reason for the credit denial. See Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 893 (1st Cir. 1992) (citing Tex. Dep't. of Comty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

[FN125]. See generally Sayers v. General Motors Acceptance Corp., 522 F. Supp. 835 (W.D. Mo. 1981); Cragin v. First Fed. Sav. & Loan Ass'n, 498 F. Supp. 379 (D. Nev. 1980); Anderson v. United Fin. Co ., 666 F.2d 1274 (9th Cir. 1982).

[FN126]. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336n.15 (1977).

[FN127]. The FRB's Official Commentary to Regulation B expressly states that it is not necessary for a plaintiff to show that a defendant has acted with intent to discriminate in order to prevail on a disparate impact claim: a facially neutral practice may violate the ECOA and Regulation B 'even though the creditor has no intent to discriminate.' Official Commentary, 12 C.F.R. § 202.6(a)-2.

[FN128]. This governing standard is often described as the McDonnell Douglas framework. S.R. No. 94-589, at 4 (1976). Congress codified the Griggs holding in the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e to 2000e-2 (1994).

[FN129]. Circuit courts have used varying approaches to statistical showing of discriminatory purpose, balancing test, burden-shifting, greater adverse impact, statistical showing of discriminatory purpose and discriminatory intent or purpose. See Metro. Hous. Dev. Corp. v. Arlington Heights, 517 F.2d 409 (7th Cir. 1975), rev'd sub nom., Arlington Heights v. Metro. Hous. Dev. Corp ., 429 U.S. 252 (1977).

[FN130]. The present test employed in the circuit courts as a basis for determining that the conduct was unlawful in the mortgage lending area is the "functional equivalent test." This test of intentional discrimination is essentially the narrow disparate impact test set forth initially in McDonnell-Douglass v. Green. Similarly, Justice O'Connor in Watson v. Fort Worth Bank and Trust, 481 U.S. 1012, (1987) held that unlawful disparate impact should be the "functional equivalent" of intentional discrimination. Thus, in addition to pleading with particularity the nature of the discriminatory conduct and identifying the appropriate applicant pool, the plaintiff must prove that the specified conduct resulted in the alleged discrimination. The defendant then has the burden of proving a business necessity, after which the burden shifts back to the plaintiff to show that there are less discriminatory alternatives under the ECOA.

[FN131]. Pigford v. Glickman, 185 F.R.D. 82, 87 (D.D.C. 1999) (citing Exhibit B, U.S. Dep't of Agric. Civil Rights Action Team (Feb. 1997) at 38).

[FN132]. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1124, 1125

(codified as amended at 12 U.S.C. §§ 2801-2810 (1988)). As originally enacted, the HMDA applied only to federally chartered or insured lenders, such as commercial banks or savings and loan associations, and to lenders who sold their originated mortgages to Fannie Mae, Freddie Mac, or the Government National Mortgage Association (Ginnie Mae). See Home Mortgage Disclosure Act of 1975, § 303. In 1989, the Act was amended so that mortgage companies and other lenders would be subject to its data collection and reporting requirements. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 191 (codified at scattered U.S.C. sections). Small lenders are exempt, however. 12 U.S.C. § 2808 (1988). There is no HMDA requirement for USDA or for Small Business Association, both of which are sources of financing for agricultural loans.

[FN133]. Although the CRA's prohibitions on redlining arguably apply, that type of geo-**lending** is less evident in the **rural** areas where white-owned or occupied farms may be adjacent to **black**-owned or occupied farmland. Therefore, a pattern in **lending** disparities due to the race of the applicant cannot be easily discerned. Redlining can be challenged under a disparate impact standard if minority small **farmers** have been denied credit in disproportionate numbers or by proving that the county committees as creditors excluded certain communities because of their race or ethnicity. Creditors must show that they have a justifiable business reason for treating certain communities differently.

[FN134]. Although the subject of much debate, ECOA does not require statistics regarding small business loans to be reported. 12 C.F.R. pt. 202 [Regulation B] (2001).

[FN135]. See generally Stephen M. Dane, Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws, 26 U. Mich. J.L. Ref. 527 (1993); Robert G. Boehmer, Mortgage Discrimination: Paperwork and Prohibitions Prove Insufficient--Is it Time for Simplifications and Incentives? 21 Hofstra L. Rev. 603 (1993); Steven Kalar, Two Steps Back: British Lessons For American Fair Lending Reform, 19 Hastings Int'l & Comp. L. Rev. 139 (1995).

[FN136]. 12 U.S.C. § 2803 (1988).

[FN137]. See Thomas v. First Fed. Sav. Bank, 653 F. Supp. 1330, 1341 (N.D. In. 1987) (holding that HMDA data, standing alone and without additional evidence, did not prove a claim of redlining); George Galster, Statistical Proof of Discrimination in Home Mortgage Lending, 7 Rev. Banking & Fin. Servs. 187, 196-97 (1991).

[FN138]. Richard D. Marsico, Shedding Some Light on Lending: The Effect of Expanded Disclosure Laws on Home Mortgage Marketing, Lending And Discrimination in The New York Metropolitan Area, 27 Fordham Urb. L.J. 481 (1999) (arguing that HMDA's requirements that banks disclose additional information about their residential real estate-related loans, including the number of applications they received, the race, income and gender of each applicant, the census tract in which the property was located, and the disposition of each application has resulted in more loans to low- and moderate-income persons).

[FN139]. See Anne M. Regan, Note, The Community Reinvestment Act Regulations: Another Attempt to Control Redlining, 28 Cath. U. Law Review 635, 651, 658 (1979) (recommending HMDA require lenders to support justifications for mortgage loan denials by comparing the loans denied with loans granted in the nearby proximity).

[FN140]. HMDA does not create a private cause of action for individuals against those who have violated the statute's provisions. In this regard, it does not prohibit discriminatory conduct or end discriminatory practices. HMDA data assists the financial institution regulatory agencies in uncovering patterns of bias by lenders and supporting industries. Its sole objective is to affect lender's marketing behavior through deterrence.

[FN141]. See generally James W. Bowen, Farm Credit: Is There a Private Right of Action under the Agricultural Credit Act of 1987?, 43 Okla. L. Rev. 723 (1990); Eric J. Gold, Implication of a Private Right of Action, 1 J. Legal Advoc. & Prac. 203 (1999); Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982).

[FN142]. 15 U.S.C.§1691(a) (1994). Under Regulation B, an "applicant" is anyone who "requests or who has received credit," and an "application" is an "oral or written request for an extension of credit." Regulation B, 12 C.F.R. § 202 (1998). In addition, the comments that accompany the note explain that a credit practice that treats applicants differently on a prohibited basis violates the law because it violates the general rule against discriminatory treatment. Finally, only an "aggrieved applicant" can sue for damages or equitable and declaratory relief under the ECOA. 15 U.S.C § 1691e(a)-(c).

[FN143]. Timothy C. Lambert, Fair Marketing: Challenging Pre-Application Lending Practices, 87 Geo. L.J. 2181, 2202 (1999).

[FN144]. As the District Court found:

> The county committees do not represent the racial diversity of the communities they serve. In 1996, in the Southeast Region, the region in the United States with the most African American farmers, just barely over 1% of the county commissioners were African American (28 out of a total of 2469). See CRAT Report at 19. In the Southwest region, only 0.3% of the county commissioners were African American. In two of the remaining three regions, there was not a single African American county commissioner. Nationwide, only 37 county commissioners were African American out of a total of 8147 commissioners-- approximately 0.45%.

Pigford v. Glickman, 185 F.R.D. 82, 87 (D.D.C. 1999) (citing Exhibit B, U.S. Dep't of Agric. Civil Rights Action Team, Feb. 1997 at 2).

> A Civil Rights Action Team Report made recommendations that would potentially change the composition of the county committee and possibly the lending disparities suggested having at least one minority member on each committee. Therefore, if through the elective process the farmers do not elect a minority farmer, CRAT recommended that USDA appoint one. Id. At 87 (citing Exhibit B, U.S. Dep't of Agric. Civil Rights Action Team, Feb. 1997, at 2).

[FN145]. In the banking context, the term "affiliated party" casts a wide net. The banking regulatory structure, which is a system of federal rules, requires that affiliated or interested parties disclose the presence of the conflict and not participate in the decision-making process. See 12 C.F.R. § 366.2 (2000).

[FN146]. The two-year limitation presents a "cooling off" period and a safe harbor that allows any benefit inherent in the denial of the loan to pass. See generally 12 C.F.R. § 650.1(2000). See also Revised Model Business Corporation Act ("RMBCA") §§ 8.50-8.52 (defining potential conflict of interest as one that is material and in which the circumstances have altered so that a

reasonable observer with knowledge of the relevant facts would conclude that the conflicting interest adversely affects the corporation's interests).

[FN147]. While the present system recognizes that local farmers are the "experts," their decisions are recommendations that are made to the County Executive. In this regard, the USDA representative's consultative role would remain critical to an understanding of the specifics of agricultural lending. Many disciplines use independent persons trained in the specific area to make critical, neutral decisions. See Edward Burnett, Arbitration and Constitutional Rights, 71 N.C.L. Rev. 81 (1992).

[FN148]. Economic loss is defined as harm to one's financial interests which may include lost profits, diminution in value, consequential damages, etc. It does not include the financial harm that is derivative of bodily injury or property damage, such as lost earnings, medical expense, or cost of repair. See Frank Nussbaum, The Economic Loss Rule and Intentional Torts: a Shield or a Sword?, 8 St. Thomas L. Rev. 473 (1996); Kelly M. Hnatt, Purely Economic Loss: a Standard for Recovery, 73 Iowa L. Rev. 1181 (1988).

[FN149]. See Eileen Silverstein, On Recovery in Tort for Pure Economic Loss, 32 U. Mich. J. Reform 403, 420 (1999) (arguing that the fear of unlimited liability that bars compensation for purely economic loss can be controlled by the factors giving rise to the duty); See also Jay Feinmann, Economic Negligence: Liability of Professionals and Business to Third Parties, 51 Bus. Law. 795 (1996) (recognizing an exception to the rule in cases involving pure economic loss of negligence).

[FN150]. See generally Amanda K. Esquibel, The Economic Loss Rule and Fiduciary Duty Claims: Nothing Stricter than the Morals of the Marketplace, 42 Vill. L. Rev. 789 (1997).

[FN151]. See generally Scott Ilgenfritz, The Failure of Private Actions as an ECOA Enforcement Tool: A Call for Active Governmental Enforcement and Statutory Reform, 36 U. Fla. L. Rev. 447 (1984); David H. Harris, Jr., Using the Law to Break Discriminatory Barriers to Fair Lending for Home Ownership, 22 N.C. Cent. L.J. 101 (1996).

[FN152]. The actual loss may be the cost that a plaintiff incurs in locating a second creditor.

[FN153]. 15 U.S.C. § 1691e(b).

[FN154]. See Vander Missen v. Kellogg-Citizens Nat'l Bank of Green Bay, 83 F.R.D. 206 (E.D.Wis. 1979).

[FN155]. See 12 U.S.C. §1591 (1994) (providing for punitive damages of up to $10,000 for individuals and up to lesser of $50,000 or one percent of creditor's net worth for class actions. 12 C.F.R. § 202.14 (1999) provides:

> Sections 706(a) and (b) and 702(g) of the act provide that any creditor that fails to comply with a requirement imposed by the act or this regulation is subject to civil liability for actual and punitive damages in individual or class actions. Pursuant to sections 704(b), (c), and (d) and 702(g) of the act, violations of the act or regulations also constitute violations of other federal laws. Liability for punitive damages is restricted to nongovernmental entities and is limited to $10,000 in individual actions and the lesser of $500,000 or 1 percent of the creditor's net worth in class actions. Section 706(c) provides for equitable and declaratory

relief and section 706(d) authorizes the awarding of costs and reasonable attorney's fees to an aggrieved applicant in a successful action.

[FN156]. Douglas Laycock, The Triumph of Equity, 56 L. & Contemp. Probs. 53, 55 (1993). The punitive damage award is designed to allow recovery based on the intentional and malicious nature of the wrongdoer's conduct. It is extra compensation-going beyond the obvious elements of ordinary compensation in order to punish or deter extreme conduct from acceptable conduct. By imposing a substantial monetary award, the award both deters similar misconduct by the defendant and expresses societal disapproval of the wrongdoer's misconduct.

[FN157]. Alan E. Brownstein, What's the Use? A Doctrinal and Policy Critique of the Measurement of Loss of Use Damages, 37 Rutgers L. Rev. 433 (1985).

[FN158]. Loss of earnings, loss of earning capacity, and lost profits are other examples of special damages.

[FN159]. See Roy Ryden Anderson, Incidental and Consequential Damages, 7 J.L. & Com. 327, 336 (1987) (distinguishing incidental damages from consequential, damages with the conclusion that the distinction is often an unimportant one with respect to buyers).

[FN160]. Damages for loss of support and loss of inheritance are recognized wrongful death remedies under maritime law. The award is usually conditioned upon a showing of full or partial dependency. Dependency is defined as the status of maintaining or helping to maintain a dependent in [her] customary standard of living. Petition of United States, 418 F.2d 264, 272 (1st Cir. 1969). See also Regina T. Drexler & Michael P. Matthews, Calculating Net Pecuniary Loss Under Colorado Wrongful Death Law, 24 Colo. Law. 1257, 1260 (1995); Robert L. Klawetter & Lewis E. Henderson, Damages Recoverable in Death Cases, 72 Tul. L. Rev. 717 (1997).

[FN161]. See Dobbs, Law of Remedies, §3.1 (2d ed. 1993).

[FN162]. This remedy is especially common in the maritime setting because of a statutory provision authorizing recovery for future earnings under a general maritime survival action. See Snyder v. Whittaker Corp., 839 F.2d 1085, 1093 (5th Cir. 1988) (holding that loss of inheritance damages are permissible and require that a wrongful death plaintiff must reasonably prove the expectation of pecuniary benefit, that the decedent would have accumulated substantial property, making adjustments in the projected accumulations for consumption and taxes). But see Hopper v. Waterman Steamship Corp., 1992 AMC 1087, 1991 (E.D. La. 1991); Ludahl v. Seaview Boat Yard, 869 F. Supp. 825, 827 (W.D. Wash. 1994) (interpreting to deny recovery for loss of inheritance damages); Miles v. Apex Marine Corp., 498 U.S. 19 (1990). In Rohan v. Exxon Corp., 896 F. Supp. 666, 671-72 (S.D. Tex. 1995), the court distinguished Hopper and Ludahl and held that loss of inheritance damages should be distinguished from loss of future earnings remedies.

[FN163]. Robert C. Jarosh, Torts/Wrongful Death-Should a Wrongful Death Action Expire Before the Decedent Does? A Wrong Turn for Wrongful Death. 35 Land & Water L. Rev. 235 (2000). See also Edwards v. Fogarty, 962 P.2d 879 (Wyo. 1998).

[FN164]. Other problems confronting courts considering loss of inheritance damages include tax inconsistencies and the difficulty of providing adequate and credible evidence to support the

potential for double recovery. Loss of inheritance damages are recoverable under both state and federal law. See generally 46 U.S.C.A. § 761 (2000).

[FN165]. Yowell v. Piper Aircraft Corp., 703 S.W.2d 630 (Tex. 1986).

[FN166]. Id.

[FN167]. Id.

[FN168]. Thomas Husted & Lawrence W. Kenny, The Effect of the Expansion of the Voting Franchise on the Size of Government, 105 J. Pol. Econ. (1967).

[FN169]. African-American history and folklore are replete with references to the government's promises to newly freed slaves of forty acres and a mule-- which never materialized. See Conley Dalton, 40 Acres and a Mule, 80 Nat'l F. 21 (2000). For an exhaustive study of the effect of laws on newly freed slaves and free blacks, see generally A. Leon Higginbotham, In the Matter of Color (1977).

[FN170]. Daniel J. Steinbock, William M. Richman, Douglas E. Ray, Expert Testimony on Proximate Cause, 41 Vand. L. Rev. 261 (1988) (discussing use of expert testimony to prove proximate cause).

[FN171]. Inability to receive a loan on the open market is not synonymous with the inability to repay the loan. USDA's lending program discourages non-payment by rendering one who fails to repay ineligible to receive loans in the future. 7 C.F.R. § 767.120 (2000).

[FN172]. In the tax area, human capital losses are recognizable. The phrase "human capital' refers to the capitalized value of an individual's labor as a factor of production. Expenditures that make individuals more productive-- including expenditures on education, training, or health care--are investments in human capital. See Roger L. Miller, Intermediate Microeconomics: Theory, Issues, and Applications 418-19 (3d ed. 1987). See also, Mary L. Heen, An Alternative Approach to the Taxation of Employment Discrimination Recoveries under Federal Civil Rights Statutes: Income from Human Capital, Realization, and Nonrecognition, 72 N.C. L. Rev. 549, 553 (1994) (discussing the theoretical issues raised by taxation of employment discrimination results in human capital loss and whether the remedies provided by federal antidiscrimination statutes compensate for that loss).

[FN173]. See Philip Eden, et. al., Forensic Economics-Valuation of Businesses and Business Losses, 16 Am. Jur. P.O.F. 2d 253, vol. 16 (1978) [[hereafter Eden et. al.].

[FN174]. Analogizing to the context of small farms that failed as businesses requires a presumption that should fall on the owners to prove: that had there been access to credit, the farms would have produced future income.

[FN175]. J. Munford Scott, Jr., Valuing the Closely Held Business, 6 S.C. L. Rev. 25 (1995).

[FN176]. Such a perspective would be similar to the new approach to property law issues that Professor Singer has suggested. Singer characterizes property rights as shifting relationships among people. He argues that the theoretical underpinnings of our system of property law reflect moral values and that property law often fails to recognize those values and consequently where

the actual ownership interest is. This theoretical re-characterization of the nonpecuniary interest entitles the holder to recovery for the value of what she has actually lost in relation to individually defined values. See generally Joseph W. Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611, 637 (1988).

[FN177]. Mark L. Ascher, Curtailing Inherited Wealth, 89 Mich. L. Rev. 69 (1990).

[FN178]. H. Renee Harris, Yowell v. Piper Aircraft Corp.: Recovery of Lost Inheritance in Wrongful Death Actions, 38 Baylor L. Rev. 1023, 1029 (1986).

[FN179]. See Eden et al., supra note 173.

[FN180]. See Lynda J. Oswald, Goodwill And Going-Concern Value: Emerging Factors in the Just Compensation Equation, 32 B.C. L. Rev. 283 (1991) (discussing measuring business losses in eminent domain proceedings); Kenneth M. Kolaski & Mark Kuga, Measuring Commercial Damages via Lost Profits or Loss of Business Value: Are These Measures Redundant or Distinguishable? 18 J.L. & Com. 1 (1998); see also Eden et. al., supra note 173.

[FN181]. Loss of future earnings and loss of prospective inheritance are not both recoverable. See Wilbur Widicus, Toward Just Compensation: A Statistical Comparison of the Total Offset Method of Valuing Lost Future Earnings Awards and United States Supreme Court Methods, 59 Temp. L.Q. 1131 (1986).

[FN182]. Jeffrey R. Cagle, Craig D. Cherry & Melanie I. Kemp, The Classification of General and Special Damages for Pleading Purposes in Texas, 51 Baylor L. Rev. 629, 657 (1999).

[FN183]. See Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 633 (Tex. 1986).

[FN184]. Tortious interference with business usually requires a contract as the basis for the claim. Gary Myers, The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law, 77 Minn. L. Rev. 1097 (1993). Similarly, unfair trade practices require copyright or patent infringement. See Brent Rabowsky, Recovery of Lost Profits on Unpatented Products in Patent Infringement Cases, 70 S. Cal. L. Rev. 281 (1996). See generally Christopher J. Curran, Claims Against a Franchisor upon an Unreasonable Withholding of Consent to Franchise Transfer 23 J. Corp. L. 135 (1997) (discussing business interference causes of action in the specific context of franchises).

[FN185]. Participant, USDA's Civil Rights Action Team (CRAT) Listening Session, Memphis TN (1997). During 1997, USDA held 13 listening sessions across the country. CRAT encouraged participation by socially disadvantaged and minority farmers to gather information on USDA's civil rights performance, including the department's responsiveness on civil rights issues and focusing specifically on the department's program delivery.

END OF DOCUMENT

Mr. NADLER. Thank you. Mr. Fraas.

TESTIMONY OF PHILLIP L. FRAAS, ATTORNEY-AT-LAW

Mr. FRAAS. Thank you, Mr. Chairman. It is an honor and privilege for me to testify before the Subcommittee on Constitution, Civil Rights, and Civil Liberties on the important legislative proposals. I would like to talk about H.R. 899, the Pigford Claims Remedy Act of 2007.

As a preliminary matter let me say I support any legislation that will ensure that every person that meets a *Pigford* class definition gets a fair opportunity to have their complaint against the Department of Agriculture heard and resolved. As I read H.R. 899, it would accomplish that end and would do so by giving the remaining *Pigford* claimants a right to have the merits of their claims determined by a Federal court in a civil cause of action.

The bill specifies that the remaining *Pigford* claimants who would be given this right are those that I referred to as late filers. That is, they are persons who sought permission to participate in the settlement but did so after the deadline for the submission of the completed claims packages. That is October 12, 1999.

Under the bill, the late filer would be given the right to have adjudicated the claim that he or she made in filing a complaint of discrimination as described in the definition of the *Pigford* class, and that is discrimination complaints filed on our before July 1, 1997, regarding USDA's treatment of his or her farm credit or benefit application.

In that regard, I believe the bill should be amended to cover cases where the complaint was made orally at a listening session or the complaint does not cover all of the instances of discrimination that the person has suffered at the hand of USDA. In such cases the claimant should have the right to spell out the nature of the claim in detail using the *Pigford* claim form.

H.R. 899 is very short, just establishing a cause of action. But by doing so it creates for itself three significant advantages. Number one, it would not impel an action by the Department of Agriculture that could be scored by the Congressional Budget Office as incurring new budget outlays, making the bill subject to the PAYGO strictures.

Number two, it does not invade the jurisdiction of any other Committee of the House and as a result could be moved more expeditiously to the floor for passage.

Number three, it avoids a constitutional separation of powers problem that might arise should it attempt to modify the terms of the *Pigford* consent decree.

That being said, I believe additional language should be added to the bill that would not negate these three advantages, but that are necessary to make it a better fit for the needs of the late filers.

The bill should clarify that claims heard by the Federal court would be subject at the request of the claimant to the substantial evidence burden of proof applicable to claims prosecuted under the *Pigford* settlement in return for the claimant accepting the standard Track A relief provided for that that settlement. This would put late filers on an equal footing with the original *Pigford* claimants and it is important to do so, not only the matter of fairness,

but in recognition of the fact that many of the *Pigford* claims involve events that occurred as far back as 1981. With claims so old, documentation gets lost and witnesses disappear, making the standard preponderance of the evidence burden of proof an almost insurmountable obstacle to many injured farmers seeking *Pigford* type relief.

In a similar vein, it would be appropriate for the bill to clarify that the claims of those who elect the tracking type process would be handled by the courts as the original *Pigford* claims were handled as a paper-only review under the substantial evidence standard of the filled out claim form, in light of any relevant documentation submitted by the Department of Agriculture.

I would like to make one last point that is not in my written statement and hearing some of the discussions so far, I think it is important to clarify that the late filers have not actually filed claims yet like the original 22,000 *Pigford* claimants. Essentially, all they have done is they put their name on a list to ask to file that claim. So we are not looking at a universe of people that have actually filed documented claims of discrimination. That remains to be seen. And a process should be devised to go through the claim process with these people to see if they actually qualify to participate.

And that is my testimony, thank you.

[The prepared statement of Mr. Fraas follows:]

PREPARED STATEMENT OF PHILLIP L. FRAAS

Mr. Chairman and members of the Subcommittee, my name is Phillip L. Fraas, and I practice law in Washington, D.C. I have worked on the *Pigford* case since late April 1997 when Tim Pigford called asking me to assist him in his discrimination case against the U.S. Department of Agriculture.

It is an honor and privilege to testify before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary on these important legislative proposals. I would like to talk about H.R. 899, the Pigford Claims Remedy Act of 2007.

As a preliminary matter, let me say that I support any legislation that will ensure that every person that meets the *Pigford* class definition gets a fair opportunity to have their complaint against the Department of Agriculture heard and resolved.

As I read H.R. 899, it would accomplish that end, and do so by giving to certain *Pigford* claimants the right to have the merits of their claims determined by a Federal court in a civil cause of action.

The bill specifies that the *Pigford* claimants who would be given this right are those that I refer to as "late filers." That is, they are persons who sought permission to participate in the *Pigford* settlement, but did so after the deadline for the submission of completed claim packages that was set out in the consent decree memorializing the settlement of the case: 180 days after the April 14, 1999, issuance of the consent decree, or October 12, 1999.

Under the bill, the late filer would be given the right to have adjudicated the claim that he or she made in filing a complaint of discrimination as described in the definition of the *Pigford* class: a discrimination complaint filed on or before July 1, 1997, regarding USDA's treatment of his or her farm credit or benefit application.

In that regard, I believe the bill should be amended to cover cases where the complaint was made orally at a listening session or the complaint does not cover all instances of discrimination the person has suffered at the hands of USDA. In such cases, the claimant should have the right to spell out the nature of the claim in detail using the *Pigford* claim form.

H.R. 899 does not set any deadlines of its own for filing of the civil action, so I believe the generally applicable six-year statute of limitations for suits against the Federal Government would apply.

The bill is very short, just establishing the cause of action, and by doing so creates for itself three significant advantages:

(1) it would not impel an action by the Department of Agriculture that could be scored by the Congressional Budget Office as incurring new budget outlays, making the bill subject to "pay go" strictures;

(2) it does not invade the jurisdiction of any other committee of the House, and as a result could be moved more expeditiously to the floor for passage; and

(3) it avoids a constitutional Separation of Powers problem that might arise should it attempt to modify the terms of the *Pigford* consent decree.

That being said, I believe additional language should be added to the bill that would not negate those three advantages but that are necessary to make it a better fit to the needs of the late filers.

The bill should clarify that claims heard by the Federal courts would be subject, at the request of the claimant, to the "substantial evidence" burden of proof applicable to claims prosecuted under the *Pigford* settlement in return for the claimant accepting the standard Track A relief provided for in the *Pigford* settlement. This would put late filers on an equal footing with the original *Pigford* claimants; and it is important to do so, not only as a matter of fairness, but in recognition of the fact that many of the *Pigford* claims involve events that occurred as far back as 1981. With claims so old, documentation gets lost and witnesses disappear, making the standard "preponderance of the evidence" burden of proof an almost insurmountable obstacle to many injured farmers seeking *Pigford*-type relief.

The last thing that hard-pressed African-American farmers need is to be given hope that they will have their complaints resolved in the manner of *Pigford*, but then find out that, unlike the original *Pigford* claimants, they will have to spend thousands on legal fees and wait years for adjudication under a standard that is inappropriate for their claim. And, why should this sub-group within the *Pigford* class be forced to re-litigate the *Pigford* case? An equitable variation of *res judicata*—recognizing what the *Pigford* settlement has already settled—should be made to apply here.

Also, in a similar vein, it would be appropriate for the bill to clarify that the claims of those who elect the Track A-type process would be handled by the courts as original *Pigford* claims were handled—as a paper-only review (under the "substantial evidence" standard) of the filled-out claim form in light of any relevant documentation submitted by the Department of Agriculture.

Both of these changes would be consonant with the provision already in the bill now expressing the intent of Congress that the bill "be liberally construed so as to effectuate its remedial purpose of giving a full determination on the merits for each *Pigford* claim denied that determination."

There are other ways to improve the bill—such as by facilitating claimants' access to information on similarly situated white farmers or by imposing a moratorium on foreclosures against claimants while their cases are pending. However, I would not encourage the adoption of those improvements if they would subject the bill to "pay-go" problems.

Mr. Chairman, the Committee on the Judiciary has before it a wonderful opportunity to ensure equal justice to all farmers who meet the *Pigford* class definition and, in doing so, to send the strong message that Congress will not tolerate any discrimination against minority farmers in the administration of the Department of Agriculture programs. I urge the Committee to seize that opportunity and report out H.R. 899 with appropriate revisions as I have described.

Thank you for your time and attention.

Mr. NADLER. Thank you. Mr. McEachin.

TESTIMONY OF THE HONORABLE A. DONALD McEACHIN (D-74TH DISTRICT), VIRGINIA HOUSE OF DELEGATES

Mr. MCEACHIN. Thank you, Mr. Chairman, and Members of the House Judiciary Committee. I want to thank you for this invitation to appear before your Committee today. I also want to thank Congressmen Scott and Davis for sponsoring these bills, which is an attempt to address the discrimination that African-American farmers have suffered because of discriminatory practices on the part of the United States Department of Agriculture.

I also want to thank John Boyd, who is here today. I thank him for his persistence in keeping this matter in front of the Congress

as well as keeping the African-American farmers of this country informed, organized and energized on this issue.

As this Committee is aware from the testimony it heard on September 28, 2004, U.S. Farm Services programs date back to the 1860's. History has shown that these programs have been riddled with discriminatory practices. While the Federal Government has stepped up these programs for farmers in recognition of the growing capital needs of farmers, African-American farmers have largely been left out due to discrimination and neglect.

In the turn of the 20th century there were a million African-American home farms, comprising some 16 million acres. Today there are less than 18,000 such farms, comprising 3 million acres.

At its September 28, 2004 hearing, this Committee learned that there are approximately 17,000 late filers to the original *Pigford* settlement process. Last summer my law partner traveled to a number of States with John Boyd. He saw firsthand the plight of these farmers. We saw the desperation in their eyes on a daily basis. Even today, we receive calls from these farmers asking about the status of the bills before you.

Many of these farmers are fighting to keep their farms out of foreclosure. And I might add, during the course of the last several months some 26,000 purportedly late filers have come forward and asked for representation contingent on the fact that one of these bills might pass.

I am going to—because my time is moving on, I am going to try to wrap up and add something that is not in my written statement. Although the original litigation attempted to mete out some measure of justice for the plight of the African-American farmer, in the end it failed to do so. To quote my Congressman, Congressman Scott: "I am concerned about the adequacy of a process that leaves 70 percent of its claimants without a determination on the merits of their claim. I am not willing to accept that nearly 66,000 individuals who believe they have legitimate claims of racial discrimination knowingly ignored notice of the initial filing deadline and chose to submit their claims after the deadline for no good reason.

I don't know what percentage of the claimants can show entitlement to relief, but it is certain some can."

In addition to that, Mr. Chairman, what I would like to add is, I am a member of the Virginia legislature and a trial lawyer in the Richmond area. I think 899 is what is needed to give these farmers full redress.

The concern I have about the other bill, bill 558, is that it places, in my judgment, at least as I read it, it places the late filers in an evidentiary predicament.

As you all are aware from your last set of hearings, for whatever reason discovery was waived as part of the consent decree. That makes it awfully hard to find a similarly situated White farmer which was part of what had to be shown in the *Pigford* process.

If you can imagine, without the tools of discovery, you literally have to hire legal assistance to go to every county courthouse in the Nation to look at the land records to try to see who got what loan and who didn't get what loan. That, to me, seems to be an impossible task to meet.

I am going to conclude now, and I am happy to answer any questions that the Committee might have. And thank you for your time.

[The prepared statement of Mr. McEachin follows:]

PREPARED STATEMENT OF A. DONALD MCEACHIN

Chairman Conyers and members of the House Judiciary Committee, I want to thank you for your invitation to appear before the Committee today. I also want to thank Congressman Scott and Congressman Davis for sponsoring these bills which attempt to redress the discrimination that African American Farmers have suffered because of discriminatory practices on the part of the United States Department of Agriculture. I also want to thank John Boyd who is here today. I thank him for his persistence in keeping this matter in front of the Congress as well as keeping the African American farmers of this country informed, organized and energized on this issue.

As this Committee is aware, from the testimony it heard on September 28, 2004, U.S. farm services programs date back to the 1860s. History has shown these programs to be riddled with discriminatory practices. While the Federal Government has stepped up its programs to farmers in recognition of the growing capital needs of farmers, African American farmers have been largely left out due to discrimination and neglect.

At the turn of the 20th Century there were a million African American owned farms comprising some 16 million acres. Today there are less than 18,000 such farms comprising some 3 million acres.

At its September 28, 2004 hearing this Committee learned there are approximately 73,000 late filers to the original Pickford settlement process. Last summer my law partner traveled to a number of States with John Boyd. We saw first hand the plight of these farmers. We saw the desperation in their eyes. On a daily basis we get calls from these farmers asking about the status of these bills. Many of these farmers are fighting to keep their farms out of foreclosure. We learned, as you did in 2004, that many of these farmers simply did not get the message concerning the Pickford settlement in a timely manner. Although the original litigation attempted to mete out some measure of justice for the plight of the African American farmer, in the end, it failed to do so. To quote my Congressman, Congressman Scott: "I am concerned about the adequacy of [a] . . . process that leaves 70 percent of its claimants without a determination on the merits of their claim. I am not willing to accept that nearly 66,000 individuals who believe they have legitimate claims of racial discrimination knowingly ignored notice of the initial filing deadline and chose to submit their claims after the deadline for no good reason. I don't know what percentage of the claimants can show entitlement to relief, but it is certain some can."

Mr. Chairman, I thank you for your time and I am happy to try to answer any questions that you or the members may have.

Mr. NADLER. Thank you.

Dr. Boyd is recognized for 5 minutes.

TESTIMONY OF DR. JOHN W. BOYD, JR., PRESIDENT, NATIONAL BLACK FARMERS ASSOCIATION

Mr. BOYD. Thank you very much. It is a privilege and honor today to be here before this prestigious Committee, and I have heard very moving testimony from all of my colleagues on this issue.

I would like to thank Chairman Nadler, Congressman Bobby Scott, who has had his door open to Black farmers for a number of years on this issue. What a lot of people don't understand is this is not a new issue.

Chairman Conyers, I came to see you in 1986, and you gave us a visit on this issue, and you said that you would continue to work on this issue. You may not know that you would continue to work on it till 2007, but here we are today in front of this Committee having a choice, and I want to tell this Committee today, Black farmers have never had a choice, not on one bill but two bills.

So I would like to thank Congressman Davis for introducing his bill as well.

This is a trying time in America for Black farmers. We have lost land. If you look in this Washington Post article yesterday, we aren't even receiving any subsidies that we have been reporting year after year after year after year. And it is time for Congress to take a deaf ear and open it up and listen to the cries of the empty fields of Black farmers across this country. We need the assistance, the help of this Committee to move our issue to the next step.

So this is a beautiful step in the right direction. It is a good day for Black farmers in America, but it is also a very sad day in America for Black farmers. We are dying, and I am tired of going to funerals and hearing, "Well, Dr. Boyd, when are we going to get justice? When will we get our cases heard based on its merits?"

And I am telling you today, Black farmers are not asking too much today by asking for their cases to be heard on its merits, on its own merits. They are not asking for a handout. By God, the Government treated us worse than dogs. Somebody knows what I am talking about in this hearing room today. The Government treated Black farmer people worse than the dirt on the ground.

When I went to see my county supervisor in Mecklenburg County, Virginia, he tore my application up and threw it in the trash can while I was sitting there in front of him.

When they came out to investigate Mr. Garnett, they said, "Did you throw Mr. Boyd's application in the trash can?" You want to know what he said? With arrogance, "Yes. I wasn't going to process it. We didn't have any funds available. But that didn't prevent me from doing my job."

When you treat an individual differently than you treat another individual by color and race, people, that is what discrimination is. And that is the kind of discrimination that Black farmers have existed around the country, and that is what they have been fighting for year after year after year in a humble way.

Black farmers are bashful to a certain aspect where they say, "Yes, sir," and "No, sir," and they are not going to have the vocal that I have to come here and say, "I have been treated wrongly."

This case needs to move forward swiftly, so I am here today to ask Congress to move to the next step. Yes, we have a choice, it is a great choice. I support bill 899. People, we worked hard on that. We worked hard on that bill with Congressman Scott, Congressman Chabot, the great senator who was here this morning and gave testimony and, yes, George Allen too, even George Allen.

So we are grateful to have a choice of bills, but what we are asking this Committee to do is move swiftly and get us a bill, mark it up so that Black farmers can move from the issue of when we are going to have our cases heard based on its merits so finally I have my day of justice.

So with that, I will close, and I will happily take any questions from the Committee that you have for me today.

[The prepared statement of Mr. Boyd follows:]

PREPARED STATEMENT OF JOHN W. BOYD, JR.

Honorable Chairman Conyers, Mr. Nadler, Mr. Scott, the rest of the committee and others who have worked with the National Black Farmers Association (NBFA) on this very important issue over the years.

My Name is John Boyd and I am the President of the National Black Farmers Association. I founded this organization in 1995 to help eradicate discrimination faced by black farmers throughout the United States Department of Agriculture (USDA) system.

It is truly an honor and a privilege to testify before your Committee today. During the past 15 years I have testified before Congress on numerous occasions about black farmers and their hardships.

I am a fourth generation farmer. But more important, with all the hardship and years of struggle it has entailed, I am still proud to say I am an American Black farmer from Baskerville, Virginia. A most remarkable fact is that just about every Black person in this country is two to three generations away from some family farm as farmers, sharecroppers and slaves.

The NBFA lobbied Congress to lift the statue of limitations for black farmers who faced discrimination from USDA. We lobbied to establish the office of the Assistant Secretary for Civil Rights. We led rallies and protests around the country to help bring much need attention to the plight of the Black farmer. The NBFA has petitioned the United Nations for relief and to raise awareness of the loss of land for Black Farmers. And, I even rode my mules, Struggle and Forty Acres, 280 miles here to Washington to protest the failure to pay Black farmers; payments that should have become a reality following the consent decree.

For far too long the Black farmer has gone without payment and without justice.

At the turn of the 19th century there were nearly one million Black farm families. Today there are fewer than 29,000 per the U.S. Census.

The oldest occupation for Blacks in America has become the first occupation facing extinction. Time does not favor the survival of black farming unless discrimination ends and new opportunities are created for black farmers to participate in the farm and food service industries.

Years ago the USDA acknowledged the discrimination against black farmers and agreed to settle the largest civil rights lawsuit in American history. Yet today I return to report that many black farmers who may have been eligible to have their claims processed were never heard. More black farm families have lost their farms and their livelihoods because their government has not acted fast enough.

Time is not on our side. We are now less than 1% of the nation's farmers. USDA has not become a stimulant for agricultural development for black farmers. "No comment" is often the best we can get out of USDA officials.

In 1983 the USDA's Office of Civil Rights was abolished, leaving Black farmers and other minority farmers with little hope for processing civil rights complaints.

The Government Accounting Office reported piles of boxes of complaints with years of dust. Documents went unprocessed and very few, if any, were investigated. There were two employees assigned to work on employment complaints and no one working on Black farmer program complaints.

I recall very vividly calling the USDA years ago to request a status of my complaints 88 times. I desperately searched for answers as I was on the verge of losing my farm and livelihood that had been passed down through generations.

Finally, after I founded the NBFA and was able, I finally did have someone call me back from the Office of Civil Rights.

Decades have gone by since our struggle began in the early 1980s.

The Black Farmers have become faces of time. Here we are after years of work to restore the Office of Civil Rights and the inspector general still cites years in processing complaints. Please see the May 2007 report, Appendix A.

The Pigford v. Glickman Consent Decree resulted from a class action lawsuit initiated by African American farmers who had for decades been discriminated against by USDA officials in the loan program. This settlement was reached after Congress intervened in 1998 to waive the applicable statute of limitations. Class counsel, without the approval of the class of plaintiff farmers, waived farmers rights to discovery with the expectation that there would be a low evidentiary standard applied to Track A and that USDA would turn over relevant documentation that would assist farmers in presenting their claims. Monetary awards issued under the Consent Decree would come from the Department of Treasury's Judgment Fund.

Approximately 23,000 farmers submitted claims under the Consent Decree by the October 12, 1999 deadline. 900 farmers failed to meet the class criteria. Of the remaining 22,00 farmers who met the class criteria, 14,000

were successful in proving discrimination under Track A. 8,000 were denied. 18 Track B Claimants have received an average of $551,000 per claim.

Approximately 77,000 African American farmers were denied participation in the Consent Decree because these farmers failed to file petitions by a Court-appointed late claim deadline. More than half stated they didn't know about the Consent Decree. Thus, these black farmers were denied entry and their discrimination complaints are not resolved unless Congress again acts to bring about justice and equality for these farmers.

WHY I SUPPORT H.R. 899

I would like to thank Congressman Davis and others for introducing H. R. 558 the African American Farmers Benefit Relief Act of 2007. After careful consideration the NBFA is supporting H.R. 899 the Pigford Claims Remedy Act of 2007. We urge the committee to undertake a swift mark up and send 899 on a speedy trip to the House floor for a vote.

H.R. 899 is the result of careful examination by members of the Judiciary Committees in both chambers of Congress. This bill, H.R. 899, and S. 515 were introduced simultaneously. Senators Grassley, Obama and Kennedy have provided remarkable leadership in the Senate. It is my opinion that H.R 899 and S. 515 have the best possibility of passing with bipartisan support. The bill has been introduced in both the House and the Senate, a rare bipartisan bill. I am encouraged that Congress is working together,

Several hearings have been held during the past two Congresses, including a field hearing in Cincinnati Ohio Feb 28th 2005. These hearings support the remedy set forth in H.R. 899. H.R. 899 is a narrow bill which serves the purpose of providing late-claim petitioners a forum to have their claims heard. The bill was tailored narrowly to stay in the Jurisdiction of the Judiciary Committee, where I personally and strongly believe the bill has a chance of passage.

H. R. 899 creates a new cause of action that is available to those African-American farmers who: (1) have filed a late claim petition with the Court-appointed arbitrator prior to December 31, 2005, which was denied by the arbitrator; (2) meet the class criteria set forth in the Pigford v. Glickman Consent Decree; (3) establish a discrimination complaint in one of the four ways set forth in the Pigford v. Glickman Consent Decree.

The NBFA states that its recommendation to replace the attorneys, facilitators, monitor and adjudicator who processed phase one of Pigford Consent Decree is consistent with its support of H.R. 899. No new responsibilities or requirements are placed on the bill if the farmers are allowed to choose their own attorneys.

How many more black farmers have to die before there is a since of urgency for assistance. This is one time congress can put aside partisan politics and do what is right for a group of people who helped establish agriculture as the basis for this America's wealth

We as Black farmers helped make agriculture what it is today with free labor. Many minorities today argue to become citizens, even complain of low wages, but no one has slaved without pay as the Black farmers did here in America.

We have the opportunity to right some wrongs with H.R. 899. I urge this committee to swiftly pass H.R. 899.

The Black farmer issue is not a new one to Congress.

In 1998 the NBFA lobbied Congress to waive the statue of limitations. The Congressional Black Caucus, under the leadership of Congresswoman Waters, led the way to relief for the Black farmers. Congressional action enabled those aggrieved farmers to file meritorious claims under the Consent Decree.

H.R. 899 is an extension of that Congressional action in 1998 and it will ensure all late claim petitioners have the opportunity to have their claims of discrimination heard on the merits.

OBSTRUCTION OF JUSTICE

In 2004 The National Black Farmers Association (NBFA) teamed up with the Environmental Working Group (EWG) to address the problems with the Black Farmers settlement, many of our finding were echoed by Black farmers around the country. Many complained about being denied payments. We worked for years to conduct the study which was well worth the wait.

THE EWG AND NBFA RESEARCH PRODUCED FOUR MAJOR FINDINGS:

- Nine in ten Black family farmers who came forward with complaints of discrimination were denied access to the settlement funds.

- The settlement was estimated to be worth 2.3 billion dollars in compensation to black farmers before the size of the class was determined. The actual size of the class was larger than expected, but black farmers received only 25% of the settlement's estimated value.
- USDA withheld vital information that was required of Black farmers in order to prove their settlement claims. And the Lead Attorney waived discovery.
- USDA spent $12 million dollars to pay for 56,000 staff hours of legal work by the Department of Justice to challenge Black farmers settlement claims one-by-one. At least one supposed staff attorney, Margaret O'Shea, reviewed Black farmers' cases under false pretense as she was never a licensed attorney.

TOGETHER THE EWG AND NBFA PROVIDED THE FOLLOWING RECOMMENDATIONS:

- Congress should order USDA to provide full compensation to the nearly 9,000 farmers who were denied relief after being accepted into the settlement class.
- Congress should order USDA to re-evaluate the merits of the nearly 74,000 farmers claims that were shut out due to lack of notice of the settlement. All black farmers who meet the preliminary requirements to qualify as a member of the class should receive the $50,000 payments and debt relief provided by the settlement.
- Congress should direct the USDA to institute accountability measure to monitor and enforce civil rights standards throughout the agency, requiring that in the future the USDA shall exert best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination.
- Congress should ensure the full implementation of outreach and financial assistance programs to include grants that support black and other minority farmers.

STATISTICS REVEALED THAT 81,000 AGGRIEVED BLACK FARMERS RECEIVED NOTHING FROM THE SETTLEMENT:

Turning to statistical breakdown of the outcome, the overall result was 94,000 black farmers came forward with complaints of discrimination and 81,000 received nothing from the settlement. Denials came in two forms: late claim denials and class member denials.

The total of 63,816 farmers who filed timely late claims applications were rejected for failure to prove that extraordinary circumstances caused their tardiness, a standard that was not defined in the consent decree. All farmers who sought late entry because they were not notified of the settlement or deadline were rejected because they did not file timely late claims applications.

CONGRESSIONAL ACTION IS THE ONLY WAY TO ENSURE JUST RESTITUTION FOR BLACK FARMERS:

Mr. Chairman, in closing I want to tell you that the more I think of what has happened to my people, the Black farmers of America, the more disgusted I have become.

Civil rights laws were violated in the case of the Black farmers. And the USDA helped ensure the Justice Department was used to obstruct justice.

The lack of accountability exists as if all my work has for naught. We have lost land—millions of acres—and many have died waiting for justice. These are good people, who worked hard to feed the nation

America we can do better than this.

I am calling on the members of this Committee to do what is right for the black farmer. Pass this legislation to give much due relief to America's struggling black farmers.

Many of you have seen us on Capitol Hill day after day, week after week, month after month, year after year, decade after decade.

I made a commitment to the NBFA members that I will never give up their fight until justice is served.

Ladies and gentlemen, I pray you will make that same commitment.

Mr. NADLER. Thank you.

I will begin the questions by recognizing myself for 5 minutes.

I have two questions. The first question I suppose I will ask Dr. Boyd.

Has the USDA, to your knowledge, taken any action against the agents whose discriminatory conduct harmed these farmers, such

as the one you mentioned, and exposed the taxpayers to enormous liabilities? How many of these people are still in place and continue to make lending decisions?

Mr. BOYD. Almost all of them are in place. There has been little to no accountability at the United States Department of Agriculture, and we are hearing even in this OIG audit report that I would like to submit as an exhibit today that they are still taking over 2½ years to process our program complaints.

Mr. NADLER. All these people who have exhibited prejudice and discrimination in administering the programs of the United States Government are basically still in place.

Mr. BOYD. They are basically still in place.

And really, Mr. Chairman, after Secretary Glickman left the department, I think things have gone from bad to worse. I think Glickman did try to put some things in place. He had the CRAT report, the CRD report, he had a team of officials, Lloyd Wright, Pearlie Reed, Rosalind Gray, all these people who had an unbiased but a good-hearted looking at trying to help Black farmers.

And I think with the position that we lobbied for, the assistant secretary of civil rights, that we all thought would be a great thing, really hasn't provided the services that it needs.

Mr. NADLER. Thank you. I am glad to hear your somewhat kind comments about Secretary Glickman since he served with many of us on this Committee years ago.

My other question is of Professor Havard and Mr. Fraas. Mention was made of the problem of—and Mr. Fraas mentioned this as one problem with, I think it was, 558 in particular—the inability to get the comparable data without which you can't make discrimination cases and the necessity of getting the Department of Agriculture and the Agriculture Committee involved.

My question, Professor and Mr. Fraas, if we were to amend the bill, is there any objection or any reason you think it wouldn't be a satisfactory solution to that problem if we were to amend the bill simply to give the normal discovery powers to the court and say that at the request of a plaintiff the court has the jurisdiction and the mandate to demand production of all this information with the appropriate privacy redactions without our placing any mandate in law on the Department of Agriculture, simply do this judicially through the court and that would not necessitate our doing anything to the Agriculture Department or cross-reference necessity to the Agriculture Committee?

Ms. HAVARD. I don't see a problem with that.

Mr. NADLER. Do you think it would solve the problem?

Ms. HAVARD. I think it would solve the problem.

Mr. NADLER. Mr. Fraas?

Mr. FRAAS. I think it would be an excellent idea. As you know, these cases have to follow the standard civil rights proof. You have to show disparate treatment, and, clearly, USDA is a repository——

Mr. NADLER. But the problem, as I understand it, or one of the major problems has been that without this information, you could not show disparate treatment——

Mr. FRAAS. That is exactly right.

Mr. NADLER [continuing]. And so I don't see why we simply don't empower the court and mandate the court to order the production of this information as you do in a normal discovery procedure.

Mr. FRAAS. That would be a good idea.

Mr. BOYD. Mr. Chairman?

Mr. NADLER. Yes, sir.

Mr. BOYD. I would like to weigh in on that. I think you make a very valid point, because our attorneys in the first part of the *Pigford* waived discovery, and that was a major, major problem for Black farmers around the country, because they were not able to go into the county offices and get their files and records, and——

Mr. NADLER. It is obviously the major problem, but if we solve this substantively through discovery and we did it through the courts so that it didn't involve another Committee of the House that could delay the legislation or asserting jurisdiction over a department that this Committee doesn't have jurisdiction over, it would seem to me that that would go through all those questions pretty simply.

Anybody else want to comment on that?

Thank you. I will yield back the balance of my time.

I will recognize the distinguished Ranking Member of the Subcommittee, the gentleman from Arizona.

Mr. FRANKS. Well, thank you, Mr. Chairman. Again, I appreciate you having this hearing.

Let me just preface my comments by saying, I have to apologize both to the Committee and to the panel here for having to leave here in just a few moments to a situation that I have tried to avoid and cannot.

But I wanted to, before I go, tell you that I think it is never redundant to remind ourselves that in America we hold these truths to be self-evident that all men are created equal, and I think that that is the central premise of the discussion here today.

And I have been very touched by the testimony, especially Dr. Boyd's testimony moved me greatly, and I am glad that this day has come and that this injustice has been addressed. And I leave here assuring you of my support for 899 and also along the lines that Mr. Fraas and Professor Havard have mentioned as far as doing some things to improve the bill.

Again, I congratulate all of you. I know sometimes these things are a long time coming, but I congratulate you for your perseverance and pray for ultimate justice here.

So thank you very much, Mr. Chairman.

Mr. NADLER. Thank you.

I will now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Chairman Nadler, this Committee, this Subcommittee is following in a great historic pattern in the 110th Congress that is so important, because we just had Medgar Evers' widow here, we had the Emmitt Till case being picked up, we had a signing of the extension of the Voter Rights Act, all coming out of this Subcommittee.

And it is very clear to me that this measure that we are discussing here for Black farmers extends this necessary backward-

looking review of what has been going wrong in America that we are trying to repair in an amazingly bipartisan way.

I was at the White House, and all of you were too, when President Bush signed the extension of the voter rights extension bill.

Now, I call upon the president, Steve King, to join us in helping move this forward. I mean, this is not just the Subcommittee of Judiciary's job. He knows how important this is, and we want to weigh in everything that we can because these farmers are dying every day, their families are being driven off the land.

And I was so moved when we had our conference in Detroit, that Black farmers were testifying how they love farming, they want to stay in this job, they love the land, and young ones as well, and they were being forced off the land.

And so, Dr. Boyd, you come here following the long line of civil rights leaders that has sat in this Committee hearing with the same courage, with the same pain of the violation of our basic fundamental civil rights. It is absolutely critical that we join in this.

And I am recommending that this Subcommittee and meet and make this tour and see for ourselves and hear for ourselves what is going on. I think that is absolutely critical.

Now, when we had the Black farmers in Detroit, I was shocked by the number of Black farmers that there were in greater Detroit and in Wayne County. I was asking these folks, "Where are you from?" They said, "I am from right here, Congressman." There were Black farmers all around me that I had never imagined what they were doing. They were doing their job.

And so this is so important. I think we are going to hear about section 2(d) to try to address the legislator, Attorney McEachin's problem.

There is just one other little point that I want to make. The corporatization of farming in America is wiping out Black farmers, but, guess what? They are wiping out small White family farmers as well, and many of them have suffered this without the stain of racism involved. They are getting wiped out not because they are Black but because people want to corporatize this business. And this, to me, is a shame.

I would ask Dr. Boyd if there is anything that I should have added to my comments. And I am sorry I didn't question you all. You are going to get questions from me, and we are going to all be working in this anyway, and they will go into the record.

Mr. BOYD. I think you have done great, and we appreciate the meeting that we had with you several weeks ago. And you promised that this hearing would happen and take place, and you are moving forward swiftly. And on behalf of the Black farmers around the country, we would like to thank you for taking action on this issue.

Mr. CONYERS. Thank you very much.

And I return my time, Mr. Chairman.

Mr. NADLER. Thank you.

I will now recognize the gentleman from Iowa for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I expressed some reservations at the opening of this hearing.

And, again, I want to thank all of the witnesses that are here.

I want to reflect off of Mr. Conyers' remarks with regard to what is happening with small farmers across America.

First, I should, for the purposes of full disclosure, let you know that my view is that I believe there should be no discrimination in America. I solidly support title VII of the Civil Rights Act and the specific language that is in there.

And I will often be trying to drag this thing back to the middle. I think sometimes it goes to the wrong side too often, and that can be on either side of that argument. So, hopefully, my remarks here will focus on that.

I would say also that I would love to see a lot more, millions more, African-American farmers in this country. And I have watched farmers leave the land all my life. Where I live I can't see a neighbor. There is only one practicing farmer in the section that I live in, and we have buried a lot of my neighbors too. So as time moves on, technology makes farms larger. That is part of this equation.

But I would express to you also a debate that I happen to recall, as I listened to testimony here, with State representative, Wayne Ford, in Iowa. He is an African-American representative, and he argued that we should close down some of our rural schools and use that money to expand the urban schools in his district. And I argued that if you are going to put those kids on a bus and take them anywhere, let's send them out there to the rural areas and put them in our schools where we have empty desks, and we can do a lot of good things there together for all of us.

So that is my public sentiment previously expressed; it is my public sentiment today.

Also, I think there is a lot of opportunity for people that are willing to go out and work on the land. I happened to run into a family a few years ago that had on a single acre—and I noticed the average farm was 16 acres back at the turn of the century, Mr. McEachin's testimony, I believe it was—on a single acre produced and sold $27,000 worth of crop, legal crop—I don't want any misconceptions here. And maybe it was $40,000 worth of child labor that went into that, but those young people in that family learned how to work and they learned how to work together as a family.

There is a richness to that, and I know Dr. Boyd knows that. It has extraordinary value in this country, how it ties us together, the people that work the land and feed the Nation and feed the world. So this is a profound thing for me.

Also, I want to express, though, that some of the data that I would like some clarification on, and I would go first to Mr. McEachin's testimony, and I noticed that you testified that at the turn of the previous century, which would be 1900, there were about 1 million African-American owned farms on 16 million acres. So that equates to the 16 acres per farm that I noted a little bit earlier. But, today, 18,000 African-American owned farms on 3 million acres. So I did the math on that, and that comes down to 167 acres of farm.

So I would submit and ask you to comment on that, that the African-American farms have grown by a factor of more than 10 over the century. And I don't know what non-African-American farms have done. But isn't that also a significant part of this equation,

that farms have gotten larger and farmers have gotten dramatically fewer regardless of their race?

Mr. MCEACHIN. Well, that may be true, Congressman King. However, the issue still remains that discrimination has been shown by the United States Department of Agriculture. The question then becomes, what are we going to do about the late filers? As I understand it, that is the question that is really being presented through this legislation.

The fact that African-American farmers, those farmers who have been able to survive, may have grown over the past 100 years I think goes to the notion that farmers have had to grow over the years to keep up with, as Congressman Conyers said, the corporate takeovers and the large corporate entities that have grown.

Mr. KING. I thank you, Mr. McEachin, and I agree with you on that. I just wanted to put that out there for clarification.

My time seems to be moving fairly quickly, so if I could, I would direct to Mr. Fraas, then, a couple of questions, if I can.

And one of them is that initial estimates by class counsel were that approximately 2,500 to 5,000 Black farmers would have claims. That number has gone up dramatically. I am going to ask one part of the question is, how do you explain that?

And then the second question is the one that I mentioned in my earlier opening remarks: We are looking at a number of perhaps 20,000 African-American farmers and 96,000 either claims or potential claims. How do you explain that? And we are going to have to get to the bottom of that before we can move forward with anything, I believe.

And so how do you explain that, Mr. Fraas?

Mr. FRAAS. On your first question——

Mr. NADLER. The gentleman is granted 1 additional minute.

Mr. FRAAS. On your first question, our initial estimates were frankly based on what information we had gotten from USDA about pending complaints. So we were really relying on what USDA was telling us when we were trying to figure out the scope of the case originally.

On your second question, you know, it is very difficult at this point, I think, to determine who among these late filers will actually qualify to participate should this legislation go forward.

Mr. KING. But five to one? How do you explain a five to one?

Mr. FRAAS. Just briefly, one response to that, well, two responses. First of all, I think until we actually go through each person's case and have them fill out a form, we don't know how many of those 70,000 do fit the class definition. It could be a much smaller number.

Secondly, we are not looking at a snapshot in time, today or 1997, we are looking at 20 years, going back to 1981, so there may be a huge number of people who have retired and left farming over that 20-year period in addition to the 16,000 or whatever the number that exists now. And I think that number may be understated. I think USDA recently has recalculated the numbers, and they realize they have underestimated the number.

Mr. KING. If the Chairman will allow Dr. Boyd to answer.

Mr. NADLER. Yes.

Mr. BOYD. Chairman Nadler, to answer that question, the 96,000 that you use, these are, for example, on my farm, there is my father, my brother and myself. We have all applied for loans but there is only one farm there. The U.S. Census counts us as one family farm. You have heirs to these people who have died now that has to be looked at. For example, Mississippi, a lot in Alabama, these farmers have passed away, and now their children are looking at the rights to these discrimination cases that they have filed as well.

And I believe that if you look at the U.S. Census figures during the time span of the consent decree, I believe it is 1981 and 1997, what the exact dates are, go back to the census and look at those numbers of how many Black farmers there were then versus what there are now, and the numbers do jive.

Mr. KING. I am going to explore that question down that path. I thank the Chairman, and I yield back.

Mr. NADLER. I thank the gentleman.

I recognize the gentleman from Alabama for 5 minutes.

Mr. DAVIS. Thank you, Mr. Chairman.

Delegate McEachin, I have placed in front of you a copy of the bill I have introduced, section 558, and I neglected to thank Mr. Conyers for being a cosponsor of that bill, so let me do that now.

Look at section 588, if you will, turn to page five, which will note for the record is section 2(d) of the bill, it is page five in the actual text. You made a very good and very telling point about the original consent decree that was reached in the case and the waiver of discovery that was effected in the consent decree, and you correctly mentioned that that was a major problem with the case. A lot of these farmers couldn't get discovery.

If you look at section 5(d), labeled, "Loan Data," it states that, "No later than 60 days after the secretary of agriculture receives notice of a claim filed pursuant to this bill, the secretary shall provide to that claimant a report on farm credit loans made within a timeframe of between January 1, 1992, ending on the date of the enactment of this act. That report shall contain information on all comparators: race of the comparator, date of application, date of the loan decision, location of the office, all data relevant to the process of deciding on the loan."

This is a provision that, in effect, compels discovery which was left out of the original consent decree.

Does this provision of 558 substantially address your concern?

Mr. MCEACHIN. I think this provision, Congressman, takes a good stab at it. But, again, forgive me for being the beast that I am, but I am a trial lawyer and I like to find things out for myself. And I am not so sure that I would necessarily trust the information from USDA to be complete and accurate as to all the claimants, given USDA's history.

Mr. DAVIS. I recognize that, but, obviously, the discovery, however you look at it, is not going to come from the air, it is going to come from the USDA.

But moving on to another point, just for the record, you will note that the next provision contains the confidentiality section that Professor Havard talked about and makes clear that there are some legitimate confidentiality concerns the comparators might

have and in effect these documents will be scrubbed of any identifying information.

I want to make sure that the record is also clear to Chairman Nadler that the provision, section 2(d), addresses the concern of discovery, it compels discovery on the part of the Department of Agriculture and compels discovery regarding comparators. And, of course, section 899 does not have any discovery provisions at all.

Let me turn to another point of concern, and I want to ask unanimous consent, Mr. Chairman, to place two documents in the record. The first document is labeled, Table C-4. It is a list of all civil cases terminated and described by nature of the suit during the 12-month period ending March 31, 2006 in all district courts in the country. I would ask that that document be placed in the official record.

Second of all, I would ask that a summary that my staff prepared also be placed in the record.

I ask unanimous consent for both of those, Mr. Nadler.

Mr. NADLER. Excuse me?

Mr. DAVIS. I ask unanimous consent that both of these documents be placed in the record.

Mr. NADLER. Oh, without objection.

Mr. DAVIS. And, again, all who want to review the record and free to look at these documents, but I want to single out for the panel the following statistics: Analyzing all civil rights claims based on a Federal question that were filed between April 1, 2005, and March 31, 2006, the last period for which we have data, 3.4 percent of those cases reach trial.

Another analysis: Cases where the United States was a defendant, 1 percent of civil rights cases where the United States was a defendant reached trial. One percent and 3.4 percent.

So, Mr. Boyd, one of the things that I want to make sure everyone takes who is interested in this issue from this hearing, getting a right to file a civil claim in United States district court means that there is a 97 percent likelihood you will never see your day in court.

And, Mr. Fraas, Mr. McEachin, I think you would both agree with me, these aren't high value settlement cases either. Most civil rights cases aren't high value settlement cases. Do you both agree with that?

Mr. MCEACHIN. I do. Yes, sir.

Mr. DAVIS. Mr. Fraas, do you agree with that?

Mr. FRAAS. They are very difficult cases.

Mr. DAVIS. Very difficult to settle.

So the best way of getting a recovery would be to have your claims heard on the merit. While I applaud the effort, the substantial concern I have with 899 is it simply says, "Go to court, take your shot, file a claim in U.S. district court, join the ranks of the 97 percent who never get their day in court."

Yes, Professor Havard is right that we need to sharpen the administrative process and make it better, 558 would do that, but the administrative process—there is a reason we got here in the first place. It is because there was a substantial distrust that U.S. district court claims would work. There was a belief that we needed a process other than United States district court.

Mr. McEachin, you and Mr. Fraas, as litigators, know very well how hard it is to litigate in U.S. district court. You know how aggressive the Government was in denying these claims and defending them even during the administrative process. They presumably would be as aggressive during the civil litigation process.

Both of you would acknowledge the cost of bringing cases. There is a cost of bringing cases for plaintiffs. It is difficult to find attorneys as experienced as Mr. McEachin.

So for all of those reasons, the remedy of saying, "Go into court, take your shot," I am concerned it would be another illusory promise to a lot of these farmers.

Dr. Zippert, would you like to comment on that?

Mr. ZIPPERT. I think that was the main reason that we are really strongly supporting 558 because those concerns are there. I think Mr. Fraas mentioned the problem of the substantial evidence issue that if we just go back into court without the framework of *Pigford*, you might not get for people the same consideration they received in *Pigford*, and, therefore, people who have claims that go back 15 or 20 years would have difficulty producing the required evidence, and they were not asked to do that originally in *Pigford*, and they shouldn't, as late claim filers, be asked to do it.

So I think the real advantage is to a comprehensive approach that is outlined in 558, and I hope it can be done in a way that avoids some of these constitutional questions. I am not a lawyer, but most of you are, and maybe you can figure out a way around some of this to make sure that the farmers in this case get justice.

Mr. NADLER. The gentleman's time has expired.

I now recognize the gentleman from Virginia for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

And thank all of the witnesses for your testimony.

I just want to get some things on the record.

We have two bills before us, 899 and 558. With either bill, have we covered everybody that needs to be covered? Has anybody, by definition, in either bill been left out or do both bills or either bill cover pretty much what needs to be covered?

Mr. ZIPPERT. There are some people who, through no fault of their own, who had appeals in this case that didn't get their appeal heard through no fault of their own, that if there is some way in this bill to correct that as well, we would like to see that too.

Mr. SCOTT. They had a case heard on the merits and lost on the merits and then appealed?

Mr. ZIPPERT. Yes. But their appeal was never heard because their lawyers didn't submit in time or there were other problems that were beyond their control.

Mr. SCOTT. Okay. Are there problems with either bill in terms of who is covered, Dr. Boyd?

Mr. BOYD. I don't think there is a big problem with either bill on who it covers.

Mr. SCOTT. Okay.

Mr. BOYD. I think that what the issue is, is there were so many people involved, the original followers that brought this case forward, the 9,000 people who were denied——

Mr. SCOTT. Okay. Let me go to the next question. With either bill, is there a problem or advantage in taking advantage of track

A or track B? Does either bill hurt your chances that you would have, as an original plaintiff would, from going to track A and track B?

So either bill would be covered. Okay.

In terms of the evidence available that we are trying to get discovery to, is all of this evidence in the control of the Department of Agriculture? Is there other evidence that they may not have access to?

The reason I ask that, Mr. Chairman, is that if the Department of Agriculture isn't providing information in these cases, that may be something we ought to consider a separate hearing, why they are not providing the information that they are to be providing so that people can have a fair case heard on the merit.

Is the information within the control of the Department of Agriculture?

Mr. MCEACHIN. I will start off with that, Congressman Scott.

I would think that a lot of that information is within the control of the United States Department of Agriculture.

But, again, I stress to the Committee and those of you who at one time or another actually practiced law and tried cases, it is difficult at this juncture to say that all the information is there and that we won't need the discovery tools that are already granted to us through the Federal rules to go and discover in other areas besides the USDA. And so I am a little bit hesitant to say that it is all there, because my 20 years of experience suggest that it is not all there.

Mr. SCOTT. Well, I guess, the way we know how to encourage Federal agencies to do things for them to cooperate, and that would solve, I think, a lot of your problems.

Mr. Fraas, you indicated there are several advantages in 899, one of which was PAYGO. Could you kind of expand on that a little bit, what the problem is there?

Mr. FRAAS. Yes, Mr. Scott, and it is really a problem that you all would have to wrestle with. As I understand it, the House of Representatives, one of the first things it did this year is pass a new rule that to the extent that any piece of legislation increases mandatory Federal spending, it either has to be offset either by increased revenue or taking money from another program, and I know the Committee would not want to be in a position of having to do either of those things.

What we are really——

Mr. SCOTT. And 558 would trigger PAYGO and 899 would not?

Mr. FRAAS. I haven't looked at 558 that closely, but to the extent that you require a Federal agency to do anything, I assume their budget people would say that costs money.

Mr. SCOTT. And 899 would not trigger PAYGO?

Mr. FRAAS. Not as I read it.

Mr. SCOTT. What about the separation of powers issue?

Mr. FRAAS. That is something that I know the Committee has been wrestling with, but, essentially, the consent decree is the property of the judicial branch, not the legislative branch, and it is also a contract between the parties that settle the case. But the separation of powers simply addresses the idea of Congress amending or modifying something that the judicial branch had concluded.

But I would really defer to your experts here on that issue. I am not a constitutional scholar.

Mr. NADLER. I thank the gentleman.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward, and ask the witnesses to respond as promptly as you can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

On behalf of everyone here, I thank the witnesses.

And with that, the hearing is adjourned.

[Whereupon, at 10:42 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

United States Senator Chuck Grassley
Iowa

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Prepared Statement of Senator Chuck Grassley of Iowa
House of Representatives Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Thursday, June 21, 2007

Thank you Mr. Chairman. I would also like to thank the Chairman of the Crime Subcommittee, Chairman Scott, as well as the Chairman of the full Committee, Chairman Conyers, and Congressman Davis for their support of this important issue. I would also like to thank the hard work of Congressman Chabot and his staff for the work they have put into this legislation that we are considering today.

People often ask me why in the world a Senator from Iowa would get involved in this issue. To be honest with you, I know of one black farmer in Iowa. But, Justice knows little about state lines. And, my state has a long history of supporting African Americans dating back to the Underground Railroad. I see no reason to stop that trend.

Ironically, as the United States Department of Agriculture has expanded in size and influence over the last several decades, the number of Black farmers in this country has declined dramatically. In 1920, there were more than 900,000 Black farmers owning or operating more than 16 million acres of land. Today, statistics reveal that fewer than 18,000 Black farmers own or operate less than 3 million acres.

In 1997, aggrieved Black farmers came together to hold the United States Department of Agriculture accountable for the systematic discriminatory treatment in the administration of loans and other credit opportunities under the Equal Credit Opportunity Act and the Administrative Procedures Act.

Unlike previous unsuccessful lawsuits, the U.S. District Court certified and consolidated the *Pigford* and *Brewington* cases as one class action lawsuit, giving aggrieved plaintiffs hope for the first time in many decades. This decision prompted USDA to agree to resolve these claims expeditiously, the result of which is the *Pigford* Consent Decree. At the time, the *Pigford* Consent Decree was the largest racial discrimination settlement in our nation's history and expectations were high once again that another turning point in the documented plight of the Black farmers had occurred. The Consent Decree was intended to provide a swift resolution for the claims of discrimination that had gone unaddressed for far too long.

Despite these good intentions, the expeditious resolution of tens of thousands of claims has not occurred. Testimony before the House Constitution Subcommittee revealed many unanticipated problems with the Consent Decree, some of which have impacted the ability of many farmers to file timely claims. In particular, the Committee was made aware that more than 65,000 potential claimants who requested entry into the Consent Decree by the court-ordered September 15, 2000 deadline, more than half did not have actual notice of the settlement, and were denied the opportunity to have determinations made on the merits of their claims.

Thus, more than 75,000 farmers once again have been shut out of a process that was created to address their discrimination complaints and are left without any recourse or opportunity to purse their claims.

H.R. 899 provides those aggrieved claimants who filed late claim petitions with the court-appointed Arbitrator before December 31, 2005, with a new opportunity. H.R. 899 is intended to provide some small measure of justice to remedy past injustices.

In creating this new cause of action, it is my hope that the U.S. District Court would embrace this opportunity and construe it in the remedial spirit in which it was intended. In his latest opinion, District Court Judge Friedman stated that " Legislatures . . . can take steps that judges cannot. If Congress believes that burdens are unfair or that a significant number of African-American farmers despite extraordinary efforts to reach them - never received notice . . . then it surely has the means at its disposal to correct these wrongs. Legislative solutions are not unprecedented . . . the Court is confident Congress could devise the means to provide relief for these farmers."

With this opinion in mind, it is my hope that the Court would liberally construe this cause of action, applying the same "substantial evidence" standard that was utilized in the Consent Decree and affording those farmers who meet the criteria with an opportunity to expeditiously resolve their complaints through a process similar to, or within, that process established by the Consent Decree.

In 1998, Congress waived the applicable statute of limitations that would have barred eligible claimants from filing a complaint under the original Consent Decree. H.R. 899 provides similar assistance enabling those with meritorious claims to have their day of justice.

I was pleased to offer a Senate Companion to HR. 899 along with Senators Obama, Kennedy, and Biden.

I want to thank you Mr. Chairman for allowing me to testify before the Committee this morning.

-30-

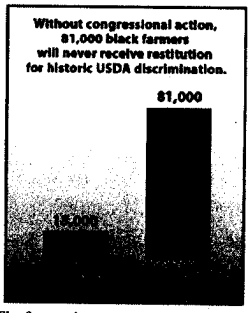
STATEMENT OF REP. STEVE COHEN
HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
LEGISLATIVE HEAR ON H.R. 558 AND H.R. 899
JUNE 21, 2007

I am a cosponsor of H.R. 558 and believe that it is well past time to provide relief to the African-American farmers who may be entitled to settlement money pursuant to the decision in *Pigford v. Glickman*. The vast majority of these farmers were denied settlement money because of a number of administrative and procedural hurdles erected by the U.S.D.A. or, in some cases, possible continuing racial discrimination on the part of the U.S.D.A. I urge my colleagues to pass legislation to remedy this situation and give potential class members their due.

Obstruction of Justice

A new investigation by Environmental Working Group (EWG) and the National Black Farmers' Association (NBFA) finds that the United States Department of Agriculture (USDA) willfully obstructed justice by deliberately undermining the terms of a 1997 landmark civil rights settlement with African American farmers. As a result, the vast majority of African American farmers have been denied compensation that the court, in approving the settlement, described as "automatic." For the 81,000 farmers denied compensation, there is no future opportunity to obtain relief. Even though USDA has admitted to civil rights abuses, it withheld some three quarters of the $2.3 billion that the settlement was worth. Without intervention by the United States Congress, these farmers will never receive the compensation they so clearly deserve. [Document: *Pigford v. Veneman* Opinion]

Specifically we found that:



- **Nearly nine out of ten denied restitution.** USDA denied payment to 86 percent, or 81,000 out of 94,000, African American farmers who came forward seeking restitution.

- **56,000 hours spent fighting farmers.** USDA aggressively fought claims by African American farmers, contracting with United States Department of Justice lawyers who spent at least 56,000 staff hours and $12 million contesting individual farmer claims for compensation.

The 81,000 denials took two forms:

- **Deadline barred 64,000 claims, despite lack of notice.** The settlement-funded arbitrator rejected 64,000 farmers who came forward with claims during the late claims process established by the court. The farmers' attorneys, whose representation was characterized by the court as "bordering on legal malpractice," were responsible for properly notifying the farmers of the original deadline for application. The settlement-funded arbitrator rejected these 64,000 farmers simply on the basis of their tardiness for the original deadline, even though all 64,000 rejected claims were submitted within the court established late claims period. An additional 7,800 farmers failed to file before the late claims deadline expired and were also denied entry to the class.

Top 10 States: Farmers seeking entry under court-mandated extension

State	Rejected	Granted	Total
Mississippi	18,983	286	19,269
Alabama	14,268	294	14,562
Tennessee	4,642	24	4,666

North Carolina	2,448	1,012	3,460
Oklahoma	3,309	51	3,360
Georgia	3,228	81	3,309
Illinois	2,864	29	2,893
Louisiana	2,312	21	2,333
South Carolina	1,826	70	1,896
California	1,495	30	1,525
National Total	**63,816**	**2,131**	**65,947**

See data for all 50 states

Note: Data in this table is based upon information received from the Office of the Monitor on April 26, 2004.

• **9,000 denied "automatic" award.** Of the 22,000 farmers granted access to the class, in what the court referred to as "automatic" payment status, USDA denied payment to 40 percent, or 9,000 farmers. Entry to the class was not guaranteed, but depended on a farmer proving that he/she applied for a USDA loan between 1981 and 1996, that USDA's response was racially discriminatory, and that the individual filed a discrimination complaint arising from USDA's treatment of the application. All of the 9,000 farmers denied payment by USDA met these criteria, but received nothing.

Nearly 9,000 Black farmers were denied "Automatic" payments by USDA — Top 10 States

		Receiving "Automatic" Awards		Denied "Automatic" Awards	
State	**Number Eligible**	**Number**	**Percent**	**Number**	**Percent**
Alabama	4,511	3,096	69%	1,415	31%
Mississippi	4,373	2,643	60%	1,730	40%
Georgia	2,960	1,757	59%	1,203	41%
North Carolina	1,989	910	46%	1,079	54%
Arkansas	1,986	1,293	65%	693	35%
South Carolina	1,274	793	62%	481	38%
Louisiana	991	478	48%	513	52%
Oklahoma	794	541	68%	253	32%
Tennessee	663	407	61%	256	39%

Florida	472	248	53%	224	48%
National Total*	**22,181**	**13,411**	**61%**	**8,770**	**40%**

* Note: Information in this table is based upon data received from the Office of the Monitor on 4/26/2004. The 7/12/2004 report from the Office of the Monitor states that the total number of awards received is now 13,429.

See data for all 50 states

> **"I've talked to more people that haven't even heard anything at all, and more people that got denied, than I have talked to people who got the $50K and a partial debt write-off. And now the USDA seems to be just sitting still."**
>
> **— Alan Diggs,**
>
> **Southampton, VA farmer**

In this historic civil rights case, known as *Pigford v. Veneman*, USDA promised to pay billions to African American farmers who claimed that the USDA had systematically discriminated against them for decades, denying them access to essential crop loans that were made readily available to "similarly situated" white farmers in their communities. The settlement was largely based on USDA's own admission of discrimination in its 1997 civil rights study, and the Reagan Administration elimination of the USDA's Office of Civil Rights in 1983, effectively denying African American farmers any recourse for claims of discrimination from 1983 through 1996, when the Office was reestablished. In part due to lack of equal access to USDA loans, the number of farms operated by African Americans has declined dramatically over the past 20 years, plummeting from 54,367 in 1982 to just 29,090 in 2002.

Recommendations

This willful obstruction of justice by the USDA demands immediate action on the part of the U.S. Congress. Only the Congress can make whole the farmers who were denied restitution arbitrarily, after the USDA had agreed, in settling the case, that their discrimination claims were valid.

EWG and NBFA recommend that USDA and the U.S. Congress immediately take action to remedy these inequities by taking the following measures:

(1) Congress should order USDA to provide full compensation to the nearly 9,000 farmers who were denied relief after being accepted into the settlement class;

(2) Congress should order USDA to re-evaluate the merits of the nearly 64,000 farmers' claims that were shut out due to lack of notice of the settlement. All African American farmers who meet the preliminary requirements to qualify as a member of the *Pigford* class should receive the $50,000 payment and debt relief provided by the settlement;

(3) Congress should direct the USDA to institute accountability measures to monitor and enforce civil rights standards throughout the Agency, requiring that in the future the

USDA shall exert best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination; and

(4) Congress should ensure the full implementation of outreach and financial assistance programs that support minority farmers.

A Century of USDA's Institutionalized Racism Subjects African American Farmers to Dramatic Land Loss

In 1920, one in every seven farms was African American owned. Today, only 1 in 100 farms is African American owned (USDA 1998, at 16). The decline of the African American farmer has taken place at a rate that is three times that of white farmers (USDA 1998, at 16-17).

"I never even got the chance to start the chicken farm like I wanted. I just gave up."

—Leroy McCray, Sumter County, SC farmer

Though many causes contribute to the decline of the African American farmer, the racial disparity is unmistakable. Institutionalized racism within the United States Department of Agriculture (USDA) played a major part in this phenomenon. Indeed, the USDA Commission on Small Farms admitted that "[t]he history of discrimination by the U.S. Department of Agriculture ... is well documented," finding that "indifference and blatant discrimination experienced by minority farmers in their interactions with USDA programs and staff ... has been a contributing factor to the dramatic decline of Black farmers over the last several decades" (NCSF 1998).

Although the civil rights movement successfully eradicated facially discriminatory laws, institutionalized racism remained and carried on the legacy of racial discrimination. In the USDA, it took the form of all-white county committees and apathetic federal offices failing to address the problem. Further, in 1983, due to Reagan Administration budget cuts, the USDA Office of Civil Rights was dismantled, and USDA stopped processing all discrimination claims until 1996, when the office re-opened (*Pigford* 1999, at 85). During this period, the USDA Office of Civil Rights Enforcement and Adjudication (OCREA) "simply threw discrimination complaints in the trash without ever responding to or investigating them," and in some cases, "even if there was a finding of discrimination, the farmer never received any relief."

In 1996, USDA set out to address this problem, forming the Civil Rights Action Team, which was charged with making recommendations for eradicating racial discrimination within the USDA (*Pigford* 1999, at 88). The Civil Rights Action Team report exposed a history of discrimination that persisted even in 1996, finding that "minority farmers have lost significant amounts of land and potential farm income as a result of discrimination by [USDA]." It found racial disparities in disapproval rates for loans and processing times, extreme lack of diversity on the county committees responsible for administering USDA programs, and revealed a civil rights complaints system that had been effectively inoperative since its inception. The report made numerous recommendations for addressing these problems—many have yet to be implemented.

African American Farmers Sue USDA for Racial Discrimination

Pigford v. Veneman — African American Farmers Turn to the Courts for Justice

When the USDA failed to implement its own recommendations for addressing the persistent racism in the administration of its programs, African American farmers turned to the courts in hopes of finally addressing this monumental injustice. Among these lawsuits was *Pigford, et al. v. Veneman*, 97 Civ. 1978, 98 Civ. 1693 (PLF), a case brought by three farmers on behalf of all African American farmers who had been victims of racial discrimination at the hands of the USDA. Pigford would prove to be a landmark case, and, unfortunately, a study on how a federal agency can evade accountability despite admitting to wrongdoing and agreeing to compensate its victims.

"The way it usually works is that you would file for FSA assistance in February. You're supposed to get your money in March or April in order to have enough resources to plant on time to reach harvest before the fall rains and frost come. White farmers were getting their money on time, every time. But not the black farmers."

—Leon Pulley, Butler County, MO farmer

On August 28, 1997, farmer Timothy Pigford filed a class action lawsuit in the United States District Court for the District of Columbia against the Secretary of Agriculture, Dan Glickman, alleging that USDA discriminated against African American farmers by denying or delaying applications for benefit programs and by mishandling the discrimination complaints filed with the Department. [Document: Complaint] The case was assigned to Judge Paul Friedman, who, on October 9, 1998, certified the *Pigford* class, allowing the case to move forward as a class action.

Concerns about the expiration of the statute of limitations loomed over the case, threatening to bar the farmers' claims from ever being heard in court. After African American farmers and their supporters presented testimony before Congress, a bill was passed suspending the statute of limitations, which President Clinton signed into law on October 21, 1998.

With this matter resolved, the African American farmers and the USDA continued in their settlement discussions. From the beginning of the case, the parties had discussed settlement under the direction of a mediator. They faced several struggles in the settlement process. A key point of controversy between the farmers and the USDA involved the structure of the potential settlement. The parties engaged in contentious debate, both before the mediator and before Judge Friedman, over whether to structure an agreement which settled all of the farmers' claims at once or whether to construct a process which would resolve the claims on a case-by-case basis. The attorneys for the farmers were concerned that a case-by-case process would drag on for years and further delay justice for the farmers. After much debate, nearly two years after the complaint was filed, the parties entered into a settlement, filing their version of the agreement, the Consent Decree, with the Court on March 19, 1999. [Document: Consent Decree]

The Consent Decree set forth a revised class definition and a two-track system for resolving claims on a case-by-case basis. All individuals who fit within the following definition were considered members of the class:

> All African American farmers who:
>
> (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996;
>
> (2) applied to USDA during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA's response to that application; and

(3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of such farm credit or benefit application. [Excerpt: Class Definition | Full Document: Consent Decree]

The system designed by the parties for resolving claims took the form of a two-track dispute resolution mechanism, with two separate processes through which African American farmers in the class could pursue claims. Under the more streamlined process, Track A, a farmer could prevail with minimal documentation, but recovery is limited to $50,000. The alternative process, Track B, would be more like a civil trial, requiring more extensive documentary evidence, but providing farmers with the opportunity to obtain cash payments based on actual damages without a cap on the award.

Successful farmers in both tracks would also be eligible for non-cash relief, including tax assistance, debt forgiveness, foreclosure termination, technical assistance and one-time priority loan consideration. Both tracks presented all-or-nothing options — if you won you got relief, if you lost, you got nothing. The Consent Decree did not provide any appeal right, therefore, if a farmer lost the claim, the farmer had no right to have that decision overturned by a neutral party. Instead, a losing party could request that the court-appointed Monitor direct the original decision-maker to re-examine the decision. Those who did not want to accept the terms of the settlement were legally entitled to opt out of the settlement and pursue lawsuits of their own.

Pigford's Two Track Settlement Process, Tracks A and B

Track A - "Automatic" $50,000 Award

Track A was designed to provide limited relief quickly for farmers with minimal or no documentary proof. The process was to take a total of 110 days, or just over 3 months, from start to finish. The Court described this track as a "dispute resolution mechanism that provides those class members with little or no documentary evidence with a *virtually automatic* cash payment of $50,000" (*Pigford* 1999, at 95).

Farmers who are alleging racial discrimination in loan or subsidy programs are eligible for this track. In order to succeed, farmers had to present substantial evidence showing that he/she was subjected to racial discrimination by the USDA and suffered economic damages as a result. Substantial evidence was defined by the Court as, "a reasonable basis for [finding] that discrimination happened." Successful farmers would receive a $50,000 cash payment for loan-based claims or $3,000 for subsidy-based claims as well as debt relief. Loan programs, or credit benefits programs, include loans offered by the Farmers Home Administration (FmHA), now part of the Farm Services Agency (FSA). Subsidy programs, or non-credit benefits programs, include commodity programs, disaster programs, and conservation programs, formerly administered by the Agricultural Stabilization and Conservation Service (ASCS), also now administered by the FSA.

Under Track A, the process should proceed as follows:

- farmer submits a claim package to Facilitator, choosing Track A. Claim packages must include all documentation and evidence supporting class membership and proving claim.
- Within 20 days of receiving the package, Facilitator determines whether farmer is a class member and assigns a track, then forwards notice to the Adjudicator, USDA and class counsel.
- Within 60 days of receiving notice USDA may submit information relevant to liability or damages to Adjudicator and class counsel.
- Within 30 days of receiving material from farmer and USDA, Adjudicator decides whether claim is supported by substantial evidence, stating the reasons for the decision. Adjudicator must evaluate whether the farmer has presented substantial evidence to show the following:

(1) farmer owned or leased, or attempted to own or lease farm land,

(2) farmer applied for a loan or subsidy transaction at a USDA office between January 1, 1981 and December 31, 1996,

(3) the application was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate service,

(4) treatment received was less favorable than that accorded to a specifically identified, similarly situated white farmer, and

(5) USDA's treatment caused farmer economic damages.

- Successful loan program claimant receives $50,000 payment and debt relief from USDA. Successful subsidy program claimant receives $3,000 payment and debt relief from USDA. (Losing party may request that the Monitor direct the Adjudicator to re-examine claim where clear, manifest error has occurred that has resulted or is likely to result in a fundamental miscarriage of justice.)
- Maximum time from submission of claim to decision: 110 days.

Track B — Evidence-Based Proceeding to Recover Actual Damages

Track B was designed to offer an abbreviated trial procedure and an accurate damages award for farmers with superior documentation of their claim. This process, though expanded, was designed to take a maximum of 240 days, or 8 months, from claim submission to decision. Only farmers with claims arising from loan, or credit program, transactions were eligible for this track. Track B farmers had to prove their claims and actual damages by the standard civil litigation burden of proof, "preponderance of the evidence," showing that it is more likely than not that their claim was valid (*Pigford* 1999, at 95). Successful farmers would be entitled to receive monetary damages as proven, and non-cash relief.

Under Track B, the process should proceed as follows:

- Farmer submits a claim package to Facilitator, choosing Track B.
- Within 20 days of receiving the package, Facilitator determines whether farmer is a class member and assigns a track, then forwards notice to Arbitrator, USDA and class counsel.
- Within 10 days of receiving claim package, Arbitrator notifies farmer and USDA of date of evidentiary hearing. Hearing date to be set within 150 days of sending notice, but may not be set for less than 120 days after notice is sent.
- 90 days prior to hearing date, parties serve on each other witness lists, statements of intended testimony of witnesses, and copies of exhibits to be presented at arbitration hearing.
- 45 days prior to hearing date, parties complete depositions of opposing party's witnesses.
- 30 days prior to hearing, parties file with Arbitrator and serve on each other written versions of direct testimony of witnesses.
- 21 days prior to hearing date, parties notify each other of witnesses whom they intend to cross-examine at trial. Also by this date, parties file memoranda of law and fact with Arbitrator.
- Hearing (eight hours)—four hours of cross-examination of opponent's witnesses and presenting legal arguments for each party.
- Within 60 days of hearing, Arbitrator issues written decision as to whether farmer has demonstrated by a preponderance of the evidence that farmer was a victim of racial discrimination and suffered damages as a result.

- Successful farmer receives actual damages from USDA. (Losing party may request that the Monitor direct Adjudicator to reexamine claim where clear, manifest error has occurred that has resulted or is likely to result in a fundamental miscarriage of justice.)
- Maximum time from submission to decision: 240 days.

Court's Fairness Review and Consent Decree Approval

The Court reviewed the settlement for fairness, considering objections and responses of the African American farmers and USDA, and approved the Consent Decree in an opinion dated April 14, 1999. Numerous class members, civil rights organizations and farmer organizations filed objections to the Consent Decree and testified at the fairness hearing. [Document: NBFA objections] Overall, the Court received objections from 15 organizations and 27 individuals, including two named plaintiffs, Timothy Pigford and Cecil Brewington. Farmers voiced concerns about many aspects of the Consent Decree, including the amount of recovery provided to the farmers in the settlement, the structure of the dispute resolution mechanism, and the lack of forward-looking relief. After considering the objections and comparing the settlement outcome with the likelihood of prevailing at trial, the Court determined that the settlement would provide a fair, efficient tool for redressing the farmers' grievances.

"You got to choose one or the other track, your choices are simple, you either take the $50,000 or you gamble that you might get more and wait it out. It wasn't an easy decision, I didn't want to just take the $50,000. I wanted to go for the $5 million they had denied me, but it seemed like it would never be resolved if I did that."

—Leroy McCray, Sumter County, SC farmer

Much of the Court's analysis hinged on the fair and efficient administration of the settlement process. In discussing the fairness of the amount of recovery provided in the settlement, the Court reasoned that farmers largely lacked documentary evidence to prove their claims and that "the settlement negotiated by the parties provides for a relatively prompt recovery" compared to trial, where, "it is unlikely that any class member would have received any recovery for his injury for many years" [Document: Fairness Opinion] (*Pigford* 1999, at 104-105).

In addressing objections to the requirement that Track A farmers show proof that they fared worse than "a specifically identified, similarly situated" white farmer, the Court found that the requirement was not overly burdensome because the plaintiffs' lawyers had obtained information on a number of white and African American farmers from USDA (*Pigford* 1999, at 106). Thus, the Court opined, "class counsel should be able to provide most farmers with the evidence they need" (*Pigford* 1999, at 106).

When the Court considered objections to Track B's lack of a discovery procedure requiring parties to exchange documents, the Court maintained that this was a fair concession since "the Track B mechanism ... resolves the claim much more quickly than an ordinary civil case would be resolved, in large part because of the shortened discovery period" (*Pigford* 1999, at 106). In resolving that the lack of an appeal procedure was fair, the Court focused on the expectation that most farmers would succeed in the settlement, stating, "[s]ince it is anticipated that most class members will prevail under the structure of the settlement, the Court concludes that the forfeit of the appeal rights was a reasonable compromise" (*Pigford* 1999, at 108).

The Court was "surprised and disappoint[ed]" by USDA's refusal to include the following sentence in the Consent Decree: "In the future the USDA shall exert best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination" (*Pigford* 1999, at 111-112). Though

the Court acknowledged that the farmers "legitimately fear that they will continue to face...discrimination in the future," the Court reasoned that the settlement was fair because "USDA is obligated to pay billions of dollars to African American farmers who have suffered discrimination...those billions of dollars will serve as a reminder to the Department of Agriculture that its actions were unacceptable and should serve to deter it from engaging in the same conduct in the future" (*Pigford* 1999, at 111). Finally, the Court determined that future discrimination would be curtailed because USDA would be under intensified scrutiny of the Courts, Congress, and the African American farmers as a group, all of which are equipped, according to the Court, to address future discriminatory practices discovered within USDA.

In approving the Consent Decree, the Court had described the settlement as an agreement that would "achieve much of what was sought without the need for lengthy litigation or uncertain results" (*Pigford* 1999, at 95).

USDA Settlement Fails Black Farmers

Denials and Delays Prevail

The current state of play in the settlement presents a far different picture than the predictable, efficient process envisioned by the Court. Instead of predictable results and shortened process, the settlement has yielded a remarkably high rate of rejection for farmers who chose Track A and a contentious, protracted proceeding for those who elected Track B.

"It was common knowledge that certain white farmers got better treatment. Everyone knew that the white farmers were getting loans while we weren't. They were not far from us, just down the road, and it was just generally known that they were getting money from FSA but we weren't."

—Calvin King, Lunenburg County, VA farmer

Overall, of the nearly 100,000 farmers who came forward with racial discrimination complaints, 9 out of 10 were denied any recovery from the settlement. As a result, instead of the $2.3 billion, USDA only provided $650 million in direct payments to farmers. The outcome of the settlement suggests that the farmers who had the best chance at achieving justice were the 230 who opted out of the settlement.

The settlement looks quite different than originally expected. Prior to advertising the lawsuit to reach potential class members, the farmers' attorneys had predicted that the class would number 2,000. This estimation was far from accurate, largely because USDA kept such poor records of civil rights complaints. There are now 22,354 farmers who have been accepted into the settlement class, 22,181 in Track A and 173 in Track B (*Pigford* Monitor 2004). There are even more, some 73,747 farmers, who sought entry into the settlement through a late-claims process (*Pigford* Arbitrator 2004, at 2-3).

African American farmers have faced high rates of denial in both tracks. Of the 22,181 farmers assigned to Track A, 8,562 or 40 percent, have been denied (*Pigford* Monitor 2004). As for Track B, of the 173 eligible farmers, 18 farmers, a mere 10 percent, have prevailed after a hearing (*Pigford* Monitor 2004a). Sixty-eight settled with USDA prior to obtaining a decision. Thirty-nine farmers had their cases dismissed without a hearing. Another 22 lost after a hearing.

According to the Office of the Monitor, 190 Track A farmers (*Pigford* Monitor 2004) and 23 Track B farmers are still awaiting decisions, 20 of whom have not yet had even an initial hearing (*Pigford* Monitor 2004a), over 5 years after the Consent Decree was entered.

Table. Denials and delays in Track B Outcomes

Farmer Status*	Number of Farmers
Total Number of Farmers in Track B	173**
Farmers Who Won After Hearing	18
Farmers Who Were Dismissed	61
- *Dismissed Prior to Hearing*	39
- *Dismissed After Hearing*	22
Farmers Awaiting Initial Hearing	20
Farmers Awaiting Arbitrator Decision	3
Farmers Receiving Negotiated Settlement Compensation Prior to Hearing	68

*The Farmer Status information is based on information received from the Office of the Monitor on June 11, 2004.

**This Total Number of Farmers in Track B figure is based on the Pigford Monitor Report of July 12, 2004.

Lack of Notice Prevents 72,000 Farmers from Joining Settlement

When thousands of farmers came forward with claims of discrimination after the settlement-imposed deadline, it became evident that notice of the settlement was insufficient to reach the majority of potential class members. Farmers had difficulty meeting deadlines in all aspects of the settlement, largely due to the failure of their lawyers to comply with the required timelines and communicate with the farmers. The Court admonished the farmers' lawyers for their failure to meet deadlines, even going so far as to state at one point that their representation "border[ed] on legal malpractice" (*Pigford* 2002, at 922).

The farmers' lawyers were responsible for providing adequate notice to all putative class members. The flood of late claims indicates that the notice failed to reach thousands of farmers with claims against USDA. The Court-approved late claims process provided for entry into the settlement process upon demonstrating extraordinary circumstances that prevented the farmer from meeting the original deadline. Acceptable reasons for late filings included natural disasters and being homebound (*Pigford* Arbitrator 2001, at 4), but not lack of notice of the settlement.

A flood of farmers, numbering 73,747, sought late entry into the settlement process (*Pigford* Arbitrator 2004, at 2-3). Of this 73,747, 65,947 farmers filed their applications on time (*Pigford* Arbitrator 2004, at 2-3). The overwhelming majority of the farmers who did apply on time, some 63,816 farmers, were ultimately denied entry into the settlement (*Pigford* Arbitrator 2004). Their claims were never heard on the merits, and they will never again have a chance to seek relief for their discrimination complaints.

Top 10 States: Farmers seeking entry under court-mandated extension

State	Rejected	Granted	Total
Mississippi	18,983	286	19,269
Alabama	14,268	294	14,562
Tennessee	4,642	24	4,666
North Carolina	2,448	1,012	3,460
Oklahoma	3,309	51	3,360
Georgia	3,228	81	3,309
Illinois	2,864	29	2,893
Louisiana	2,312	21	2,333
South Carolina	1,826	70	1,896
California	1,495	30	1,525
National Total	**63,816**	**2,131**	**65,947**

See data for all 50 states

Note: Data in this table is based upon information received from the Office of the Monitor on April 26, 2004.

USDA Pays DOJ Millions to Fight Farmers' Claims

USDA contracted with the United States Department of Justice (DOJ) to provide legal representation in the settlement. DOJ internal documents reveal that the Civil Division spent 56,000 hours of attorney and paralegal time challenging 129 farmers' claims. [Document: DOJ timesheets] This amounts to an average of 460 hours, or nearly 3 months of time, devoted to contesting each individual farmers' claim. Assuming an average salary of $60,000, if this amount of time was spent attacking the claims of all 22,000 farmers in the class, this represents a potential cost of $330 million to taxpayers. That is equivalent to the cost of providing Track A relief for 6,600 farmers.

Overall, USDA spent $12 million by 2002 for DOJ's assistance in disputing individual farmers' claims. [Document: USDA Expenses] These numbers are extraordinarily high for a settlement that was intended to provide a "virtually automatic" payment to farmers through an abbreviated procedure. Instead, it appears that African American farmers were treated as adversaries rather than as partners in a cooperative settlement.

Proceedings Lack Transparency and Accountability

Much of the transparency provided in traditional legal proceedings was lost in the *Pigford* matter because the case settled out of court. While the terms of the settlement agreement are public and the amounts of most settlement payments are public, details about the settlement proceedings are largely confidential.

Traditionally public documents such as transcripts of proceedings, motions of the parties and rulings of the decision-makers are not made available to the public. Farmers' attorneys have even faced difficulty in obtaining written rulings in their own cases. All attorneys who sign privacy agreements

are entitled to obtain information in their farmer's case, however, because of the USDA's obstructive practices, information relating to white farmers may be omitted from the documents. This poses a serious problem, because proving the existence of a white farmer who received better treatment is vital to obtaining payment in both tracks. The farmers proceeding *pro se*, without legal representation, are not permitted to obtain any materials that include information on similarly situated white farmers (*Pigford* Monitor 2003). Without the accountability offered by transparent proceedings, plaintiffs are more vulnerable to inequities that may arise in the course of the proceedings.

Court Trial	USDA Settlement
Public hearings	Closed hearings
Right to discovery documents, court-enforced information sharing	No discovery process
Right to appeal by neutral party	No appeal, only request for re-examination by original decision-maker
Public transcripts, motion papers and court rulings	Farmers' attorneys must specially request transcripts, USDA filings and rulings in their own case; without confidentiality agreements, farmers prohibited from seeing any documents; All farmers' attorneys must sign confidentiality agreements; pertinent information on case redacted by USDA
Publicly appointed or elected judges make decisions	Private, for-profit companies employ judges-for-hire to make decisions on claims

USDA Conceals Key Data from Farmers

> "[T]he thing I'm frustrated about...is the farmers...believed at the time of the settlement that most of them were going to get something...because we thought finding similarly situated white farmers wasn't going to be a problem. And then it turned out to be a problem."
>
> — Judge Paul Friedman, 4/19/2001, *Pigford* Status Hearing

USDA constructed a major obstacle by refusing to provide African American farmers with information from its own files regarding "specifically identified, similarly situated white farmers" in their interactions with USDA. This was a key element required for relief in both tracks, and became the basis for denial of numerous claims.

USDA's practice of concealing this data left most farmers facing the task of obtaining information on similarly situated white farmers on their own. This meant tracking down a specific farmer in their county who applied for the same benefit program at the same time, with the same acreage, the same type of crop, the same credit history, and received a higher payment or better treatment than the African American farmer. This is a feat that even the most sophisticated lawyer would not be able to achieve based on public information alone. When farmers turned to USDA for information, USDA's lawyers often refused, relying on the fact that they had no obligation under the terms of the Consent Decree to release information on similarly situated white farmers to class members.

USDA repeatedly denied Freedom of Information Act (FOIA) requests from farmers. Thus, the African American farmers in the settlement would endeavor to obtain information using a piecemeal

when he/she had filed for benefits. This would provide the general pronunciation, but not necessarily the correct spelling of, the names of white farmers. Then, the farmer's attorney would run the name through public records, searching for property information such as deeds and USDA liens, which would fill in some of the information gaps. This process, however, was often inadequate, as state data systems are not uniform, and detailed information is not widely available through public avenues. Furthermore, this process is time-consuming, and often could not be accomplished within the abbreviated timeline provided by the settlement.

Throughout the course of the settlement, some measures have addressed the problem, but only to a substantially limited degree. Class counsel attorneys, since they represent large numbers of African American farmers, have been able to engage in a limited information exchange based on data gleaned from USDA responses to Track A claims. Arbitrators in Track B cases have started requiring USDA lawyers to provide information on at least three of five white farmers specifically named by farmers in the class. Of course, this still left farmers with the problem of naming such farmers on the basis of non-USDA sources.

If the cases were being litigated in civil court, there would have been rooms full of information on white farmers obtained through discovery. In the absence of documentary discovery, however, cooperation of the USDA was the only option for most farmers in the lawsuit to obtain complete information. Such cooperation was withheld. Without the assistance of USDA, the farmers have found it nearly impossible to obtain enough evidence to prove their claims.

USDA Utilizes Hard-Nosed Tactics in Track B Cases

> "When we were negotiating with Counsel for the Government for the consent settlement, had I had any inkling that each claim would be litigated almost as if it was a class action unto itself, I never would have agreed to it."
>
> — J.L. Chestnut, Attorney for African American Farmers, 4/19/2001, *Pigford* Status Hearing [Excerpt | Full Document]

The Track B mechanism described in the Consent Decree is a procedural shell. It included some basic provisions and deadlines, but provided scarce guidance on procedure. The Court did not adopt the Federal Rules of Civil Procedure or any official set of procedural guidelines. The process essentially relied on an honors system—if both parties agreed to play fair, claimants would reap the benefits of a short, fair settlement procedure superior to the alternative of a civil trial. African American farmers in the settlement and their attorneys had no such luck.

"This same situation has happened to a lot of farmers. They [USDA] find discrimination but they won't pay. They'll fight each one to the end. They'll use taxpayer money to fight against you. The good old boy system is still in place, and working well."

—Linwood Brown, Brunswick County, VA farmer

Reports from the Office of the Monitor, which oversees all claims, note that claimants consistently complain about the "litigious nature of Track B arbitrations" (*Pigford* Monitor 2002, at 18). Judge Friedman even noted that USDA's conduct was not what was anticipated in the settlement, stating "I think that we all believed from the beginning...[that] the government wasn't going to file that many petitions." [Excerpt | Full Document] A petition is a challenge to a decision made in a settlement case. The USDA filed 672 challenges to decisions made in the settlements, engaging in a pattern of litigious handling of settlement claims (*Pigford* Facilitator 2003). During a status hearing, an attorney for the farmers expressed outrage at USDA's duplicity, "If I had known I was negotiating a situation

whereby in Track B cases we would have these monumental struggles over discovery, lengthy Hornbook motions to dismiss, I never would have agreed to that." [Excerpt | Full Document]

Attorneys from large law firms in the Washington D.C. area took on a large number of *Pigford* cases on a *pro bono* basis to assist the farmers' original attorneys in processing claims. They expected a streamlined mediation process, not a trial. What they got was an elaborate motions practice, USDA appeals that repeatedly interrupted the cases, numerous evidentiary objections, delay, and aggressive litigation tactics—contentious litigation at its worst (Legal Times 2002). Attorneys found themselves spending hundreds of hours processing a single African American farmer's claim (Legal Times 2002, 2002a). The firms have devoted thousands of *pro bono* hours litigating this "settlement" Legal Times 2002a).

During the settlement, USDA adopted the position that farmers who missed any deadlines in their cases should face automatic rejection of their claims. In some cases, USDA lawyers would file numerous motions, causing delays in the arbitration process and missed deadlines. Once such deadlines had passed, USDA lawyers would file a motion to dismiss the case for failure to meet the deadlines.

The USDA asserted its strict deadline position in the case of Earl Kitchen, whose case was ultimately heard before Judge Friedman and then the Court of Appeals. USDA argued that the Arbitrator did not have the power to extend deadlines in settlement proceedings, thus, if a class member missed a deadline, his/her case ought to be summarily dismissed. Judge Friedman rejected this argument, finding that Arbitrators had discretion to extend deadlines (*Pigford* 2002a). Kitchen ultimately lost, when the Court of Appeals overruled this decision, holding that the Court can modify the deadlines only to the extent that it is justified by significantly changed circumstances (*Pigford* 2002).

Lawyers for the farmers also faced frivolous motions, or petitions, and hard-nosed litigation tactics at the hands of USDA's attorneys. Such tactics included agreeing to postponements then seeking dismissal for failure to prosecute. Another tactic was to seek recusal of the Arbitrator when faced with sanctions or adverse rulings. USDA has sought to overturn Arbitrator rulings in 12 of the 18 successful Track B farmers' cases (*Pigford* Monitor 2002, at 7).

Conclusion & Recommendations

As an agency with an annual budget of $100 billion, with nearly $40 billion (USDA 2003) designated for financial assistance to farmers, this contentious battle over paying farmers in a settled case is unjustifiable. Congressional intervention is the only solution that remains for these farmers. The U.S. Congress should step in and ensure that this discrimination comes to an end immediately. EWG and NBFA recommend that Congress remedy these inequities by taking the following measures:

(1) Congress should order USDA to provide full compensation to the nearly 9,000 farmers who were denied relief after being accepted into the settlement class;

(2) Congress should order USDA to re-evaluate the merits of the nearly 64,000 farmers' claims that were shut out due to lack of notice of the settlement. All African American farmers who meet the preliminary requirements to qualify as a member of the *Pigford* class should receive the $50,000 payment and debt relief provided by the settlement;

(3) Congress should direct the USDA to institute accountability measures to monitor and enforce civil rights standards throughout the Agency, requiring that in the future the USDA shall exert best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination; and

(4) Congress should ensure the full implementation of outreach and financial assistance programs that support minority farmers.

"I've talked to farmers from all over... and it's nationwide, everybody has dealt with it. I've heard the same type of stories from Midwestern farmers all the way down south. There's a lot of things that still need to happen, still a lot of things the USDA needs to make right."

—Alan Diggs, Southampton County, VA farmer

The history of discrimination that led to the Pigford suit tells the tale of deeply entrenched institutionalized racism. The discrimination that led to the suit still persists in many forms, including even the administration of a civil rights settlement. Instead of a fair facilitation of the settlement, the victimization continues with delay tactics and aggressive litigation strategies. A settlement is a cooperative process, not a small-scale litigation battle. Ultimately, the farmers have not fared substantially better than they would have at a civil trial. A startling 86% of the farmers with discrimination complaints have been unsuccessful and walked away from the settlement with no money and no ability to redress their grievances in a court of law. As for Track B claimants, lengthy litigation and uncertain results are the reality of this settlement. Only 18 claimants of nearly 200 have been successful before the Arbitrator and 20 still await the initial hearing over five years after the settlement was reached. This is not a favorable alternative to civil trial. On the contrary, it is a continuation of the disenfranchisement of the African American farmer at the hands of the USDA.

Small farmers, the group of farmers to which most African American farmers belong, are the backbone of our sustainable agricultural future. By contributing a heightened awareness of the needs of the land, utilizing sustainable practices such as multicropping, and by supporting the growth and wealth of their local communities, small farmers provide an invaluable resource to the agricultural system. Government-subsidized loans and grants are designed to support the small farmer, and provide vital resources to this important segment of the farming industry. In order for this system to operate effectively, it must operate equitably. To discriminate against small farmers, and to further marginalize particular small farmers with racially discriminatory practices in the administration of financial assistance, contravenes the spirit and purpose of these USDA programs.

UPDATE: USDA Refuses to Own Up to Failings of Settlement with African American Farmers

Instead of taking responsibility for the failures of the out-of-court settlement with African American farmers for racial discrimination in its loan and subsidy programs arising from the *Pigford v. Veneman* case, the United States Department of Agriculture (USDA) has attempted to deflect attention from its wrongdoings by blaming the settlement's shortcomings on the United States Department of Justice (DOJ) and the private entities it hired to run the program. In response to a renewed public interest in the progress of the settlement, and in defending a second racial discrimination class action, USDA has claimed that the private monitors are solely responsible for the settlement's surprisingly high denial rates, and that DOJ is preventing USDA from addressing any of the settlement's problems. USDA's response is disappointing and disingenuous. In fact, USDA has spent at least $12 million dollars challenging successful settlement claims. USDA was responsible for the behavior that led to the settlement, and has the duty to ensure that the settlement fairly compensates African American farmers for their resulting losses.

- **USDA Has Only Paid 1 in 4 Dollars of the Settlement's Value to African American Family Farmers.** USDA has responded to concerns about the low payout rate in the settlement

by insincerely stating that it did not promise to pay farmers a specific amount. The Consent Decree between African American farmers and USDA was estimated to be worth $2.25 billion in payments to farmers, but USDA has only paid $650 million in cash payments to farmers. This $2.25 billion estimate appears in a declaration from the attorneys for the farmers, and is cited in the fairness opinion in which the Court approved the proposed settlement. (*Pigford v. Glickman*, 185 FRD 82, 95) Judge Friedman, in assessing the fairness of the settlement, referenced this value, stating, "under the terms of this Consent Decree, the USDA is obligated to pay billions of dollars to African American farmers who have suffered discrimination." (*Id.*) This statement clearly reflects the farmers' and the Court's understanding of USDA's promise. If USDA did not intend to fulfill this promise, it should have made a clear statement challenging this assessment at the time the Consent Decree was under consideration by the federal court, rather than five years after the settlement was reached and approved.

- **African American Family Farmers in the Settlement Faced USDA Opposition in Accessing Vital Information that Could Have Proved Their Claims.** Although USDA has turned attention to the private individuals and companies that were hired to run the settlement to justify the high rate of denials in the settlement, USDA's refusal to provide for access to data on "similarly situated white farmers" created an obstacle which contributed to farmers' disappointing approval rates. According to the Court approving the settlement, farmers in the class were supposed to receive a "virtually automatic cash payment of $50,000," with little or no documentation required, but only 60% of the farmers in the class received this payment. (See *Pigford v. Glickman*, 182 F.R.D. 82, 95 (D.D.C. 1999)) While arguing that African American farmers had to meet exacting standards in proving that they fared worse than specifically identified, similarly situated white farmers, USDA consistently denied access to its files that held this information, making it nearly impossible for most farmers to succeed in the settlement.
- **USDA Challenged the Rulings of the Private Entities that Presided over the Settlement.** Although USDA has recently claimed that the arbitrators and adjudicators that the Department hired to run the settlement were the only entities responsible for the low success rate of the farmers in the settlement, USDA filed numerous challenges seeking to overturn awards to farmers. In fact, USDA's actions prompted the Court to comment on the surprisingly large number of USDA objections to successful claims. USDA filed challenges to at least 686 farmers who were awarded compensation the settlement. Also, DOJ records show that they were paid at least $12 million by USDA to spend some 56,000 legal staff hours challenging farmers' claims after the settlement was reached.
- **USDA Has Acknowledged that African American Family Farmers were Subject to Unfair Treatment in Loan and Subsidy Programs.** USDA is disingenuously relying on the absence of an admission of guilt in the Consent Decree to explain its litigious stance in the settlement process. The fact is that USDA accepted financial responsibility for the damages caused by discrimination underlying the settlement and acknowledged publicly that African American farmers faced discrimination in USDA loan and subsidy programs. USDA's own Office of Inspector General and Civil Rights Action Team (CRAT) reports were cited by the Court in *Pigford* as proof of the underlying discrimination, "The reports of the Inspector General and the Civil Rights Action Team provide a persuasive indictment of the civil rights record of the USDA and the pervasive discrimination against African American farmers." (*Pigford v. Glickman*, 185 FRD 82, 103-4).

The USDA Civil Rights Action Team (CRAT) reported that "[p]articipation rates in ... programs of the former Agricultural Stabilization and Conservation Service, particularly commodity programs and disaster programs, were disproportionately low for all minorities." Civil Rights at the United States Department of Agriculture, A Report by the Civil Rights Action Team, February 1997, p. 21. The report further stated that "one farm advocate at the Halifax, NC, listening session stated that according to information he received through the Freedom of Information Act ...'when hearing officers rule for the agencies, they were competent [upheld] 98 percent of the time, but when they ruled for the farmer, these same hearing officers were incompetent [reversed] over 50 percent of the time.... This is indisputable

evidence of bias and discrimination against a whole class of farmers....'" CRAT at 23-24. The report also found that loan processing times for black farmers were three times longer than for white farmers in southeastern states.

The USDA National Commission on Small Farms reported that "[t]he history of discrimination by the U.S. Department of Agriculture in services extended to [minority] farmers, ranchers, and small farmers, and to small forestry owners and operators, is well documented. Discrimination has been a contributing factor in the dramatic decline of Black farmers over the last several decades." A Time to Act, A Report of the USDA National Commission on Small Farms, January 1998, p. 40.

Over five years after reaching the agreement with USDA that ended the *Pigford v. Veneman* civil rights case, African American family farmers are still struggling within an inadequate settlement program:

- 8,600 of 22,000 farmers in the settlement received nothing;
- 64,000 farmers were turned away without the opportunity to even file a claim; and
- USDA denied farmers access to vital information that could have proved their claims.

These farmers deserve a meaningful remedy that provides an opportunity for all potential claimants to have their cases heard on the merits and allows for consideration of all USDA-held data that may help them prove their claims.

USDA's mishandling of subsidy and loan programs is the sole source of the underlying problem, and USDA is responsible for rectifying this wrong. The settlement has utterly failed to live up to its promise of resolving the problems caused by decades of USDA discrimination against African American farmers. The private companies and individuals that were hired to run the settlement had no hand in USDA's underlying wrongdoings, and they are accountable neither to the public nor to the African American family farmers involved. The Department of Justice, as USDA's legal representative, is required to act in USDA's interests. USDA must accept accountability for its actions, stop pointing fingers at other parties and remedy the problems with the settlement without further delay.

UPDATE:Second Unlicensed Government Lawyer's Illegal Work Mars Controversial Civil Rights Settlement

See related press releases and letter.

Letter to Asst. Attorney General

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
VIA ELECTRONIC MAIL: peter.d.keisler@usdoj.gov

March 24, 2005

Peter D. Keisler
Assistant Attorney General
Civil Division

United States Department of Justice
950 Pennsylvania Avenue, NW
Room 3141
Washington, DC 20530

To the Honorable Assistant Attorney General Keisler:

Environmental Working Group (EWG) and the National Black Farmers Association (NBFA) jointly request a complete audit of the validity of the law license of every Department of Justice (DOJ) attorney who worked or who is still working on the *Pigford v. Veneman* matter. We also seek an opportunity for all black farmers affected by any illegally practicing attorney in your employ to seek reconsideration of their cases.

As a licensed attorney yourself, you surely appreciate the gravity of the problem that arises when two employees working in the same DOJ division on the same case come under investigation for illegally posing as licensed lawyers. A 30-second Internet search would have revealed the status of these individuals' licenses and could have prevented this sort of wrongdoing from affecting civil rights.

After facing decades of systemic discrimination at the hands of the federal agency charged with providing assistance to all American family farmers, black family farmers have faced continued obstruction in an out-of-court settlement supposedly devised to address the Department of Agriculture's (USDA's) wrongdoing. What comes as the greatest tragedy, though, is that six years after the case was settled and some 81,000 black farmers have been denied access to justice in the course of the settlement, black farmers have now learned that DOJ's quality-control system was so inadequate that at least two DOJ attorneys involved in the *Pigford* case are being investigated for fraudulently practicing law without a license.

As you know, one of these attorneys, Margaret O'Shea, reportedly never held a license to practice law, though she represented DOJ for six months in the settlement as a "general attorney." O'Shea has been indicted for illegally posing as an attorney in a criminal case that is currently before a judge in Monterey County, California. The judge has ensured that all individuals who were defrauded by Ms. O'Shea have been given the opportunity to have their cases reconsidered in light of Ms. O'Shea's illegal practice.

On December 16, 2004, EWG wrote you a letter requesting that black farmers in the *Pigford* settlement be given the same opportunity. We have not yet received a reply to that request.

We have now learned that another attorney, Michael Sitcov, the Assistant Director in the Federal Programs Branch of the Civil Division, may have illegally played an instrumental role in DOJ's participation in the settlement. According to DOJ timesheets, he logged at least 389 hours on the case while unlicensed, and he is currently under investigation by the DOJ Office of Professional Responsibility for unauthorized practice of law from 2002-2004. Once the investigation is complete, DOJ must notify all of the courts before which Mr. Sitcov practiced during his suspension of his status.

Overall, DOJ lawyers or people claiming to be lawyers spent at least 56,000 hours challenging black farmers' claims in the *Pigford* settlement. DOJ represented USDA in court and in settlement proceedings, obtaining denials in 40% of the cases, and filing over 600 challenges to payments awarded to the farmers in the settlement. The farmers in the settlement negotiated in good faith with people they believed were licensed DOJ attorneys.

The black farmers involved in the *Pigford* settlement have had to fight for decades against illegal racist practices carried out by USDA, and in the context of what should have been a straightforward claims processing program, have faced an outright battle with DOJ attorneys. Now, after learning that the DOJ attorneys who vigorously challenged their claims might not have even held valid licenses to

practice law, they face yet another setback in their case that profoundly betrays the public trust.

DOJ's negligence in performing the simplest and most essential of background checks on its employees creates the impression of a departmental culture of carelessness and casts doubt on the credibility of its other employees' credentials. DOJ's hypocrisy in employing unlicensed attorneys to take such aggressive action in blocking "virtually automatic" payments to farmers who have already faced discrimination is shocking. This case was supposed to rectify USDA's discrimination against black farmers, not add to it.

We await your response.

Kenneth A. Cook
President
Environmental Working Group

John Boyd
President
National Black Farmers Association

RELATED LINKS

- Michael Sitcov's DOJ Timesheets
- Michael Sitcov's Affidavit
- O'Shea Indictment

News Release: 24 MAR 2005

For Immediate Release
March 24, 2005

EWG Public Affairs, 202-667-6982
John Boyd, NBFA 804/691-8528

Second Unlicensed Government Lawyer's Illegal Work Mars Controversial Civil Rights Settlement

Pattern Prompts Groups to Ask for Background Checks, Demand Settlements be Reopened

WASHINGTON — Federal court documents reveal that the leading Department of Justice (DOJ) attorney in a federal racial discrimination case, Michael Sitcov, faces a DOJ Office of Professional Responsibility investigation for practicing law for two years without a license.

Sitcov is the second unlicensed DOJ lawyer assigned to the controversial Pigford v. Veneman case, in which the U.S. Department of Agriculture (USDA) agreed to settle out of court for decades of racial discrimination against black farmers. DOJ was hired by USDA to fight claims that were supposed to be settled, drawing congressional criticism for the agencies' treatment of black farmers. Since September 28, 2004, the House Judiciary Constitution Subcommittee has held three hearings to investigate why tens of thousands of black farmers were denied a hearing or relief under the settlement.

In December 2004, the District Attorney in Monterey County, California, filed criminal charges against another unlicensed attorney, Margaret O'Shea, who fought settlements in the same lawsuit.

Public documents show that after paying his dues for over two decades, Sitcov stopped paying them and had his law license suspended by the District of Columbia Bar from October 1, 2002, through November 7, 2004.

It is illegal to practice law without a license.

Records show that Sitcov billed taxpayers for at least 1, 096 hours on the Pigford case, including 389 hours during the period when he was unlicensed.

EWG General Counsel Arianne Callender said, "The Department of Justice has sought to hold often low-income black farmers in this settlement to the highest of standards, but has failed to make even the simplest effort to ensure that the attorneys working on these cases were legitimate. It takes a thirty-second web search to find out whether an attorney has a license. The discovery of a second unlicensed attorney assigned to work on these cases at DOJ creates the impression of a culture of sloppiness that is just unacceptable."

National Black Farmers Association (NBFA) President John Boyd said, "Not only did the Department of Justice fight claims that the Department of Agriculture had supposedly settled, but it had two unlicensed lawyers doing it."

EWG and the NBFA wrote to Peter Keisler, Sitcov's supervisor, to ask him if he had a license, and if the rest of the staff working on the settlements had a license.

The groups further request that all cases that Sitcov, O'Shea and any other unlicensed attorneys worked on be reopened.

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The EWG/NBFA investigation, "Obstruction of Justice," is available online at http://www.ewg.org/reports/blackfarmers.

EWG is a not-for-profit research organization that uses the power of information to protect human health and the environment.

NBFA has been fighting to save the black farmers and small farmers since 1995.

UPDATE:Woman Illegally Posing As Attorney Involved With Fighting Claims From Wronged Farmers

20

See related press releases and letter.

Letter to Asst. Attorney General

December 16, 2004

Peter D. Keisler

Assistant Attorney General

Civil Division

United States Department of Justice

950 Pennsylvania Avenue, NW

Room 3141

Washington, DC 20530

To the Honorable Assistant Attorney General Keisler:

America's black farmers deserve better than to face illegal discrimination at the United States Department of Agriculture (USDA), then a bitter out-of-court legal battle with a "Justice" department that carelessly assigns an unlicensed lawyer to challenge their settlement claims. A former Department of Justice (DOJ) lawyer, Margaret O'Shea, who was assigned to the Pigford racial discrimination settlement between black farmers and the USDA, is facing charges from the Monterey County District Attorney's Office for allegedly practicing law without a license and grand theft via fraud. A Monterey County judge has frozen all rulings in cases in his jurisdiction that O'Shea was assigned to, and USDA ought to do the same. Environmental Working Group calls for DOJ to take immediate action to redress this problem. Black farmers in the settlement have a right to know whether O'Shea, or any other unlicensed DOJ attorney was assigned to their case, and they deserve the opportunity to have their cases reconsidered if unlicensed attorneys handled their settlement claims.

Margaret O'Shea was reportedly assigned to the Pigford settlement from July until September of 2002. Personnel records indicate that she was hired by DOJ as a "general attorney" after claiming that she was a member of the California bar. A simple web search would have confirmed that she was not, in fact, a licensed attorney in California. With the civil rights of family farmers at stake, it is shocking that DOJ may have overlooked this potential fraud within its own ranks. This situation, however, leads one to question whether there are other lawyers who have obtained attorney jobs in DOJ's Civil Division without having passed the bar.

DOJ was hired by USDA to spend 56,000 hours challenging black farmers claims in the out-of-court settlement that was designed to provide a "virtually automatic" $50,000 to farmers who faced discrimination. DOJ represented USDA in court and in settlement proceedings, obtaining denials in 40% of the cases, and filing over 600 challenges to payments awarded to the farmers in the settlement. The farmers in the settlement had good reason to believe that the DOJ lawyers assigned to their cases were licensed. Now that information has surfaced to the contrary, these farmers have a right to know what work unlicensed lawyers

performed on their cases, and to seek reconsideration of rulings where an unlicensed DOJ lawyer was assigned to work on their case.

At a November 18, 2004 Subcommittee on Constitution Oversight Hearing investigating the settlement, Chairman Steve Chabot (R-OH) remarked that "from the time this Subcommittee began examining this issue, we have had more reasons than not to believe that the government has failed to 'do the right thing.'" Environmental Working Group calls for DOJ to "do the right thing":

- **Notify all farmers in the settlement of whether O'Shea, or any other unlicensed DOJ lawyer was assigned to their case, and describe what work the unlicensed lawyer performed on the case; and**
- **Direct the Monitor to reconsider all denials of farmers' claims where O'Shea or any other unlicensed DOJ lawyer misrepresented him/herself as a licensed attorney or engaged in unauthorized practice of law.**

Anything less will be a disservice to the black family farmers affected by this potential fraud, and to all citizens who rely upon DOJ for a careful and honest administration of justice.

Sincerely,

Kenneth A. Cook

News Release: 16 DEC 2004

For Immediate Release
December 16, 2004

Liz Moore, EWG, 202-667-6982

Environmental Working Group and the National Black Farmers Association Call on the Department of Justice to Reopen Civil Rights Claims

Woman Illegally Posing As Attorney Involved With Fighting Claims From Wronged Farmers

WASHINGTON -- Environmental Working Group (EWG) and the National Black Farmers Association today called on the US Department of Justice (DOJ) to retry USDA discrimination settlement claims after a former DOJ lawyer, Margaret O'Shea, was charged Monday by the Monterey County District Attorney with practicing law without a license.

The DOJ was hired by the United States Department of Agriculture (USDA) to fight claims by black farmers that the USDA had originally agreed to pay after admitting past civil rights abuses. USDA settled with black farmers in 1997 and agreed to provide a "virtually

automatic" payment of $50,000 to those who had faced discrimination.

Since then, the USDA has fought these claims they agreed to pay. DOJ represented USDA in court and in settlement proceedings, obtaining denials in 40 percent of the claims, and spending 56,000 hours and $12 million filing over 600 challenges to payments awarded to the farmers in the settlement. O'Shea was specifically assigned by the DOJ to work on these claims.

"The DOJ could have done a simple search and verified that O'Shea was not an attorney," said Arianne Callender, general counsel for EWG.

"Now, at the very minimum, the DOJ should rely not on their collective memories, but actually check their records, see which of these claims involved O'Shea, and reopen those claims."

O'Shea worked for six months for the DOJ in Washington after indicating that she was a licensed attorney in California. O'Shea has never been licensed to practice law in California and is being charged with fraud for accepting payment on the premise that she was an attorney. A search of the website for the State Bar of California (http://www.calbar.ca.gov/state/calbar/calbar_home.jsp,) which goes back several decades, does not turn up O'Shea's name.

"I think it's a crying shame the government would put an unlicensed attorney on the case, and make the American taxpayers pay for it," said John Boyd, president of the National Black Farmers Association.

"All those cases need to be reviewed."

The EWG investigation, Obstruction of Justice: USDA Stonewalls African American Farmers in Landmark Civil Rights Settlement, is available online at http://www.ewg.org/reports/blackfarmers.

RELATED FILE: View EWG's FOIA Request

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The Environmental Working Group is a nonprofit research organization based in Washington, DC that uses the power of information to protect human health and the environment.

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Groups Press Justice Department To Reopen Discrimination Cases Brought By Black Farmers

Unlicensed Lawyer Handled Six Cases For Government

(Washington, February 4) — Environmental Working Group (EWG) and the National Black Farmers' Association (NBFA) today call for the reexamination of racial discrimination settlements that were fought by a US Department of Justice (DOJ) employee who now faces criminal charges for practicing law without a license.

The claims were filed by black farmers against the US Department of Agriculture (USDA) and handled by Margaret O'Shea, who is now being prosecuted for practicing law without a license. The Bush Administration has repeatedly refused to comment on O'Shea's work on the farmers' cases while an employee at the DOJ.

Documents obtained through a Freedom of Information Act (FOIA) request show that Margaret O'Shea lied on her job application to the Department of Justice (DOJ) and was hired as a lawyer despite not being licensed to practice law. The documents also reveal that O'Shea was exclusively assigned to work on the cases of six black farmers who were part of a landmark class action lawsuit in which the US Department of Agriculture agreed in a settlement to pay for decades of racial discrimination.

EWG and NBFA want the DOJ to explain the role that O'Shea played in settling these farmers' legal claims while posing as a licensed attorney for the Department of Justice.

The groups call on the Monitor of the settlement program to reexamine those individual cases to ensure those farmers a fair chance at justice. They further ask DOJ to perform proper background checks to assure that all other employees who worked as lawyers on up to 22,000 farmers' cases were indeed licensed to practice law.

Arianne Callender of EWG said, "Margaret O'Shea worked to challenge these six farmers' claims after the Department of Agriculture admitted to systematically discriminating against them for decades. To learn that she was not even licensed to practice law while she did so adds insult to injury."

NBFA President John Boyd said, "These six farmers deserve to have their cases reexamined by the settlement's Monitor."

The documents EWG obtained include O'Shea's resume and job application where she claims to be licensed to the California bar, and the DOJ new hire form showing that she was hired as an attorney specifically to work on the discrimination case. These documents, the criminal charge pending against O'Shea and EWG's report about the settlement, co-authored with the NBFA, "Obstruction of Justice," are available at http://www.ewg.org.

RELATED DOCUMENT: DOJ Records (uncovered by EWG FOIA request)

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EWG is a not-for-profit research organization that uses the power of information to protect human health and the environment.

NBFA has been fighting to save the black and small farmers since 1995.

Testimonials

African American Farmers' Accounts of USDA Discrimination

CALVIN KING

USDA Refused to Even Provide Mr. King with an Application

Calvin King visited USDA's local Lunenburg County Farm Services Agency (FSA) office in Kenbridge, VA in January 1981 to apply for a loan to purchase 27 acres of timber land adjacent to the farm where his parents had been sharecroppers since the early 1900s. The FSA official refused to even provide King with an application, telling him that no funds were available for his loan. "It was common knowledge that certain white farmers got better treatment. Everyone knew that the white farmers were getting loans while [black farmers] weren't. They were not far from us, just down the road, and it was just generally known that they were getting money from [USDA] but we weren't," says King.

King Joins the Civil Rights Settlement and is Denied the "Automatic" Payment, Appeal Still Pending More Than Five Years Later

After learning of the *Pigford v. Veneman* class action settlement, King sought restitution by joining the settlement in June 1999. He was assigned to Track A, the "automatic" $50,000 track, but his claim was ultimately denied. USDA's refusal to provide King with an application became a major obstacle in his case. He was left with no record that he applied for a loan, "If they'd offered an application, at least they'd have something on file. When you buy a car or go for a job at least they give you an application to fill out."

USDA's practice of withholding information on similarly situated white farmers who received loans also became an insurmountable hurdle for King. USDA refused to provide any information to King, despite having the data within its own files. King attempted to navigate the maze of public documents to prove his case, but failed. King named two similarly situated white farmers in his claim, one of whom he was certain was receiving loans, and another whom he was reasonably sure received loans and owned a large farm several miles from his parents' farm. He later learned that one of the farmers was actually leasing the farm to a white neighbor who operated the next farm over and several other farms in the area, "Had I listed [the other farmer] I would've been ok, but since I named [the land owner], I got denied. That was a mistake I made with the name, and that resulted in the denial. It seemed logical at the time that I assumed [the landowner] was receiving the [USDA] loans. But it's hard to tell in this area where one farm begins and another ends or who is farming what or who owns what. There are no clear boundaries like in the suburbs."

Calvin went back to the Kenbridge, VA FSA office in May 2000 attempting to define the boundaries between the farms, and met with further obstruction. "I wanted to demonstrate to them that the two farm operations were connected just to show how I had gotten the name confused. In the process, the FSA office denied me some basic information that should've been released, such as whether or not the farms were connected, and how. And who was the farmer that farmed the land that year," says King. He explains, "It seems to me that they withheld information that they should not have withheld from me ... but I was not given anything." Ironically, says King, "the FSA office in Fredericksburg, VA ... provid[ed] me with information ... about two black farmers ... if the black farmers' information was released

to me, the white farmers' information should have also been released."

In November 2000, King challenged the denial of his claim. Although his settlement claim was filed over five years ago, no decision has been made on his appeal, and Calvin's case remains unresolved today.

King Files New Complaint for Retaliation by USDA for his Participation in the Settlement

King faced retaliation due to his participation in the *Pigford* civil rights settlement, and filed a subsequent discrimination complaint with USDA. King explains, "I filed an additional complaint against USDA because of ongoing discrimination I experienced after the *Pigford* suit, and probably because of my involvement in the *Pigford* suit. After *Pigford*, I was continually discriminated against." King's experience is that "USDA is not applying the same standard to black farmers that it is applying to white farmers, and that constitutes an act of discrimination against me and all black farmers. USDA law is the same all over the country. The law is the law, and it should be applied equally throughout the land."

LINWOOD BROWN

USDA's Late Payments Caused Crop Yields to Dwindle

Linwood Brown sought assistance from the Farm Services Agency (FSA) in Brunswick County, VA, from 1980 through 1994. Brown's farm, at the time, consisted of about 80 acres, upon which he grew corn, soybeans and tobacco. Brown is the fifth generation to farm his land, which his relatives worked as slaves. "The old slave house is still here on the property," says Brown.

In Brown's experience in applying for USDA crop loans, USDA would withhold payments until it was too late to harvest the crops, creating a cycle that continually decreased the size of his yields, "I'd apply for assistance around the first of the year, but wouldn't receive the money until June or July. That wasn't enough time to plant the seeds, put the fertilizer and chemicals on at the right time, do all the things you needed to do. So then your yields would suffer, and you'd only get, say, 80% of your crop. Then they'd use that against you in future years saying your yields were low so you can't get the money you need to farm the land." Though he applied for assistance at the same time as area white farmers, Brown's checks would arrive months later, while his white counterparts received faster turnaround. Brown states, "it was a constant struggle for us."

In Brunswick County, African American farmers were required to report to a supervisor to obtain payments expense-by-expense while white farmers were paid in a lump sum. As Brown explains "the black farmers had a supervisor of their [FSA] bank account, where you had to take your bills and receipts to prove that you needed the money. You could only go to the supervisor's office on Wednesday. The white farmers just picked up their check and put it in their pocket, they had no supervision, no questions asked."

Civil Rights Settlement Failed to Provide Restitution

Linwood Brown was part of the *Pigford v. Veneman* lawsuit, but chose to opt out.

"That process left the burden on the farmer to prove his case. You had to have hard facts to prove you were discriminated against. I went through that and won a partial settlement. But it's not fully resolved. USDA was supposed to come back and pay for the other years that

they discriminated against me, but that never took place." Linwood explains, "this same situation has happened to a lot of farmers. They [USDA] find discrimination but they won't pay. They'll fight each one to the end. They'll use taxpayer money to fight against you. The good old boy system is still in place, and working well."

Brown laments the land loss that has plagued African American farmers denied USDA loans and subsidies, "the saddest days of my life I spent watching USDA selling these people's farms. To see that, it was unexplainable. I went and saw some of the sales, when they auction off the black farms. USDA would literally sell the farm and leave the family sitting there under the tree, watching somebody move onto their farms they've been living and working on for generations, some since slavery. Now they don't have a place to call home. When you witness what they are doing here, it doesn't look like you live in America. You just won't believe that this kind of thing, this discrimination, is happening to poor struggling farmers here in America. But it has... it still is. It's still the same today."

LEON PULLEY

Local USDA Office Repeatedly Turned Away African American Farmer and Delayed Fulfillment of Loan

Leon Pulley owns a farm in Butler County, Missouri, where he has grown milo and soybeans for two decades. Between 1994 and 1996, USDA repeatedly delayed loan payments, severely limiting the profitability of his crops. "The way it usually works is that you would file for Farm Service Agency (FSA) assistance in February. You're supposed to get your money in March or April in order to have enough resources to plant on time to reach harvest before the fall rains and frost come. White farmers were getting their money on time, every time. But not the black farmers," says Pulley. USDA delayed payment until as late as September for several consecutive years.

Pulley also experienced obsfucation at the hands of local USDA FSA representatives, "You'd go in, they'd tell you they were busy, to come back later, and so you would come back later and they'd say the same thing again. I got told that every time," Pulley explained. Pulley believes these practices were only aimed at African American farmers, "They [FSA representatives] weren't letting some people get money at all, and others would get the money too late so they couldn't set up in time to harvest so got bad or no crops." Pulley knew of two or three white farmers in similar farm situations who got their money on time, and contends that discrimination is to blame for the disparity.

Pulley signed up for the class action lawsuit and was admitted to Track B. To his disappointment, his case was never heard. He says that his lawyers were inadequate and his case "just fell through the cracks."

Unfair Treatment by USDA Continues

Leon has continued to seek help through USDA programs. Last year, he was turned away and told there was no money. This year, he applied and was also rejected. Leon has reduced the amount of land he actively farms to 20 acres, and has put the remainder of his farm into the wetlands conservation program. Ever since 1996, he has been paying USDA $154 a month toward the debts he has accumulated over the years, debt which, ironically, was accrued largely due to USDA's unjust delays of his loans.

LEROY McCRAY

Rejected Twice by USDA, McCray Nearly Gave up on Farming Altogether

Leroy McCray applied to the Farm Services Agency (FSA) around 1990, requesting $5 million in working capital and equipment loans to set up a chicken farm in Sumter County, SC. The local USDA FSA official met with McCray, telling him that no money was available. "They told me to go look for a private loan," he recalls. This story was not what his white neighbors were told, "I knew there were 7-8 white farmers in my area with chicken farms who were getting the money, the same type of loan that I wanted. And they only had high school education and limited or no farming experience when they got their loans. I was a college graduate with lots of experience with different farm animals and operations, and I was getting denied. It didn't make any sense." USDA denials stifled McCray, "I never even got the chance to start the chicken farm like I wanted. I just gave up." Several years later, he applied for another loan, McCray says, "They didn't even take the application I had filled out because they just said there was no money available."

Settlement Presented Difficult Compromise

McCray learned of the civil rights settlement with USDA, and chose to pursue relief through Track A, though he felt that it would not make him whole. "It wasn't an easy decision, I didn't want to just take the $50,000. I wanted to go for the $5 million they had denied me, but it seemed like it would never be resolved if I did that." McCray is one of the few farmers who received relief under the settlement. Despite his success, McCray does not expect USDA's treatment of African American farmers to change. "It's not any better, it's still the same as it was. It's the same plot."

ALAN DIGGS

Local USDA Officials Used Common Tactic of Withholding Paperwork to Delay Loans

Alan Diggs and his brother Milton Diggs farm together as the Diggs Bros. Partnership in Southampton County, VA farm. Their story of discrimination is similar to many other African American farmers' accounts: complicated mountains of paperwork, processing delays, and late payments.

Diggs would witness his white neighbors being treated differently by USDA's local FSA officials. "The FSA officer would trickle the paperwork out one piece at a time to black farmers, there'd be 10-15 days in between communications, then another piece of paperwork would be in the mail, 3-4 days lag time, then you fill it out and keep coming back and then there's another paper to fill out. Another figure, another number they needed from you. White farmers were already getting their work done, they weren't getting the extra paperwork we did. They'd get a full package, fill it out, and in ten days to two weeks they'd have their money."

Diggs has survived in farming while many African American farmers have been forced out of farming, "We might be the only black farmers of size doing this any more, a lot of people have dropped out of farming because it's such a hassle, some of the white supervisors in the office try to make it hard. If USDA had made it easier for the black farmers, they might still be in business now. In a sense they just ran them out of business."

USDA Failed to Live up to Promises Made in Settlement

Alan Diggs received $50,000 in the *Pigford* settlement, but remains disappointed by the treatment he received from USDA throughout the process. Diggs explains, "When the settlement came out, USDA said you were entitled to $50K and they would write off all your debt. I got the $50K but they only wrote off a portion of the debt I owed. During the Monitor review, when I put in an appeal, they tried to tell me that the years that they did not write off were years I wasn't discriminated against. But that's not what they said they were going to do. They said they'd write off all your debt. But they didn't." Diggs believes that priorities shifted during the course of the settlement, "The Bush Administration put this thing on the back burner when they took office. When Bill Clinton was in office, it was a front burner issue. But that changed when Bush got in there."

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Environmental Working Group and the National Black Farmers Association Call on the Department of Justice to Reopen Civil Rights

http://www.ewg.org/reports/blackfarmers/release20041216.php

Table: Nearly 9,000 Black farmers were denied "Automatic" payments by USDA — All 50 States

Nearly 9,000 Black farmers were denied "Automatic" payments by USDA — All 50 States

State	Number Eligible	Receiving "Automatic" Awards		Denied "Automatic" Awards	
		Number Receiving Awards	Percent Receiving Awards	Number Denied Awards	Percent Denied Awards
Alabama	4,511	3,096	69%	1,415	31%
Alaska	2	2	100%	0	0%
Arizona	6	2	33%	4	67%
Arkansas	1,986	1,293	65%	693	35%
California	232	127	55%	105	45%
Colorado	11	4	36%	7	64%
Connecticut	10	3	30%	7	70%
Delaware	3	2	67%	1	33%
District Of Columbia	26	13	50%	13	50%
Florida	472	248	53%	224	48%
Georgia	2,960	1,757	59%	1,203	41%
Hawaii	1	1	100%	0	0%
Idaho	1	1	100%	0	0%
Illinois	282	144	51%	138	49%
Indiana	39	13	33%	26	67%
Iowa	1	0	0%	1	100%
Kansas	48	24	50%	24	50%
Kentucky	118	54	46%	64	54%
Louisiana	991	478	48%	513	52%
Maine	0	0	0%	0	100%
Maryland	66	32	49%	34	52%
Massachusetts	6	3	50%	3	50%
Michigan	148	72	49%	76	51%
Minnesota	15	5	33%	10	67%
Mississippi	4,373	2,643	60%	1,730	40%
Missouri	147	80	54%	67	46%
Montana	0	0	0%	0	100%

Nebraska	2	2	100%	0	0%
Nevada	9	6	67%	3	33%
New Hampshire	0	0	0%	0	100%
New Jersey	57	34	60%	23	40%
New Mexico	3	0	0%	3	100%
New York	58	33	57%	25	43%
North Carolina	1,989	910	46%	1,079	54%
North Dakota	0	0	0%	0	100%
Ohio	42	20	48%	22	52%
Oklahoma	794	541	68%	253	32%
Oregon	1	1	100%	0	0%
Outside U.S.	36	26	72%	10	28%
Pennsylvania	22	13	59%	9	41%
Rhode Island	0	0	0%	0	100%
South Carolina	1,274	793	62%	481	38%
South Dakota	0	0	0%	0	100%
Tennessee	663	407	61%	256	39%
Texas	437	287	66%	150	34%
Utah	2	1	50%	1	50%
Vermont	0	0	0%	0	100%
Virginia	292	146	50%	146	50%
Washington	6	4	67%	2	33%
West Virginia	0	0	0%	0	100%
Wisconsin	25	13	52%	12	48%
Wyoming	0	0	0%	0	100%
National Total*	**22,181**	**13,411**	**61%**	**8,770**	**40%**

*** Note: Information in this table is based upon data received from the Office of the Monitor on 4/26/2004. The 7/12/2004 report from the Office of the Monitor states that the total number of awards received is now 13,429.**

Table: Farmers Seeking Entry Under

Court-Mandated Extension - All 50 States

Farmers seeking entry under court-mandated extension

State	Rejected	Granted	Total
Alabama	14,268	294	14,562
Alaska	126	0	126
Arizona	75	0	75
Arkansas	1,430	70	1,500
California	1,495	30	1,525
Colorado	53	1	54
Connecticut	137	1	138
Delaware	7	0	7
District Of Columbia	72	7	79
Florida	908	34	942
Georgia	3,228	81	3,309
Hawaii	8	0	8
Idaho	0	0	0
Illinois	2,864	29	2,893
Indiana	350	1	351
Iowa	71	1	72
Kansas	125	1	126
Kentucky	77	3	80
Louisiana	2,312	21	2,333
Maine	0	0	0
Maryland	241	11	252
Massachusetts	84	2	86
Michigan	1,219	11	1,230
Minnesota	33	4	37
Mississippi	18,983	286	19,269
Missouri	299	2	301
Montana	0	0	0
Nebraska	33	0	33

Nevada	65	6	71
New Hampshire	0	0	0
New Jersey	389	6	395
New Mexico	13	0	13
New York	550	14	564
North Carolina	2,448	1,012	3,460
North Dakota	3	0	3
Ohio	410	10	420
Oklahoma	3,309	51	3,360
Oregon	14	0	14
Outside U.S.	74	1	75
Pennsylvania	133	4	137
Rhode Island	2	0	2
South Carolina	1,826	70	1,896
South Dakota	0	0	0
Tennessee	4,642	24	4,666
Texas	853	21	874
Utah	28	0	28
Vermont	0	0	0
Virginia	252	18	270
Washington	25	2	27
West Virginia	1	0	1
Wisconsin	280	2	282
Wyoming	1	0	1
National Total	**63,816**	**2,131**	**65,947**

Federal Court Statistics:
Dismissals Rates of Civil Rights Claims
by the Fourth, Fifth, and Eleventh Circuit Courts of Appeal[1]

Summary

H.R. 899 (**Scott-Chabot Bill**) by merely authorizing a federal civil cause of action for time barred black farmers under the **Pigford** consent decree of 1999 does not provide an adequate remedy for **Pigford** claimants that deserve full restitution. Statistical reports, compiled by the Federal Judiciary, disclose the following:

Civil Litigants – Courts of Appeals

Among civil cases brought before the Fourth, Fifth, and Eleventh Circuit Courts of Appeal:

(1): Between April 1, 2005 and March 31, 2006 --- 4,305 civil cases were commenced – of those 3,521 were private civil litigation suits

(2): Between April 1, 2005 and March 31, 2006 --- 4,217 civil cases were dismissed – of those 3,485 were private civil litigation suits

Conclusion: Between April 1, 2005 and March 31, 2006, 98% of all civil cases commenced in the Fourth, Fifth, and Eleventh Circuit Courts of Appeal were dismissed – of those only 1% (36) of private civil litigation suits were not either procedurally terminated or terminated on the merits

(3): Between April 1, 2005 and March 31, 2006 --- 2,091 civil cases were terminated on the merits – of those 1,666 (80%) were private civil litigation suits

(4): Between April 1, 2005 and March 31, 2006, of the 1,666 private civil litigation suits terminated on the merits, 888 (53%) were dismissed after submission of briefs and 778 (47%) were dismissed after an oral hearing

(5): Between April 1, 2005 and March 31, 2006 --- of the 1,666 private civil litigation suits terminated on the merits, 1,363 (82%) were affirmed, 79 (4.7%) were dismissed, and only 205 (12.3%) were reversed

(A): Between April 1, 2005 and March 31, 2006 --- of the 425 U.S. civil litigation cases terminated on the merits only 8.9% (38) were reversed with 387 cases either affirmed or dismissed

Conclusion: If Pigford claimants can successfully traverse judicial roadblocks and come within the 1% of private civil litigants that are not either procedurally

[1] All statistics are provided by the Federal Judiciary at www.uscourts.gov/library/statisticalreports.html. Federal Judicial Caseload Statistics is the relevant report that is the basis for this memorandum.

terminated or terminated on the merits, and if they succeed on their claims, at least they can rest soundly knowing that their cases will be affirmed. However, for the remaining 99% of private civil litigants that fail in presenting their claims, only 12% will succeed in getting a reversal – not a favorable prospect.

Civil Rights Litigants – District Courts

The Federal Judiciary does not compile detailed statistics on the dismissal rate of particular civil rights claims, such as §§1981, 1983, or Title 7 claims, but it does provide general statistics on the success rate of civil rights claims in the Federal District Courts. The statistics compiled by the Federal Judiciary is revealed below:

Among civil rights cases commenced in the District Courts of the Fourth, Fifth, and Eleventh Circuit Courts of Appeal:

(1): Between April 1, 2005 and March 31, 2006 --- 140,033 private civil cases were commenced or pending, of those 80,377 (57%) were terminated, leaving 59,656 cases pending

(2): Between April 1, 2005 and March 31, 2006 --- 72,327 civil rights claims were commenced or pending, of those, for claims commenced in 2006, 31, 241 were federal questions cases, 2,065 were U.S. cases where the United States was a defendant, and 199, were diversity of citizenship cases

(3): Between April 1, 2005 and March 31, 2006 --- 13,770 civil rights claims (excluding employment claims) based on federal question jurisdiction were terminated, of those 10,589 (77%) were terminated before pretrial, while 2,566 (23%) were terminated during or after pretrial

(A): Only 3.4% (615) of all civil rights claims based on a federal question reached trial – these figures are not limited to the Fourth, Fifth, and Eleventh Circuit Courts of Appeal but apply to all United States District Courts

(B): Only 1% (11) of all civil rights claims (1,091) (excluding employment claims) where the United States is a party reached trial – 822 (75%) were terminated, of which 747 (90%) were dismissed before pretrial and 64 (10%) were dismissed during or after pretrial

Conclusion: The Scott-Chabot Bill by merely granting Pigford late-filers a cause of action in federal court does not address the concern that only 3% of civil rights claims based on federal question jurisdiction reach trial with most either dismissed pretrial (77%), or dismissed during or after pretrial (23%)

Conclusion: Because the rate of success for federal civil rights litigants is exceedingly small, the Scott-Chabot Bill would do better to work within the existing

administrative framework outlined in the Pigford consent decree and support H.R. 558 in order give to Pigford claimants their full restitution

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, COMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

On April 14, 1999, I stood in victory with Black farmers across this country. The United States Department of Agriculture (USDA) agreed to a $1 billion settlement in the *Pigford v. Glickman* case. Each black farmer was to receive at least $50,000 to settle claims that they were denied government loans because of their race. However, this groundbreaking victory for civil rights proved be short lived. Black farmers would soon face major obstacles in obtaining settlement payments and more allegations of discrimination by the USDA would surface. These allegation have included shocking claims of retaliation by USDA through its office of Inspector General.

Now, eight years and multiple lawsuits later, the nation's black farmers have not yet complete the *Pigford* claims process. In 2003, black farmer groups filed another lawsuit against the USDA alleging that the agency conspired to take their land through racial discrimination in government farm loans and programs. A report by the Environmental Working Group, issued in July 2004, gives strong credibility to the black farmers' recent claims that the USDA purposefully makes insufficient and late operating loans to Black farmers in order to later foreclose on their land.

Given the continuing nature of complaints against the USDA, this hearing is extremely well timed. It is incumbent on Congress to ensure that the goals of the *Pigford* settlement have been met by the USDA. Unlike most litigation, where Congress watches from the outside, we have taken a more active role here by extending the statute of limitations and allowing claims to move forward.

I was disturbed to learn that USDA has denied payments to almost 90% of black farmers. Of the 94,000 growers who sought restitution for discrimination, 81,000 were turned away. The most glaring denial of compensation is the settlement-funded arbitrator's rejection of 64,000 farmers who came forward with claims during the late claims process established by the court.

Since the Court in approving the settlement described the claims process as almost "automatic," we need to understand what has gone wrong and the nature of our role in putting the process back on track.

Also of concern to me in the *Pigford* settlement, is that black farmers were limited in their ability to bring sufficient claims because they were denied discovery rights. While the Track B arbitration process called for the disclosure of witnesses, the settlement's consent decree included no other provisions for information exchange between the parties.

As a result, the farmers had to prove discrimination without the benefit of access to information held in USDA files. This lack of access to information prevented black farmers from identifying similarly situated white farmers, a requisite to prove discrimination.

I do not believe that such issues were the intended results of *Pigford*.

Today, I hope to not only gain a better understanding of where we are in the *Pigford* process, but the overall plight of our nation's Black farmers as well. In 1910 Black farmers owned about 16 million acres of land. Today, Black farmers own fewer than 2 million acres. In 1920 there were nearly 1 million Black farmers, but fewer than 20,000 exist today.

Yesterday, in *The Washington Post,* a front page article pointed out that in the Mississippi Delta—where a large section of this nation's farms are located—95 percent of the agricultural subsidies went to large, commercial farms primarily owned by whites despite the fact that the majority of residents in that region are black. This is a situation that demands attention.

Today I stand alongside these farmers in demanding that their livelihood and civil rights be protected. Time is of the essence, as records will diminish and black farmers will be gradually forced out of their chosen profession. We must act now to provide an opportunity for the *Pigford* claimants to have their opportunity to be heard and receive appropriate monetary relief. We will not only fail our Black farmers if we do not address their plight, but all of society, because the principles of equality and fairness should be afforded to everyone in this country.

REPLY TO:
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United States Senate
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☐ 131 WEST 3RD STREET
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July 31, 2007

Representative Jerrold Nadler
Chairman, Subcommittee on the Constitution,
Civil Rights, and Civil Liberties
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler:

Thank you for the opportunity to appear before your Subcommittee regarding H.R. 558, the "African American Farmers Benefits Relief Act of 2007" and H.R. 899, the "Pigford Claims Remedy Act of 2007."

I do not have the necessary information to answer the questions you referenced and I believe they would be more appropriately referred to the United States Department of Agriculture and the plaintiff's counsel. If you have further questions or concerns, please contact Amanda Taylor at (202) 224-0475.

Sincerely,

Chuck Grassley

Charles E. Grassley
United States Senator

CEG: art

ub
knowledge
that works

School of Law

Cassandra Jones Havard
Associate Professor of Law
chavard@ubalt.edu
410-837-5038

August 10, 2007

Mr. Jerrold Nadler
Chairman Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

Congress of The United States House of Representatives
Committee on The Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Enclosed, please find my response to the Questions from Representative Trent Franks and Representative Steve King.

If I can be of further assistance to the Committee, please do not hesitate to contact me.

Sincerely,

Cassandra Jones Havard /sp

Cassandra Jones Havard
Associate Professor

University of Baltimore
1420 N. Charles St.
Baltimore, MD 21201-5779
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Questions from Rep. Trent Franks and Rep. Steve King:

1. Were the process and time limit for filing claims and late claims agreed to by the lawyers for the farmers, the government, and the court?

2. Did you register an objection at the time to Judge Friedman approving the consent decree as fair?

3. The initial estimates by class counsel were that approximately 2500-5000 black farmers would file claims. What was the basis for this estimate?

4. Of the more than 70,000 individuals who would be permitted to file claims under the legislation, how many of these individuals were farmers or actually farmed? Please provide the names and addresses of each of the Plaintiffs, and any blood relationships between the claimants if known. Witness testimony at the hearing revealed that relatives of farmers filed claims. It is unclear whether each family member was actually a farmer. Please provide whatever evidence you have to show that each claimant was in fact a farmer that fit the criteria.

5. Regarding the assertion that USDA has not provided relevant information in the Consent Decree process, please specifically identify the data, documents, or the like that have not been provided by USDA as required by the Consent Decree. Please also specifically provide the basis for the assertion that information has not been so provided.

6. When the court ruled on April 14, 1999 that the notice to the class was "more than adequate" and in fact was "extraordinary" - did you register an objection at the time? Do you disagree with the Court's finding that notice to the class members was adequate? Why? Do you think that the judge was biased in reaching this conclusion?

7. Since the entire process was administered by court appointed neutrals with additional process for independent review, what is your basis for stating that the agreed to consent decree process for accepting late claims was unfairly administered? Which court appointed neutrals were biased or otherwise unfairly treated claimants, and what is the basis for your conclusion?

8. The total number of timely filed farmer's claims was 22,400. The total number of late filed farmers was 65,982. Additional late filers were approximately 8,000. This is a total of approximately 96,000 total filers. The total population of black farmers during the class period was approximately 20,000. Who are these 76,000 additional filers? How would you respond to a constituent who suggests that these numbers are indicative of people taking advantage of a Consent Decree originally intended to provide redress to a far more limited number of individuals who had actually been aggrieved?

9. Out of a total of 22,440 timely filed claims how do you explain the fact that only 1,420 of those individuals had ever actually been FSA borrowers?

10. Do you believe that every claim that was denied by the court appointed neutrals was

wrongfully denied?

11. Isn't it true that the manner in which notice will be provided under HR 558 is very similar to the notice that was provided pursuant to the terms of the Consent Decree?

12. Please explain how notice of the claims deadline was inadequate when approximately 23,000 individuals from around the country timely filed their claims? Please cite examples of other class action settlements where more notice was provided to potential class members?

13. Did Class Counsel fail to ensure that there was adequate notice when counsel signed the consent decree which identified how notice was to be provided?

14. Do you believe that statutes of limitations serve a valid purpose?

15. In light of Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), which holds that it is an unconstitutional violation of the doctrine of separation of powers to require federal courts to reopen final judgments entered before an act's enactment, how can HR 558 withstand a constitutional challenge if it reopens the Pigford Consent Decree to allow additional individuals into the claims process?

16. One witness suggested that there be a presumption of liability added to the bills, are you aware of any other federal legislation that contains such a presumption, particularly as it pertains to litigation in the federal courts? Do you agree with this suggestion? Is so, do you believe that such a presumption is justified because all USDA officials are racist? Most USDA officials? Please explain.

17. What has been the dollar amount of all claims paid out to Plaintiffs as of June 27, 2007? What is the estimated maximum that the total cost of all potential claims could reach? Explain the methodology for calculating this amount. Members of the Subcommittee have been informed that the **cost of all claims could be as great as 3 Billion dollars**. Is this correct? Is this amount possible under the current formulation of damages? If not, why not?

Responses to Questions from Rep. Trent Franks and Rep Steve King

Cassandra Jones Havard
Associate Professor of Law
University of Baltimore School of Law

1. This question is beyond the scope of my testimony.

2. This question is beyond the scope of my testimony.

3. This question is beyond the scope of my testimony.

4. This question is beyond the scope of my testimony.

5. This question is beyond the scope of my testimony.

6. This question is beyond the scope of my testimony.

7. This Subcommittee held a hearing on the notice aspects of the *Pigford* case.

8. This question is beyond the scope of my testimony.

9. This question is beyond the scope of my testimony.

10. This question is beyond the scope of my testimony.

11. H.R. 558 provides a new notice requirement and procedures to inform perspective claimants of the case and the new opportunities to petition. The complaints of class members about the adequacy of actual notice were the subject of a hearing before this Subcommittee.

12. This Subcommittee previously held a hearing that established the inadequacy of the notice given to potential *Pigford* claimants .

13. This question is beyond the scope of my testimony.

14. Statutes of limitations serve a valid purpose in limiting stale claims. However, in many instances, there are circumstances which should toll the statutes of limitations, meaning preventing the time from running while certain conditions exist. One such circumstance is when claimants were legitimately unaware of notice for claims or were effectively denied notice of some necessary requirements.

15. This question is beyond the scope of my testimony.

16. Under the Consent Decree, there is effectively a presumption of liability. The only remaining issue is what claimants have to do to support their claims for financial compensation.

17. This question is beyond the scope of my testimony.

October 10, 2007

The Honorable Jerrold Nadler
United States House of Representatives
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
B353 Rayburn House Office Building
Washington, DC 20515-6216

Dear Mr. Chairman:

Please find enclosed answers to your recent inquiry.

Sincerely,

A. Donald McEachin
Virginia House of Delegates

RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY THE HOUSE COMMITTEE ON THE JUDICIARY IN FOLLOW-UP TO THE HEARING ON HR 899 HELD JUNE 21, 2007

(Questions are in roman type and answers are in boldface roman type)

QUESTION 1: Were the process and time limit for filing claims and late claims agreed to by the lawyers for the farmers, the government, and the court?
ANSWER: Yes.

QUESTION 2: Did you register an objection at the time to Judge Friedman approving the consent decree as fair?
ANSWER: I was not counsel to any litigant involved in the action at that time.

QUESTION 3: The initial estimates by class counsel were that approximately 2500-5000 black farmers would file claims. What was the basis of this estimate?
ANSWER: I was not class counsel. My belief is that initial estimates of the number of claimants were based on the number of discrimination complaint investigations pending before USDA's Office of Civil Rights (OCR) at the time, as adjusted to reflect the number of contacts we had had from Black farmers about participating in the case.

QUESTION 4: Of the more than 70,000 individuals who would be permitted to file claims under the legislation, how many of these individuals were farmers or actually farmed? Please provide the names and addresses of each of the Plaintiffs, and any blood relationships between the claimants if known. Witness testimony at the hearing revealed that relatives of farmers filed claims. It is unclear whether each family member was actually a farmer. Please provide whatever evidence you have to show that each claimant was in fact a farmer that fit the criteria.
ANSWER: In response to the first question, I cannot hazard an estimate as to the number of the 70,000 individuals who have requested permission to fill out and file claim forms late were farmers. I can't provide the names and addresses requested as I don't understand which plaintiffs the request refers to. The last question focuses on claims already filed, not late filer requests to participate. And with regard to claims already filed, if the claimant was not a farmer or someone attempting to farm, or someone who represented the estate of such a person, the claim would have been denied. In other words, all successful claimants must be farmers or persons attempting to farm, or their representatives, and the other criteria of the class definition must be met.

QUESTION 5: Regarding the assertion that USDA has not provided relevant information in the Consent Decree process, please specifically identify the data, documents, or the like that have not been provided by USDA as required by the Consent Decree. Please also specifically provide the basis for the assertion that information has not been so provided.
ANSWER: I will defer answering this question, as my testimony did not focus on this matter.

QUESTION 6: When the court ruled on April 14, 1999 that the notice to the class was "more than adequate" and in fact was "extraordinary" – did you register an objection at the time? Do you disagree with the Court's finding that notice to the class members was adequate? Why? Do you think that the judge was biased in reaching this conclusion?
ANSWER: I was not class counsel. I do not think that the notice was adequate. I do not believe the judge was biased.

QUESTION 7: Since the entire process was administered by court appointed neutrals with additional process for independent review, what is your basis for stating that the agreed to consent decree process for accepting late claims was unfairly administered? Which court appointed neutrals were biased or otherwise unfairly treated claimants, and what is the basis for your conclusion?
ANSWER: I do not claim that the late claim process was unfairly administered; I would concede that the huge number of applications to file late raises a substantial question as to whether the claims of all persons who fit the class definition have been heard. I know of no court appointed neutral who was biased or otherwise unfairly treated claimants.

QUESTION 8: The total number of timely filed farmer's claims was 22,400. The total number of late filed farmers was 65,982. Additional late filers were approximately 8,000. This is a total of approximately 96,000 total filers. The total population of black farmers during the class period was approximately 20,000. Who are these 76,000 additional filers? How would you respond to a constituent who suggests that these numbers are indicative of people taking advantage of a Consent Decree originally intended to provide redress to a far more limited number of individuals who had actually been aggrieved?
ANSWER: The total population of black farmers during the class period was probably much more than 20,000. There were almost 30,000 Black farm operations showing up on the 2002 agricultural census, as recently reported; and many of the operations reported there might be a family operations with several family members farming. Such is the case nationwide for farm families, black or white. Further, the consent decree allows persons who attempted to farm to participate in the settlement; and the class period runs back to 1981. Also, between 1981 and 2000, it is likely that many thousands of Black farmers retired or otherwise left farming.

QUESTION 9: Out of a total of 22,440 timely filed claims how do you explain the fact that only 1,420 of those individuals had ever actually been FSA borrowers?
ANSWER: I am not familiar of the 1,420 figure, and am somewhat skeptical of its accuracy. Also, one of the main claims made by the *Pigford* class was that they were denied access to USDA loan programs. A small number of actual FSA borrowers would be good evidence of the validity of that claim.

QUESTION 10: Do you believe that every claim that was denied by the court appointed neutrals was wrongfully denied?
ANSWER: No.

QUESTION 11: Isn't it true that the manner in which notice will be provided under HR 558 is very similar to the notice that was provided pursuant to the terms of the Consent Decree?
ANSWER: Not necessarily.

QUESTION 12: Please explain how notice of the claims deadline was inadequate when approximately 23,000 individuals from around the country timely filed their claims. Please cite examples of other class action settlements where more notice was provided to potential class members.
ANSWER: It failed to take into account the educational level of the target class.

QUESTION 13: Did Class Counsel fail to ensure that there was adequate notice when counsel signed the consent decree which identified how notice was to be provided?
ANSWER: In retrospect, yes.

QUESTION 14: Do you believe that statutes of limitations serve a valid purpose?
ANSWER: Not when the government has discriminated against its citizens.

QUESTION 15: In light of Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), which holds that it is an unconstitutional violation of the doctrine of separation of powers to require federal courts to reopen final judgments entered before an act's enactment, how can HR 558 withstand a constitutional challenge if it reopens the *Pigford* Consent Decree to allow additional individuals into the claims process?
ANSWER: It can withstand challenge by adopting the aspects of the consent decree necessary to accomplish its purpose.

QUESTION 16: One witness suggested that there be a presumption of liability added to the bills, are you aware of any other federal legislation that contains such a presumption, particularly as it pertains to litigation in the federal courts? Do you agree with this suggestion? If so, do you believe that such a presumption is justified because all USDA officials are racist? Most USDA officials? Please explain.
ANSWER: In response to the first question, I can't immediately think of other federal legislation that contains such a presumption of liability beyond the burden-shifting rules under the *McDonnell-Douglas* doctrine. In response to the second questions, I do not have a position on this suggestion. And, finally, I do not believe that such a presumption is justified because all or most USDA officials are racist.

QUESTION 17: What has been the dollar amount of all claims paid out to Plaintiffs as of June 27, 2007? What is the estimated maximum that the total cost of all potential claims could reach? Explain the methodology for calculating this amount. Members of the Subcommittee have been informed that the cost of all claims could be as great as 3 Billion dollars. Is this correct? Is this amount possible under the current formulation of damages? If not, why not?

ANSWER: I believe that, as of June 2007, almost $1,000,000,000 has been paid or obligated to all *Pigford* claimants. That is close to the maximum that will be paid out under the consent decree, as currently structured; and I say this because practically all *Pigford* claims already have been adjudicated. I don't believe that $3,000,000,000 is a remotely accurate estimate of the cost of claims under HR 899. Many persons on the "late filer" list will not meet the class definition. Beyond that, it is inappropriate to try to guess the cost of claims under HR 899 because we can't even guess how many "late filers" who meet the class definition will file cases in Federal court under the bill and, of those, how many will prevail.

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