Hearing on: H.R. 558, The African-American Farmers Benefits Relief Act of 2007 and H.R. 899, Pigford Claims Remedy Act of 2007

House Judiciary Committee
Subcommittee on the Constitution, Civil Liberties and Civil Rights

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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.

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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).

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.

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

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

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.

[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.

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 relief 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.

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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.