



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

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DECISION MEMORANDUM FOR THE SECRETARY

FROM: Mike Alexander
Executive Assistant

NOV 04 1994

SUBJECT: Blue Ribbon Task Force to Create Greater Equal Opportunity and Diversity Within USDA

ISSUE:

USDA's Coalition of Minority Employees (Coalition) has requested that the Secretary appoint a Blue Ribbon Task Force to address several issues relative to equal opportunity in the work place. These issues were presented to Secretary Espy in a letter and subsequent meeting with the Coalition's leadership. This memorandum will discuss the necessity for a Task Force and present a model for its establishment.

BACKGROUND:

Many minority employees at the Department of Agriculture are concerned about the lack of diversity among USDSA's career senior managers and senior executives; the lack of accountability for managers who are found to have discriminated; the occurrence of reprisals against employees who have filed complaints; the lack of minority members on important task forces; preselection; the possible adverse impact on minorities as a result of reorganization; and several other issues which were presented to the Secretary by the Coalition in their letter of September 13, 1994. (attached)

These concerns persist despite the Secretary's efforts to create a new climate of equal opportunity and civil rights at USDA. Minority employees are appreciative of the efforts that have been made by the Secretary to begin changing the culture at USDA. However, there is tremendous concern that these issues must be addressed in an even more effective manner from a level within the Department where genuine change can be fostered, especially within the career civil service.

The Coalition has asked that a Blue Ribbon Task Force be appointed by the Secretary to ensure that the issues they raised are addressed and that their recommendations are implemented.

The recent Department wide conference on work force diversity (April 1994) also pointed out the need for such a coordinating body. During planning for the conference, it was clear that attention to these issues is very uneven across the USDA. Nor is there any group charged with sharing the lessons, both positive and negative, that are being learned by various agencies within USDA. Training of managers and employees is uneven and uncoordinated across the Department, and it is not even clear that the same definitions are being used from one agency or office to the next.

At present, there is a definite need for a coordinated Team USDA strategy and more effective leadership on a Department wide basis. The Department's Office of Civil Rights Enforcement, and many agency civil rights officers, expend significant energy focused on the difficult and often overwhelming task of complaints management. Also, because these offices are typically at reporting levels well below the Secretary, the sub cabinet, or even agency administrators, they have minimal authority to influence decisions that impact work force diversity prior to complaints being filed.

For similar reasons, the Civil Rights Leadership Council, which consists of civil rights directors and representatives from employee groups and is chaired by the Director of OCRE, has limited ability to affect events at the Departmental, or even agency, level where key decisions are being made. The Council primarily makes policy recommendations to the Assistant Secretary for Administration through the Office of Civil Rights Enforcement.

It has become clear that progress on equal opportunity, civil rights, and work force diversity issues generally within agencies occurs only when top level officials give it their personal attention. As long as equal opportunity is the "responsibility" of civil rights directors, special emphasis program managers, and others who in most cases are several layers removed from administrators and officials whose decisions directly impact diversity, it is doubtful that these issues will be adequately addressed.

A Blue Ribbon Task Force of diverse individuals, including career and political appointees from the highest levels, would bring more focused attention on some very intractable and pervasive problems that exist across the Department.

OPTIONS:

There are several positive reasons to appoint a Blue Ribbon Task Force to Create Greater Equal Opportunity and Diversity within USDA. Primarily, such a body would ensure that issues important to all employees at USDA are addressed at the highest levels of the Department in a coordinated and effective fashion.

Where problems exist across agencies, coordinated policy responses and recommendations would be developed. Most importantly, because the Task Force would be appointed by the Secretary of Agriculture, and include top USDA officials, as well as key employee leaders they select, its decisions, if adopted by the Secretary, would have far reaching impact within the Department.

There is also a precedent for the creation of a body appointed by the Secretary to improve USDA's performance in a critical area. The USDA 1890s Task Force, which was established in 1988, has played a pivotal role in helping USDA overcome the historic neglect of historically black colleges and universities. The Task Force's members are appointed by the Secretary. It has recently been restructured to include both career and political appointees, and has representation from each of the six mission areas and Departmental Administration.

Most importantly, the USDA 1890s Task Force includes senior level officials from the Department. Among its members are the Deputy Under Secretary for Food and Consumer Services; the Associate Chief of the Forest Service; the Director of the Office of Personnel; and the Acting Administrators of RDA and ARS. It is chaired by the Deputy Chief for Strategic Planning and Budget of the SCS. Membership of individuals at this level ensures that 1890 issues and concerns are being addressed by individuals within each mission area with the authority to make decisions and commit resources. Also, the Task Force is staffed by an Executive Team, led by a member of the senior executive service, which coordinates implementation of all decisions. The Executive Assistant to the Secretary also is a member of the Executive Team.

This commitment of high level talent and resources has proven very effective in promoting the partnership between USDA and the 1890 institutions. It has also become a model for improving USDA's work with Hispanic Serving Institutions.

A Blue Ribbon Task Force appointed by the Secretary to ensure progress in the area of equal opportunity and work force diversity would provide proactive leadership on a Department wide basis; and provide a forum for input by employees who often have good ideas on how to effect a change in culture at the Department. It would also demonstrate, again, that this issue deserves the attention of high level officials within USDA who can make a difference.

Given the present lack of effective coordination of this issue, I do not see any negatives to appointing a Blue Ribbon Task Force other than the minor impact on the schedules it would have on those who are asked to serve. However, the importance of the issue to the Department demands that key officials give it time and attention. Otherwise, the changes the Administration has articulated simply won't occur. If such a Task Force is not established, there will continue to be no focal point influential enough to foster the kind of change that can remove barriers to equal opportunity and diversity.

RECOMMENDATION:

Utilize the model of the 1890s Task Force to appoint a Blue Ribbon Task Force to Create Greater Equal Opportunity and Diversity within USDA. The Task Force would have representatives from each mission area and include officials positioned similarly to those on the 1890s Task Force. It would also include the Directors of the Office of Personnel and the Civil Rights Enforcement Office as well as representatives of key employee organizations such as the Coalition. The Secretary would appoint the Task Force Members, including a Chairperson and Vice-Chairperson.

The Task Force would appoint an Executive Team (one per commissioner, or per mission area) to provide staff support for the Commission.

The Task Force would be charged by the Secretary with coordinating USDA's efforts at building a diverse work force and ensuring implementation of the Secretary's April 1993 Civil Rights Policy Statement. This would include assessing and acting upon the recommendations presented by the Coalition of Minority Employees and, where appropriate, providing Departmental leadership to their implementation.

DECISION BY THE SECRETARY:

Approve ✓

Disapprove

Discuss with me

Date 11/22/94

Reviewed by [Signature]



U.S. Department of Agriculture
Coalition of Minority Employees
"The Coalition"

SEP 13 1994

The Honorable Mike Espy
Secretary of Agriculture
United States Department of Agriculture
Washington, DC 20250

Dear Secretary Espy:

A few months ago the Coalition of Minority Employees (The Coalition) was founded out of a need to eradicate systemic racial discrimination at the Department of Agriculture. The Coalition's growing membership represents employees of more than 33 agencies and organizations. These employees, ranging in grades from GS-2's to GS-15's, have communicated their personal experiences of encounters with both overt and covert discrimination.

An Issues Committee was appointed to survey our membership for issues of a discriminating nature. From that survey over two dozen separate issues were identified. After much discussion, twelve issues resulted and their recommended solutions are enclosed for your response.

Mr. Secretary, The Coalition requests a meeting with you to discuss these issues and other factors associated with the establishment of The Coalition. Contact me on (202) 720-0968 to schedule this meeting.

We look forward to meeting with you and assisting in improving the work environment for all employees of USDA.

Sincerely,



LAWRENCE C. LUCAS

President
The Coalition

Enclosure

Action Office: usec
Referral Code: 6



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ISSUES OF THE USDA COALITION

Issue #1 Lack of Substantial Senior Black Managers and Supervisors

Data Needed: Breakdown by race and sex

Total number of positions within USDA with supervisory code of 1 or 3.

- Recommendation:**
- 1) Continue with the USDA Management Development Program and Senior Executive Service Candidate Development Program assuring substantial minority participation.
 - 2) Conduct assessments of the MDP and SESCOG graduates to determine their effectiveness as potential managers placing those ranked highest on priority consideration lists for USDA vacant managerial positions.
 - 3) Develop a tracking system to determine the placement of minority participants into USDA supervisory and managerial positions.

Issue #2 Lack of Accountable actions By Management

Findings as of August 30, 1994 for calendar years 1992, 1993, and 1994:

- 1) TOTAL CASES: 39
- 2) OPEN CASES: 11
- 3) ACTIONS TAKEN IN CLOSED CASES (INDIVIDUALS):
 - 14 Responding Office left agency, no action
 - 6 Supervisory Counseling Letter, Others, etc.
 - 2 Letter of Reprimand (two supervisors, one case.)
 - 7 Evidence does not support discipline, no action.
- 4) TRAINING: 11 cases (Training was provided to supervisors, regardless of the action and when identified as being needed.)

Recommendation: In the case where a manager(s) has been determined to have discriminated and/or purposely acted in an unfair manner, that manager(s) and any superior that failed to take immediate disciplinary actions, shall be officially punished to a degree appropriate for the infraction, with training being a remote solution. The form of punishment shall be communicated to the victim through written communication of the agency's head official.

Issue #3 Lack of Blacks in the Senior Executive Service

As of August 31, 1994, USDA has 356 employees in the Senior Executive Service of which 304 are career positions; 5 are occupied by black females and 4 by black males. USDA has 52 non-career (political) positions of which 23 are occupied by black males and 4 by black females.

Recommendation: Encourage selection of those ranked highest on our priority consideration list described in issue #1, Recommendation #2 above. Required justification for non-selection.

Allow the President of the Coalition or his/her designee sit on the USDA Qualification Review Panel.

Distribute SES Vacancy Announcements to all recognized USDA employee organizations.

Issue #4 Disparity in Settlements

Recommendation: The Secretary should require each agency head to submit a written report within 60 days that covers the past 24 months, detailing by gender and race, the total time and resolve of each informal and formal complaint.

If it is determined that disparity exists, the Secretary should require standardized guidelines to eliminate settlement disparities by October 1, 1994.

Issue #5 Disputes Resolution Process

For many complainants, the Dispute Resolution Board process has proven to be intimidating. There is a perception that the Board is biased toward management.

Recommendation: Limit management officials to essential employees (the discriminating official(s) and the resolving management official).

Eliminate undue pressure on complainants to resolve cases.

Insure Board members are properly trained in resolution/mediation skills.

Allow complainant's representative to speak for the complainant during the negotiating/settlement phase.

Give complainants the option to discuss in advance the "Accepted Issues" presented before the Board.

Provide for independent monitoring of the Dispute Resolution Board process to insure proper procedures are adhered to.

Insure that each complainant is fully informed of the Dispute Resolution Board's process (Purpose and Procedures) in advance of their appointed date to appear before the Board.

OCRE to consider the recommendations listed in the USDA Dispute Resolution Board Plot Project Evaluation, dated May 1994 (attached), and include designated Coalition members, complainants and management in an open dialogue to resolve issues listed above and in the Evaluation's recommendations.

Issue #6 Reprisal Actions Against Complainants

Recommendation: Each finding of reprisal by a manager against complainants or past complainants should result in an automatic 30 day suspension, without pay for the first occurrence; 60 day suspension, without pay for the second occurrence and relocation; and separation for reprisal acts, thereafter.

Issue #7 Lack of Minority Members on Task Forces, including Leadership Roles

Recommendation: Managers who do not recommend diverse lists of names to serve on various task forces should be penalized. Utilization of qualified members of the Coalition of Minority Employees would enhance a diverse representation on agency and departmental task forces.

Issue #8 Continued adherence to policies established by previous administrations

Recommendation: Many policies of the previous Administration are still in place. Many are in complete opposition to this Administration's communicated policies e.g., equal opportunity for all in employment and program delivery.

Additionally, too many career managers with philosophies diametrically opposed to the good intention of this administration should be placed, through internal reorganization, in positions of lesser influence.

Again, these preceding nine issues are but a few of the many issues that exist as barriers to achieving equality of opportunity for all.

Issue #9 Preselection:

Managers are skilled at avoiding findings of guilt from charges of preselection. They know Office of Personnel Management's definition of preselection **paramount** to any technicality, is the essentiality of fairness. Thus, any action taken by a manager(s) to improve the chances of one employee over another should and must be treated as illegal. Preselection exists at all grades.

Recommendation: That the Secretary prepare and disseminate a policy on preselection. The policy should state that any acts to favor one employee over another will result in automatic punishment, up to and including separation.

Issue #10 Length of Time in Same Grade:

It is perceived that minorities remain in the same grade substantially longer than their counterparts. This is especially observed in clerical positions when minority employees have reduced opportunity to acquire training and personal contacts to enhance their chances for upward mobility.

Recommendation: That the Secretary require an assessment of this issue, report findings and implement corrective actions by no later than October 1, 1994.

Issue #11 Recruitment of Minorities:

Too often, when the question is asked, "why is there not more minorities in professional and administrative occupations at USDA," the answer is, "no one applied."

With appropriate outreach by management and personnel offices, the aforementioned response would not be a consideration. There are still too many, first minority to ever be selected to this or that position.

Recommendation: The Secretary create and appoint members to a Departmental Task Force on Recruitment, to include representatives of The Coalition. The Task Force be required to assess current practices, and prepare and submit recommendations on how to improve USDA's recruitment efforts to the Secretary by September 30, 1994.

Diversity

Among the recommendations that must be included are (1) recruitment at minority education institutions, (2) utilization of minority news media, and (3) outreach to minority organizations.

Issue #12 Lack of USDA's Support for Agencies to Participate in the Transportation Subsidy Program with Metro.

As of August 1994, 95 Federal agencies have joined the Transportation Subsidy Program including all of the Departments of Energy and Transportation and some units within EPA and HHS. USDA, however, has issued a blanket statement that the Department will not participate in this Program.

Recommendation: That the Secretary issue a policy statement to allow USDA agencies to participate in the Transportation Subsidy Program with Metro should they wish. Such a statement would eliminate unions having the transportation subsidy issue as an inducement for attracting USDA employees to their membership and would also allow management officials to make the determination.

October 18, 1994

SUBJECT: Blue Ribbon Commission

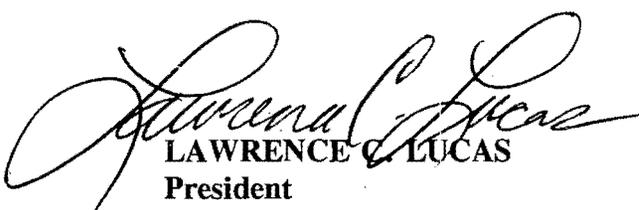
TO: Mike Espy
Secretary, USDA

The following list of names are submitted to serve on your newly established Blue Ribbon Commission designated to work on issues and recommendations submitted on September 13, 1994, and the Coalition's concerns regarding the Department's Reorganization and Downsizing.

Lawrence C. Lucas, REA, *retired*
Kevin Turner, FAS
Lousanya E. Barnes-Keene, ES
Carol Fields, OCRE
Blanche Hamilton, RDA
Harvey Wiley, FCIC
Clifford Herron, FmHA*
David Lewis, RDA*
Angel Cielo, FSIS*
Melody Mobley, FS*
Nossie Cunningham, ES*
William Gant, OIRM*

We have selected six members to serve as alternates (identified by the *).

The Coalition is ready to get started immediately on this very important mission to improve the working environment and advancement opportunities in USDA for women and minority employees.


LAWRENCE C. LUCAS
President
Coalition of Minority Employees

cc: Mike Alexander, SEC

Unproductive programs that have little to do with agriculture are wasting billions of our tax dollars. It's time to weed them out

USDA: BUREAUCRACY OUT OF CONTROL

BY DANIEL R. LEVINE

HOW MANY FARMERS receive government assistance in Bell County, Kentucky? Last year Agriculture Secretary Edward Madigan said 2127 were on the rolls of one federal agency. That didn't

seem possible to Sen. Richard G. Lugar (R., Ind.), ranking minority member of the Senate Agriculture Committee. After all, 85 percent of the county is forest, Lugar, perplexed by the count, then received a U.S. Department of Agriculture printout showing 1217 farmers, and an explanation that the first number was a mistake. When he asked for more details, the USDA provided another

list—this one containing just 57 names.

Most of the farmers on the original list had died, moved, or quit farming, yet they had not been deleted from USDA rolls. "The list had no relationship to reality," Lugar says.

Bell County's phantom farmers are a symptom of a larger problem: the USDA has become so bloated it can't even keep track of itself. Indeed, over the years—with the help of Congress and special-interest groups—the USDA has grown to a disproportionate size by adopting missions that have little to do with agriculture.

The USDA was created by President Lincoln in 1862 to research new seeds and plants for a nation where six out of ten workers were farmers. The department had nine

employees and a \$64,000 annual budget. Today, though less than two percent of the nation's population live on farms, the USDA continues to swell. The exact number of its employees is uncertain, but estimates range from 110,000 to more than 150,000 worldwide. George S. Dunlop, a former assistant secretary of agriculture for three years, managed more than 50,000 people while overseeing just two of the USDA's 42 agencies. "I had more people working for me than a half-dozen Cabinet officers combined," he says. This year the USDA will cost taxpayers \$62.7 billion, or nearly \$700 per U.S. household.

In September 1991, the General Accounting Office (GAO), Congress's watchdog agency, described the USDA as "a number of diverse, autonomous and entrenched local self-governing systems." While cultivating a mom-and-apple-pie image, the USDA has addicted farmers, former farmers and pseudo-farmers to its services. Its Congressional benefactors festoon every farm bill with make-work projects for the department's remote outposts. Taxpayer funds are routinely funneled into USDA projects on blackbird control, manure disposal, onion storage, soybean-based ink, and screwworms (virtually eliminated in the United States 26 years ago).

Moreover, 40 percent of the \$9.3 billion in farm subsidies in 1990 went to the largest five percent of farms. Even though 75 percent of the nation's farms are considered

small, Bud Kerr, director of the Office for Small-Scale Agriculture, is the only USDA official specifically representing small farmers.

"Farm policy is the classic example of Congress serving the special interest rather than the public interest," says Rep. Dick Armev (R., Texas).

Of course, agriculture continues to be a vital force in our economy, and the Department of Agriculture performs important functions. But does the USDA really need to be so big? Let's look at some of its problems:

Field Office Follies. Most of the USDA's employees work out of its estimated 11,000 field offices, a remnant of a bygone era when farmers lacked phones and dependable transportation. They needed offices near home. But in today's world of interstate highways, faxes and computers, the far-flung offices are an anachronism. Even the USDA doesn't know the exact number of field offices. When asked by Senator Lugar, Richard Albertson, assistant secretary for administration, replied, "We have tried to get a straight answer to this question for as long as I have been here. Our staff still cannot give us an accurate number."

The field offices are located in 94 percent of the nation's counties, only 16 percent of which are still considered agricultural. In Nevada there are field offices where there are no fields. Seven separate agencies have offices in Las Vegas, even

READER'S DIGEST

though there are virtually no farms within 50 miles of the city.

Rather than share space, USDA offices are often located at different addresses within the same community. Tiny Dillon, S.C. (pop. 6000), has four USDA agencies scattered in four different locations.

In areas having few farmers to subsidize, some offices concentrate on less traditional forms of agriculture to justify their existence. The USDA's Agricultural Stabilization and Conservation Service in Fairfield County, Connecticut, one of the nation's richest suburban areas, can find only 58 farmers to assist. So it's helping in other ways. The sign outside the Ox Ridge Hunt Club in Darien reads "Private," but that doesn't mean it won't accept public money. The Fairfield County ASCS office gave the exclusive club \$3500 for a concrete loading dock to dispose of horse manure. Club members already pay as much as \$9380 to belong, plus a \$2000 deposit.

Thicker Ketchup. At the Fresh Fruit and Vegetable Division of the Agricultural Marketing Service in Washington, D.C., Paul Manol spent a good part of three years composing the nine-page manifesto *United States Standards for Grades of Christmas Trees*. This illustrated document describes in detail how a Christmas tree should be shaped and trimmed, and informs us that a "premium" tree is "fresh, clean and healthy."

In the same agency, Harold Machias devoted much of three years

to upgrading the standards for ketchup. In 30 seconds, the "new" thicker ketchup flowed two centimeters less than the previous one—thus creating a new nationwide benchmark. Meanwhile, H. J. Heinz, the nation's largest ketchup maker, was already producing a thicker ketchup without government help.

The USDA is so busy being busy that it hires temporary help. Employed last summer for \$8 an hour at the Soil Conservation Service, James Sheets expected someone to tell him what his job was. No one ever did. At his desk in Room 6015, deep inside the USDA's main building, he was able to finish such heavy-weight tomes as *The Handmaid's Tale* by Margaret Atwood and Adam Smith's *The Wealth of Nations*. "It goes against my basic instinct to loaf," he says, "but half my workweek was spent reading books."

Anything Goes. Subjects only remotely related to agriculture get full-scale attention. Want to open your own bed and breakfast inn or run a hunting preserve? Just ask for help from the "Recreation Specialist" in the USDA's Soil Conservation Service. The USDA's Video and Teleconference Division has produced, at taxpayers' expense, videos on such topics as food safety at picnics.

Similarly, the USDA's Extension Service, created in 1914 to teach farmers about agricultural advances, has seized on one of the nation's most popular pastimes: gardening. It is spending \$3.6 million a year in 23

USDA: BUREAUCRACY OUT OF CONTROL

cities to make sure that low-income residents enjoy the avocation. In New York City the department teaches planting and watering techniques to 21,319 "urban gardeners" who maintain 10,976 separate vegetable plots, including tomatoes grown on fire escapes.

The USDA is even giving \$200 million a year to help corporations, many of them wealthy, pay for overseas advertising. When Sunkist Growers, Inc., one of the world's richest produce companies, decided to advertise in Asia, American taxpayers contributed \$9 million through the USDA's Market Promotion Program. Why? Because, to boost exports, the Foreign Agricultural Service does not differentiate between firms that need help and those that don't. In 1991 it gave Blue Diamond Growers \$6.2 million and the E. & J. Gallo Winery \$5.1 million.

This Is Agriculture? The USDA also engages in costly activities that have nothing to do with farming. Its Farmers Home Administration (FmHA) at one time loaned struggling farmers \$1000 to help them stay on their land. Today it's a \$46.5-billion bank—one of the government's largest lenders. Besides farmers, its clients are developers and the rural poor. In 1991 the agency lost \$3 billion on bad loans. Between 1988 and 1991 it lent \$67 million to farmers who were already in arrears. It lent another \$38 million to borrowers who'd failed to repay earlier loans; nearly half of them didn't repay the second time either.

In Sylacauga, Ala., developer Joseph Turner secured a \$1.4-million USDA loan at one-percent interest to build a low-income housing complex. In less than two years Turner parlayed his down payment of \$43,000 into \$337,800—a profit of more than 700 percent. The FmHA allowed him to sell tax credits to limited partners and even subsidized the tenants' rent. Agency officials say generous benefits are the only way investors can be enticed to fund low-income housing. Rep. John Dingell (D., Mich.) of the House Energy and Commerce Committee sees it differently: "Taxpayers are being ripped off."

Other activities unrelated to agriculture: In 1991 the USDA handed out \$28.5 billion, more than half of all it spent, on food stamps and other domestic nutrition programs. The Rural Electrification Administration, created in 1935 to provide electricity to farms, loaned \$359 million to telephone co-ops at taxpayer-subsidized interest rates as low as two percent.

Spending Spree. Even the headquarters of the USDA are symbolically overblown. Spread over 1.4 million square feet with about 5000 offices, the building has a \$3-million mini-mall in the sub-basement, complete with a dry cleaner, bookstore, gift shop, barber shop, credit union, food bar and fitness center.

The ASCS believes its employees are doing such a fine job that it recently shelled out more than \$1 million on two employee-award ceremonies. And Secretary Madigan and

READER'S DIGEST

other top officials spent \$750,000 last year to repair and spruce up their offices with new kitchenettes, draperies and scalloped window cornices.

Meanwhile, some improvements are not being put to full use. Last year the USDA spent about \$650 million on new computers and information technology. Yet when GAO auditors went to the FmHA office in Sherman County, Kansas, to check on the pilot site of the new USDA system, they found the computers sitting idle while staffers kept track of loans from boxes of three-by-five cards. Soon afterward, the department announced plans to spend \$2 billion more on computer technology over the next five years.

"We cannot let the USDA throw money down a black hole," says Senate Agriculture Committee Chairman Patrick Leahy (D., Vt.). "Now is the time to cut back." Here's where the Clinton Administration might begin:

- *Shut down unnecessary field offices.* First to be closed or merged should be 179 ASCS offices that Senator Lugar discovered are spending more on overhead than on helping local farmers. In Unicoi County, Tennessee, the USDA office has an annual budget of \$75,000 and, incredibly, spends \$29.78 on overhead for every dollar it dispenses in federal largess. Also, offices serving areas with limited farm acreage should be shut down. The GAO found that the department could save \$90 million a year just by consolidating ASCS field offices. Since May, a USDA/

White House task force has been examining ways to streamline all USDA field offices.

- *Eliminate duplication.* Eight agencies working on biotechnology? Ten handling water quality? Wherever possible, agencies should be combined.

- *Reduce federal involvement in agricultural universities' research.* This "cooperation" from the government is little more than a channel for pork-barreling. Besides, states know their own agricultural priorities far better than the federal government does.

- *Dissolve obsolete agencies.* Elimination of the Rural Electrification Administration alone would save \$2.5 billion a year. Elimination of both the Rural Development Administration and FmHA, which subsidize rural America, would save \$8.3 billion. The Market Promotion Program, which spends \$200 million on overseas advertising for wealthy U.S. companies, should also be dissolved.

EVERY TIME THE USDA reinvents itself, the bureaucrats dig deeper into taxpayers' wallets. But why should taxpayers pay \$62.7 billion a year to run a department that doesn't even live up to its name?

There is growing bipartisan concern on Capitol Hill about this waste. Senator Leahy promises a continuing probe early next session. "The number of USDA agencies can and should be cut in half," Leahy says. "It's indefensible that the bureaucracy is growing while the number of farmers is declining."



CHANGING
THE CULTURE
AT THE
U.S.
DEPARTMENT
OF
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CHANGING THE CULTURE

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ACCOMPLISHMENTS OF SECRETARY MIKE ESPY

At the direction of President Bill Clinton, Secretary of Agriculture Mike Espy has embarked upon a course to change the culture of the U.S. Department of Agriculture (USDA). While the media has focused most of its attention on Espy's efforts to open new markets for American agriculture, enhance the safety of our nation's food supply, streamline the Department, and respond to floods, droughts, forest fires, and other natural disasters, there are other areas, vitally important to African-Americans and other minorities, that have largely gone unreported.

Secretary Espy has begun to transform the image of USDA from that of a Department only concerned about production agriculture. More than any other Secretary, Espy has emphasized areas within USDA such as rural economic development, food and nutrition, and housing that are crucial to the well-being of African-Americans and many others who wrongly believe that if they are not farmers, they have no interests at USDA.

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Espy has worked to make the Department more responsive to the needs of all Americans. While it will take more than a few months to change a culture that has been entrenched for years, Secretary Espy has made a positive beginning. Here's how:

KEY APPOINTMENTS

DID YOU KNOW?

Secretary Espy, at the recommendation of the President, has made several key appointments among the senior executives who run USDA, the fourth largest Federal agency with a budget of \$62 billion, \$140 billion in assets, 110,000 employees, and offices throughout the U.S. and the world. Espy, the first African-American Secretary of Agriculture, has appointed several African-Americans, other minorities, and women to unprecedented positions of authority at USDA. They include:

- Bob Nash, Under Secretary for Small Community and Rural Development; Wardell Townsend, Jr., Assistant Secretary for Administration; Jose Amador, Assistant Secretary designate for Science and Education; Patricia Jensen, Assistant Secretary designate for Marketing and Inspection Services; Dallas Smith, Deputy Under Secretary for International Affairs and Commodity Programs; Oleta Fitzgerald, Director of the Office of Intergovernmental Affairs designate; and Tony Williams, Chief Financial Officer.

Others include: Ali Webb, Director of the Office of Communications; Ellen Haas, Assistant Secretary for Food and Consumer Services; Shirley Watkins, Deputy Assistant Secretary for Food and Consumer Services; Lon Hatamiya, Administrator of the Agricultural Marketing Service; Dave Montoya, Director of the Office of Civil Rights Enforcement; Roger Viadero, Inspector General designate; and Wilbur Peer, Deputy Administrator for the Rural Development Administration.

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■ Among career employees, key appointments include: Evelyn White, the first ever African-American and female to head USDA's Office of Personnel, who sets policy for the Department's 110,000 employees; Ira Hobbs, the first African-American male to head USDA's Office of Operations, which oversees \$3.8 billion in procurement; and Pearlie Reed, the first African-American male to be named Deputy Chief at the Soil Conservation Service.

ENHANCING DIVERSITY

DID YOU KNOW?

Making good on the President's pledge to create a government that looks like America, Espy's appointments have significantly enhanced diversity among the ranks of USDA's senior executives.

■ In June of 1994, USDA had 334 senior executives, down from 380 in June of 1992. Even though the overall number of senior executives has been reduced, the number of women and minorities among SES ranks has increased from 71 to 89.

■ Women and minorities now constitute 26 percent of senior executives at USDA, up from 18 percent in June of 1992. The percentage of minorities has more than doubled, from 6 percent to 13 percent. The percentage of women has increased from 13 percent to 17 percent of senior executives.

■ Under Espy's leadership, the number of African-American female senior executives has increased from 3 to 10 and the number of African-American males from 17 to 26. The overall number of minority males, including Hispanics, Asians, and American Indians, has increased from 20 to 33. The number of minority women has increased from 5 to 11. For women overall, the number has increased from 51 to 57, again, during a period of overall downsizing.

■ Under Secretary Espy minorities now account for 18.1 percent of all employees at USDA, up from 16.2 percent. These increases have occurred even though the Department must significantly reduce its overall work force.

EXPOSING DISCRIMINATION

DID YOU KNOW?

Under Secretary Espy USDA has also made progress in processing complaints of discrimination.

Historically, adequately processing complaints of discrimination has never been a priority at USDA. This has changed.

■ Since Secretary Espy assumed office, USDA has found 52 cases of discrimination against employees. In the year prior to Espy's appointment the Department found only four instances of discrimination.

■ During all of 1992, USDA found 6 cases of discrimination in its farm, food stamp, and other program areas. Under Secretary Espy, there have been 26 findings of discrimination in these areas.

■ USDA is also changing the way it processes complaints. As of August 24, 1994, the Department's Dispute Resolution Board had handled 173 discrimination complaints. Among these, 145 cases have been closed while 9 are continuing in investigation. Conferences have been set in others. The average time for cases at the Dispute Resolutions Board is 59 days. The Board brings employees and managers to the table to resolve disputes, reduces the amount of time for processing complaints, and saves thousands of dollars which are necessary to investigate complaints under the traditional system.

■ The average time for processing EEO complaints has been reduced by 31 percent, a substantial improvement over the situation inherited in January of 1993.

SUPPORTING HBCUS

DID YOU KNOW?

Secretary Espy has worked to enhance USDA's relationship with and support for Historically Black Colleges and Universities.

■ In FY 1993, USDA agencies provided \$87 million in support to Historically Black Colleges and Universities, mostly to the 1890 land-grant institutions and Tuskegee University. Significantly, in discretionary awards, the Department's 1993 total of \$16 million was more than three times the amount awarded in FY 1992.

■ USDA has made a commitment to establish Centers of Excellence at each of the 1890s over a period of 5 to 7 years. The centers, which will be established in areas such as forestry, food safety and animal health, aquaculture, and others, will enhance the capability of each institution to assist in the delivery of USDA programs. Three centers were established in 1994, and four more are slated for 1995. USDA's 1996 budget request to Congress will include several more Centers of Excellence.

■ Over the last 18 months USDA has provided 75 scholarships to minority students to study the agricultural sciences at 1890 institutions. Upon graduation, these 1890 scholars will be offered employment at USDA agencies, enhancing efforts to bring a new generation of minorities into the professional ranks at USDA.

IMPROVING CHILD NUTRITION

DID YOU KNOW?

Meeting the President's goal of putting people first, Secretary Espy has worked to ensure that all children have access to the vital food and nutrition programs at USDA. In 1994, USDA will provide \$16 billion (or 40 percent of the total) in food assistance programs to minorities.

6

■ To open a much needed dialogue on the health and nutrition needs of minorities, USDA has initiated a series of roundtable discussions in Washington, Chicago, and other cities, among senior policy officials, community leaders, leading experts, and others.

■ Through the School Meals Initiative for Healthy Children, USDA has worked to ensure that 25 million schoolchildren, including millions of minority children, receive school lunches that promote health, prevent disease, and meet the Dietary Guidelines for Americans. Also, over \$20 million has been awarded in start-up grants to help schools, especially schools in low-income areas, begin a school breakfast program.

■ Under Secretary Espy, USDA's Food and Nutrition Service has also taken steps to ensure that nutrition benefits are available to all eligible people. From \$500,000 in FY 1992, USDA awarded some \$1.8 million in FY 1993 and expects to award over \$1 million more in FY 1994 to local organizations and communities with plans to reach out to groups that have traditionally been underserved by the Food Stamp Program.

■ USDA is also working with the Department of Housing and Urban Development to increase the availability of supermarkets and other full-service grocery stores in underserved urban and rural areas.

■ USDA's Women, Infants, and Children (WIC) Program now reaches annually more than 6.5 million pregnant women, new mothers, their infants, and their young children. Half are minorities. USDA has worked to remove cultural barriers that prevent even more minorities from participating in the program.

7

SUPPORTING MINORITY BUSINESSES

DID YOU KNOW?

USDA annually awards almost \$4 billion in direct contracts and nearly \$200 million in subcontracts.

- Since 1993, USDA has made progress in awarding contracts to minority businesses. In FY 1993 the Department slightly exceeded the Federal objective of 5 percent awards to minority businesses. Overall, USDA awarded some \$190 million in contracts to 8(a) and small disadvantaged businesses, representing 5.1 percent of total contract expenditures, an increase of \$52 million over FY 1992.
- USDA awarded \$9 million in total subcontracts to minorities in FY 1993, up from \$5 million in FY 1992.
- Under Secretary Espy, USDA's Rural Development Administration has also significantly enhanced the availability of loans to minority businesses. Since May of 1993, RDA has made Business and Industry Disaster Loans of \$7 million and Intermediary Relending Program loans of \$4.5 million to minority-owned businesses. RDA has guaranteed an additional \$2.4 million in loans to minority-owned businesses.
- USDA is working with the Department of Commerce to assist rural minority businesses through Rural Minority Business Development Centers.

ENHANCING UNDERSERVED COMMUNITIES

DID YOU KNOW?

The Administration's Rural Enterprise Zone initiative will target \$78 million in FY 1995 to underserved rural areas that are designated as

enterprise zones and communities.

- Approval of 3 enterprise zones and 30 enterprise communities this fall will target financial assistance through USDA's Rural Development Administration to needy communities, with special emphasis placed on serving under-represented and persistently high-poverty counties.
- In FY 1993 Secretary Espy announced a \$3 million cooperative agreement with 1890 land-grant institutions to develop nonfarm income-producing projects for underdeveloped rural communities. The project will provide direct hands-on job creation in communities that have traditionally depended upon agriculture.
- Secretary Espy has announced the creation of a strategic national plan to meet the goal of bringing running water to all rural homes in America by the year 2000. Funding for rural water projects has increased from \$1 billion to \$1.5 billion under the Clinton Administration, demonstrating the President's commitment to rural America.

ASSISTING MINORITY FARMERS

DID YOU KNOW?

Under Secretary Espy, USDA has also taken steps to assist minority farmers, who have historically been underserved and in many cases discriminated against by the U.S. Department of Agriculture.

- As a Member of Congress, Espy wrote legislation to provide outreach and technical assistance to minority farmers. As Secretary of Agriculture, Espy ensured that this bill received funding for the first time—\$1 million in FY 1993 and an additional \$3 million in FY 1994.
- Other steps that Secretary Espy has taken to assist minority farmers include:

The suspension by the Farmers Home Administration of farm foreclosures which allowed

time to ensure that all distressed farmers are being treated fairly; and the implementation of an automatic tracking system to ensure that all farm loans, without exception, are processed in a timely fashion.

■ In FY 1993, USDA's Federal Crop Insurance Corporation contracted with the Federation of Southern Cooperatives/ Land Assistance Fund to host workshops in four states to educate minority and limited-resource farmers on the details and advantages of the Federal Crop Insurance Program. Along with the Federal Crop Insurance Corporation, the FSC/LAF is implementing an outreach and education program that will enable minority and limited-resource farmers to participate in greater numbers in the Federal Crop Insurance Program.

ENHANCING WORKERS' SAFETY

DID YOU KNOW?

Under Secretary Espy, USDA, which is responsible for the safety of much of our food supply, has strengthened its efforts to ensure the safety of the employees who work in meat and poultry plants as well.

■ Secretary Espy made one of his priorities the completion of an agreement between USDA and the Occupational Safety and Health Administration (OSHA) to strengthen employee training and reporting procedures for serious workplace hazards.

Under the agreement, USDA's food inspectors now report serious hazards affecting agency and plant employees to agency management and to OSHA to ensure proper investigations. The agreement was signed in response to the 1991 fire in North Carolina which killed 25 workers, mostly women, in a poultry processing plant.

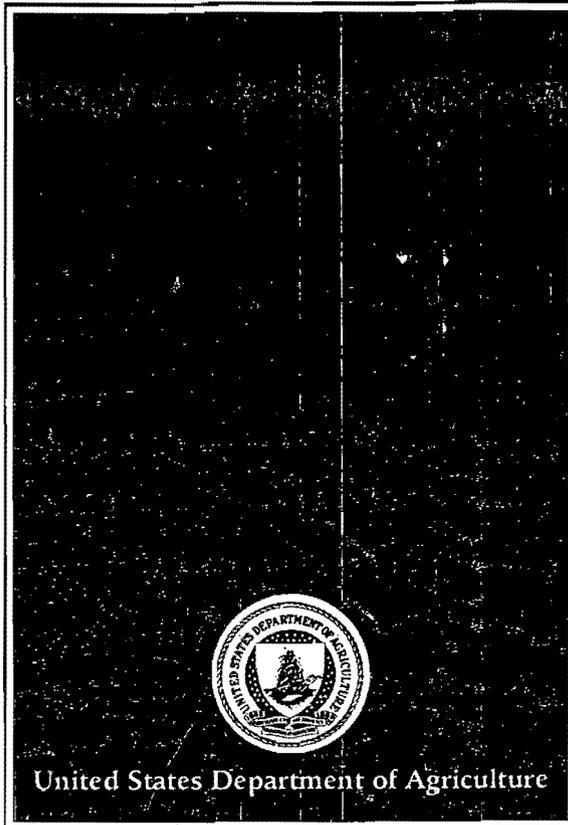
CONCLUSION

These accomplishments represent only initial steps down what will be a long road in Secretary Espy's efforts to change the culture, the image, and most importantly, the reality of the USDA. Without doubt, problems remain at the U.S. Department of Agriculture. The Department must break glass ceilings which remain in place for minority and female career employees, reach out more to minority and women-owned businesses, and ensure accountability for civil rights at all levels. Still, with the full support of the President, the Secretary is determined to reinvent the Department, in spite of institutional resistance to change and improvement.

The Secretary's goal, which he stated in his Civil Rights Policy Statement in April 1993, is to "make the Department of Agriculture a place where equal opportunity is assured and where promoting civil rights is essential to employee and managerial success. Diversity is a source of strength at USDA as we tap the talent, creativity, and energy of all Americans who desire to serve, or who have an interest in the programs we provide."

Espy also stated, "We will eliminate discrimination from our program delivery system, reach out to groups which have historically been neglected, and ensure that we are inclusive, rather than exclusive, in all aspects of our program delivery."

Secretary Espy remains committed to achieving this goal.



The U.S. Department of Agriculture (USDA) prohibits discrimination in its programs on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, and marital or familial status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact the USDA Office of Communications at (202)720-5881 (voice) or (202) 720-7808 (TDD).

To file a complaint, write the Secretary of Agriculture, U.S. Department of Agriculture, Washington, DC 20250, or call (202)720-7327 (voice) or (202)720-1127 (TDD). USDA is an equal opportunity employer.

Issued September 1994



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20260

JUN 29 1993

SUBJECT: SES Performance

**TO: Under/Assistant Secretaries
Agency Heads**

As you know, my goal is to make fundamental changes in the Department of Agriculture. President Clinton has charged us with reinventing government - becoming customer driven and results oriented, reducing red tape, making government more efficient, eliminating waste and duplication, and empowering employees so that their full potentials are utilized to get the job done.

In the coming days we will begin the performance appraisal process for members of the Senior Executive Service. This letter is to clarify my expectations for senior executives as this important process gets underway.

My greatest expectation is that all senior executives will join with me and the subcabinet in fully supporting our efforts to reinvent USDA and work hard at being a catalyst for change. Specifically, I expect senior executives to join me in building a real Team USDA and to seize upon available opportunities to promote the changes we seek throughout the Department. I expect to see clear evidence of this support at the executive appraisal cycle in September 1993.

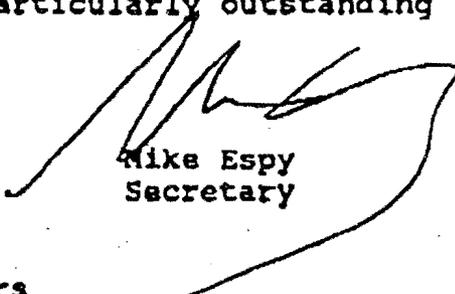
Change is difficult. There are many obstacles along the way. However, I expect each senior executive to utilize their skills in removing these obstacles in support of our efforts. This upcoming rating cycle should afford us an excellent opportunity to evaluate the contributions of each member of our leadership team. To reinvent USDA, we must restructure our organization, make fundamental changes in our management culture and rethink many of the systems and policies that have become ingrained throughout government. We must change many of the old ways of conducting business that may have served us well in the past, but are no longer adequate for the future. To accomplish this task, we will need the full support of all USDA employees, but especially the members of the senior executive service.

In the area of human resource management, I expect senior executives to lead by motivating and educating, rather than by dictating, and to help foster a new management culture at the Department which respects employees, values their input and seeks to help all employees realize their full potential.

In the critical element of EEO and civil rights, I want to see specific evidence of support for the policy statement I issued on April 15. I expect to see bottom line results in the hiring and advancement of qualified minorities, women and persons with disabilities when opportunities are available. Each Performance Review Board will make a thorough review of accomplishments in the EEO/CR critical element.

To ensure that ratings are deserved, the Office of Advocacy and Enterprise and the Office of Personnel will be asked to provide me with input regarding organizational performance in EEO/CR for Assistant and Under Secretaries, agency heads and staff office directors.

Lastly, as you all know, I have already expressed my concerns about the present awards and bonus system at the Department. However, I want to assure you that, within budgetary and political realities, I am committed to making every effort to reward those senior executives who make particularly outstanding contributions to reinventing USDA.



Mike Espy
Secretary

cc: Agency Personnel Officers
Agency Civil Rights Directors
Senior Executives

MIKE ALEXANDER



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

October 5 1993

SUBJECT: Senior Executive Service Performance

TO: Under/Assistant Secretaries
Agency Heads

In my June 29, 1993, memorandum, I enlisted your support in instituting fundamental changes in the Department of Agriculture that will allow us to focus more effectively on the needs of our customers, now and in the future. I also clarified my intent to evaluate the contributions of our leadership team in effecting these changes during the 1993 appraisal cycle, especially in the area of civil rights. In accordance with my June memorandum, the Office of Civil Rights Enforcement (OCRE) and the Office of Personnel (OP) have developed guidelines that will be used to obtain additional information and input on Senior Executive Service performance appraisals in the equal opportunity/civil rights critical element.

The guidelines are attached. As you can see, the functional areas stated closely parallel those identified in the generic performance element that is currently in place for senior executives. It is my intent that these guidelines be used to ensure factual appraisals of civil rights accomplishments that focus on bottom line results.

Jointly, OCRE and OP will provide oversight of the evaluation process. In addition, they will be developing procedures for monitoring accomplishments of supervisory employees for the 1994 performance appraisal cycle.

Agency Heads will consult with their Civil Rights Directors to obtain their input prior to discussing ratings with senior executives.

A handwritten signature in cursive script that reads "Mike Espy".

MIKE ESPY
Secretary

Attachment

UNITED STATES DEPARTMENT OF AGRICULTURE

CIVIL RIGHTS APPRAISAL GUIDELINES

SENIOR EXECUTIVES - FY 1993

GENERAL

For the 1993 appraisal cycle, the following procedures will apply in regard to the equal opportunity/civil rights (EO/CR) performance element:

- Department of Agriculture (USDA) Civil Rights Directors will provide input on the civil rights performance of senior executives, with the exception of their immediate supervisors. Included are senior executives at headquarters and in the field below the level of Agency Head.

OCRE will provide input on the performance of senior executives below the Agency Head level who supervise Civil Rights Directors.

- Specifically, Agency Personnel Directors/Senior Executive Service (SES) Executive Secretaries will make a copy of the write-ups of civil rights accomplishments submitted by senior executives, annotate them across the top margin to show the name and appraisal rating of each senior executive and forward the annotated copies to Civil Rights Directors.
- Civil Rights Directors will review the write-ups, initial and date them in the bottom left margin and return them to their Personnel Directors/Executive Secretaries, retaining an initialed/dated copy for further processing.
- Based on their review, the Civil Rights Directors will submit a report to the Director, OCRE, which summarizes by RSNOD, information on the number of SES employees rated "Exceeds," "Meets" and "Does Not Meet" Fully Successful, attaching the copy of the written accomplishments.
- When they deem it necessary, the Civil Rights Directors will also submit any critical information needed to fully document any rating at the "Exceeds" and "Does Not Meet" Fully Successful levels, assuring that sufficient information is available to support the rating.

- OCRE will review the reports provided by the Civil Rights Directors and if warranted, submit any pertinent information related to the civil rights performance of career senior executives to the chairpersons of appropriate performance review boards, allowing them the opportunity to make a complete review of accomplishments.
- Any member of the SES whose performance on the EO/CR element is critiqued or otherwise addressed in materials or recommendations forwarded by OCRE, shall have the opportunity to review and respond to any such materials, and to respond to any proposed change in his or her rating, prior to completion of action thereon by the performance review board.
- OCRE will also prepare reports on civil rights organizational performance for all agencies and staff offices by Under and Assistant Secretary areas and submit them to the Secretary's Performance Review Board.

FUNCTIONAL AREAS

Below are the functional areas covered in the generic civil rights performance element for SES employees. Since all of them may not apply to each SES position, this guidance must be tailored to reflect the responsibilities and authority of the individual being rated. Questions have been developed in each functional area to provide raters and reviewers with a framework for appraising accomplishments. Hopefully, this will help in focusing on measurable bottom line results in the context of USDA and Agency goals and objectives as defined in the Secretary's civil rights policy statement, policy memoranda, civil rights plans, and agency planning documents.

1. Outreach and Public Notification:

- What efforts were made to inform applicants, recipients and beneficiaries of the USDA nondiscrimination policy and civil rights compliance requirements?
- What innovations have been made in the past year to identify and reach out to under-served groups? How have these innovations impacted service delivery to minorities, women, persons with disabilities and others?
- What means were used to inform applicants, recipients and beneficiaries, including persons with disabilities and the non-English speaking, of the availability of programs, services and benefits? How do they differ from previous years? Did the participation of under-served groups increased? To what extent has the potential customer base been expanded/increase?

- What efforts have been made to ensure that work sites (office space, temporary housing, workshops, meetings), equipment and related facilities are accessible to internal and external customers with disabilities?
- What progress has been made in diversifying internal and external boards, committees, councils, etc.; in soliciting input from internal and external customers, including employee groups and grassroots organizations; in responding promptly and openly to requests for information from customers?

2. Contracts and 8(a) Set Asides:

- Were internal goals established for minority and female-owned business enterprises? 8(a) set asides? Were goals substantially met?
- What efforts were made to identify minority and women-owned businesses who could participate in the future?

3. Work Force Diversity:

- Were 1993 recruitment needs defined in terms of projected vacancies? What targeted recruitment efforts were initiated that focused on underrepresented groups? Were recruitment efforts targeted to the levels of authority and occupations where underrepresentation exists? How many (%) of the recruits were hired? At what grade levels? Were there net increases in % representation? Were new strategies or tactics used to diversify the applicant pool; if so, what and how?
- What developmental training experiences (inter-and-intra-agency cross-training, developmental assignments, including details, OPM, USDA and Agency development programs, Career Enhancement, etc.), were used over the past year to develop knowledge and skill levels of employees? How were employees informed of the availability of assignments, details, positions? Who received developmental training (by RSNOD and employment category)?

4. Training:

- How were civil rights training needs and opportunities identified? Was civil rights training made available to employees? If so, what subject matter was covered, the number of hours, training method? Was training provided to a diversity of employees in terms of RSNOD, disciplines and geographic locations?

5. Civil Rights/Management Integration:

- How were civil rights policies, goals and objectives communicated to supervisors, managers and other employees? Did feedback from subordinates demonstrate that they understood what was expected of them? How?
- How were employees under their jurisdictions held accountable for meeting expectations? How were their efforts integrated into ongoing activities, monitored and evaluated?
- Were employees recognized for their efforts commensurate with actual accomplishments?
- Was the advice and assistance of civil rights directors regularly sought on matters involving integration of civil rights into employment, programs and related activities?

6. Civil Rights Program Planning, Implementation and Evaluation:

- Were civil rights (affirmative employment, civil rights implementation plans, reports, etc.), submitted for approval in a timely manner? Was feedback, if any, incorporated?
- Were action items implemented and monitored for effectiveness in eliminating barriers to employment or program delivery? How often? How were evaluation results used?
- Were compliance reviews conducted internally? Were corrective actions/recommendations implemented? Were corrective actions/recommendations evaluated for broader applicability?
- What data processes and systems were used to track and evaluate recruitment, hiring? Assess civil rights impacts of new program initiatives and/or changes, reorganizations, etc.? Monitor implementation of compliance review recommendations?

7. **Discrimination Complaints:**

- Were employment or program discrimination complaints filed during the year? Were complaint resolutions/settlements actively pursued through reasonable offers? Of the total number of complaints filed, how many were informally resolved? How many were settled during the formal stage? Were issues common to more than one complaint/complainant scrutinized and addressed?
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SUBJECT: Senior Executive Service Performance

TO: Under/Assistant Secretaries
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MIKE ESPY
Secretary

Attachment

cc: Lynn Finnerty, OES

UNITED STATES DEPARTMENT OF AGRICULTURE

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United States
Department of
Agriculture

Office of
the Secretary

Office of
Civil Rights
Enforcement

Washington, D.C.
20250

M. Downing - OPM distribute
Ho. White E.O.
to employees
as requested

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18 MAY 1994 *Eckert*

SUBJECT: Establishment of USDA GLOBE

TO: Agency Heads

In keeping with the Secretary's April 15, 1993, EEO and Civil Rights Policy Statement, the USDA Gay, Lesbian, and Bisexual Employees (GLOBE) employee group was officially sanctioned by Assistant Secretary Townsend on March 25, 1994. USDA GLOBE will provide a collective voice for the concerns of USDA gay, lesbian, and bisexual employees and serve as a resource to the Department in addressing issues related to discrimination and harassment based on sexual orientation.

Attached is Assistant Secretary Townsend's March 25, 1994, letter which includes a copy of the USDA GLOBE Bylaws. Agency Heads are asked to provide the attached information to employees within their agencies. //

Agency Heads are to continue to communicate a commitment to equal opportunity in their civil rights policy statements in line with Secretary Espy's April 15, 1993, policy statement. Agency policy statements should include information on avenues of redress available to those individuals who believe that they have been discriminated against because of their sexual orientation.

Your continued commitment to the civil rights program of this department is appreciated and will ensure equal opportunity and diversity in all employment and program delivery areas.

Questions concerning USDA GLOBE are to be referred to Patricia Browne, President, USDA GLOBE at (202) 219-0307.

[Handwritten signature: David Montoya]

David Montoya
Director

Attachment



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

April 15, 1993

EEO AND CIVIL RIGHTS POLICY STATEMENT

It is customary for Secretaries of Agriculture to issue strong statements about their concern for equal opportunity and civil rights. Since coming on board, I have talked with scores of employees as well as members of the public. I know that many employees, at all levels, are absolutely committed to the goal of ensuring equal opportunity for all in employment and program delivery.

However, many also believe strongly that past EEO statements, while sincere, were not reinforced with the necessary actions and follow up that critical policy issues require. Many feel that the Department's efforts have focused too much on process, and too little on results. Therefore, I would like to share some of my concerns, goals, and expectations in this important area.

My goal is to make the Department of Agriculture a place where equal opportunity for all Americans is assured and where promoting civil rights is essential to employee and managerial success. Ours is a diverse society. Diversity is a source of strength for USDA as we tap the talents, creativity, and energy of all Americans who desire to serve, or who have an interest in the programs and services that we provide.

To ensure these results, we must first improve our system of accountability. In line with this policy, managers and supervisors will be evaluated for their performance in EEO and civil rights. Success in this vital area will be an important factor in the performance assessment of every employee. It will be considered in their competition for monetary awards as well as for future responsibility.

We will improve the ability of civil rights and EEO related units to accomplish their duties in a manner that is timely and of high quality. The present EEO complaint process is burdensome and it is often misunderstood. It is time consuming and expensive for employees and for the Department. There is also concern that some civil rights related units are positioned so as to lessen - rather than enhance - their ability to perform functions vital to the success of each agency.

We will create an environment where employees and supervisors are able to discuss concerns openly without fear of reprisal or retaliation. I am especially concerned about allegations of a "culture of reprisal" at USDA. Many persons feel that filing EEO complaints will be detrimental to one's career. I am also aware of several instances of overt racist and sexist remarks and acts which no one should have to endure.

All of these considerations point to the need for change. We must have the courage to change, especially the way we manage our most precious resource, our people. A key

element of reinventing government is that we change how we interact with one another, and how we treat one another. My goal is to create a participatory work environment at Team USDA that allows everyone to realize their full potential, and increases our productivity, without the waste of human resources.

In line with this policy, our actions will be directed towards positive accomplishments in the Department's efforts to attain a diverse workforce, ensure equal opportunity, respect civil rights, and create a work environment free of discrimination and harassment based on gender or sexual orientation.

I expect all managers to develop a positive, problem solving approach to handling employment and program discrimination complaints, to work at understanding the basis for complaints, and to extend every effort to resolve them, where feasible, before they reach the formal stage. Further, there is simply no room for management by discrimination, reprisal, or fear in the new USDA and such activities will not be tolerated.

We will eliminate discrimination from our program delivery system, reach out to groups which have historically been neglected, and ensure that we are inclusive, rather than exclusive, in all aspects of our program delivery. We will communicate in such a manner that everyone making an inquiry or participating in USDA programs understands how programs will benefit them. We are the "people's" department. Barriers that prevent the full participation of under-served groups will be overcome.

Under secretaries, assistant secretaries and agency heads must ensure that all managers are committed to each of these goals and that their performance appraisals take into account specific and timely accomplishments in these areas. I also expect agency heads to examine the placement of civil rights units and ensure that they have adequate support.

This policy is more than a sincere statement of intent. It is a personal commitment to take the actions necessary to ensure implementation. Each employee, at every level, will be held personally accountable for her or his performance in ensuring equal opportunity and promoting civil rights.

MIKE ESPY
SECRETARY



DEPARTMENT OF AGRICULTURE
OFFICE OF ASSISTANT SECRETARY FOR ADMINISTRATION
WASHINGTON, D. C. 20250-0100

MAR 27 1994

SUBJECT: Establishment of USDA GLOBE

TO: Pat Browne
Spokesperson, USDA GLOBE

In keeping with the Secretary's April 15, 1993, EEO and Civil Rights Policy Statement, I am pleased to officially sanction the creation of USDA GLOBE by approving the attached bylaws. With this approval, USDA GLOBE will exercise all of the rights and responsibilities of other officially sanctioned employee organizations.


Wardell C. Townsend, Jr.
Assistant Secretary
for Administration

Attachment

**U. S. Department of Agriculture
Gay, Lesbian, and Bisexual Employee Organization
(USDA GLOBE)**

Bylaws

Mission Statement.

The mission of the U. S. Department of Agriculture Gay, Lesbian, and Bisexual Employee Organization is to create a work environment free of discrimination and harassment based on sexual orientation.

I. Name of the Organization.

The U. S. Department of Agriculture Gay, Lesbian, and Bisexual Employee Organization, hereafter referred to as "USDA GLOBE."

II. Purpose.

The purpose of USDA GLOBE is to:

- A. Promote understanding of issues affecting gay, lesbian and bisexual employees in USDA.
- B. Support the USDA policy of nondiscrimination based on sexual orientation.
- C. Provide outreach to the gay, lesbian, and bisexual community in the Department.
- D. Serve as a resource group to the Secretary on issues of concern to gay, lesbian, and bisexual employees.
- E. Work for the creation of diverse work force that assures respect and civil rights for gay, lesbian, and bisexual employees.
- F. Create a forum for the concerns of the gay, lesbian, and bisexual community in the Department.

III. Membership.

Membership and all privileges and responsibilities of membership shall be available to all USDA employees and retired USDA employees.

IV. Meetings.

- A. Meetings will be held monthly and will be open to all current or retired USDA employees and their invited guests.**
- B. The Officers shall conduct a monthly Executive Board meeting.**
- C. Committee Chairpersons may conduct committee meetings as necessary.**
- D. Meetings will generally be held at the USDA headquarters in Washington. Meetings will occasionally be held at non-headquarters locations in the Washington area.**

V. Dues.

- A. Dues will be collected by the Treasurer from all members at the annual election meeting in January. Dues shall be \$12.00 per year. New members may pay dues on a pro-rated basis.**
- B. Only dues-paying members shall be allowed voting privileges at meetings and elections.**

VI. Government.

The laws of this organization shall consist of these bylaws and additional guidelines adopted by the membership.

VII. Officers and Election Process.

- A. Each year at the November general meeting, USDA GLOBE will form a Nominating Committee for the purpose of overseeing the nomination and election process. All USDA GLOBE members are eligible to run for office and may nominate themselves or other members willing to serve. The Nominating Committee will:**

1. Solicit and/or receive nominations from USDA GLOBE members willing to serve as officers;
 2. Certify candidate qualifications and prepare and present elections ballots at the December general meeting;
 3. Receive additional nominations from the floor at the December general meeting;
 4. Mail a copy of the election ballot and applicable candidate information to all USDA GLOBE members not present at the December general meeting after a final slate is proposed at that meeting; and
 5. Receive absentee ballots from voting members who will not be present for the election at the January general meeting.
- B. Each year at the January general meeting, USDA GLOBE will elect five Officers from among the members. These Officers will include: President, Vice-President, Historian, Treasurer, and Liaison to Federal GLOBE. By paper ballot, the Officers will be elected by a simple majority vote of members attending the election meeting and by members who have submitted absentee ballots. The Officers will function as an Executive Board chaired by the President. Terms will be for one year and no Officer may serve more than two consecutive terms in the same elected position.

VIII. Duties.

- A. The President, with the help of other officers, when appropriate, will:
1. Develop or update a statement of direction that will identify specific annual goals and objectives in support of the USDA GLOBE mission.
 2. Organize, direct, and coordinate all USDA GLOBE activities to meet defined goals and objectives.
 3. Annually assess progress made, evaluate the effectiveness of the goals and objectives themselves, take necessary actions to correct any deficiency, and report findings to the USDA GLOBE.
 4. Develop the agenda and preside at all meetings of the general membership.

5. Serve as the official representative and spokesperson for USDA GLOBE.
6. Serve as the official representative for USDA GLOBE on the USDA Civil Rights Management Council.
7. Sign and execute all agreements and obligations voted by a majority of the members in attendance at meetings.

B. The Vice-President will:

1. Advise and assist the President in the execution of his or her responsibilities.
2. Execute the functions of the President in the absence, or upon the resignation, of the President.
3. Serve as second signature for all checks and disbursements made by USDA GLOBE.
4. Coordinate with USDA GLOBE in establishing committees, assure that committee Chairpersons are nominated and assigned, and act as an oversight manager of all committees.
5. Function as the liaison to USDA GLOBE groups in non-headquarters locations.

C. The Historian will:

1. Keep minutes of all general meetings.
2. Maintain all official correspondence and documents.
3. Develop or coordinate the development and reports and correspondence as may be assigned by the President or Vice-President.
4. Notify members of all meetings and activities.
5. Circulate minutes, agendas, and other pertinent documents.
6. Maintain a list of members and other non-financial records.

7. Make available to all members and prospective members copies of the Bylaws and other related documents.

D. The Treasurer will:

1. Receive all funds payable to USDA GLOBE and issue receipt for such funds, including membership dues.
2. Satisfy financial obligations as duly authorized by a majority vote of members present at a general meeting.
3. Keep a clear and accurate record of all USDA GLOBE receipts and disbursements.
4. Maintain a checking account to store funds and issue payments and ensure that the second signature on the account is that of the Vice-President.
5. Present a report on the financial status of USDA GLOBE at all general meetings.

E. The Liaison to Federal GLOBE will:

1. Represent USDA GLOBE at monthly Federal GLOBE meetings.
2. Write the USDA column for the Federal GLOBE newsletter.
3. Report current Federal GLOBE activities at USDA GLOBE meetings.
4. Federal GLOBE dues will be paid for this Officer through USDA GLOBE funds.

IX. Filling Vacant Positions.

- A. When an Officer resigns his or her position on the USDA GLOBE Executive Board or separates from USDA employment, he or she shall notify the President prior to leaving USDA GLOBE.
- B. In the event the President is the resigning Officer, the Vice-President shall assume the President's responsibilities for the remainder of the term. A new Vice-President shall be nominated and elected by members at the next general meeting.

Voting.

To initiate or transact normal business presented at the meetings, a quorum shall constitute 10% of the general membership.

All issues regarding significant changes to USDA GLOBE, as determined by the Executive Board, shall be presented as voting issues and must be voted on by at least two-thirds of the voting members through paper ballot.

The annual election of Officers in January will also take place by paper ballot. Members may arrange to vote through absentee ballot if they are unable to attend the election meeting.

Committees.

Any USDA GLOBE member may recommend that a committee be formed to develop a specific issue of interest.

Any USDA GLOBE member may nominate another member to be the Chairperson of a committee.

The USDA GLOBE Executive Board will confirm the establishment of committees and appoint committee Chairpersons.

Committee Chairpersons will report the status of committee efforts at general USDA GLOBE meetings.

Chapters.

USDA GLOBE members may form local Chapters of USDA GLOBE in field locations.

All USDA GLOBE members working in the geographical area of a USDA GLOBE Chapter shall be eligible for Chapter membership under the same terms and conditions as members of USDA GLOBE.

Each Chapter shall have the power to select its own name and develop its own charter. However, Chapter charters shall be consistent with Departmental policy and with the vision, goals, and objectives of USDA GLOBE.



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D. C. 20530

April 18, 1994

**MEMORANDUM FOR JAMES S. GILLILAND
GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE**

From: Walter Dellinger *W.D.*
Assistant Attorney General
Office of Legal Counsel

Re: Authority of USDA to Award Monetary Relief for Discrimination

This memorandum responds to your request for our opinion concerning the authority of the Secretary of Agriculture to award damages and other forms of monetary relief, attorneys' fees, and costs to individuals who the Department of Agriculture ("USDA") has determined have been discriminated against as applicants for, or participants in, USDA conducted programs.¹ You have informed us that the statutes authorizing these programs do not authorize such relief and have asked our opinion concerning whether various civil rights statutes authorize the Secretary to afford such relief.

The Secretary has authority to award monetary relief, attorneys' fees, and costs if a court could award such relief in an action by the aggrieved person. Accordingly, the dispositive questions regarding your inquiry are whether the anti-discrimination provisions of the individual civil rights statutes apply to federal agencies, and if so, whether the statutes waive the sovereign immunity of the United States against imposition of such relief. In considering your request, we have reviewed Title VI of the Civil Rights Act of 1964, the Fair Housing Act, the Rehabilitation Act, and the Equal Credit Opportunity Act. With respect to attorneys' fees and costs, we have also reviewed the Equal Access to Justice Act.

We conclude that the anti-discrimination provisions of Title VI do not apply to federal agencies. Some anti-discrimination provisions in each of the other statutes that we reviewed do apply to federal agencies, but only one of the statutes, the Equal Credit Opportunity Act, waives sovereign immunity with respect to monetary relief, authorizing imposition of compensatory damages. The Fair Housing Act and the Rehabilitation Act do not waive immunity against monetary relief. Attorneys' fees and costs may be awarded pursuant to the waiver of immunity contained in the Equal Access to Justice Act.

¹ See Letter to Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, from James S. Gilliland, General Counsel, Department of Agriculture (Oct. 8, 1993).

I. BACKGROUND

A federal agency must spend its funds only on the objects for which they were appropriated. 31 U.S.C. § 1301(a). Consistent with this requirement,² appropriations law provides that agencies have authority to provide for monetary relief in a voluntary settlement of a discrimination claim only if the agency would be subject to such relief in a court action regarding such discrimination brought by the aggrieved person.

This principle has been applied in a number of Comptroller General opinions. For example, the Comptroller General has concluded that agencies have the authority to settle administrative complaints of employment discrimination by awarding back pay because such monetary relief is available in a court proceeding under Title VII of the Civil Rights Act of 1964 ("Title VII"); however, "[t]he award may not provide for compensatory or punitive damages as they are not permitted under Title VII." Equal Employment Opportunity Commission, 62 Comp. Gen. 239, 244-45 (1983).³ The Comptroller General has come to the same conclusion with respect to the Age Discrimination in Employment Act of 1967 ("ADEA"). Albert D. Parker, 64 Comp. Gen. 349, 352 (1985). The Comptroller General has applied this appropriations law limitation directly to USDA. See Comp. Gen. Decision No. B-237615, at 1 (June 4, 1990) ("Employee may not be reimbursed for economic losses pursuant to a resolution agreement made under [ADEA or Title VII] since there is no authority for reimbursement of compensatory damages under either statutory authority.").⁴

Therefore, the question you have raised regarding the Secretary's authority to award monetary relief in administrative proceedings turns on whether the various civil rights statutes authorize the award of such relief against federal agencies in a court proceeding. That question requires a two-step analysis: whether federal agencies are subject to the discrimination prohibitions of the statute; and, if so, whether the statute waives the sovereign

² See also 31 U.S.C. § 1341(a)(1) (Anti-Deficiency Act).

³ Waiving sovereign immunity, Title VII expressly authorizes awards of back pay against federal agencies. A provision in Title VII entitled "Employment by Federal Government," 42 U.S.C. § 2000e-16, prohibits discrimination by federal agencies (subsec. (a)); authorizes a civil action in which "the head of the department, agency, or unit . . . shall be the defendant" (subsec. (c)); and incorporates the remedies provisions of 42 U.S.C. § 2000e-5 for such civil actions (subsec. (d)). Awards of back pay are expressly authorized by 42 U.S.C. § 2000e-5(g). Subsequent to issuance of the Comptroller General opinions cited in the text, Title VII was amended to provide for compensatory damage awards against all parties, including federal agencies, and punitive damage awards against all non-government parties. 42 U.S.C. § 1981a(b).

⁴ The same appropriations limitation exists for settlements of litigation by the Department of Justice as exists for settlements of administrative proceedings by agencies. This Office has previously opined that the permanent appropriation established pursuant to 31 U.S.C. § 1304 ("the judgment fund") is available "for the payment of non-tort settlements authorized by the Attorney General or his designee, whose payment is 'not otherwise provided for,' if and only if the cause of action that gave rise to the settlement could have resulted in a final money judgment." 13 Op. O.L.C. 118, 125 (1989) (preliminary print) (emphasis added) (quoting 31 U.S.C. § 1304).

immunity of the United States against monetary relief. See U.S. Dept. of Energy v. Ohio, 112 S. Ct. 1627, 1632 (1992) (Energy Department conceded it was subject to procedural requirements of Clean Water Act and Resource Conservation and Recovery Act and liable for coercive fines under those statutes; therefore, only question presented was whether the statutes waived sovereign immunity from liability for punitive fines).⁵

The first step of the analysis requires application of conventional standards of statutory interpretation. The second step, however, requires application of a special, "unequivocal expression" interpretive standard that the Supreme Court has established to govern determinations as to whether a statute waives sovereign immunity -- either the inherent constitutional immunity of the federal government or the Eleventh Amendment immunity of the States:

Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed. . . . [T]he Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] beyond what the language requires As in the Eleventh Amendment context, the unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.

United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1014-16 (1992) (internal quotation marks and citations omitted). Thus, "[t]here is no doubt that waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." United States v. Idaho, Ex Rel. Dir., Dept. of Water Res., 113 S. Ct. 1893, 1896 (1993).

The methodology required by this "unequivocal expression" standard may be illustrated by the decision in Nordic Village. Seven Justices joined in an opinion for the Court that found that although a provision of the Bankruptcy Code could be read to effect a waiver of sovereign immunity for monetary claims against the United States by a bankruptcy trustee, the provision was "susceptible of at least two interpretations that do not authorize monetary relief." 112 S. Ct. at 1015 (emphasis in original). The Court made no effort to apply traditional rules of statutory construction to determine which was the better reading of the provision and simply concluded:

The foregoing [two alternative interpretations] are assuredly not the only readings of [the provision], but they are plausible ones -- which is enough to

⁵ The Court expressly identified in Department of Energy the fundamental difference between the substantive coverage of a statute and liability for violations of the statute, stating that the Clean Water Act contains "separate statutory recognition of three manifestations of governmental power to which the United States is subjected: substantive and procedural requirements; administrative authority; and 'process and sanctions,' whether 'enforced' in courts or otherwise. Substantive requirements are thus distinguished from judicial process" 112 S. Ct. at 1637.

establish that a reading imposing monetary liability on the Government is not "unambiguous" and therefore should not be adopted.

Id. at 1016.⁶ The Court held that sovereign immunity against imposition of monetary relief had not been waived.

In consultation with the Civil and Civil Rights Divisions of the Department of Justice, and having received and considered submissions from various interested governmental and nongovernmental parties,⁷ we have identified four civil rights statutes that may apply to USDA programs: Title VI of the Civil Rights Act of 1964, the Fair Housing Act, the Rehabilitation Act, and the Equal Credit Opportunity Act. We will discuss Title VI first. That analysis presents the least difficulty, because it is well established that the anti-discrimination provisions of Title VI do not apply to federal agencies and thus there is no need to discuss whether sovereign immunity has been waived. The remaining three statutes require more discussion. The first step of the analysis is satisfied in each case because federal agencies are covered by the anti-discrimination provisions of each statute, at least to some extent. Applying the "unequivocal expression" standard required under the second step, however, we have concluded that sovereign immunity has been waived with respect to monetary relief by only one of the statutes: the Equal Credit Opportunity Act. The final section of the memorandum discusses attorneys' fees and costs.

II. TITLE VI

Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." By its terms, this anti-discrimination provision does not apply to programs conducted directly by a federal agency, but rather applies only to "any program or activity receiving federal financial assistance." The conclusion that this provision does not include federal agencies is reinforced by the definitions of "program or activity" and "program" contained in 42 U.S.C. § 2000d-4a. That provision specifically identifies the kinds of entities that are covered, including State and local governments, but contains no reference to the federal government. The courts have held that Title VI "was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary."

⁶ Applying its rule that waivers of sovereign immunity must be unequivocally expressed in the statutory text, the Court declined to consider the legislative history in an attempt to resolve the ambiguity. Id.

⁷ See Letters from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, and Nelson Diaz, General Counsel, U.S. Department of Housing And Urban Development (Nov. 15, 1993); Elaine R. Jones, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. (Oct. 28, 1993); Bill Lann Lee, Western Regional Counsel, NAACP Legal Defense and Educational Fund, Inc. (Nov. 12, 1993; Nov. 24, 1993); Les Mendelsohn, Esq., Speiser, Krause, Madole & Mendelsohn (Nov. 4, 1993); David H. Harris, Jr., Executive Director, Land Loss Prevention Project (Nov. 5, 1993, Nov. 8, 1993).

Soberal-Perez v. Heckler, 717 F.2d 36, 38 (2nd Cir: 1983), cert. denied, 466 U.S. 929 (1984); Fagan v. U.S. Small Business Administration, 783 F. Supp. 1455, 1465 n.10 (D.D.C. 1992) (Title VI inapplicable to SBA direct loan program).

In light of our conclusion that the discrimination prohibition of Title VI does not apply to federal agencies, there is no need to consider whether Title VI waives sovereign immunity.

III. THE FAIR HOUSING ACT

A.

The Fair Housing Act, 42 U.S.C. §§ 3601 et seq.,⁸ prohibits covered persons and entities from engaging in any "discriminatory housing practice," which is defined as "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. § 3602(f). Section 3604 prohibits discrimination in the sale or rental of housing. Section 3603 of the Act provides that "the prohibitions against discrimination in the sale or rental of housing set forth in section 3604 . . . shall apply" to "dwellings owned or operated by the Federal Government." Thus, a federal agency is subject to the discrimination prohibitions of section 3604 whenever the agency itself is engaged in selling or renting real estate.

In contrast to the language explicitly subjecting federal agencies to the discrimination prohibitions of section 3604, it is unclear whether federal agencies are subject to section 3605, which prohibits "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction." The definition section of the Act does not include governments or government agencies in the definition of "person," see § 3602(d), and unless otherwise specified, the term "person" in a statute does not include the federal government or a federal agency. United States v. United Mine Workers of America, 330 U.S. 258, 275 (1947) ("In common usage," the term person "does not include the sovereign, and statutes employing it will ordinarily not be construed to do so."). The term "entity" is not defined at all in the Act. It is not necessary to resolve this question for purposes of this opinion, however, because we conclude in the next section that the Act does not waive the sovereign immunity of the United States against monetary liability.⁹

⁸ The Fair Housing Act was originally enacted as Title VIII of the Civil Rights Act of 1968, Pub.L. No. 90-284, 82 Stat. 73 (1968).

⁹ For the same reason it is also unnecessary to resolve whether the discrimination prohibitions in sections 3606 and 3617 apply to federal agencies. We note, however, that these sections do not appear to be directed at government activities. Section 3606 makes it unlawful to discriminate with respect to "access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings." Section 3617 makes it unlawful to "coerce, intimidate, threaten, or interfere with any person" with respect to the exercise of rights protected by sections

B.

Whether federal agencies are subject to monetary liability for violations of section 3604 of the Fair Housing Act turns on application of the "unequivocal expression" standard for waivers of sovereign immunity discussed in section I of this memorandum. We conclude that the Act does not waive sovereign immunity, because its text falls well short of satisfying the "unequivocal expression" standard.

Section 3613 authorizes aggrieved persons to enforce the Fair Housing Act's anti-discrimination prohibitions in court. Although section 3613 is silent as to whom this action may be brought against, it does specify what relief may be awarded. Subsection (c)(1) authorizes a court to award an aggrieved person "actual and punitive damages," as well as injunctive relief. In addition, under subsection (c)(2), the court "may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person."

We do not believe that section 3613 waives sovereign immunity, except with respect to attorneys' fees and costs. Although the Fair Housing Act expressly establishes a general cause of action for redress of discriminatory practices, it is silent as to the parties against whom such a cause of action may be brought and it does not contain language expressly subjecting the United States to such a suit.

It is possible to infer from the fact that section 3603 expressly subjects the United States to the discrimination provisions of section 3604 that Congress intended that the cause of action established by section 3613 would also apply to the United States. However, section 3613 does not say so and the Supreme Court has held that subjecting a governmental entity to the substantive or procedural requirements of a statute does not necessarily mean that sovereign immunity has been waived or abrogated with respect to claims for damages. See, e.g., U.S. Dept. of Energy v. Ohio, 112 S. Ct. 1627 (1992) (federal agencies subject to procedural requirements of Clean Water Act and Resource Conservation and Recovery Act but immune from actions for punitive fines); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 244-46 (1985) (States subject to section 504 of Rehabilitation Act but immune from actions for monetary relief); Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973) (States subject to Fair Labor Standards Act but immune from actions for monetary relief).¹⁰ The Court has stated that additional language in the suit authorization provision is necessary to "indicat[e] in some way by clear language that the constitutional immunity [is being] swept away." Id. at 285.

3603-3606 of the Act.

¹⁰ The Supreme Court has stated that the standard for establishing a waiver of the federal government's sovereign immunity is substantially the same as the standard for finding congressional abrogation of state Eleventh Amendment immunity. See Nordic Village, 112 S. Ct. at 1016. Eleventh Amendment cases like Atascadero and Missouri Public Health Dept. are therefore helpful in our analysis.

The only additional relevant language in section 3613 is subsection (c)(2), which authorizes the award of attorneys' fees:

In a civil action [brought by an aggrieved person under section 3613], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

The presence, in a provision authorizing the bringing of suits by private parties, of language indicating that the United States may be liable for attorneys' fees and costs certainly indicates a recognition that the United States may be subject to suits under the provision. The question remains whether that is a sufficient expression of a waiver of sovereign immunity against damages or any other monetary relief except attorneys' fees and costs.

We recognize that it is a plausible reading of the statute to answer that question in the affirmative. We note, however, that the Supreme Court has declined to give such a reading to an attorneys' fees provision in a State sovereign immunity context. See Dellmuth v. Muth, 491 U.S. 223, 231 (1989) (stating in decision holding State sovereign immunity not abrogated by Education of the Handicapped Act: "The 1986 Amendment to the EHA deals only with attorney's fees, and does not alter or speak to what parties are subject to suit."). In any event, we conclude that the statute does not meet the "unequivocal expression" standard because there is another plausible interpretation of the attorneys' fees language that would not entail waiver of immunity for damages and other monetary relief. Just because the United States is subject to the cause of action does not necessarily mean it is subject to the full range of remedies that are set forth in the statute. These remedies include not only compensatory and punitive damages, but also a "permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such [discriminatory housing] practice or ordering such affirmative action as may be appropriate)." 42 U.S.C. § 3613(c)(1).

The alternative plausible interpretation of the statute is that the attorneys' fees provision contemplates an action that is limited to seeking relief other than money damages. This reading is based on the fact that the sovereign immunity of the United States against non-monetary relief already has been waived by the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701 et seq., which provides that

[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States.

5 U.S.C. § 702.¹¹ "[T]he caselaw of [the Court of Appeals for the District of Columbia Circuit] confirms that 'the [APA] waiver applies to any suit, whether under the APA . . . or any other statute.'"¹² Other Circuits are in accord,¹³ and the Supreme Court has implicitly held that the APA waiver is not limited to actions brought under the APA, *see Bowen v. Massachusetts*, 487 U.S. 879, 891-901 (1988) (APA waiver applied in action brought under 28 U.S.C. § 1331).

Under the Supreme Court's "unequivocal expression" standard, the availability of this alternative interpretation of the Fair Housing Act attorneys' fees provision -- that it contemplates an action for non-monetary relief based on the APA waiver of sovereign immunity -- precludes finding a waiver of sovereign immunity. *See Nordic Village*, 112 S. Ct. at 1016 (when a provision is subject to more than one plausible interpretation, the "reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted").¹⁴

¹¹ The legislative history of this APA provision indicates that its purpose was "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a Federal officer." S. Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121. *See also id.* at 9, 1976 U.S.C.C.A.N. at 6129 ("[T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity."). *See generally*, Kenneth C. Davis, *Administrative Law Treatise* § 23.19, at 192 (2nd ed. 1983) ("The meaning of the 1976 legislation is entirely clear on its face, and that meaning is fully corroborated by the legislative history. That meaning is very simple: Sovereign immunity in suits for relief other than money damages is no longer a defense.").

¹² *State of Alabama v. Bowsher*, 734 F. Supp. 525, 533 (D.D.C. 1990), quoting P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1154 (3rd ed. 1988), and citing *National Ass'n of Counties v. Baker*, 842 F.2d 369, 373 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989); *Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Sea-land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982).

¹³ *See, e.g., Specter v. Garrett*, 995 F.2d 404, 410 (3rd Cir. 1993) ("the waiver of sovereign immunity contained in [the APA] is not limited to suits brought under the APA"); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) ("[T]he waiver of sovereign immunity contained in [the APA] is not dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief.").

¹⁴ Another alternative interpretation may also be possible. Because the United States may intervene in private actions brought under section 3613 in order to seek broader relief, *see* 42 U.S.C. § 3613(e), it is possible that the United States could incur liability for attorneys' fees and costs without being a defendant. We find this interpretation to be less plausible than the non-monetary relief interpretation because the latter gives effect to provisions in the same subsection, which is devoted to "[r]elief which may be granted," 42 U.S.C. § 3613(c), while the former requires reading together separate subsections and inferring that Congress may have contemplated in subsection (c) that interventions by the Attorney General under subsection (e), in cases where she "certifies that the case is of general public importance" and seeks broader relief, might result in awards of attorneys' fees and costs against the United States.

We therefore conclude that the text of the Fair Housing Act as amended does not waive the sovereign immunity of the United States against imposition of monetary relief. The APA waives sovereign immunity as to any non-monetary relief available under the Act.

C.

The foregoing conclusion is reinforced by consideration of the text and legislative history of the Fair Housing Act when it was originally enacted as Title VIII of the Civil Rights Act of 1968 ("Title VIII"), supra, and of the 1988 amendments to the Fair Housing Act (the "1988 Amendments"), Pub.L. No. 100-430, 102 Stat. 1619. This is a useful methodology for considering whether the Act waives sovereign immunity because it allows a focused analysis of whether Congress specifically intended to waive sovereign immunity.¹⁵

As discussed above, the language in the Fair Housing Act that provides the most specific basis for an argument that sovereign immunity for monetary liability has been waived is the language in the attorneys' fees provision authorizing a court to award

the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

42 U.S.C. § 3613(c)(2). This specific reference to the United States was not contained in the original Fair Housing Act's (Title VIII's) attorneys' fees provision, which authorized the courts to "award to the plaintiff . . . reasonable attorney fees in the case of a prevailing plaintiff: Provided, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." Pub. L. No. 90-284, § 812(c), 82 Stat. 88 (1968). As with the current version of the Act, the original provision on enforcement by private persons authorized an award of damages to an aggrieved person but was silent as to who could be potential defendants in the civil actions. Id., § 812, 82 Stat. at 88.

Thus, the original Fair Housing Act contained no express or implied reference to any cause of action against the United States in its provisions establishing a private cause of action and authorizing awards of attorneys' fees. The 1988 Amendments to the Act removed

¹⁵ Justice Scalia criticized this methodology in Pennsylvania v. Union Gas Co., 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part) ("That methodology is appropriate . . . if one assumes that the task of a court of law is to plumb the intent of the particular Congress that enacted a particular provision. That methodology is not mine It is our task . . . not to enter the minds of the Members of Congress . . . but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times."). Notwithstanding this criticism, we believe the methodology is appropriate here. Whatever the merit of Justice Scalia's emphasis of code meaning over congressional intent in other contexts, we do not think that approach is required or desirable where the question presented is whether sovereign immunity has been waived and more than one statutory enactment is involved. We note that no other Justice expressed agreement with Justice Scalia's statement in Union Gas. Moreover, the Court's majority in Dellmuth used this approach. See 491 U.S. at 227-32.

the "ability to pay" limitation on attorneys' fee awards and added language making it clear that the United States was subject to an award of attorneys' fees and costs. The 1988 Amendments, however, did not add any language suggesting that the United States was subject to damages claims.

The legislative history of the 1988 Amendments reinforces the conclusion that the Housing Act does not waive the sovereign immunity of the United States for monetary relief.¹⁶ The principal legislative history for those amendments is contained in the report of the Committee on the Judiciary of the House of Representatives. H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 2173. In a paragraph giving an overview of the purpose of the amendments made by the committee, the report stated that the revision "brings attorney's fee language in title VIII closer to the model used in other civil rights laws." 1988 U.S.C.C.A.N. at 2174. The committee went on to state later in the report that "[t]he bill strengthens the private enforcement section by expanding the statute of limitations, removing the limitation on punitive damages, and brings [sic] attorney's fee language in title VIII closer to the model used in other civil rights laws." Id. at 2178.¹⁷

The committee report indicates that the thrust of the amendments was to remove limitations on effective private enforcement by changing the statute of limitations, removing the limit on punitive damages, and removing the "ability to pay" limitation on the award of attorneys' fees. It also indicates an intent to conform the language of the attorneys' fees provision to that in other civil rights laws.¹⁸ There is no discussion whatsoever of actions

¹⁶ Although legislative history cannot be relied upon to provide the "unequivocal expression" the Supreme Court requires, Nordic Village, 112 S.Ct. at 1016, we believe it is permissible to cite legislative history to reinforce a text-based conclusion that a statute does not waive sovereign immunity. Confidence in a conclusion based on the text can be strengthened where the legislative history reveals no evidence of intent to waive sovereign immunity.

¹⁷ In the discussion of section 813(c) in the section-by-section portion of the report, the committee focused on removing the punitive damages limitation. The following is the entirety of the discussion of section 813(c):

Section 813(c) provides for the types of relief a court may grant. This section is intended to continue the types of relief that are provided under current law, but removes the \$1000 limitation on the award of punitive damages. The Committee believes that the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law. The Committee intends that courts be able to award all remedies provided under this section. As in Section 812(o), the court may also award attorney's fees and costs.

1988 U.S.C.C.A.N. at 2200-01.

¹⁸ For example, the attorneys' fees provision in Title VII of the Civil Rights of 1964 (employment discrimination) contains the following similar language concerning the United States: "[T]he court . . . may allow the prevailing party, other than . . . the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and . . . the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k).

against the United States, much less any reference to an intent to waive sovereign immunity or to establish monetary liability for the United States.

Given the focused nature of the 1988 amendments to the Fair Housing Act, it is not reasonable to infer any intent to waive the sovereign immunity of the United States against imposition of monetary relief. At most, the amendments can be read to waive sovereign immunity against awards of attorneys' fees. Reading into the amendment a broader waiver would be impermissible under the interpretative method required by the Supreme Court and would amount to finding an accidental waiver or a waiver by inadvertence.

D.

Our conclusion regarding waiver of sovereign immunity under the Fair Housing Act is supported by the case law on other statutes. In Dellmuth v. Muth, 491 U.S. 223 (1989), the Supreme Court discussed whether the Education of the Handicapped Act ("EHA"), which, like the Fair Housing Act, had been amended to impose liability for attorneys' fees on an otherwise immune governmental entity (in that case, the States), subjected the States to suit. Although the textual basis for arguing waiver of sovereign immunity under that statute appears to be stronger than is the case under the Fair Housing Act, the Court declined to find waiver.

The EHA "enacts a comprehensive scheme to assure that handicapped children may receive a free public education appropriate to their needs. To achieve these ends, the Act mandates certain procedural requirements for participating state and local educational agencies." Id. at 225. In Dellmuth, the Supreme Court reversed a decision of the Third Circuit Court of Appeals that the EHA abrogated the States' sovereign immunity against suit for damages. According to the Supreme Court,

[T]he Court of Appeals rested principally on three textual provisions. The court first cited the Act's preamble, which states Congress' finding that "it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the education needs of handicapped children in order to assure equal protection of the law." Second, and most important for the Court of Appeals, was the Act's judicial review provision, which permits parties aggrieved by the administrative process to "bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." Finally, the Court of Appeals pointed to a 1986 Amendment to the EHA, which states that the Act's provision for a reduction of attorney's fees shall not apply "if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section." In the view of the Court of Appeals, this amendment represented an express statement of Congress' understanding that States can be parties in civil actions brought under the EHA.

Id. at 228 (citations omitted).

We quote at length the Supreme Court's rejection of the Court of Appeals' analysis, because it can be applied directly to the Fair Housing Act:

We cannot agree that the textual provisions on which the Court of Appeals relied, or any other provisions of the EHA, demonstrate with unmistakable clarity that Congress intended to abrogate the States' immunity from suit. The EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity. Nor does any provision cited by the Court of Appeals address abrogation in even oblique terms, much less with the clarity Atascadero requires. The general statement of legislative purpose in the Act's preamble simply has nothing to do with the States' sovereign immunity. The 1986 Amendment to the EHA deals only with attorney's fees, and does not alter or speak to what parties are subject to suit. . . . Finally, [the private cause of action provision] provides judicial review for aggrieved parties, but in no way intimates that the States' sovereign immunity is abrogated. As we made plain in Atascadero, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

. . . We recognize that the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA. This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which . . . is necessary before we will determine that Congress intended to exercise its powers of abrogation.

Id. at 231-32 (emphasis added) (citations omitted).

Dellmuth presented a stronger case for waiver of sovereign immunity than the Fair Housing Act because the EHA contains "frequent reference[s] to the States" and is obviously very much focused on the activities of the States, while the Fair Housing Act is focused on the private sector and has relatively minor relevance to the activities of federal agencies. Nonetheless, the Supreme Court refused to find that the EHA waived sovereign immunity, relying on specific points that are directly applicable to the Fair Housing Act: that an attorneys' fees provision speaks only to attorneys fees and does not address who is subject to suit or what remedies are available; that a general authorization for suit is not an

"unequivocal expression"; and that legitimate inferences that Congress intended a damages cause of action are not "unequivocal expressions."¹⁹

The Department of Housing and Urban Development ("HUD") has submitted a letter stating its conclusion that "a federal agency . . . may be required to pay damages and other relief . . . [for] violations of the [Fair Housing Act]."²⁰ HUD relies principally on the analysis contained in Doe v. Attorney General of the United States, 941 F.2d 780 (9th Cir. 1991), which held that the Rehabilitation Act waives the sovereign immunity of the United States against damage awards. As discussed in the next section of this memorandum, we believe that Doe used a method of statutory interpretation that is impermissible under the Supreme Court precedents and that the case was incorrectly decided.

IV. REHABILITATION ACT

We reach fundamentally the same conclusions with respect to the Rehabilitation Act of 1973 as amended (the "Rehabilitation Act"), 29 U.S.C. §§ 794 et seq., as we have reached with respect to the Fair Housing Act.

A.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibits discrimination on the basis of disability:

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

¹⁹ The Court's opinion in Dellmuth relies heavily on Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). See 491 U.S. at 227, 230-32. Atascadero also strongly supports the conclusion that the Fair Housing Act does not waive sovereign immunity for monetary relief. Atascadero concerned the discrimination provisions of the Rehabilitation Act of 1973 and is discussed in detail in the next section of this memorandum, which addresses that Act. Atascadero held that the Rehabilitation Act does not abrogate the sovereign immunity of the States. We conclude in the next section that the analysis in that case should apply fully to actions against the federal government. The case is significant for purposes of the discussion in this section because the Rehabilitation Act has a structure that is similar to the Fair Housing Act.

²⁰ Letter to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, and Nelson Diaz, General Counsel, at 1 (Nov. 15, 1993).

Id. at § 794(a) (emphasis added). The underlined language, which was added to section 504 in 1978,²¹ expressly subjects federal agencies to the discrimination prohibitions of the Act.

B.

Section 505 of the Rehabilitation Act (29 U.S.C. § 794a), which also was added in 1978,²² sets forth the remedies available for violations of the discrimination prohibitions. The following provisions of section 505 are pertinent here:²³

(a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title:

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Thus, as with the Fair Housing Act, the Rehabilitation Act has had two legislative enactments that bear on the sovereign immunity question: the original discrimination prohibition and a later amendment that can be argued to effect a waiver of immunity against imposition of monetary relief because it refers to the United States in a way that recognizes that federal agencies may be defendants in private actions. The history of the Rehabilitation Act enactments would at least initially suggest the possibility of a more plausible argument in favor of waiver, however, because its amendments were more sweeping than the Fair Housing Act amendments: while the Fair Housing Act amendments of 1988 merely made relatively minor changes to an existing cause of action and modified an attorneys' fees provision, the section 504 amendments in 1978 added for the first time a provision authorizing a private action for violations and a provision authorizing attorneys' fees awards.

However, after analyzing the Rehabilitation Act enactments under the Supreme Court's "unequivocal expression" standard, we conclude that there is no waiver of sovereign immunity for monetary relief. There is no fundamental difference between the effect of the Rehabilitation Act enactments and the effect of the Fair Housing Act enactments. In both cases, there is no express language authorizing actions against the United States for damages or other monetary relief and it is reasonable to read the cause of action and attorneys' fees provisions as allowing actions against the United States for injunctive relief pursuant to the

²¹ Pub.L. No. 95-602, § 119, 92 Stat. 2982.

²² Pub.L. No. 95-602, § 120, 92 Stat. 2982.

²³ The only other provision of section 505 (29 U.S.C. § 794a(a)(1)) concerns discrimination in federal employment, which we do not understand to be covered by your opinion request.

waiver of sovereign immunity for such relief contained in the Administrative Procedure Act. As the Supreme Court made clear in Nordic Village, where a plausible reading is available that does not authorize monetary relief. "a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." 112 S. Ct. at 1016.²⁴

C.

Our conclusion is supported by the case law. The Supreme Court already has held that the Rehabilitation Act does not abrogate the sovereign immunity of the States. In Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), the Court held that sections 504 and 505 of the Act do not abrogate the States' Eleventh Amendment sovereign immunity against imposition of monetary relief. Id. at 244-46. Applying an "unequivocally clear" standard,²⁵ which is substantially the same as the "unequivocal expression" standard governing waiver of federal immunity (Nordic Village, 112 S. Ct. at 1016), the Court held that States that receive federal assistance are clearly subject to the discrimination prohibition of section 504,

[b]ut given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically. Accordingly, we hold that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States.

473 U.S. at 246 (citations omitted).²⁶ The Court did not specifically address the section 505 attorneys' fees and costs provision, but its holding contains an implicit conclusion that the provision does not waive immunity for any monetary relief other than the attorneys' fees

²⁴ As we explained in the course of our consideration of the Fair Housing Act, we believe it is permissible to cite legislative history to reinforce a text-based conclusion that a statute does not waive sovereign immunity. We have reviewed the legislative history of the Rehabilitation Act amendments of 1978 and have found, as was the case with respect to the Fair Housing Act amendments of 1988, that it does not include any consideration of the subjects of sovereign immunity or of establishing monetary liability for the United States. Thus, it is consistent with our conclusion that those amendments do not waive sovereign immunity.

²⁵ Atascadero established the following standard: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." 473 U.S. at 242.

²⁶ Responding to the Supreme Court's decision in Atascadero, Congress passed legislation expressly abrogating the sovereign immunity of the States under the Rehabilitation Act and other civil rights statutes. Pub.L. No. 99-506, § 1003, 100 Stat. 1845 (1986). That legislation contained no provisions bearing on the sovereign immunity of the United States.

and costs themselves. The statutory framework with respect to the United States is substantially the same as with respect to the States, and we see no basis for concluding that the language of the Act waives the federal government's sovereign immunity when it does not abrogate the immunity of the States.²⁷

A panel of the Ninth Circuit Court of Appeals has concluded otherwise, holding that the Rehabilitation Act does indeed waive the sovereign immunity of the United States against imposition of damages. Doe v. Attorney General of the United States, 941 F.2d 780 (1991). We believe, however, that Doe was incorrectly decided. First, the Ninth Circuit's analytical approach was inconsistent with the Supreme Court's requirement of an "unequivocal expression" in statutory text without resort to legislative history. See Nordic Village, 112 S. Ct. at 1014-16. In the section of its opinion entitled "The Legal Standard for Ascertaining Whether the Government has Waived Sovereign Immunity," 941 F.2d at 787, the Ninth Circuit incorrectly stated that "[t]he key to determining whether there has been a waiver is Congress's intent as manifested in the statute's language and legislative history." Id. at 788. Rather than using the special standard established by the Supreme Court, the Ninth Circuit chose to view the issue as requiring application of the factors for implying a private right of action under Cort v. Ash, 422 U.S. 66, 78 (1975), with an additional sovereign immunity gloss that "only explicit congressional intent in the statutory language and history will suffice" for implying a private right of action against the United States. Doe, 941 F.2d at 788.

In addition, the Ninth Circuit's analysis of the Rehabilitation Act is unpersuasive. The court's conclusion was as follows:

In amending section 504, Congress made certain that federal agencies would be liable for violations of the statute. Congress's insertion of federal agencies in the pre-existing clause subjecting others to liability and its broad-brush remedy provision indicate that Congress intended that there be no distinction among section 504 defendants.

941 F.2d at 794. That conclusion is incorrect in two fundamental respects. First, the addition of federal agencies to section 504 was not to a "clause subjecting others to liability," but rather to a clause that imposed a non-discrimination substantive requirement and did not address liability in any way; it was not until section 505 was added in 1978 that the Rehabilitation Act addressed remedies. Second, the Supreme Court has rejected the view that the "broad-brush remedy provision [section 505] indicate[s] that Congress intended that

²⁷ The only treatment of the federal government in section 505 that is different from the treatment of the States (other than the obvious difference that federal agencies are not recipients of federal assistance) is that the attorneys' fees provision (paragraph (b)) does not allow the United States as a prevailing party to recover attorneys' fees. That exception says nothing, of course, about the liability of the United States for damages or other monetary relief, and the fact that the United States may be subject to attorneys' fees awards does not waive sovereign immunity for damages and other kinds of monetary relief.

there be no distinction among section 504 defendants." As discussed above, the Supreme Court opined in Atascadero State Hospital v. Scanlon that there are indeed distinctions to be made among section 504 defendants, holding that

given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

473 U.S. at 246. The United States, of course, also has special constitutional status, and the approach taken in Atascadero requiring an unequivocal specific expression of intent to waive sovereign immunity is equally applicable in the context of the federal government. Nordic Village, 112 S. Ct. at 1016.

V. EQUAL CREDIT OPPORTUNITY ACT

In contrast to our preceding conclusions, we conclude that the Equal Credit Opportunity Act (the "Credit Act"), 15 U.S.C. §§ 1691 *et seq.*, partially waives the sovereign immunity of the United States against the imposition of monetary relief, by authorizing an award of compensatory damages. Although this conclusion is not completely free from doubt because it is possible that the Supreme Court would require a more explicit statement of waiver, we reach this conclusion because we can find no reasonable explanation for a provision exempting all government creditors from liability for punitive damages other than that the provision recognizes that government creditors are liable for compensatory damages. There is no comparable provision in any of the other civil rights statutes addressed in this memorandum.

A.

The Credit Act prohibits any creditor from discriminating against any applicant with respect to any aspect of a credit transaction. § 1691(a). The term "creditor" is defined as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew or continue credit." § 1691a(d). For purposes of the Act, a "person" is "a natural person, a corporation, government or governmental subdivision or agency, trust, estate partnership, cooperative, or association." § 1691a(f) (emphasis added).

Although the Credit Act contains no further indication in its text or legislative history as to whether the governmental references in the definition of "person" were intended to include federal agencies, the natural understanding of the references is that the federal government is included, because the language is unrestricted and there is no language suggesting any different treatment for different levels of government. If it were intended that

the federal government was to be exempt and the statute limited in its coverage to State and local governments, we would expect that the text of the statute would make such a distinction -- or at least the distinction would be identified in legislative history. Neither the statute nor the legislative history contain any such suggestion.

Our conclusion that the federal government is subject to the discrimination provisions of the Credit Act may be reinforced by reference to another, previously enacted statute that also regulates the extension of credit, the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.* Both the Credit Act and TILA are part of the Consumer Credit Protection Act.²⁸ Statutes addressing the same subject matter -- that is, statutes "in pari materia" -- should be construed together.²⁹

TILA uses the same language as the Credit Act concerning covered government organizations. TILA applies to any "creditor," which is defined as a "person" who regularly extends certain types of consumer credit. § 1602(f). "Person" is defined as a "natural person" or an "organization," § 1602(d), and "organization" includes a "government or governmental subdivision or agency." § 1602(c). As with the Credit Act, there is no further indication of what levels of government are covered. Unlike the Credit Act, however, TILA contains an express assertion of sovereign immunity in the enforcement section of the statute, thus indicating a clear recognition that the federal government is subject to the substantive provisions of TILA:

[N]o civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any department or agency thereof, or any agency of any State or political subdivision.

§ 1612(b). It is reasonable to assume that when Congress defined "person" in the Credit Act to include a "government, governmental subdivision or agency," it intended those terms to have the same scope as the identical terms used in the previously enacted TILA.³⁰

²⁸ TILA was enacted in 1968 as title I of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, and the Credit Act was added to the Consumer Credit Protection Act as title VII in 1974, Pub. L. 93-495, title V, 88 Stat. 1521.

²⁹ See 2B *Sutherland Stat. Const.* § 51.02, at 121 (5th ed. 1992) ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they all should be construed together.").

³⁰ See 2B *Sutherland, supra*, § 51.02, at 122 ("Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense.").

B.

Of course, as discussed in prior sections of this memorandum, the fact that federal agencies are subject to the substantive requirements of the Credit Act does not necessarily mean that there has been a waiver of sovereign immunity against imposition of monetary liability for violation of such requirements. The Credit Act sovereign immunity question is not a simple one, because there is no language directly addressing the subject of sovereign immunity or directly stating that the United States may be subject to an award of monetary relief. However, as discussed below, we find there has been a waiver because the Act contains a provision that indirectly, but in our view unequivocally, indicates that the United States may be required to pay compensatory damages.

Section 1691e of the Credit Act provides for a private right of action against creditors who violate the discrimination prohibitions of the Act. Under subsection (a), all creditors are liable for compensatory damages: "[a]ny creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class." Under subsection (b), all creditors except governmental creditors are liable for punitive damages: "[a]ny creditor, other than a government or governmental subdivision or agency . . . shall be liable to the aggrieved applicant for punitive damages" Equitable relief is authorized under subsection (c).³¹ Finally, under subsection (d), costs and attorneys' fees may be imposed: "In the case of any successful action under subsection (a), (b), or (c) . . . , the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court"

Subsection (b) of section 1691e provides the key to finding a partial waiver of sovereign immunity against monetary relief. Coming immediately after a provision (subsection (a)) that states that all creditors are liable for compensatory damages, a provision exempting government creditors from liability for punitive damages necessarily implies a recognition that government creditors are otherwise liable for damages under the Act and remain liable for compensatory damages under the preceding section, which contains no such limitation. "[A] limitation of liability is nonsensical unless liability existed in the first place." Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2280 (1989) (holding that CERCLA abrogated State sovereign immunity based in part on implication of provisions exempting States from liability for certain actions).

Thus, the Credit Act is different from the Fair Housing Act and the Rehabilitation Act in the fundamental respect that it contains a provision indicating liability for damages that is susceptible to no other plausible interpretation that would not impose liability. Whereas we concluded that the attorneys' fees provisions in the Fair Housing Act and the Rehabilitation Act did not satisfy the "unequivocal expression" standard because there was another plausible

³¹ "Upon application by an aggrieved applicant, the [court] may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter." § 1691e(c).

interpretation that did not impose monetary liability, see Nordic Village, Inc., 112 S. Ct. at 1016, the interpretation of subsections (a) and (b) that subjects government creditors, including the United States, to liability for compensatory damages is the only plausible interpretation. Accordingly, we conclude that the Credit Act waives sovereign immunity with respect to compensatory damages.³²

VI. ATTORNEYS' FEES AND COSTS

The analysis for whether attorneys' fees and costs may be awarded under the civil rights statutes whose anti-discrimination provisions apply to federal agencies is simpler than the foregoing analysis on whether monetary relief may be awarded. There is no need to decide whether the individual civil rights statutes waive sovereign immunity for attorneys' fees and costs, because the Equal Access to Justice Act (the "EAJA") expressly waives sovereign immunity. Immunity for costs is waived by 28 U.S.C. § 2412(a), and immunity for attorneys' fees is waived by 28 U.S.C. §§ 2412(b) and 2412(d). Each of these sections contains language authorizing an award of attorneys' fees or expenses to "the prevailing party in any civil action brought by or against the United States."

The EAJA also specifically addresses the extent of the United States' liability for attorneys' fees and costs. There are two separate attorneys' fees regimes under the EAJA. Under 28 U.S.C. § 2412(b), a court may award attorneys' fees against the United States, and if it does, "[t]he United States shall be liable for [attorneys'] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."³³ Because the common law applies the "American Rule," which provides that each litigant must ordinarily pay his or her own lawyer, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975), the extent of liability for attorneys' fees under the individual civil rights statutes should generally

³² Our conclusion with respect to the waiver of sovereign immunity under the Credit Act has implications with respect to claims alleging violations of the Fair Housing Act. Although the latter statute does not waive sovereign immunity, conduct violative of that statute may also violate the Credit Act. The fact that the two statutes are, to some extent, coextensive is acknowledged in the Credit Act's provision that "[n]o person aggrieved by a violation of this subchapter and by a violation of section 3605 of [the Fair Housing Act] shall recover under this subchapter and section 3612 of [the Fair Housing Act], if such violation is based on the same transaction." 15 U.S.C. § 1691e(i). Thus, where a federal agency is discriminating in the extension of credit, that conduct may violate both statutes. If it does, the agency would have authority pursuant to the Credit Act's waiver of sovereign immunity to provide monetary relief in settlement of a claim, even if the claim cites only the Fair Housing Act, to the extent allowed by the Credit Act.

³³ Because section 2412(b) begins with the caveat "[u]nless expressly prohibited by statute," we have reviewed the civil rights statutes to determine whether they "expressly prohibit" an award of attorneys' fees against the United States. They do not.

be governed by the specific fee-shifting language of the statutes, each of which authorizes the court to award "a reasonable attorney's fee."³⁴

As an alternative to an award of attorneys' fees under section 2412(b), the EAJA provides in section 2412(d) for a mandatory award of attorneys' fees against the United States (upon application by the prevailing party), except when the United States' position was substantially justified or when special circumstances would make an award of fees unjust. Under subsection (d), attorneys' fees are capped at the rate of \$75 per hour, absent a special judicial finding that special factors justify higher fees, § 2412(d)(2)(A), and parties may only recover if they have incomes or net worths below certain levels, § 2412(d)(2)(B).

The EAJA also provides for the extent of the United States' liability for costs: "[A] judgment for costs when taxed against the United States shall . . . be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation." 28 U.S.C. § 2412(a)(1). Because this provision begins with the caveat "[e]xcept as specifically provided by statute," it is necessary to decide whether the civil rights statutes provide differently with respect to costs. The Rehabilitation Act and the Equal Credit Opportunity Act do not contain language specifically addressing the liability of the United States for costs. *See* 29 U.S.C. § 794a(b); 15 U.S.C. § 1691e(d). Therefore, the EAJA provision applies under those two statutes. The Fair Housing Act, however, does contain a specific provision that displaces the EAJA provision. It provides that "[t]he United States shall be liable for . . . costs to the same extent as a private person." 42 U.S.C. § 3613(c)(2).

VII. CONCLUSIONS

The Supreme Court has established a strict "unequivocal expression" standard for determinations on whether a statute waives the sovereign immunity of the United States against imposition of monetary relief. One of the civil rights statutes that we have been asked to review, Title VI of the Civil Rights Act of 1964, does not prohibit discrimination by federal agencies. Anti-discrimination provisions in the remaining statutes do apply to federal agencies but only one of them, the Equal Credit Opportunity Act, contains a waiver of sovereign immunity regarding monetary relief, and that waiver is limited to compensatory damages. Agencies therefore have authority to provide compensatory damages to the extent allowed by the Credit Act in their voluntary settlement of discrimination claims if the conduct complained of violates the Credit Act. In addition, the Equal Access to Justice Act authorizes awards of attorneys' fees and costs against federal agencies.

³⁴ *See* Fair Housing Act, 42 U.S.C. § 3613(c)(2); Rehabilitation Act, 29 U.S.C. § 794a(b); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d).



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

November 4, 1993

To: Under and Assistant Secretaries
Agency Heads
Staff Office Heads
Agency Civil Rights Directors

Fr: Mike Alexander/ Executive Assistant *MA*

Re: Changes in EEO and Civil Rights at USDA

Thanks to the efforts of many of you, the Department of Agriculture has made noticeable progress in the area of equal opportunity and civil rights during the past few months. While we have much work to do before fulfilling Secretary Espy's goal of becoming a Department where "equal opportunity for all Americans is assured and promoting civil rights is essential to employee and managerial success," there are unmistakable signs of change at USDA.

This memo is to solicit your help in documenting those changes to keep both the public and our employees informed of the positive efforts we continue to make in addressing an area which is clearly a priority for Secretary Espy.

On April 15 the Secretary issued his EEO and Civil Rights Policy Statement. He emphasized that everyone would be held accountable for performance in EEO and Civil Rights. He also called on managers to be proactive in resolving complaints and many have done so. The Secretary recently informed you that input would be obtained from Civil Rights Directors to ensure that performance ratings in EEO and CR for senior executives are fully justified.

The Complaints Management Division was moved from the Office of Personnel to what is now the Office of Civil Rights Enforcement. OCRE has moved aggressively to investigate and make determinations in discrimination complaints. The Disputes Resolution Board pilot project has worked extremely well, bringing managers and employees together with neutral third parties to resolve EEO complaints.

At the agency level, in addition to being more proactive in resolving complaints, some have also taken steps to send clear messages to employees and customers that, as the Secretary has stated, there is a new attitude at USDA. For example, the Farmers Home Administration moved aggressively to take over management of an FmHa funded housing project in Louisiana once discrimination was found. FmHa has also taken steps to provide greater access to its programs for historically underserved groups.

EOCR

M&B

Action

file

page 2

There are other examples of aggressive implementation of the Secretary's policy statement. However, for the most part, we have not adequately communicated what is happening to employees or to the public. **USDA has historically been chastized for its perceived lack of concern about civil rights.** Now that this Department is taking some positive steps, we need to communicate that as well. However, we need your help.

Please submit a short list of the key changes within your agency since the Secretary's April 15 policy statement to my office by November 13. We are not looking for a listing of individual accomplishments in EEO and Civil Rights. Nor is this related to performance ratings. A few paragraphs should be sufficient. The purpose is simply to document some of the major changes as well as efforts we have made in EEO and Civil Rights so that we can better inform our employees and the public. We are looking for things that have been done differently from previous Administrations.

Bad news about civil rights and other issues will automatically be publicized. However, if we publicize the good things we are doing, the positive efforts we are making, it will significantly add to the momentum for change. Some important steps have been taken by agencies and by the Department in the last few months. Please let us know what you believe has been most significant in your office or agency.

Thank you.



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

AUG 1993

SUBJECT: USDA 1994 Workforce Diversity Conference

TO: Agency Heads

President Clinton has indicated that he wants the Federal Government to reflect the diversity of this country. In embracing this goal, I am determined that USDA will become a model Department that not only reflects the composition of the country but is prepared to meet the challenges of the 21st Century:

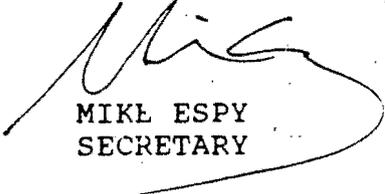
Demographic projections indicate that organizations will face a dramatically different labor force than the one we have today. By the year 2000, women and people of color are expected to fill 75 percent of the newly created jobs in the United States. The number of individuals of different ages, ethnic heritage, physical abilities, religious beliefs, and educational backgrounds will also be growing.

In order to fully understand the complexity of workforce diversity issues, there will be a first-ever USDA Workforce Diversity Conference to be held in Washington, D.C., in February 1994. The purpose of this conference is to help participants better understand, build, utilize, appreciate and manage the Department's increasingly diverse workforce as we look toward the year 2000.

I have asked the Soil Conservation Service to coordinate this conference. In the spirit of "Team USDA," I am encouraging other agencies to designate a representative to participate on the Conference Planning Committee. I may also make appointments to the committee.

Names of agency representatives should be submitted by Friday, August 27, 1993, to Ms. E. Ann Grandy, Director, Human Resources and Equal Employment Opportunity, Soil Conservation Service, Room 6210, South Building.

If you have any questions, please contact Ms. Grandy at 202-720-2227 or by fax at 202-720-7722.


MIKE ESPY
SECRETARY

cc:
Under/Assistant Secretaries



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

April 11 1994

Mr. Charles Tisdale
Editor/Publisher
The Jackson Advocate
300 North Farish Street
Jackson, Mississippi 39202

Dear Mr. Tisdale:

I am compelled to respond to your article printed in a recent issue of the Jackson Advocate entitled *Black Land Loss Grows Under Sec. Espy's Regime*.

To blame my "regime", which has been in existence for only 14 months, for the deplorable trends of Black land loss, which have been evident and escalating for decades, is blatantly untrue and simply unfair. On the topic of support for small and limited resource farmers in general, and combatting discrimination against minority farmers in particular, I am prepared to let the work I have done, and continue to do, speak for me.

You are correct to point out that the loss of land by African-American farmers, which no doubt is due in part to pervasive discrimination, has a tremendously negative impact on the African-American community and on our entire nation. As the only African-American member of the Committee on Agriculture while I served in the Congress, I played a major role in exposing and condemning the systematic discrimination against minority farmers by agencies of the Department of Agriculture (USDA). As Secretary of Agriculture, I am committed to ending discrimination of all kinds at USDA.

The truth is that African-American farmers are also victims of the same powerful economic trends that have radically reduced the overall farm population and concentrated land ownership in general: i.e. global competition, increased mechanization, greater productivity and increased costs of production due to inflation, etc.

To mitigate the impact of these trends, while a Member of Congress, I authored the Minority Farmers Rights Act of 1990. Key provisions of this bill, authorizing \$10 million for technical assistance and outreach to minority and socially disadvantaged farmers, were incorporated into the 1990 Farm Bill. As Secretary of Agriculture, I have worked closely with the Congress to ensure that--for the first time--this program received funding (\$1 million in FY 93, \$3 million in FY 94, and \$5 million in the President's FY 95 budget). This program was never funded or implemented during the Reagan-Bush years. Under the Clinton Administration this program has a bright future.

Important changes have been made at USDA in the past 14 months, specifically to assist African-American and other socially disadvantaged farmers. Concerted efforts

are being made to reverse past trends of inadequate services to minority farmers. For example, the Farmers Home Administration (FmHA) national office program management performance goals for socially disadvantaged farmers direct states to: use 100 percent of ownership and operating loans targeted to this group; increase the percentage of farms sold or leased to socially disadvantaged farmers; and report outreach activities and accomplishments to the Secretary's office. FmHA's inventory property regulations have been revised to give priority to socially disadvantaged applicants when selling inventory property.

Other initiatives undertaken by this administration that will assist minority farmers include: (1) the recently announced increase in price support levels as well as generally lower commodity acreage reduction program levels than were applicable in previous crop years; (2) an independent review of FmHA loan accelerations to ensure that all distressed farmers are being treated fairly; (3) the implementation of an automatic tracking system to ensure that all farm loans, without exception, are processed in a timely fashion; and (4) the targeting of \$3.5 million in funds for FmHA to work through 1890 institutions to provide technical assistance to small farmers.

Additionally, my reorganization proposal now before the Congress will eliminate FmHA and replace it with a comprehensive Farm Service Agency. USDA activities important to the survival of minority farmers will be located in the same agency. This will permit us to provide more efficient, timely, sensitive, and customer friendly services to minority and other small farmers whose needs have too often been neglected.

At a time when funding for many programs is being reduced, I have also worked to expand USDA's support for 1890 colleges and universities, institutions that provide vital assistance to African-American farmers and rural communities. For example, USDA's 1995 Budget includes funding for four new Centers of Excellence on 1890 campuses, a program initiated in 1992 to enhance the capability of each 1890 institution to assist in the delivery of USDA programs.

Last year, USDA signed a \$3 million cooperative agreement with seven land grant schools, including Alcorn State University and two community based organizations, the Arkansas Land and Farm Development Corporation and the Federation of Southern Cooperatives, to develop jobs and income producing projects for rural communities. In addition, USDA's National Scholars Program will provide \$2.8 million in scholarships for students attending 1890 Universities to study food and agricultural sciences.

To address historic patterns of discrimination and increase USDA's sensitivity to the concerns of minorities, women, and others, I have articulated and am working to enforce the strongest Equal Opportunity and Civil Rights policy in the history of USDA. I have also appointed the most diverse group, ever, to key positions of authority to help lead FmHA and other agencies within USDA, including the appointment of an African-

American director of the Mississippi State FmHA office. Still, no one who is reasonable should expect years of neglect to be reversed in a few months.

Unlike previous Administrations, our Office of Civil Rights Enforcement has moved aggressively to investigate complaints of discrimination. For example, in 1991 and 1992 USDA made a total of only six findings of discrimination in program delivery. In 1993 alone, this administration determined that there were 26 cases of discrimination, primarily in the delivery of farm programs.

The lawsuits you cited were filed by four African-American farmers who have been fighting these cases for several years. The lawsuits were filed after this administration determined that discrimination had occurred. I have encouraged settlement of these cases, however, we are awaiting an opinion from the Department of Justice as to whether the remedies that attorneys for these farmers have requested are authorized by law. I am optimistic that the Department of Justice will authorize appropriate relief in these cases.

Finally, I reject the statement in your article that I am taking a "moderate" approach to land loss issues because my "financial support is mainly from large, white farmers." I am not running for anything. I have no need to worry about offending financial contributors. Even if I were, that would not prevent me from doing what I think is right.

The plight of African-American farmers and, I might add, the issues facing the African-American community in general are too critical to be used as cannon fodder for unwarranted personal attacks. Land loss, poverty, hunger, lack of decent housing and job opportunities - these and other issues continue to disproportionately impact African-Americans.

As Secretary of Agriculture, I oversee farm programs, but also programs vital for rural economic development, rural housing, food stamps, the school lunch program, the Women, Infants, and Children Program (WIC), rural enterprise zones and other programs that are necessary to provide solutions.

On the issue of Black land loss, I reject your outrageous assertion that my "regime" is contributing to the problem. Nothing could be further from the truth.

Sincerely,



MIKE ESPY
Secretary

Post-Net Fax Note 7671

Date

of pages

To: *Deborah Parker*

From: *James Under*

City/Dept

Co: *SCS, MS*

Phone #

281 965 4336

Fax #

905 4536

March



Black landloss grows under Sec. Espy's regime



County farmer continues to farm in the old way. His plight is typical for Black farmers in state, nation.

Local news sources reported on March 17, that Secretary of Agriculture Mike Espy is being sued by a number of African American farmers who contend that Espy (a Yazoo City native) has refused to remedy racial discrimination complaints acknowledged by his agency's office of Civil Rights enforcement. The farmers filed suit in Federal District Court in Washington, D.C., seeking 5 million each to redress the discrimination they faced from Farmers Home Administration.

Espy, the nation's first African American Secretary of Agriculture, is seen by many Black farmers in his home state as powerless and unwilling to address issues of racial discrimination by USDA agencies, particularly FmHA. One Holmes County farmer states that Espy "should take a look in his own backyard and he will be surprised to find that there is FmHA discrimination here too...., it would be a shame for Blacks from his home state to file suit against him."

Among the litany of complaints is that FmHA has been the primary agency responsible for the decline in the number of minority farmers and of

See Espy, page 10A

responsibility for aiding limited resources farmers, who often are the targets of discrimination and neglect.

Black family farmers and landowners in the rural South have been in "continual crisis" for the past half century. They have faced the systematic disposition of their land holdings, racial discrimination and economic exploitation.

African American farm ownership and the Black farm population has declined steadily at a rate more than 2 1/2 times the rate of loss of white farmers.

The latest agricultural census shows that Blacks now own only 2.2 million acres of land, down from 27 million acres at the turn of the century. Figures also show Blacks are currently losing 1,000 acres per day. In terms of wealth at a conservative value of \$750.00 per acre, Africans Americans are losing over \$275 million of irreplaceable equity resources annually.

In 1982, the U.S. Civil Rights Commission in a report entitled "The Decline of Black Farming in America" stated that, "the loss of land and the inability of Blacks to endure as landowners may result in serious problems in racial relations in this country." A society where whites control virtually all agricultural production, and land development (including commercial) is not racially equal. Less than 2% of the population controls 98% of the nation's land and resources.

A number of Black farmers express a similar sentiment in that Sec. Espy, "has to take a moderate approach to the sensitive land issues here in Mississippi because his financial support is mainly from large white farmers, and quite naturally one does not bite the hand that feeds it."

A prime case in point wherein Sec. Espy has demonstrated an unwillingness to investigate matters of discrimination and other improprieties by USDA agencies here in Mississippi, is ongoing "land grab" in Oktibbeha County (story covered by the Advocate) involving several prominent political figures, white landowners and a young African American farmer DeWayne Boyd, who in reclaiming family land uncovered a fraudulent scheme by a white farmer who was a beneficiary of several USDA programs in that county.

An agricultural official has admitted that Boyd's "case opens a can of worms that would bring down too many high ranking government officials, large land holders and big business men, if investigated."

Experts say the Boyd case is a classic example of how whites have used ASCS and FmHA to take land and other resources from Blacks. Boyd found three instances in which his grandmother's signature was forged on ASCS documents. Boyd's complaint to the FBI, the State Attorney's General Office, the OIG have all fallen on deaf ears. Steve Gaines, a State OIG employee stated that "the forgeries of Boyd's grandmother did not warrant investigation and the Boyd should be more concerned with the arson charges leveled against him," by the very people he alleges seized his families lands.

Boyd says that the FmHA and ASCS were providing programs and services to Waldrop Farms based on fraudulent documents on file with each

respective agency. Boyd's applications to FmHA for operating loans (to farm his family land) were consequentially denied.

Secretary Espy has first hand knowledge of the discrimination against Black farmers that is practiced by FmHA. In an article in the Clarion-Ledger dated, July 26, 1990, entitled, "Espy: Agency discriminates against minority farmers for loans." Espy is quoted as saying, "FmHA 'insensitivity' is one of the factors contributing to the rapid decline of minority owned farms in America." According to this article Mississippi has lost more than 40% of its minority farmers since 1978. These statements came at a hearing of the House subcommittee on government operations of which Mr. Espy was a member while serving as Mississippi's first Black congressman since reconstruction.

In open court testimony in the arson charge against Boyd, an USDA official testified that he was aware of the forgeries of Boyd's grandmother's signature and illegal payments without proper authorization to Waldrop Farms. This information was made available to Sec. Espy in a letter from Boyd dated December 6, 1993. Espy replied to Boyd in a letter dated February 4, 1994, that "The Office of Inspector General (OIG) previously reviewed information supplied by you and also information from the FmHA and the ASCS concerning your complaint. Based upon that review, OIG did not find fraudulent or improper activity by those named in your complaint."

Boyd had previously written to OIG that he wanted a thorough unbiased investigation into the matter, in that neither he, the complainant, nor his grandmother were ever contacted in regard to the forged signatures.

A letter to Boyd dated May 18, 1992, from the Office of Inspector General of the U.S. Department of Agriculture appears to contradict Sec. Espy. Said letter stated, "Regarding your statement that you have not received a copy of the OIG report. As Special Agent Lynn Odenbach explained to you on February 10, 1992, our file was closed following the receipt and review of the ASCS and FmHA responses. There is no OIG report."

The Advocate has requested under the Freedom of Information Act a copy of the FmHA administrative decision regarding Mr. Boyd's complaint in which the former State Director, James Huff, Sr. raised questions of criminal activity and other improprieties on the part of Waldrop Farms. This paper's subsequent request is under review by the General Counsel of the USDA.

Those knowledgeable about previous discriminatory practices by agencies of the USDA, were hopeful that Mr. Espy would use his position as secretary to reverse the well documented trend of USDA officials working in collaboration with "a privileged few" to discriminate, and disenfranchise Black farmers.

Boyd says, "I hope it does not take filing a law suit in Secretary Espy's home state to prod him into taking appropriate actions to remedy discriminatory and illegal practices of his agency, but who knows?"