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Testimony in Support of the Earnings and Living Opportunities Act
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Good morning, Congresswoman Velázquez and other members of the Subcommittee. My name is David Rammler and I am an attorney and Director of Government Relations at the National Housing Law Project in Washington, D.C. The National Housing Law Project thanks you for this opportunity to express our support for the changes to the Section 3 program to be introduced by Representative Nydia Velazquez (D-NY) through the Earnings and Living Opportunities Act (ELOA). The proposed legislation comes at a critical time for the Section 3 program, when HUD is distributing and monitoring the expenditure of roughly \$12 billion in stimulus funds¹ and \$14 billion in Fiscal Year 2009 appropriations that are subject to the requirements of Section 3.²

The purpose of the Section 3 program is to provide economic and employment opportunities to low- and very low-income individuals.³ The program was enacted as part of the Housing and Urban Development Act of 1968, with the purpose of providing “a decent home and a suitable living environment for every American family.”⁴ Integral to the fulfillment of this purpose was the creation of programs such as Section 3, which focuses training and jobs to public housing residents and other low-income residents living in areas where HUD funds are expended so as to multiply the benefit of the funds for low- and very low-income individuals. Since its creation, Section 3 has not operated to its greatest potential, due to a lack of oversight by HUD and the absence of enforceable rules. As a result, a multitude of projects have failed to

¹ Under the Housing and Economic Recovery Act of 2008, HUD received \$3.9 billion for its Neighborhood Stabilization Program. Under the American Recovery and Reinvestment Act of 2009, HUD received \$7.8 billion in funds subject to Section 3.

² These FY 2009 Appropriations Funds consist of \$4.455 billion for the Public Housing Operating Fund, \$3.9 billion for the Community Development Fund, \$2.45 billion for the Public Housing Capital Fund, \$1.825 billion for the HOME Investment Partnership Program, \$765 million for Section 202 Housing for the Elderly, \$250 million for Section 811 Housing for Persons with Disabilities, \$140 million for the Lead-Based Paint Hazard Reduction Program, and \$120 million for HOPE VI.

³ 12 U.S.C.A. § 1701u(b) (Westlaw July 13, 2009).

⁴ Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 2, 82 Stat. 476, 476 (1968).

generate the quality and quantity of employment opportunities that were originally intended by Congress. ELOA promises to strengthen the Section 3 program and address deficiencies in current Section 3 implementation.

The committee asked me to address some of the legal barriers preventing implementation of a successful Section 3 program, how the legislation offered by Representative Velázquez will address the issues with the current program, how resident involvement helps the implementation of the Section 3 program and provide information regarding successful Section 3 programs. My testimony is organized to highlight the benefits of a number of the provisions of the proposed legislation in the context of the legal problems that have confronted the Section 3 program. As currently structured, there is a lack of clarity regarding what entities are subject to Section 3 and for what type and level of funding. In addition, there has been a very significant lack of reporting and HUD oversight and sanctions or incentives related to performance. Finally a significant failure of the Section 3 program is the lack of coordination with other federal agencies that are responsible for jobs, training and business development. Thus, we recommend that:

- The standards for Section 3 compliance be broadened and simplified. All recipients of HUD funds should be subject to Section 3 and the obligation should be mandatory including a preference in employment and training for residents who receive housing assistance from HUD and that qualified businesses are preferred for at least ten percent of the contract dollars.
- Sanctions, incentives and reporting should be geared to achieving the stated objectives of Section 3. In the event that the objectives of the Section 3 cannot be achieved an analysis of the barriers and strategies for overcoming those barriers should be included in any reports.
- Cooperation with other federal agencies that are responsible for jobs, training and the development and assistance to small and disadvantaged businesses is key to a full and robust Section 3 program.

Mandatory Obligation Can Strengthen Program, Close Loopholes and Simplify

ELOA broadens the applicability of Section 3. ELOA contains a number of provisions to broaden the applicability of Section 3. Most significantly, it imposes a mandatory obligation on all recipients of HUD funds. The present Section 3 statutory and regulatory requirements has created confusion (and thereby noncompliance) because Section 3 applicability currently depends upon the agency type and program type, with differing requirements for each. The statute now distinguishes between public and Indian housing agencies and “other programs,” and names certain types of projects—three discrete projects for public and Indian housing authorities, and three broad categories of projects for other programs—for which Section 3 applies.⁵ These nuanced exceptions can make it difficult for a recipient to know if it is subject to Section 3. ELOA eliminates such confusion by speaking in broad terms about Section 3’s applicability to

⁵ § 1701u(c)(1)(A), (c)(2)(A), (d)(1)(A), (d)(2)(A).

“recipients of funds administered by [HUD]”⁶ and by removing any distinction in requirements based on whether a recipient is a public or Indian housing agency or otherwise.

ELOA clarifies the standard. ELOA eliminates confusion surrounding the manner in which it applies. Currently, the Section 3 statute requires only that recipients comply with requirements “to the greatest extent feasible.”⁷ Some courts, and undoubtedly numerous recipients, have construed this language as allowing recipients to circumvent the Section 3 obligations in certain circumstances.⁸ If “greatest extent feasible” standard continues to operate as a term of art, recipients may not feel compelled to exert their greatest efforts to meet the program requirements or may fall back upon claims that an effort is sufficient despite the fact that year after year the intended outcomes are not achieved. ELOA provides a statutory fix to the confusing impression of the current statute and regulations, removing nearly all of the “greatest extent feasible” and “best efforts” language and plainly requiring compliance *as a “condition of [HUD] assistance.”*⁹ These mandatory obligations add much needed strength to the statute.

ELOA requires 30% of all hours worked. ELOA also corrects provisions that often undermine Section 3’s effectiveness. The Section 3 regulations outline minimum numerical requirements through which fund recipients can demonstrate they have met this “greatest extent feasible” standard. Recipients of Section 3-covered funds “may demonstrate compliance” by ensuring that 30% of the aggregate number of new hires annually must be Section 3 residents and 10% of the dollar amount of building trade contracts and 3% of all other contracts must go to Section 3 business concerns.¹⁰ One loophole to the safe harbor presumptions has become apparent during the course of project execution: fund recipients who hire Section 3 residents toward a project’s end can meet the numerical hiring goals without providing meaningful work hours. On at least one such occasion, HUD issued a Determination of Non-Compliance letter ordering the recipient to submit a plan in “clear and convincing detail” as to how it would restore all Section 3 employment and business opportunities within the next three years.¹¹ ELOA fixes this aggregate hiring loophole by requiring that Section 3 contractors give 30% of all hours worked to low- and very low-income persons qualifying for the Section 3 preference.¹²

ELOA provides a high priority for all recipients of HUD housing assistance. When Section 3 was initially enacted, the major housing program that met the needs of the lowest income families was the public housing program. In the subsequent forty years, Congress created and increased funding for other housing programs. ELOA addresses this reality by creating a top priority for recipients of “housing assistance from the Department of Housing and Urban Development.”¹³

⁶ Earnings and Living Opportunities Act, H.R. _____, 111th Cong. § 3(e)(1), (f)(1) (2009) (Discussion Draft, June 25, 2009).

⁷ See, e.g., § 1701u(b).

⁸ See, e.g., Ramirez, Leal & Co. v. City Demonstration Agency, 549 F.2d 97 (9th Cir. 1976) (reversing a trial court decision that found the City met the “greatest extent feasible” standard when it did not award a contract to the only of four Section 3 businesses bidding whose initial bid was the lowest of the group).

⁹ Earnings and Living Opportunities Act, at § 3(e)(2)(A), (f)(2)(A) (emphasis added).

¹⁰ 24 C.F.R. § 135.30 (2009). For definitions of “Section 3 resident” and “Section 3 business concern,” see § 135.5.

¹¹ Letter from Carolyn Peoples, HUD Assistant Secretary for Fair Housing and Equal Opportunity, to Heather A. Mahood, Long Beach, CA, Deputy City Attorney (April 26, 2004) at 11-13.

¹² Earnings and Living Opportunities Act, at § 3(e)(2)(A).

¹³ *Id.* at (g)(1)(A).

ELOA requires HUD to issue regulations. Over the years, HUD, housing advocates, and recipients of HUD dollars subject to Section 3 have recognized weaknesses in the Section 3 program. Efforts have been made to address these problems by revising and finalizing the Section 3 regulations. In 2003, HUD committed to revising and finalizing the Section 3 regulations.¹⁴ But to date, 15 years after the interim Section 3 regulations were adopted, the rules have not been revised and finalized.¹⁵ ELOA addresses that issue by requiring the Secretary to issue regulations implementing the revisions to the statute within 120 days.¹⁶

Sanctions, Incentives, and Reporting Can Increase Compliance

ELOA highlights the importance of sanctions. In the same lackadaisical spirit as the safe harbor presumptions, current regulations lack teeth to enforce Section 3 requirements. The current regulations allow, but do not mandate, sanctions for noncompliance: “debarment, suspension, and limited denial of participation *may be applied*” “where appropriate.”¹⁷ For the most part, the regulations leave sanctions to be specified by the contract through which the HUD funds are provided or else by regulations governing the particular HUD program.¹⁸ Until recently, HUD did not regularly inform fund recipients of its authority to impose sanctions.¹⁹ ELOA, by contrast, mandates strict sanctions. Recipients, contractors, and subcontractors who do not comply with Section 3 “shall be sanctioned” by the HUD Secretary.²⁰ These sanctions include reduction of future HUD funds, debarment, suspension, limited denial of participation in HUD programs, or such other sanctions as the Secretary deems necessary to discourage noncompliance.²¹ Clear sanction will more than likely have the salutary effect of improving up-front compliance.

ELOA prohibits contracting with entities that violate Section 3. ELOA also tightens its enforcement through contractor requirements. While current regulations prohibit recipients from contracting with an entity “after notification to the recipient by HUD that the contractor has been found in violation of” Section 3, ELOA clarifies this standard to require that recipients not contract with “any contractor in any case in which the recipient has *notice or knowledge* that the contractor has violated” Section 3.²² ELOA further makes Section 3 compliance “part of any performance standard” in reviewing recipients and their contractors.²³

¹⁴ OFFICE OF INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SURVEY OF HUD’S ADMINISTRATION OF SECTION 3 OF THE HUD ACT OF 1968 4 (Audit Case # 2003-KC-0001) (2003).

¹⁵ *Id.* at 8.

¹⁶ Earnings and Living Opportunities Act, at § 2(b).

¹⁷ 24 C.F.R. § 135.74(d) (emphasis added). *See also* § 135.76(g).

¹⁸ § 135.74(d).

¹⁹ 2 C.F.R. part 2424 authorizes HUD to impose sanctions such as debarment and suspension for failure to comply with applicable regulations, but the NOFAs for various HUD programs vary widely and often do not contain information on Section 3 compliance sanctions. HUD only recently added this information to the General Section of its Notices of Funding Availability (NOFAs), in FY2009. *See* Notice of HUD’s Fiscal Year (FY) 2009 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD’s FY2009 NOFAs for Discretionary Programs, 74 Fed. Reg. 79,548, 79,552 (Dec. 29, 2008).

²⁰ Earnings and Living Opportunities Act, at § 3(k)(1).

²¹ *Id.*

²² *Id.* at (k)(2) (emphasis added).

²³ *Id.* at (h).

ELOA empowers Section 3 individuals and businesses to enforce the provision. Under the present system, Section 3 complaints can often take years to resolve and may never result in meaningful outcomes for intended Section 3 beneficiaries. In one case, Section 3 residents filed a complaint with HUD in 1998 and did not obtain a letter outlining a restitution plan until 2004.²⁴ In another example, a Section 3 business concern filed a HUD complaint in 1997 and did not receive a final appellate decision until 2003.²⁵ By that time, the company had gone out of business. Given this climate, a major improvement of ELOA over current law is its explicit grant of a private right of action for enforcement, with the statement that the Administrative Procedure Act, Chapter 7 of Title 5 and 42 U.S.C. § 1983 are available to aggrieved parties for pursuing such actions.²⁶ Statutory clarification is particularly necessary in light of recent case law determining that Congress did not intend to create a private right of action to enforce Section 3 requirements.²⁷ In addition, such a provision recognizes the reality that there is a very substantial number of recipients of HUD dollars that are subject to Section 3 and HUD cannot effectively oversee compliance by all such recipients²⁸ and would be assisted if aggrieved parties could individually seek enforcement. By adding a private right of action, ELOA makes clear that Section 3 must and will be enforced, a critical message given that current complaint procedure can afford little effective relief even when HUD issues a determination of noncompliance.²⁹

ELOA affords further protections by specifying that the federal statute does not preempt State and local laws that might provide more favorable methods and protections for achieving Section 3 goals.³⁰

ELOA requires reporting and an analysis of impediments. A major difficulty with Section 3 enforceability under the current system is the paucity of available, accurate information. Anecdotally, HUD has informed advocates that it often cannot analyze Section 3 effectiveness because recipients do not submit reports as required. A 2003 report from the Office of Inspector General found that HUD had not effectively implemented the recipient reporting system or other methods of recipient monitoring.³¹ Without this information, HUD cannot possibly know whether recipients are properly carrying out Section 3. Currently, Section 3-covered recipients must submit information on Section 3 activities to HUD annually.³² And

²⁴ For more information on this example, involving the City of Long Beach, see NATIONAL HOUSING LAW PROJECT, AN ADVOCATE'S GUIDE TO THE HUD SECTION 3 PROGRAM: CREATING JOBS AND ECONOMIC OPPORTUNITY 12-14 (2009).

²⁵ *Mannarino v. Morgan Twp.*, 64 F. App'x 844 (3d Cir. 2003). See also *Mannarino v. HUD*, 2009 WL 918355 (W.D. Pa. Apr. 2, 2009) (slip op.).

²⁶ Earnings and Living Opportunities Act, at § 3 (k)(3).

²⁷ See *McQuade v. King County Hous. Auth.*, 203 F. App'x 823 (9th Cir. 2006); *Williams v. HUD*, 2006 WL 2546536 (E.D.N.Y. Sept. 1, 2006) (unreported) and 2008 WL 5111105 (E.D.N.Y. Dec. 4, 2008) (unreported); *Nails Constr. Co. v. City of Saint Paul*, 2007 WL 423187 (D. Minn. Feb. 6, 2007) (unreported).

²⁸ OFFICE OF INSPECTOR GENERAL, *supra* note 14 at 3-4.

²⁹ In one instance involving the Chapel Hill Housing Authority, for example, a Section 3 business concern did not win a contract award despite being the only Section 3 business competing and having the lowest bid. HUD's FHEO office concluded that the Housing Authority violated the Section 3 regulations, but the bidder never obtained the ultimate contract. For more information, see AN ADVOCATE'S GUIDE TO THE HUD SECTION 3 PROGRAM, *supra* note 24, at 14-15.

³⁰ Earnings and Living Opportunities Act, at § 3 (k)(3).

³¹ OFFICE OF INSPECTOR GENERAL, *supra* note 14 at 3-4.

³² 24 C.F.R. § 135.90.

though HUD has the ability to sanction recipients who fail to submit reports, its failure to mention reporting sanctions prior to the 2009 Notice of Funding Availability (NOFA) indicates that it does not do so with regularity.³³ ELOA, by contrast, requires reporting “at least twice a year,” with quarterly reports mandated for those quarters in which a recipient, contractor, or subcontractor failed to meet the numerical requirements, including information on the steps taken to meet the requirement.³⁴ In addition and overall, ELOA aims to achieve greater accountability and transparency so that the public—and HUD—will not be left in the dark about who is or is not in Section 3 compliance. These additional accountability standards take the form of requirements that recipients include Section 3 compliance information in their 5-year plans, annual plans, or similar alternative plans,³⁵ that the HUD Secretary submit annual reports to Congress summarizing Section 3 recipient report information,³⁶ and that recipients conduct annual community hearings to obtain citizen input on their Section 3 performance.³⁷

ELOA provides incentives for compliance with Section 3. At the opposite end of the spectrum, ELOA incentivizes recipients to comply with Section 3 through performance incentives to all recipients who exceed the baseline numbers.³⁸ The proposed bill also authorizes \$5 million, which may be used to fund efforts to implement and improve local Section 3 programs, such as the provision of incentives.³⁹

Centralization and Capacity Building and Working with Residents Can Improve Programmatic Outcomes

A great hallmark of ELOA is its recognition that Section 3’s success hinges on centralized support for its administration and coordination with other federal agencies.

ELOA requires a Section 3 coordinator at the local level. ELOA creates the unprecedented requirement that all Section 3-covered recipients “designate, employ, or contract with” a Section 3 coordinator.⁴⁰ Given current limitations in obtaining adequate remedies and the mixed messages that HUD sends regarding Section 3 applicability, requiring a discrete coordinator whose sole purpose is to monitor Section 3 implementation may be ELOA’s most powerful step toward fulfilling Section 3 goals on the ground. Studies of the few jurisdictions that have already made such a move of their own accord attest to the impact a Section 3 coordinator can have. The City of Kansas City, for example, has employed two full-time staffers devoted to Section 3 administration since receiving a negative HUD audit in February 2006. Under this new structure, the City quickly turned its operations around such that in 2006 it

³³ See 74 Fed. Reg. 79,552, *supra* note 19.

³⁴ Earnings and Living Opportunities Act, at § 3(j)(1)(A)-(B). In addition, recipients, contractors, and subcontractors, if they fail to meet the requirement that 10% of all contracts go to Section 3 businesses, are required to show that they used all feasible means to achieve the goal and to explain why qualified businesses that submitted a bid were not selected. *Id.* at (f)(2)(B)(ii).

³⁵ *Id.* at (h).

³⁶ *Id.* at (j)(2).

³⁷ *Id.* at (i)(2).

³⁸ *Id.* at (e)(2)(A)

³⁹ *Id.* at (n)(1).

⁴⁰ *Id.* at (g)(4)(A).

exceeded its aggressive goal of placing 50 Section 3 residents into full-time employment positions and awarded over \$2 million in contracts to Section 3 business concerns.⁴¹

ELOA creates a stand-alone Section 3 office. ELOA makes another significant structural change to increase centralized oversight of the program. ELOA more clearly defines the Section 3 organizational structure by removing the program from its current location in HUD's Office of Fair Housing and Equal Opportunity and creating a separate Section 3 office in the Office of the Secretary.⁴² This change has the potential to increase the effectiveness and outcomes for Section 3. Currently, the Section 3 office within HUD has no line authority over the HUD departments that control and allocate the majority of the HUD funds. Moving the Section 3 office should result in a broader achievement of Section 3 goals and requirements.

ELOA emphasizes training and long-term employment objectives. ELOA further improves Section 3 outcomes through its emphasis on particular types of training and contracting opportunities. In its "Employment" subsection, ELOA states that "special consideration shall be given to persons enrolled in State-approved apprenticeship programs."⁴³ In the training arena, ELOA requires the HUD Secretary to provide incentives to those recipients and contractors whose training programs promote career advancement for qualifying Section 3 individuals.⁴⁴ This emphasis on meaningful, long-term outcomes is also reflected through a slight modification in individual and business priorities. In contracting priorities, for example, ELOA creates a separate category for "qualified businesses that provide significant training and job opportunities to low- and very-low income persons," irrespective of whether those persons live in a particular location or development, and irrespective of the geographic location of the business.⁴⁵ In addition, the redefining of a Section 3 individual to include retaining such definition for five years promotes long-term employment and skill development.⁴⁶ ELOA thus aims to ensure that Section 3's impact will not be limited to the short-term but will create meaningful advancement toward the goal of "produc[ing] significant employment and other opportunities" for low- and very low-income communities residing in areas where HUD funds are expended.⁴⁷

ELOA requires resident participation and input. In several ways, ELOA calls for resident participation and requires recipients to consider resident input. ELOA requires recipients to conduct annual community hearings to obtain citizen input on their Section 3 performance.⁴⁸ These hearings must accommodate non-English speaking residents "where a significant number of non-English speaking residents can be reasonably expected to participate."⁴⁹ In addition, residents are also able to provide input through the public housing (or other similar) planning process, for which ELOA now mandates a specific Section 3 component.⁵⁰ Finally, recipients are held to greater public accountability standards in reporting, as discussed further below. Given HUD's difficulty monitoring compliance on the ground,⁵¹

⁴¹ AN ADVOCATE'S GUIDE TO THE HUD SECTION 3 PROGRAM, *supra* note 24 at 21-22.

⁴² Earnings and Living Opportunities Act, at § 3(c).

⁴³ *Id.* at (e)(2)(A).

⁴⁴ *Id.* at (d)(3).

⁴⁵ *Id.* at (g)(2)(B).

⁴⁶ *Id.* at (l)(3).

⁴⁷ § 1701u(a).

⁴⁸ Earnings and Living Opportunities Act, at § 3(i)(2).

⁴⁹ *Id.* at (i)(2)(B).

⁵⁰ *Id.* at (h).

⁵¹ See OFFICE OF INSPECTOR GENERAL, *supra* note 14 at 3-4.

resident involvement is important as it provides for local monitoring, enforcement and improves the outcomes. Residents and the organizations that they are members of are often familiar with local residents and businesses in their own and neighboring developments, and they may be in the best position to monitor whether Section 3's benefits are truly reaching the intended beneficiaries. They may also be in a position of identifying or referring individuals who have training needs and job skills. Coupled with the creation of a private right of action, ELOA taps into the currently underutilized potential of resident involvement as a compliance tool. NHLP is familiar with the extensive engagement of residents and the city-wide resident council for the Housing Authority of Kansas City during the period of the redevelopment of public housing in Kansas City. The tenant organization had a member on an oversight committee that met monthly and every two weeks during periods of substantial redevelopment with the developer and the public housing authority staff. The residents referred other public housing residents for jobs and training, the resident representative on the oversight committee review weekly payrolls and the resident council was involved in the creation and support of a resident business, which received Section 3 contracts. Such efforts helped to achieve the Section 3 goals.

ELOA Requires Coordination Among Federal Agencies. The current Section 3 statute requires the HUD Secretary to coordinate among federal agencies. Up until very recently, that coordination did not occur. ELOA now requires that the HUD Secretary enter into "formal collaborative agreements regarding training, employment, contracting or other areas" within 180 days and to report to Congress regarding the changes that these and other agencies to "facilitate the effective implementation and outcomes of the [Section 3] program." This coordination is essential for a full and robust implementation of Section 3 and to substantially improve the likelihood that the objectives of the program are fully met.⁵²

Further Suggestions

We support Congresswoman Velazquez's proposed amendments to the current Section 3 program. In the course of developing this testimony, we have created a list of proposed, minor changes to further strengthen and clarify Section 3 provisions. First, for maximum effectiveness, and in light of stimulus funding awards, we strongly suggest that ELOA be expanded to apply Section 3 to non-HUD funds as well. At a minimum, Section 3 should apply to funds expended for housing work, such as weatherization and green retrofits and LIHTC housing, regardless of the federal agency distributing or facilitating the creation of the funds. Second, to avoid confusion, ELOA should define what it means to be a recipient of "housing assistance from the Department of Housing and Urban Development" and thereby qualify for the top employment and training priority. This priority should be broadly defined so that all participants in federal housing programs are included in the Section 3 prioritization, regardless of their assistance type. It may be better to refer to these individuals as residents, so as to avoid any confusion with the term recipient, which is defined in the proposed legislation.

Conclusion

⁵² BARBARA SARD & MICAH KUBIC, CENTER ON BUDGET AND POLICY PRIORITIES, REFORMING HUD'S "SECTION 3" REQUIREMENTS CAN LEVERAGE FEDERAL INVESTMENTS IN HOUSING TO EXPAND ECONOMIC OPPORTUNITY 12 (2009), available at www.cbpp.org (noting the lack of any formal role of Work Force Investment Boards (WIBs) in Section 3 implementation and suggesting that should be changed).

Section 3 reform is needed now more than ever. In February 2009, President Obama signed the American Recovery and Reinvestment Act (ARRA), allocating nearly \$14 billion in funding to HUD. With its focus on job creation and assistance to those most impacted by the recession, ARRA's goals are patently consistent with the underlying purposes of Section 3, enacted over four decades ago. Since its enactment in 1968, however, Section 3 has proven difficult to implement, presenting administrative obstacles and regulatory loopholes. With ELOA, Congress has the opportunity to address current deficiencies in time to ensure that Section 3 makes a real difference as HUD begins distributing the ARRA funds. These changes are crucial to ensuring that HUD funds are used to assist low- and very low-income residents to obtain economic opportunities.

Thank you again for inviting me to present these views before this Subcommittee.