

## U.S. COMMISSION ON CIVIL RIGHTS

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PUBLIC BRIEFING ON COLLATERAL CONSEQUENCES: THE  
CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE  
EFFECTS ON COMMUNITIES

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FRIDAY, MAY 19, 2017 **FINAL**

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The Commission convened in Suite 1150 at  
1331 Pennsylvania Avenue, Northwest, Washington, D.C.  
at 9:30 a.m., Catherine Lhamon, Chair, presiding.

PRESENT:

CATHERINE E. LHAMON, Chair

PATRICIA TIMMONS-GOODSON, Vice Chair\*

DEBO P. ADEGBILE, Commissioner

GAIL HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

KAREN K. NARASAKI, Commissioner

MICHAEL YAKI, Commissioner

MAURO MORALES, Staff Director

MAUREEN RUDOLPH, General Counsel

\* Present via telephone

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STAFF PRESENT:

LASHONDA BRENSON

PAMELA DUNSTON, Chief, ASCD

LATRICE FOSHEE

ALFREDA GREENE

WARREN ORR

MICHELE RAMEY

SARALE SEWELL

BRIAN WALCH

MARIK XAVIER-BRIER

COMMISSIONER ASSISTANTS PRESENT:

SHERYL COZART

JASON LAGRIA

CARISSA MULDER

AMY ROYCE

RUKKU SINGLA

ALISON SOMIN

IRENA VIDULOVIC

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

9:31 a.m.

1  
2  
3 CHAIRMAN LHAMON: Good morning. So I'm  
4 going to call us to order, and that this briefing on  
5 the U.S. Commission on Civil Rights comes to order at  
6 9:31, and it takes place at the Commission's  
7 headquarters here at 1331 Pennsylvania Avenue  
8 Northwest, Washington D.C. I'm Chair Catherine  
9 Lhamon. Commissioners present at this briefing in  
10 addition to me I hope will soon be Commissioner  
11 Adegbile and we'll announce when he's here. In the  
12 meantime, Commissioner Heriot, Commissioner Kirsanow,  
13 Commissioner Kladney, Commissioner Narasaki,  
14 Commissioner Yaki are present. Vice Chair Timmons-  
15 Goodson joins us by phone. Vice Chair, can you confirm  
16 that you're on the line? And if you are confirm..

17 VICE CHAIR TIMMONS-GOODSON: I am on the  
18 line.

19 CHAIRMAN LHAMON: Thank you, terrific. A  
20 quorum of the commissioners is present. Is the court  
21 reporter present, can you confirm? Yes? And is the  
22 Staff Director present?

23 STAFF DIRECTOR MORALES: I am present.

24 CHAIRMAN LHAMON: So I welcome everyone to  
25 our public briefing titled Collateral Consequences:

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1 The Crossroads of Punishment, Redemption and the  
2 Effects on Communities. Today's briefing addresses  
3 what have been proliferating collateral consequences  
4 of incarceration, ranging from limitations on access  
5 to employment, the right to vote, subsistence aid for  
6 food and housing, and federal financial aid for  
7 education attainment, among many other categories.  
8 Our speakers' material as well as the data for which  
9 Congress has funded collection, related to these  
10 collateral consequences, show that in total  
11 significantly more than 48,000 federal and state  
12 consequences could attach to criminal convictions.  
13 Itemized in labyrinthine federal and state codes and  
14 not always readily available to affected persons,  
15 including not only the persons accused of crimes, but  
16 also their attorneys, prosecutors, judges, and others.  
17 Happily, Senator Patrick Leahy championed the effort  
18 to include a survey of collateral consequences in the  
19 Court Security Improvement Act of 2007 and we have  
20 access to some collected information through the  
21 National Inventory of the Collateral Consequences of  
22 Conviction Database that resulted from his effort.

23 As I expected, we'll hear today we have  
24 distance yet to travel to accurately capture the full  
25 range of collateral consequences, much less to ensure

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1 careful consideration of them as part of charging and  
2 sentencing decisions, as well as part of federal and  
3 state legislative decision-making, or more locally  
4 sound employment and other decisions. These issues do  
5 not only affect other people and they do not only  
6 affect a defined sub-set of America; these issues  
7 affect all of us because they impact who can  
8 effectively be rehabilitated, who can transition from  
9 poverty to self-sufficiency and who can access higher  
10 education degrees necessary to participate in a  
11 sustaining, thriving economy. These impacts touch  
12 public safety, economic health and the full contours  
13 of our shared community and they affect some of us  
14 painfully, directly.

15 To cite one statistic I learned from  
16 briefing materials for today, nearly half of all U.S.  
17 children have at least one parent who has a criminal  
18 record. The issues can also not surprisingly affect  
19 particular identity groups in ways that challenge or  
20 violate our core civil rights principles related to  
21 race, disability status, sex, including sexual  
22 orientation and gender identity. I expect we will  
23 hear today about all of those ways, today's topic  
24 implicates civil rights.

25 Because disability status can have

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1 particular resonance for collateral consequences,  
2 absent reform, I highlighted for us to consider  
3 throughout our conversations today DOJ statistics  
4 reflect that 45% of federal prisoners, 56% of state  
5 prisoners, and 64% of jail inmates have mental health  
6 diagnoses. For these populations in particular,  
7 collateral consequences such as being barred for  
8 eligibility for public housing or food stamps could  
9 preclude effective rehabilitation. If we do not take  
10 action, we will live those harms across our national  
11 community for generations forward.

12 Today's briefing features 13 distinguished  
13 speakers who will provide us with an array of  
14 viewpoints, including multiple speakers who have  
15 themselves been incarcerated in the past. The first  
16 panel includes national experts who will provide an  
17 overview of the long-lasting effects of incarceration  
18 after a prison sentence ends. They will discuss how  
19 these continuing barriers impact recidivism and  
20 particular communities. The second panel includes  
21 national experts who will discuss the barriers to civic  
22 participation following incarceration, specifically  
23 focusing on the rights to vote and participate on a  
24 jury. The third panel also includes national experts  
25 who will discuss the barriers of self-sufficiency and

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1 meeting basic needs after incarceration, focusing on  
2 employment, housing, and access to public benefits. I  
3 look forward to hearing more from our experts who are  
4 gathered here today. And before we begin, I thank  
5 Commissioner Kladney at whose impetus the Commission  
6 decided to take on this important issue. I also thank  
7 our staff who have put such hard work in today's  
8 briefing. I particularly recognize Sarale Sewell,  
9 Marik Xavier-Brier, LaShonda Brenson, and Maureen  
10 Rudolph for their efforts in putting together the  
11 panels and the research for today. And I also thank  
12 Latrice Foshee, Pam Dunston, Juanda Smith, Warren Orr,  
13 Michele Yorkman-Ramey, and Teresa Adams for their  
14 efforts in securing travel and all other logistical  
15 details for today.

16 I hope to remember to make this announcement  
17 again before the close of the briefing, but for any  
18 other member of the public who would like to submit  
19 materials for our review, our public record remains  
20 open for 30 days following today's briefing, closing  
21 on Monday, June 20th. Materials can be submitted by  
22 mail to the U.S. Commission on Civil Rights, Office of  
23 General Council, at 1331 Pennsylvania Avenue  
24 Northwest, Suite 1150, Washington D.C. 20425, or by  
25 email to [reentry@usccr.gov](mailto:reentry@usccr.gov). During the briefing our

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1 speakers and panelists will have seven minutes to  
2 speak, and I will hold you to that. After each panel  
3 presentation, commissioners will have the opportunity  
4 to ask questions within our allotted period of time  
5 and I will recognize the commissioners who wish to  
6 speak. I see that Commissioner Adegbile has joined  
7 us, thank you.

8 In order to maximize the amount of  
9 opportunity for discussion between commissioners and  
10 panelists and to ensure that the afternoon panelists  
11 receive their fair share of time, I will strictly  
12 enforce our seven-minute time period for each  
13 panelists. Panelists, you'll notice our system of  
14 lights that we have set up; when the light turns from  
15 green to yellow, that means that two minutes remain,  
16 and when the light turns red you should stop speaking.  
17 My fellow commissioners and I will also keep our  
18 comments and questions concise, I hope.

19 So our first panel and our order in which  
20 they will speak is as follows: Margaret Love,  
21 Executive Director of the Collateral Consequences  
22 Resource Center, Vikrant Reddy, Senior Research Fellow  
23 with the Charles Koch Institute, Traci Burch,  
24 Associate Professor of Political Science at  
25 Northwestern University, John Malcolm, Vice President

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1 of the Institute for Constitutional Government at the  
2 Heritage Foundation, and a special commission point of  
3 privilege, John Malcolm is also a member of our D.C.  
4 State Advisory Committee to the U.S. Commission on  
5 Civil Rights and I very much appreciate your service  
6 in that way. And Naomi Goldberg, Policy and Research  
7 Director at the Movement Advancement Project.

8 Ms. Love, please begin.

9 **I. PANEL ONE: Overview of Collateral Consequences**  
10 **of Incarceration**

11 MS. LOVE: I am very, very pleased to be  
12 here today and thank the commission for turning their  
13 attention to what I think is one of the most important  
14 policy issues facing this country today, and it has  
15 really not had sufficient attention at the federal  
16 level, I believe. My name is Margaret Love, I'm a  
17 lawyer in private practice here in Washington and I  
18 specialize in federal executive clemency. My  
19 involvement with collateral consequences goes back a  
20 number of years, stemming from my service as U.S.  
21 Pardon Attorney in the Justice Department; that's the  
22 office that makes recommendations to the President for  
23 pardons or sentence commutations. Since leaving the  
24 Justice Department almost 20 years ago, I have  
25 represented people seeking relief from collateral

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1 consequences and have written law reviews and a couple  
2 of books on the adverse effects of a criminal record.  
3 More recently I founded the Collateral Consequences  
4 Resource Center which serves as kind of a focal point  
5 for policy and practice documents and research.

6 I want to just say a word since I'm the first  
7 witness to set the stage; collateral consequences are  
8 nothing new, they have been around since Greek and  
9 Roman times. When people were convicted of serious  
10 felonies, they were basically made outlaws, they were  
11 driven out of the community, they would frequently  
12 lose all of their property. And even in our own  
13 country civil death and the notion that you lost all  
14 rights before the law continued well into the 20th  
15 Century in many states. The debased legal status that  
16 comes with a criminal conviction, particularly a  
17 felony conviction, allows almost any sort of civil  
18 penalty and there are very few legal restrictions.  
19 But collateral consequences have become a particular  
20 problem in the last 20 years for three reasons: there  
21 are more people affected by them, there are more laws  
22 and policies that restrict benefits and opportunities,  
23 and there are fewer ways to avoid or mitigate them.  
24 Many of these legal restrictions have very little nexus  
25 to public safety and serve (as you mentioned Madam

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1 Chair) only to discourage reentry and rehabilitation.  
2 They have become a pressing civil rights issue insofar  
3 as the criminal justice system itself has a  
4 disproportionate effect on racial and ethnic  
5 minorities. They've become what Michelle Alexander  
6 has famously called the new Jim Crow.

7 People are fond of citing the 48,000 laws  
8 and rules collected in the National Inventory, of which  
9 I was the first director. But that eye-popping number  
10 obscures what I think is an equally important issue,  
11 and that is the serious problem of informal collateral  
12 consequences that are facilitated through easy access  
13 to criminal records and the increasingly prevalent  
14 practice of background checking. The law provides few  
15 protections against discrimination based on criminal  
16 record, which is more than simply a proxy for racial  
17 discrimination. Twenty years ago background checks  
18 were rare, even for employment; nowadays they control  
19 access to almost any area of endeavor from obtaining  
20 a home improvement loan to volunteering to coach your  
21 own kid's sports team. And my clients are an  
22 interesting subset insofar as many of them are  
23 established business people; they are not people who  
24 are just reentering the community, they are people who  
25 have made it out, but they are still burdened with

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1 these disabilities and discrimination.

2 So I won't go into the technical advances  
3 that have made it possible to check a criminal record  
4 while you're sitting home on your sofa instead of  
5 having to go to the court house and actually look it  
6 up. It is incredibly easy to check someone's criminal  
7 record; it is also incredibly unreliable and name check  
8 background checks can yield very unreliable results.  
9 Unfortunately in America, unlike other parts of the  
10 Western world particularly, there is no right to be  
11 forgotten. I just want to mention three areas on  
12 which I think the Commission could have a really  
13 helpful contribution to this particular area; one is  
14 in research, the second is in standard setting, and  
15 the third is in public education. As to research, it  
16 is pretty clear that access to jobs and housing are  
17 the clearest predictor of future criminality. It's  
18 also clear that employers and landlords are largely  
19 free to discriminate, notwithstanding some laws that  
20 have been extended to them. But it's not clear what  
21 effect criminal records have on initial hiring and  
22 promotion or on job performance. Recent research, for  
23 example, indicates that the new ban the box rules and  
24 policies may have a questionable effect on hiring.  
25 There are studies that show that they may in fact

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1 result in fewer minorities being hired because of  
2 assumptions that are made. It's an unfortunate and  
3 unhappy circumstance, but that is what some of the  
4 recent research shows.

5 The underlying issue are that employers are  
6 simply reluctant to hire someone with a criminal record  
7 and it is more than simply a public safety concern  
8 that they have. I witnessed my own clients' situation  
9 where they are barred from many opportunities, where  
10 there really is no public safety issue at all.

11 CHAIR LHAMON: Thank you, Ms. Love. Your  
12 time is up, but thank you very much. And we'll be  
13 able to enjoy time in questions.

14 MS. LOVE: Oh. Sure.

15 CHAIR LHAMON: Mr. Reddy?

16 MR. REDDY: Well, hello. My name is Vikrant  
17 Reddy and it's a great honor to be in front of you  
18 today. I've testified in front of this body before  
19 and I've had the privilege of serving on the State  
20 Advisory Committee for my home state of Texas, so I've  
21 really appreciated the relationship that I've  
22 developed with this commission and admire the work  
23 that you do.

24 I'm going to start my comments out today by  
25 saying something I think is not said nearly enough in

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1 the criminal justice circles that I've been working in  
2 for ten years, and that is that accountability matters,  
3 offenders have to be held accountable. Now, having  
4 said that, at a certain point the accountability  
5 portion ends and you have to help people reenter  
6 society. You have to do this for two reasons; the  
7 first is the obvious moral reason, but the second  
8 reason is really a hard-nosed question of public  
9 safety. More than 90% of the people who enter state  
10 prisons in this country will come out of those prisons  
11 and they will live next door to you and me, and we all  
12 have an interest in making sure that they are  
13 successfully reintegrated so they are not hurting  
14 people again.

15 I'm going to focus my comments today on the  
16 key factor in limiting recidivism and that's  
17 employment, and I'm going to talk about some really  
18 prominent employment barriers that I think the  
19 commission should take a look at. First of all, I'm  
20 going to talk about occupational licensing, secondly  
21 I'm going to talk about driver's license suspensions,  
22 and then third very briefly, I'm going to touch a bit  
23 on ban the box as Ms. Love discussed, because I think  
24 that's worth digging into a little bit more in the  
25 hearing today. First of all, on the question of

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1 occupational licensing, all of you are familiar with  
2 what occupational licensing is, these are rules that  
3 prohibit entry into a profession unless you've passed  
4 certain exams, you've got certain standards that  
5 you've met. The easiest occupational licensing  
6 barrier in the world to announce is simply to say that  
7 someone is not permitted in the profession if they  
8 have a criminal record. This is something for which  
9 people in the public and policymakers and government  
10 will immediately nod their head and say, well, yes,  
11 that makes sense. But unfortunately, that kind of  
12 logic has piled up and led to a place where we have so  
13 many barriers that of this 40,000 figure that you've  
14 mentioned from the ABA, that Ms. Love mentioned, the  
15 majority of those are actually licensing and  
16 certification barriers.

17 It's extraordinary how many professions it's  
18 difficult to get into if you've got some kind of a  
19 criminal record. The way this works sometimes very  
20 obvious, people, the law will simply say if you have  
21 this kind of record you can't get into this profession,  
22 but sometimes it's a little more insidious, they will  
23 have these good character requirements and panels from  
24 within the profession will get together and assess  
25 whether or not you have the character to permit you

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1 into that profession. And of course these panels are  
2 composed of people who have an economic interest in  
3 limiting competition in their profession and they will  
4 look at your criminal background, sometimes they look  
5 at very unusual things. Before we changed a law in  
6 Texas in 2013, one thing that these committees would  
7 look at is your Class C misdemeanors; these are  
8 citations that are written by police officers, these  
9 are not things that people almost ever go to prison or  
10 even jail for, and yet these were the kinds of things  
11 that were being factored into assessments of whether  
12 or not you have the moral character to enter into a  
13 profession. Those are the kinds of things that I  
14 think we really want to reconsider at the policy level.

15 I want to note, especially, a really  
16 interesting paper that was done by a professor at  
17 Arizona State University. His name is Stephen  
18 Slivinski and he did something really fascinating; he  
19 took a ten-year period from 1997 to 2007 and he asked  
20 himself what happens to recidivism rates in different  
21 states depending on how burdensome the occupational  
22 licensing requirements are. So the states in which  
23 the -- and by the way, I should note he took his  
24 figures on which states were most burdensome from the  
25 Institute for Justice, which has really the best

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1 research in this area -- the states that have the most  
2 burdensome occupational licensing requirements during  
3 this ten-year period saw a 9% increase in recidivism  
4 rates. The states that have the least burdensome  
5 requirements saw a 2-1/2% decrease in recidivism  
6 rates. Now, correlation isn't causation and all of  
7 those kinds of things are important to note, but I  
8 think it is a reasonable inference for policymakers to  
9 say that it's possible that this has something to do  
10 with whether or not people can be successful upon  
11 reentry. At a certain point economic desperation  
12 kicks in and you can imagine that people start  
13 committing crimes again. Let me also talked a bit about  
14 driver's licenses; I think that this perhaps isn't  
15 fully appreciated in places where the policy wonk  
16 community resides, places like Washington or New York,  
17 because if you lose a driver's license in a place where  
18 you have a really great public transportation system,  
19 it's a nuisance but it's not a catastrophe. But in  
20 most of America if you lose a driver's license, it's  
21 a real catastrophe, it is impossible to get from Point  
22 A to Point B and that means it's absolutely impossible  
23 to get to work.

24 There may be certain reasons why you'd want  
25 to deny a driver's license to somebody because of a

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1 criminal action, but we have done all too frequently  
2 is deny driver's licenses to people because of  
3 underlying crimes that have nothing to do with the  
4 operation of motor vehicles. In the State of  
5 Virginia, for example, in the Year 2015, 39,000 people  
6 were denied driver's licenses -- or had their driver's  
7 licenses suspended, excuse me -- 99% of the underlying  
8 offenses had nothing to do with the operation of motor  
9 vehicles. It's important to note, I think, that these  
10 sorts of licensing barriers, occupational licenses and  
11 driver's licenses, they come down much harder on  
12 minority communities, disadvantaged communities  
13 because those communities are disproportionately  
14 represented in the criminal justice system. It's just  
15 sort of inevitable that this is a way in which  
16 government policies which are well-intentioned instead  
17 have this very counterproductive effect, and have a  
18 counterproductive effect on the most vulnerable  
19 communities also.

20 Very quickly on ban the box. What Ms. Love  
21 was saying was absolutely correct, there are these  
22 really interesting studies emerging that suggest that  
23 what people are doing whenever government's mandate  
24 they cannot look at criminal background, is not simply  
25 shrug their shoulders and say, okay, I don't care

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1 anymore; instead they say, well, if you tell me I can't  
2 do it and I still care about criminal background, I'm  
3 going to find a proxy by looking at your resume to  
4 determine whether or not I think you've ever been  
5 incarcerated. And they use very crude stereotypes to  
6 try and figure out whether or not this is an African-  
7 American name, for example, and what may be happening  
8 is that lower numbers of minorities are being  
9 interviewed for these positions in the first place.

10 I know my time is up, so I will simply say  
11 that my most prominent board member is Charles Koch  
12 himself and his business in Kansas they've implemented  
13 ban the box, but not under government mandate, it was  
14 something that they chose to do, they've created a  
15 culture internally, and that I think would work better  
16 than a government mandate. Thank you.

17 CHAIR LHAMON: Thank you very much, Mr.  
18 Reddy. Professor Burch?

19 MS. BURCH: Thank you, all. Thank you to  
20 the commission.

21 CHAIR LHAMON: Okay, I'm going to interrupt  
22 you just for a moment and just ask Mr. Reddy and Ms.  
23 Love to turn your microphones off so that our  
24 microphones will start working. Thank you.

25 MS. BURCH: Is mine on?

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1 PARTICIPANT: Yes.

2 MS. BURCH: Okay. Thank you so much for  
3 inviting me to participate in this very important  
4 briefing, and thank you to the commission for  
5 undertaking this important topic. In my written  
6 statement I provided more detailed information in  
7 response to the question about the extent to which  
8 these barriers of collateral consequences affect an  
9 individual, ex-offenders ability to reenter society  
10 and to do that with respect to racial discrimination.  
11 However, I do just want to point out that I did provide  
12 a very brief table that at least breaks down some of  
13 these collateral consequences, the 48,000 number that  
14 people have been throwing around, by category so that  
15 we can see -- and this table is taken from Joshua  
16 Kaiser's work, the paper is cited below and this is  
17 Table 1 from him -- and as you can see here as Kaiser  
18 estimates, about 62% of the post-release collateral  
19 consequences affect employment and business licensing,  
20 but there are also several other categories up here  
21 that I'm sure we will explore throughout the day.

22 I would just like to now pivot for the  
23 remainder of my time, very briefly, to talk about  
24 racial and ethnic minorities who are  
25 disproportionately affected by these collateral

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1 consequences, particularly African Americans, because  
2 African-American men and women are disproportionately  
3 affected by the exponential expansion of the criminal  
4 justice system since the 1970's. Black people are 13%  
5 of the U.S. population, but are over-represented among  
6 people who are arrested for crimes and also who are  
7 incarcerated. About half of black men and about 40%  
8 of white men can expect to be arrested for anything by  
9 age 23, and almost half of black men can expect to be  
10 arrested for a felony in their lifetimes, compared to  
11 only 14% of white men. Blacks make up 37% of inmates  
12 incarcerated in local jails and 36% of state and  
13 federal prisoners. And so the racially disparate  
14 impact of criminal justice involvement does translate  
15 into racial differences in the effects of collateral  
16 consequences and much of this transfer is really just  
17 how disparate impact works, however it arises, such  
18 that disparate impact in one realm can lead to  
19 disparate impact in another. However, this racially  
20 disparate impact of collateral consequences, I would  
21 argue and the research shows, is also exacerbated by  
22 racial discrimination.

23 So I'll just talk about three areas here;  
24 so with respect to employment discrimination, it is no  
25 secret that employers want to and prefer to hire

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1 individuals who do not have criminal records.  
2 However, as Devah Pager and Lincoln Quillian show, and  
3 that paper is cited in my written remarks, using audit  
4 studies they find that employers who are less likely  
5 to call back black job-seekers generally and they're  
6 also less likely to call back job-seekers of all race  
7 who admit to having criminal convictions. However,  
8 they also find that the effect of criminal convictions  
9 is 40% greater for blacks than whites, such that  
10 employers --

11 MS. TIMMONS-GOODSON: Hello?

12 CHAIR LHAMON: We're still on, but we're  
13 just having some microphone trouble.

14 VICE CHAIR TIMMONS-GOODSON: Okay, just  
15 checking to make sure I wasn't cut off.

16 CHAIR LHAMON: Thank you, Vice Chair.

17 Okay. Great, we're back and I will give you  
18 your seconds back.

19 MS. BURCH: Thank you. So I think, the  
20 point that I was just making there is that collateral  
21 consequences matter with respect to employment for  
22 everyone, but employers are much more likely to  
23 penalize blacks and penalize blacks with criminal  
24 convictions harshly when making employment decisions  
25 relative to whites. Moreover, because blacks are more

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1 likely to have contact with the criminal justice  
2 system, they are more likely to be in these databases  
3 more so than whites. And that may be the result of  
4 bad behavior, but numerous studies also suggest that  
5 racial discrimination may play a large role with  
6 respect to disparate criminal justice contact.

7 So, for instance, a collateral consequence  
8 of making criminal records widely available is that  
9 when you're putting in people just into databases just  
10 because they were either arrested or convicted of a  
11 minor, lower level offense, that practice, which in  
12 many cases has been shown to be discriminatory, just  
13 think about New York's stop-and-frisk policy, that  
14 transfers to discrimination that blacks may face in  
15 the criminal justice system to the labor market, making  
16 it less likely that blacks will be hired for jobs.

17 Briefly with respect to government benefits,  
18 racial disparities in punishment, particularly for  
19 drug crimes, are widely known. The difference in  
20 penalties between crack and powder cocaine still  
21 exists, even though it has been reduced, but also more  
22 troubling, blacks are more likely to be prosecuted and  
23 convicted of federal drug crimes, even though the usage  
24 rates in the population do not differ dramatically.  
25 Many federal statutes do allow states to deny benefits

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1 such as TANF and public housing to people who are  
2 convicted of drug crimes and many states are also now  
3 proposing drug tests for applicants for benefits, and  
4 so punishing drug addicts by denying them poverty  
5 relief. According to the National Council of State  
6 Legislators, at least 15 states have passed laws  
7 involving drug testing for public benefits. So again,  
8 these issues with respect to racial disparities in  
9 convictions for drug crimes will then translate into  
10 racial disparities and the denial of public benefits.

11 Finally, I just want to talk about a very  
12 interesting consequence that I don't think is  
13 reflected in the database but is emerging in research,  
14 and that is the notion of DNA and privacy rights. The  
15 collection of biological material through contact with  
16 the criminal justice system, like fingerprints but  
17 increasingly DNA profiles, is growing and the National  
18 DNA Index System is growing as well with millions of  
19 samples now. And as I noted in my written statement,  
20 blacks are more likely to have records in this database  
21 and in statewide DNA databases. Now estimates vary  
22 widely, but some studies estimate that it's as many as  
23 half of the DNA profiles in the National DNA Index  
24 System are from blacks. Again, blacks are 13% of the  
25 population. It is important to remember that you can

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1 end up in these databases in many states, not because  
2 of a conviction, but even just from mere contact or  
3 arrest with the criminal justice system. And states  
4 are making arrests grounds for including biological  
5 information in these databases. So as a result,  
6 Krinsky and Simoncelli estimate that nearly 10% of  
7 blacks may have DNA on file in the state database and  
8 Dorothy Roberts, now at University of Pennsylvania,  
9 argues that this increased and racialized genetic  
10 surveillance poses a threat to minorities who are  
11 already targeted by the criminal justice system. To  
12 think about it very concretely, if law enforcement is  
13 conducting an investigation and two offenders did the  
14 same thing, one black one white, law enforcement is  
15 much more likely to catch an offender who is black  
16 because they can either identify them directly through  
17 being in the DNA database or through a familial match,  
18 because blacks are much more likely to be in this  
19 database.

20 So with that, I will stop because I think  
21 my time is up. Thank you.

22 CHAIR LHAMON: Thanks very much, Ms. Burch.  
23 Mr. Malcolm?

24 Vice Chair, we're having some microphone  
25 issues. We'll be back in a sec.

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1 VICE CHAIR TIMMONS-GOODSON: Thank you.

2 MR. MALCOLM: It's a pleasure to be with you  
3 here today. So when most people think about the  
4 consequences of criminal conviction, they think about  
5 somebody being sentenced to prison or probation and  
6 maybe given a fine and restitution. Most people also  
7 probably think that when somebody is released from  
8 prison or their probationary period ends, that the  
9 punishment is over and the individual can begin the  
10 process of reintegrating into society and become a  
11 law-abiding citizen, but as you have heard that is far  
12 from true. There are more than 48,000 federal and  
13 state civil laws and regulations that are referred to  
14 as collateral consequences that restrict the  
15 activities of ex-offenders and curtail their liberties  
16 after they have been released from confinement or their  
17 probationary period has ended. And in fact experts  
18 estimate that are thousands of similar restrictions at  
19 the local, in terms of local ordinances. So in 1910  
20 in *Weems v. United States*, Supreme Court Justice Joseph  
21 McKenna described what awaits a criminal convict at  
22 the end of a sentence, and he stated, his prison bars  
23 and chains are removed, it is true, but he is subject  
24 to tormenting regulations that if not so tangible as  
25 prison bars and stone walls, oppress as much by their

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1 continuity and deprive of essential liberty.

2 He was right; ex-offenders face long odds  
3 when they are trying to put their past behind them, in  
4 addition to the stigma that's associated with being an  
5 ex-offender, a lot of them have substance abuse issues,  
6 a limited education and even more limited job skills  
7 and experience. Now regrettably, many of these ex-  
8 offenders will end up committing additional offenses  
9 after their release. And although many of these  
10 individuals undoubtedly would have committed offenses  
11 regardless of whether or not any collateral  
12 consequences were imposed upon them, certainly a  
13 significant minority, if not an outright majority of  
14 ex-offenders would like to turn over a new leaf and  
15 become productive, self-reliant, law-abiding members  
16 of society who are capable of supporting themselves  
17 and their families and of helping in their community.  
18 As the American Bar Association has pointed out,  
19 however, if promulgated and administered  
20 indiscriminately, a regime of collateral consequences  
21 may frustrate the chance of successful reentry into  
22 the community and thereby encourage recidivism.  
23 Legislators have very broad discretion when it comes  
24 to enacting laws creating collateral consequences and  
25 they're usually imposed under the guise of protecting

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1 public safety. These laws are considered to be  
2 remedial in nature and not punitive, they can affect,  
3 as you've already heard, among other things, an ex-  
4 offender's ability to get a job or a professional  
5 license, to get a driver's license, to obtain housing,  
6 student aid or other public benefits, to vote, hold  
7 public office or serve on a jury, even to do volunteer  
8 work, and certainly to possess a firearm.

9 Now clearly there will be times when the  
10 public safety benefits will outweigh any burden that  
11 a particular collateral consequence imposes on an ex-  
12 offender. For example, it is perfectly reasonable to  
13 prohibit a convicted child molester from running a  
14 daycare center or residing near an elementary school,  
15 prohibiting violent felons from purchasing or  
16 possessing firearms would be another example.  
17 Similarly, prohibiting somebody's who's convicted of  
18 defrauding a federal program, from participating in a  
19 related industry, at least for a period of time, is a  
20 sensible restriction that is directly related to the  
21 substance of the offense that was committed. Other  
22 collateral consequences, however, have at best a  
23 tenuous connection to public safety and appear to be  
24 more punitive in nature.

25 Now imposing punitive restrictions on ex-

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1 offenders out of a continuing sense of anger comes at  
2 a very high cost; it makes it far more difficult for  
3 an ex-offender to reintegrate into society. So Ohio  
4 law, for example, provides for the suspension or  
5 revocation of an offender's driver's license upon a  
6 conviction for some crimes that are entirely unrelated  
7 to driving. And as my friend Vikrant said, why would  
8 you restrict an ex-offenders ability to get to a job  
9 or to pick up your children or to go to school, if  
10 that individual poses no greater danger on the road  
11 than any other driver? A criminal conviction can cost  
12 a military veteran his or her pension, insurance, and  
13 a right to medical treatment, which is particularly  
14 troubling given the fact that some studies indicate  
15 that veterans who are suffering from post-traumatic  
16 stress disorder and therefore in serious need of  
17 medical treatment, may be far more likely to commit  
18 crimes. So as you've heard, about 60 to 70% of these  
19 more than 48,000 collateral consequences are  
20 employment-related, and as Vikrant also said, they're  
21 even more when you add to it a good moral character  
22 qualification for job and professional license  
23 requirements. These laws include prohibiting ex-  
24 offenders from operating a dance hall, a bar, a pool  
25 hall, a bowling alley, or a movie theater, or from

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1 working as a midwife, an interior designer, a barber,  
2 a contractor, an HVAC installer or repairman, or a cab  
3 driver. Even creative politicians would be hard-  
4 pressed to come up with legitimate public safety  
5 rationale from prohibiting ex-offenders from engaging  
6 in these professions.

7 This is particularly absurd when one  
8 considers that many ex-offenders receive training to  
9 become barbers or HVAC installers and repairmen while  
10 they're incarcerated, only to discover that they can't  
11 get a license to practice in the one field in which  
12 they now have a marketable skill. There are tens of  
13 millions of ex-offenders living in our communities and  
14 millions more will be joining them in the next few  
15 years. It is important that we do everything we can  
16 to encourage them to become productive, law-abiding  
17 members of society and that we not put too many  
18 impediments in the form of excessive collateral  
19 consequences in their way that will hinder their  
20 efforts. It is not in anyone's interest to consign  
21 ex-offenders to permanent second-class status; doing  
22 so will only lead to wasted lives, ruined families,  
23 and more crimes.

24 And I'm hoping at a time of intense  
25 polarization, that this is one issue that people can

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1 rally around and find some common ground. Thank you  
2 for inviting me to appear before you today, and I look  
3 forward to your questions.

4 MS. LHAMON: Thank you very much, Mr.  
5 Malcolm. Ms. Goldberg? We may have to move the  
6 microphone over for you.

7 Thank you for your flexibility.

8 MS. GOLDBERG: Good morning. My name is  
9 Naomi Goldberg and I'm the Director of Research and  
10 Policy for the Movement Advancement Project. I'd like  
11 to thank the commissioners and your staff for extending  
12 the opportunity to share how the lesbian, gay, bisexual  
13 and transgender, LGBT, community is disproportionately  
14 and uniquely impacted by the criminal justice system.  
15 The Movement Advancement Project is a think tank  
16 focused on speeding equality for LGBT people in the  
17 United States. In 2016 we released a series of reports  
18 along with the Center for American Progress focused on  
19 the experiences of LGBT people with the criminal  
20 justice system. We focused on all aspects of the  
21 criminal justice system, ranging from engagement with  
22 law enforcement and the societal forces that push LGBT  
23 people into the system, to the experiences in the legal  
24 system and the harsh violence and harassment the LGBT  
25 people experience in prisons and jails, and finally to

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1 the unique challenges the LGBT people face when trying  
2 to rebuild their lives with a criminal record.

3 Rather than walk you through the entirety  
4 of our report, I'm going to focus my remarks on two  
5 topics that bear important relevance to your work  
6 today. First, emerging research shows that LGBT  
7 people, particularly LGBT people of color, are  
8 disproportionately incarcerated. The second thing I'd  
9 like to focus on is the unique challenges that these  
10 LGBT people face when they have a criminal record upon  
11 reentry. So first, research finds LGBT people are  
12 over-represented in America's prisons and jails. And  
13 I have a slide here that shows that in general about  
14 4% of the U.S. population identifies as LGBT, yet when  
15 you look at currently incarcerated people you see much  
16 higher rates. So in the 2011-2012 National Inmate  
17 Survey, a national probability sample, there were more  
18 than one-quarter of women in jails identify as lesbian,  
19 gay or bisexual as you have 1 in 3 women in America's  
20 prisons. Numbers are slightly lower for men as you  
21 see on the right.

22 On the second slide you can see the same  
23 rates for LGBT youth held in juvenile detention  
24 facilities. So here in the 2012 National Survey of  
25 Youth in Custody, another nationally representative

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1 sample of youth in juvenile correction facilities,  
2 nearly 40% of girls in juvenile correction facilities  
3 identify as lesbian, gay or bisexual. This compares  
4 to national estimates of about 7 to 9% of all youth  
5 who identify as LGBT. This demonstrates a greatly  
6 increased, over-representation of LGBT youth in the  
7 juvenile justice system. And another survey found  
8 that of LGBT youth in the system, 85% are youth of  
9 color. So I think these numbers really challenge us  
10 to think about who are in our prisons and jails and to  
11 think about what their unique needs are when they're  
12 released.

13 So the issues that face LGBT people in the  
14 general population ranging from family rejection,  
15 employment discrimination, bullying and harassment in  
16 schools and police targeting, can be even more  
17 pronounced when someone is released from prison or has  
18 a criminal record. LGBT people can have a uniquely  
19 hard time rebuilding their lives because of added road  
20 blocks in three key areas shown on this slide; first,  
21 inadequate reentry programs and restrictive probation  
22 and parole policies; second, discrimination based on  
23 sexual orientation and gender identify that's  
24 pervasive both in those programs and in society more  
25 broadly; and finally, the collateral consequences that

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1 everyone on this panel has been speaking about and  
2 that you all will be working on all day today. So  
3 taking the first piece, there's a general lack of  
4 support for LGBT people in probation, parole, and  
5 reentry programs. So, reentry planning includes  
6 helping inmates try to find employment and housing  
7 upon being released.

8 For transgender inmates, for example, it can  
9 be very difficult if not impossible to obtain identity  
10 documents that accurately reflect their gender  
11 identity. The reason is that many transgender people  
12 are housed in correctional facilities that do not  
13 reflect their gender identity; as a result staff may  
14 be simply unaware on how to obtain an accurate identity  
15 document for these people. Without an accurate  
16 driver's license with a gender marker and name that  
17 match their identities, transgender people who are  
18 released from prison face added challenges in finding  
19 jobs and accessing the very services they need.  
20 Additionally, there's been cases in which transgender  
21 people have been placed into halfway houses that do  
22 not match their gender identity and had been referred  
23 to by their legal names and having even their clothing  
24 taken away from them.

25 Some of the individuals on probation and

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1 parole are required to attend job training or  
2 educational programs or to hold steady jobs as a  
3 condition of their parole. Again, LGBT people face  
4 high rates of discrimination particularly in  
5 employment. In a 2016 nationally representative  
6 survey conducted by the American Center for Progress,  
7 fully one-quarter of LGBT people experienced  
8 discrimination because of their sexual orientation or  
9 gender identity in the last year. These are not  
10 formally incarcerated, this is the entire population,  
11 with half of those people saying that it happened in  
12 the work environment. Obviously with a criminal  
13 record, LGBT people have an even harder time finding  
14 jobs. Second, LGBT people, particularly those with a  
15 criminal record, face added discrimination that can  
16 make rebuilding their lives more difficult. As I just  
17 mentioned, LGBT people face generally high rates of  
18 employment discrimination, in housing, and public  
19 accommodations, all made worse by the fact there's no  
20 federal law explicitly prohibiting such  
21 discrimination, and fewer than half of states have  
22 protections for LGBT people. This discrimination  
23 compounded by discrimination experienced by those with  
24 a criminal record along the lines of race and sex, can  
25 make it even more difficult for LGBT people to find

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1 the two building blocks of successful reentry, as  
2 everyone has mentioned employment, but also housing.

3 Finally, the disenfranchisement,  
4 discrimination, and broader challenges that face  
5 individuals with a criminal record obviously also  
6 impact LGBT people with criminal records. Fixing  
7 America's criminal justice system means fixing it for  
8 everyone, including the nine million LGBT people  
9 living across this country. I have two broad  
10 recommendations; first, non-discrimination provisions  
11 should be included in all government funded reentry  
12 programs. Federal, state, and local governments  
13 should require all organizations receiving government  
14 funding for reentry to include non-discrimination  
15 provisions that explicitly address race, sex, sexual  
16 orientation, and gender identity. Second, prison and  
17 jail reentry programs should provide a holistic  
18 assessment of individual's needs. Probation and  
19 parole officers and staff in prisons and reentry  
20 facilities need to include these crucial components  
21 for LGBT people, access to safe, affordable housing,  
22 competent, affordable healthcare, educational  
23 resources, employment, and more. Program staff should  
24 receive training and be aware of the added barriers  
25 LGBT people face in accessing these jobs, these

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1 programs and services. Federal and state, local  
2 prisons and jails and detention facilities should make  
3 supplementary resources available to LGBT people as  
4 part of release planning.

5 I would like to thank the commissioners and  
6 staff for allowing me to participate in today's hearing  
7 and lifting up the experiences of LGBT people in the  
8 United States as they're disproportionately impacted  
9 by the criminal justice system. Thank you.

10 CHAIR LHAMON: Thank you very much, Ms.  
11 Goldberg, and thank you to all the panelists. Before  
12 we start with questions, we're just going to take a  
13 short break so that we can switch out the one mic  
14 that's not working and then we don't have to keep  
15 moving the mic, so we'll take a pause. Sorry about  
16 that.

17 (Whereupon, the above-entitled matter went  
18 off the record at 10:16 a.m. and resumed at 10:18 p.m.)

19 CHAIR LHAMON: Wonderful. Thank you.  
20 Thank you all for your presentations and I will open  
21 it up to my fellow commissioners for questions, in  
22 particular Vice Chair because you're not present,  
23 please either email me or speak loudly so we can make  
24 sure we call on you.

25 Commissioner Kirsanow?

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1                   COMMISSIONER KIRSANOW:     Thank you Madam  
2 Chair and thanks very much to the panel, this is very  
3 informative and very instructive. Thanks also to the  
4 staff.

5                   We've been talking a lot about laws that do  
6 not have a rational basis or are not rationally related  
7 to the ostensible objectives that are at least stated  
8 whenever legislatures implement laws related to felons  
9 in reentry into different fields. But I'm wondering  
10 if there's any data that shows even if, and I know  
11 this is difficult to show because it would rely on  
12 certain presumptions; if you were to remove  
13 occupational, professional business licensing laws  
14 that present barriers to entry for ex-felons, to what  
15 extent would there still be market barriers, to this  
16 extent? Even if you were to remove laws and regulations  
17 related to professional licensing or occupations, you  
18 would still have insurance companies, for example,  
19 that would probably raise insurance premiums for  
20 whatever businesses were employing those individuals  
21 or whatever businesses that ex-felons, for example,  
22 establish on their own. Does anybody have any data or  
23 any understanding as to what extent those would still  
24 provide or present barriers to those who have been  
25 incarcerated?

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1 MR. MALCOLM: Well, so, Vikrant already  
2 referred to some studies that are also referred to in  
3 my written testimony about states that have removed  
4 more of these barriers end up having higher employment  
5 rates among ex-offenders and lower recidivism rates,  
6 but of course you're absolutely correct, there are  
7 going to continue to be market barriers. I mean, even  
8 if you have a voluntary, or for that matter a  
9 compulsory ban the box provision, at some point at the  
10 end of the hiring process you get to ask somebody  
11 whether they have a criminal conviction, and there'll  
12 be people who just don't want to employ formerly  
13 incarcerated people, either because of excessive  
14 insurance rates or they fear a lawsuit if something  
15 happens or a PR hit if it doesn't work out or if it  
16 comes out that they are employing somebody who is an  
17 ex-offender. There's some companies like the Charles  
18 Koch and others that have said we're going to set that  
19 aside, we're going to ask a lot of questions and try  
20 to employ the most talented people. But those  
21 barriers will certainly remain, but the studies that  
22 do exist indicate that when you at least remove this  
23 barrier, that more ex-offenders get employed and there  
24 are fewer recidivism rates.

25 MS. LOVE: I'd like to add something to

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1 that. I think the one really important thing to focus  
2 on is this problem of no standards, this blanket  
3 categorical bar on people with a criminal record. I  
4 think your mention of the insurance industry is  
5 tremendously important; I can't tell you how  
6 frequently I've been told that my company cannot hire  
7 people with a record because our insurance will not  
8 allow it. The problem is an absence of standards that  
9 would permit a granular case-by-case determination.  
10 Many states have standards that ask how long it's been  
11 since you were convicted, what were you convicted of,  
12 what have you done since. If the concern is public  
13 safety, having standards focused on public safety is  
14 one place I think this commission could really be  
15 helpful -- developing standards that will help people  
16 who want to do the right thing understand how to  
17 measure the risk. I think insurance companies have to  
18 be regulated to a certain extent; they can't put these  
19 barriers in the way of willing employers.

20 COMMISSIONER KIRSANOW: If I could just  
21 follow up on that real quickly. It strikes me  
22 insurance companies obviously have a proprietary  
23 interest in getting the risk assessment right. Is  
24 there evidence that they're not getting the risk  
25 assessment right?

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1 MS. LOVE: For me only anecdotal. I have  
2 been told that they simply have blanket policies, no  
3 one with a criminal record may be hired, no matter  
4 what they did or how long ago it was. I suspect that  
5 there may be ways of finding out perhaps through the  
6 industry that regulates insurance providers.

7 MR. REDDY: Commissioner, I -- Here we go.  
8 Well, I agree with everything that both John and  
9 Margaret said. I don't have a good answer to the  
10 insurance question, but I have an anecdote that I think  
11 you'd find really interesting; I used to work in Texas  
12 State politics in a think tank and I was working on  
13 criminal justice issues, and we would hear from a  
14 number of employers that for personal reasons they  
15 were actually very interested in hiring ex-offenders,  
16 they had family reasons or whatever, you know that  
17 they had some sympathy for people in this position.  
18 But they would tell us, just as Margaret said,  
19 nevertheless we can't do this because the insurance  
20 cost would be far too high and we just can't take on  
21 that kind of a risk. We started sharing these  
22 anecdotes with state office-holders in Texas and many  
23 of them said to us, well, that sounds like a tort  
24 reform problem. That's something that Texas has  
25 worked on in the past and we could do something on

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1 that issue here. And so the year 2015 Texas actually  
2 passed damage caps on these negligent hiring lawsuits,  
3 and it's far too recent for me to have any data for  
4 you on exactly what the results have been, but this is  
5 something that has been tried. And what I think is  
6 particularly interesting about it is that it was tried  
7 in a red state with a conservative political culture  
8 and the arguments used to justify doing this were  
9 conservative political arguments, so I think it's an  
10 interesting idea that other states could take a look  
11 at.

12 CHAIR LHAMON: Commissioner Kladney?

13 COMMISSIONER KLADNEY: Thank you, Madam  
14 Chair. I'd point out, to everyone actually, that the  
15 commission several years ago at the behest of  
16 Commissioner Kirsanow, did an employment ban the box  
17 briefing and what we did find out was interesting  
18 information; our briefing showed a white person with  
19 a felony was more likely to be employed than a black  
20 person without a felony, that many employers would not  
21 even use official ways to find out if someone has a  
22 record or check whether that background check was  
23 correct, and many employers would use the Internet,  
24 which failingly lacks credibility, I guess. And that  
25 they had to consider the job, the offense, and the

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1 time. So we actually in that report, I think, came up  
2 with some conclusions as to how people should handle  
3 that, how employers should handle it, but regretfully  
4 we can't make the law. So do you propose state-by-  
5 state laws or federal laws?

6 And my second question to the panel is, when  
7 it comes to licensing and occupation in my state, many,  
8 many of the licensing boards have -- it's not a waiver  
9 provision -- it's a permission type of application  
10 rather than a bar; so how do you propose licensing  
11 boards actually handle licensure of people who have  
12 not just been in prison but who have criminal  
13 convictions? And actually, it's not even just  
14 felonies, it's also misdemeanors.

15 MS. LOVE: What most states do is they have  
16 a system by which people may regain their rights and  
17 regain a sense of good character. Every state has a  
18 way, whether it's through judicial certificates,  
19 executive pardon, sealing or expungement, a variety of  
20 relief mechanisms. These can be very useful,  
21 particularly if they're linked to protections against  
22 negligent hiring. And there's some very interesting  
23 new national law reform proposals; one, next week the  
24 American Law Institute is going to be approving, along  
25 with their model penal code on sentencing, a whole

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1 system of how to deal with collateral consequences  
2 that includes a negligent hiring protection, which  
3 ought to address the insurance problem. Again, I  
4 think it's very important to do away with these  
5 mandatory bars and develop standards that can help  
6 licensing boards, that can help employers arrive at  
7 the right decision and to provide specific, official  
8 designation of rehabilitation, that a pardon, for  
9 example, would. So that's what I think is the most  
10 important thing.

11 COMMISSIONER KLADNEY: Well, isn't that a  
12 really complex kind of position to put an offender in  
13 who may not be well-educated or have the money to apply  
14 or hire someone like yourself?

15 MS. LOVE: Well, that's for sure. And  
16 increasingly, legal aid providers and public defenders  
17 are realizing that collateral consequences are very  
18 much a part of their job and that people who are having  
19 trouble dealing with having an old criminal record,  
20 whether it's through expungement or some sort of  
21 judicial certificate, they can get help in many states  
22 from legal aid offices. And I think giving resources  
23 and encouragement to legal aid and public defender  
24 offices, to regard this as part of their job, and in  
25 fact to encourage prosecutors to also consider this as

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1 a part of their job, that these are success stories,  
2 they should want success stories out of the people  
3 that they prosecute. So I think getting a systemic  
4 buy-in from all the players in the system, including  
5 courts and certainly licensing boards, to address this  
6 problem at a rational level, I think it's really  
7 important.

8 COMMISSIONER KLADNEY: And then is there  
9 anybody who would like to contribute as to how  
10 licensing boards should operate in the initial  
11 application stage or that type of thing? Do you all  
12 propose some sort of standard approach that would be  
13 a model for jurisdictions to use?

14 MR. MALCOLM: I'm not sure about a standard  
15 approach; so, this is part of a bigger problem that  
16 goes beyond this but is included, encompassed within  
17 this, which is a lot of state licensing boards are  
18 also made up of people who are in that profession who  
19 are frankly rent-seekers and are trying to keep out  
20 competition. And people who are ex-offenders, they're  
21 the low-hanging fruit in terms of keeping out  
22 competition. Just come up with a blanket rule and  
23 you're eliminating a whole slew of competitors. So  
24 one thing I think that has to happen is that state  
25 legislators ought to be paying more attention to

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1       avoiding rent-seeking with professional licensing  
2       boards and the other thing they ought to do is, as I  
3       said, there are a whole slew of professions in which  
4       it is, it would plumb the depths of my imagination to  
5       come up with a legitimate public safety reason why an  
6       ex-offender could not be an interior decorator,  
7       particularly in the days of Yelp in which people can  
8       post bad reviews if an ex-offender is a bad interior  
9       decorator. And so I think that they need to be far  
10      more scrutinizing in terms of looking at categories  
11      and coming up with scalpel-like approaches to  
12      eliminating people from professional licenses and jobs  
13      than the meat cleaver that is usually employed by  
14      people who have a vested interest in keeping out  
15      competition.

16                   MR. REDDY: Yes, I agree with Mr. Malcolm.  
17       I think that some of these licensing boards probably  
18       just need to be eliminated altogether, they don't  
19       really make a lot of sense, and the criminal justice  
20       benefits would be incidental, but you'd have these  
21       really broad economic benefits, more competition,  
22       lower prices, more innovation. In Louisiana, I think  
23       this is still the case, you have to pass a written  
24       exam to become a florist, and one of the arguments  
25       that was made was that roses and other flowers have

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1 thorns, you could prick yourself, there's blood, I  
2 mean there's all sorts of safety issues involved, and  
3 these are just really absurd arguments. But as John  
4 said, the low-hanging fruit here is to say well,  
5 anybody with some kind of a criminal record can't be  
6 permitted in our profession, and you'll see people  
7 immediately nod their heads in support of it. I think  
8 that, as John said, if you just look more broadly at  
9 the economic benefits of reducing licensing in  
10 society, the criminal justice issues that we're  
11 talking about here would be incidentally benefitted.

12 MS. LOVE: Let me add just one thing; most  
13 states, two-thirds of the states, do already have laws  
14 that set standards for licensing. We've collected all  
15 those laws on our website. And so if those laws were  
16 observed and enforced, I think a good deal of this  
17 problem would go away.

18 COMMISSIONER KLADNEY: Just one more  
19 question; Ms. Burch, you spoke about a DNA database,  
20 and I made some notes, but I'm trying to figure out  
21 what is the problem, what is the solution, is there a  
22 solution, is there a problem?

23 MS. BURCH: So the issue that I raised is  
24 the collection of DNA for even incidental contact,  
25 even before conviction, leads to a disproportionate

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1 representation of blacks relative to other groups in  
2 the database. A couple issues I think are that, one,  
3 privacy, having your DNA on file forever, in many cases  
4 many people don't realize that's what's happening, can  
5 come back to be problematic later in several instances;  
6 one, for instance, is that people are starting to, as  
7 Dorothy Roberts points out, use these DNA databases to  
8 of course solve crimes, but even to use familial DNA  
9 matching, so looking in the database to figure out if  
10 a crime scene matches someone even in a family, to  
11 then narrow down the suspect pool. And the moral and  
12 other implications of that procedure aside, again it  
13 leads to the situation that blacks are more likely to  
14 be caught by law enforcement than whites because of  
15 their disproportionate presence in this database. And  
16 again, a lot of people in this database aren't even  
17 there because they've been convicted of crimes, just  
18 contact, arrest or contact, can get you into the  
19 database in certain states.

20 So to think about either changing the  
21 process or the point at which people, at a minimum,  
22 where DNA is collected and how it's stored, if someone  
23 is put on trial, for instance, and then found innocent,  
24 does their DNA then get taken out of these databases  
25 legally and is that policy actually implemented, is

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1 one way to just start trying to solve this problem.  
2 Maybe not at the point of arrest, but at the point of  
3 conviction. Again, the real issue is the  
4 disproportionate arrest rates that may or may not be  
5 driven by crime and actual commission of a crime versus  
6 then thinking about is DNA, are fingerprints, other  
7 kinds of biological materials collected, if so, for  
8 how long. If the person is, again, not found guilty,  
9 is that information discarded or is it kept, and then  
10 going forward how is it used? And I think we're still  
11 at the beginning of using DNA for the solving of  
12 crimes, but also, again, people may use these data for  
13 research into criminal tendencies and the like, and so  
14 there is a danger that this disparity in being in the  
15 database is going to have detrimental effects,  
16 racially detrimental effects down the road.

17 COMMISSIONER KLADNEY: They also use it for  
18 the exoneration of people who were wrongfully  
19 convicted, right?

20 MS. BURCH: Right. Yes, of course. But it  
21 is important to think about the -- there is this  
22 positive benefit of exoneration but there can also be  
23 a downside, as is the case with many public policies.

24 CHAIR LHAMON: Thank you. Commissioner  
25 Yaki?

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1                   COMMISSIONER YAKI:    Thank you very much.  
2                   What's interesting about this briefing, I think as Ms.  
3                   Love pointed out, this is something that goes far back.  
4                   I remember reading back in high school about Nathaniel  
5                   Hawthorne in the "Scarlet Letter"; I mean, it's really  
6                   no different now than it is then, the desire to shame,  
7                   punish, and otherwise ostracize people in communities  
8                   for whatever crimes that may have been committed.  And  
9                   all of us as people of good conscience and good will  
10                  are always faced with the story of well, did this  
11                  person turn their life around and should they be able  
12                  to do something, and I think that's something that  
13                  this hearing is about.

14                  I have a couple of quick questions for some  
15                  of the individual panelists; Mr. Reddy, you mentioned  
16                  that Koch Industries had taken away the "box."  I just  
17                  wanted to know what the experience has been with that,  
18                  and have you done any studies or have they done any  
19                  studies or seen any results as a result of that?

20                  MR. REDDY:  I can't give terribly detailed  
21                  information.  I work for the Charles Koch Institute,  
22                  so this is Mr. Koch's philanthropic endeavor, but  
23                  obviously he has his company in Kansas and from time  
24                  to time I meet executives from that company.  I've  
25                  asked them; I've said, "Well, you've got rid of this

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1 question on the application, what kind of results have  
2 you seen," and anecdotally they tell me that things  
3 have gone really well. My sense of it is that when  
4 companies do this on their own, they're required to  
5 really kind of go the extra mile, they have to bring  
6 in their HR people, they have to talk to them about  
7 why they have this vision, about why they want to do  
8 it this way, what their broader social concerns are,  
9 and there's a real education effort that has to happen  
10 within the employer. And so it's probably going to be  
11 a lot more effective if that happens rather than if  
12 you're simply informed that look, you're not allowed  
13 to ask this question anymore.

14 Now, the problem with my answer there is  
15 that it's really hard for government to do anything,  
16 to just kind of create underlying cultural change  
17 within employers. But if we can encourage more of  
18 that, that's actually going to get us the kinds of  
19 results that we want, a lot more than I think the  
20 government mandates will, because as we've talked  
21 today and as apparently you've had a previous briefing  
22 on, some evidence is emerging that suggesting that  
23 whenever these mandates are created, the consequences  
24 are counterproductive.

25 COMMISSIONER YAKI: Another question going

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1 to the panel; as I sort of look at this and understand  
2 this, I'm trying to think of we have this intersection  
3 in terms of disproportionate impact on minority  
4 communities and then their ability to try and go  
5 through even if they're aware of the different hurdles  
6 and procedures that may exist. And has anyone seen  
7 any sort of Title VII litigation on this? Or is it  
8 because of their status as a prisoner, does that sort  
9 of exempt them from the ability to file a claim of  
10 disproportionate impact of how these procedures for  
11 restoration are being applied in the state?

12 MS. LOVE: I can speak to that. Three or  
13 four years ago EEOC developed guidance on how the  
14 effect of a criminal record can raise a Title VII  
15 problem. There have been a handful of lawsuits  
16 challenging company policies that exclude people with  
17 a record or have a disparate impact on them. They're  
18 linked to racial or other bases which are prohibited,  
19 which is not that hard to do actually. But there are  
20 only a handful and I think that it is very hard to try  
21 to affect social change through this kind of  
22 litigation. I think I really want to associate myself  
23 with what you just said, Vikrant, because I think there  
24 are more employers, people who I call, "the willing  
25 but worried," who would hire people with a record if

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1 they thought it was acceptable, safe, if they could  
2 avoid the risk not simply of public safety, but of the  
3 kind of criticism in the community. I mean, I've  
4 heard, for example, FedEx and UPS are very reluctant  
5 to hire people with a record because they are worried  
6 about what people will think or be fearful of. And  
7 again, this is the problem of reassuring employers who  
8 are willing and if you can develop standards, encourage  
9 states to have effective restoration procedures so  
10 that there's easy access to sort of rehabilitation  
11 certification, if you will, I would say through the  
12 courts is probably the best way to do it.

13 This kind of a system of certifying  
14 rehabilitation and encouraging employers and giving  
15 them some sense of protection, I think that will go a  
16 long way to improving and finding more industries like  
17 the Koch Industries.

18 COMMISSIONER YAKI: One final thing; I used  
19 to, when I was in law school I actually did a lot of  
20 work with prisoners, we had a big prison project in  
21 Connecticut. And what's obviously happened over the  
22 years is that the idea of rehabilitation has kind of  
23 been thrown out the window and we're into, "It's  
24 punishment and then you're out." To what extent do  
25 you believe that a renewed commitment to post-release

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1 programs, whether it's drug treatment, whether it's  
2 job training, is going to be helpful in sort of  
3 creating a better baseline for a lot of these  
4 individuals to overcome these hurdles that are out  
5 there?

6 MS. LOVE: I think there are two things;  
7 number one, there are the reentry programs, the service  
8 provision of people coming out of prison for example,  
9 but you mentioned Connecticut, which is a wonderful  
10 example of a state that's doing both a great deal of  
11 reentry programming. They also, however, have a very  
12 active and functional pardon system that processes  
13 hundreds of applications, and there are also other  
14 kinds of relief mechanisms in Connecticut. That state  
15 could be a real bellwether for how to handle this.  
16 Now, their pardon board is independent of the governor,  
17 so that gives it a certain degree of presumed  
18 functionality. But there are other kinds of systems.  
19 Indiana is a state also that has a more recent scheme  
20 for restoring rights. There are a number of states  
21 that have been experimenting and I wish the federal  
22 government would kind of take some steps in this  
23 direction, also.

24 COMMISSIONER YAKI: Yes, we've got Vice  
25 President Pence to say something about that.

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1 MR. MALCOLM: Yes, Commissioner Yaki, you -  
2 -

3 MS. LOVE: He signed that law, by the way,  
4 after he'd been in office about three months.

5 MR. MALCOLM: -- you touch on an important  
6 point, but you limited your question to post-release  
7 programs, and I think while post-release programs  
8 certainly ought to be encouraged, what makes far more  
9 sense are frankly pre-release programs. I mean, so  
10 people when they're out whatever demons that they had  
11 going into prison, if they're left untreated while  
12 they're in prison, are likely to continue, they're  
13 just untreated problems that will continue. And  
14 they're now going to face all kinds of pressures on  
15 the outside world, including having to get jobs and  
16 get back in terms of their connection with family  
17 members and probably some bad influences that were in  
18 their life beforehand. When you can really address  
19 these problems is when people are actually  
20 incarcerated, you have physical control over them, you  
21 can give them some kind of an incentive to actually  
22 take these programs and complete these programs at a  
23 time which they will receive the benefits of those.  
24 And then once they are released, having completed these  
25 programs, they'll be far less likely to recidivate.

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1 So there were all kinds of criminal justice proposals  
2 that were introduced in Congress that addressed what  
3 is referred to as prison reform. I expect that those  
4 proposals will come up again, so while post-release  
5 programs are important, I don't wish to downplay those  
6 at all, I think pre-release programs may be even better  
7 and more effective.

8 MS. GOLDBERG: I just want to add to that  
9 briefly, that I think we also have to think about what  
10 happens to people when they're in prison, it's not  
11 only what they come in with. In the LGBT community,  
12 for example, 1 in 4 trans people is sexually assaulted  
13 in prison. So what does that do then when you leave  
14 and you have that experience and it's not being  
15 addressed when you try to rebuild your life? And  
16 that's just the LGBT example, but I think prisons in  
17 many ways are not places to help people grow and I  
18 think particularly when we think about young people  
19 and what that means for someone if they're incarcerated  
20 at 18 or 19. I think there's some great examples in  
21 the youth context where there is so much more emphasis  
22 on rehabilitation and thinking about this as a chance  
23 to restart, as opposed to a chance to be penalized for  
24 all the stuff that you came in with. And so I think  
25 that there are definitely opportunities there to get

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1 people accepted. And in a medical context a lot of  
2 people are actually more adherent to drugs or to  
3 medications while they're in prison, and then when  
4 they're released there's a lot of drop-off. And so I  
5 think about while you're in prison as well as outside  
6 and having that be a constant thread and having a lot  
7 of connection between those is super important.

8 CHAIR LHAMON: So I'm going to insert myself  
9 out of order --

10 VICE CHAIR TIMMONS-GOODSON: Madam Chair?

11 CHAIR LHAMON: I will add you to the list,  
12 Vice Chair. And I'm going to insert myself because  
13 one of my questions is directly related to what you  
14 were just saying, Ms. Goldberg. You mentioned in your  
15 opening testimony that there's a general lack of  
16 support for reentry, in particular for LGBT inmates.  
17 Can you -- I read your report, I heard your testimony;  
18 can you give us cites, either now or following this,  
19 for what you mean by that lack of support and what  
20 would be needed?

21 MS. GOLDBERG: So unfortunately, there is  
22 very little data collection about LGBT people  
23 generally. There are not questions on the census and  
24 so forth, and so much of what we have is really about  
25 people who are currently incarcerated, which are the

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1 two nationally representative samples that I  
2 mentioned, so most of what we know about reentry  
3 experiences is anecdotal or has come through  
4 litigation. So for example, in Illinois, there was a  
5 woman who was released into a halfway house, she's  
6 trans, she's put into a men's facility even though  
7 that is actually in contradiction to PREA and the  
8 requirements around placement. And she reported just  
9 how can I possibly just go get a job when I can't wear  
10 my own clothing or on makeup or be myself. And so I  
11 think we need to understand much better what's  
12 happening, and there are some efforts, the National  
13 LGBT Task Force is undertaking a survey of reentry  
14 providers to understand competency; have you ever  
15 thought about the needs of your LGBT clients given  
16 that 1 in 3 women identify as lesbian, gay or bisexual,  
17 when they're released that is not unrelated to their  
18 reentry experience. And so I think there's a  
19 recommendation within the LGBT community that we need  
20 to understand this much better, but I think also there  
21 needs to be more data collected about LGBT experiences  
22 and national surveys and so forth.

23 CHAIR LHAMON: Very helpful, thank you.  
24 And if it were possible to share with us some of the  
25 litigation that you're referring to, that would also

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1 be helpful.

2 MS. GOLDBERG: Yes, happy to.

3 CHAIR LHAMON: Thanks. Commissioner  
4 Narasaki.

5 COMMISSIONER NARASAKI: Thank you, Madam  
6 Chair. I have some different questions for different  
7 -- for all of you. So one of them is we weren't able  
8 to find very much on the issue of consequences for  
9 people who are trying to get loans or aid for school,  
10 and it seems to me that that is a critical part of  
11 trying to be able to get the job skills and credentials  
12 necessary, even once you are able to eliminate the  
13 licensing requirements. So it would be very helpful  
14 to hear from those of you who may have expertise or  
15 thoughts about what is the current state of access,  
16 collateral consequences in the education system, and  
17 what do you think should be done about that, if there's  
18 still problems?

19 MS. LOVE: You mentioned two things; one is  
20 the issue of loans and the other one is the access to  
21 education. Those are governed by two different  
22 systems of laws or rules or policies, if you will.  
23 Most of the limits on bank loans are governed by  
24 private policies that are if not unique, they're  
25 particular to banks. Education is another matter,

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1 that is very frequently governed by law and it's a  
2 state-by-state issue. And I think it's tremendously  
3 important to ensure that people have access to  
4 education, particularly for training and higher  
5 education as well. New York State has taken some very  
6 progressive steps recently, and I'd be glad to provide  
7 you with particulars about that. But I think that the  
8 whole banking area is tremendously important and it is  
9 not regulated. Many banks will not deal with people  
10 with a criminal record. For example, they won't make  
11 them loans. In fact, some of my clients who are more  
12 successful and further away from their crime, they  
13 cannot have investment accounts with banks if they  
14 have a record that may be 20 or 25 years old. So  
15 banks are a real problem that is not well-known.

16 COMMISSIONER NARASAKI: Even in the area of  
17 -- I was thinking more loans in the context of  
18 education, the guaranteed loans?

19 MS. LOVE: I'm not sure how the federal law  
20 on student loans works, as far as people with a record.  
21 There used to be stricter rules about students losing  
22 their federal loans, if they were - if they had a past  
23 drug conviction. Now they lose them if they have a  
24 conviction while they are in school with federal loans.  
25 But I think that is not as big a problem as having

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1 general access to financial support from banks.

2 MS. GOLDBERG: Although, I will say that I  
3 think that while there was a change in the eligibility  
4 for federal student loans, I don't think that that was  
5 well-communicated, and so I think the perception is if  
6 you're a youth, you have a record, a drug-related  
7 offense, you can't get a loan. And I think the other  
8 piece is actually on the college front, that there are  
9 some colleges that do ask about criminal record for  
10 students who are enrolling. And we came up with a  
11 couple of examples in our research, particularly  
12 around youth who were convicted of sex offenses,  
13 whether they are dangerous or not, that colleges are  
14 very wary to let someone come to college who might  
15 have a sex offense, for example. And obviously, that  
16 category we know is incredibly broad and frequently is  
17 not -- is misused in many cases. So I think that  
18 those are two pieces that are really important is both  
19 education about the limits for federal loan  
20 applications and that you really can get student loans,  
21 and if you wait two years, you still can go to college.  
22 But also on the college front, I think much like the  
23 other employers, just like "willing and worried" piece  
24 that colleges set up barriers for students that  
25 probably should be removed.

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1                   COMMISSIONER NARASAKI:     And Mr. Malcolm,  
2     I'm very concerned about the issue of vets, veterans  
3     -- right, of them losing their pensions or other  
4     benefits, particularly given that there are some who  
5     do come back with PTSD or other issues, and end up  
6     homeless.  If you're homeless and if you end up, there  
7     a myriad number of crimes you could be committing just  
8     because you're homeless.  So could you talk about what  
9     the state of the law is and what's going on in terms  
10    of trying to help that population?

11                   MR. MALCOLM:     Well, Ms. Love's probably  
12    better equipped to answer that question than I am.  I  
13    do know that there are some federal laws that deprive  
14    veterans of these benefits, including their ability to  
15    seek treatment when they are convicted of crimes.  And  
16    obviously there are returning veterans, large numbers  
17    of them that suffer from things like PTSD and sometimes  
18    worse, that are clearly contributing factors to  
19    committing crimes.  You may unfortunately have just  
20    witnessed this yesterday in Times Square with the  
21    returning naval veteran and I just think it is self-  
22    defeating.  I mean, if you have identified, for this  
23    precise reason for instance, the number of states that  
24    have in quite an innovative manner set up specialty  
25    courts, including veterans' courts to address the

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1 unique issues that veterans face when they return and  
2 they develop these disorders that may be a contributing  
3 factor committing crimes and to limit their access to  
4 treatment, people who have actually served our country  
5 and faced the prospect of death in order to protect  
6 our freedom, I think that's just horrific.

7 MS. LOVE: I'll just add a short note on  
8 that, that depending upon the nature of your discharge,  
9 whether it's a bad conduct discharge or even  
10 dishonorable, you may lose eligibility for a variety  
11 of benefits, ranging from your pension to the ability  
12 to be buried in a veteran's cemetery, but those are  
13 linked to the nature of your discharge, rather than to  
14 the commission of a crime.

15 COMMISSIONER NARASAKI: So it's something  
16 that's going to your service as opposed to something  
17 that might happen post-service?

18 MS. LOVE: That's right. That's right.

19 COMMISSIONER NARASAKI: That's very  
20 helpful. And then I just had one more question about  
21 -- let's see if I can find it -- yes, that's right.  
22 So Ms. Goldberg, you had referred in your written  
23 testimony about the challenges in terms of potential  
24 loss of rights to adopt or to lose your actual parental  
25 rights. Of course it was in the context of the LGBT

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1 community which is particularly fraught, but I'm  
2 wondering if you could explain a little bit more about  
3 what those issues might be?

4 MS. GOLDBERG: So, specifically, I think  
5 more LGBT-related, many families need to do what's  
6 called a second-parent adoption to establish legal  
7 ties between a child and a parent, and in many  
8 instances there is questions about a criminal record.  
9 And we scanned all of the LGBT legal organizations and  
10 no one had really heard of anybody being denied a  
11 second-parent adoption. That said, we know that many  
12 low income communities don't do a second-parent  
13 adoption because it's costly, and those may be the  
14 same communities where there may be criminal justice  
15 former involvement that could be challenging. I think  
16 there's a long line of history of LGBT people losing  
17 parenting rights for all kinds of reasons related to  
18 their sexual orientation and gender identity and I  
19 think knowing now that LGBT people are  
20 disproportionately incarcerated, we know that lots of  
21 people lose parental rights when they become  
22 incarcerated. And even if they don't lose those legal  
23 rights, there's disconnection that happens, and I  
24 think that particularly given the tenuous connections  
25 between LGBT parents and their children that

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1 frequently aren't legally tied, being incarcerated  
2 could result in an entire family fracturing.

3 So that was where we were going with the  
4 second-parent adoption piece. Again, we don't have  
5 examples, but, given that that is a case-by-case in  
6 family courts and judges are making those decisions,  
7 I think that is a place where there could be a lot  
8 happening that we're not aware of.

9 COMMISSIONER NARASAKI: Thank you.

10 CHAIR LHAMON: Commissioner Heriot?

11 COMMISSIONER HERIOT: Thank you, Madam  
12 Chair. I just want to put an already existing idea on  
13 the table here and get your comment on it. I am not  
14 a fan of the mandatory "ban the box" rules, I have a  
15 feeling that the empirical research suggesting that it  
16 just leads to race and sex discrimination is probably  
17 right. And I'm not usually a fan of federal subsidies  
18 for purely private, commercial behavior, but this may  
19 be a pretty good reason for me to go against that usual  
20 view. I understand that back in 1996 Congress passed  
21 a subsidy -- I've written down what it's called --  
22 it's called a Work Opportunity Tax Credit Program and  
23 it was part of the Small Business Job Protection Act,  
24 which gave a small subsidy to employers willing to  
25 hire job applicants who have a criminal record. And

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1 it was intended to be temporary, but it seems to have  
2 been renewed. I don't know what the status of it is  
3 right now, but I'd like your comment on that, whether  
4 it works, do you know of any empirical evidence to  
5 suggest that that does actually increase the number of  
6 ex-felons who get jobs, are there any state programs  
7 like this? This I'm throwing out to all of you because  
8 I don't know who would be the most knowledgeable about  
9 this.

10 MS. LOVE: I know a little bit about it. I  
11 know that the federal subsidies, tax subsidies, have  
12 not been a topic of conversation in this whole  
13 discourse. I suspect that's because it has not had a  
14 very great effect, it has not been sufficient to really  
15 encourage, when measured against all the pressures  
16 against whether they're coming from the insurance  
17 industry or elsewhere. Since you mentioned small  
18 business, I will note an area that's a great trouble  
19 to me, and that is the barriers that the Small Business  
20 Administration places to people with a record in  
21 getting loans. And that is something that federal law  
22 controls and that nobody really has paid very much  
23 attention to, but there are specific collateral  
24 consequences that affect small business opportunities,  
25 that will be a wonderful area if you wanted to look

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1 into that a little bit.

2 COMMISSIONER HERIOT: Because the thing I  
3 like about the tax subsidy is the notion that this is  
4 something where the individual employer will know,  
5 "Hey, I have a job where I don't really think the risk  
6 is that great," as opposed to a "ban the box" approach  
7 where everybody's in the same boat regardless of the  
8 particular job it is. Because most employers know,  
9 "Hey, I've got a job here that really isn't the sort  
10 of job where this is going to be a problem, the person  
11 is going to very closely supervised." And they might  
12 even have a particular job applicant where they think,  
13 "Okay, this person is not going to be that great a  
14 risk," whereas "ban the box" is very rigid and can put  
15 people into a situation where they're entering into  
16 transactions that aren't really voluntary, they  
17 wouldn't do it if they knew what the risks were. This  
18 is one where both parties are going in with their eyes  
19 open.

20 CHAIR LHAMON: So we have five minutes left,  
21 I just wanted to move us to the Vice Chair's questions.

22 VICE CHAIR TIMMONS-GOODSON: Thank you very  
23 much, Madam Chair. I just have two quick questions;  
24 the first one -- and I don't know, perhaps the train  
25 has gone too far down the road, but you know that we

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1 will be making both findings and recommendations. And  
2 so my question relates to the statements that have  
3 been made to the effect that the Internet, it's not  
4 uncommon for the Internet to be used by employers and  
5 others seeking information regarding felony  
6 convictions. My question is whether those records  
7 should be accessible to the public? Of thinking on  
8 where we are at this time, we have, for example, as it  
9 relates to body cameras and the information that is  
10 obtained as a result of that. Many jurisdictions are  
11 not permitting the public to access that. In fact,  
12 you've got to get some kind of court order or something  
13 to lead to it. I was just wondering whether, I would  
14 like someone to discuss whether these criminal records  
15 should be accessible to the public, whether there's  
16 something that we can do as we seek to balance the  
17 stigmatization that comes with convictions with our  
18 concern for public safety?

19 MR. MALCOLM: So this is John Malcolm.  
20 Thank you for that question. There's of course a big  
21 difference between body cameras and information that's  
22 available on the Internet, body cameras are under the  
23 control of law enforcement authorities or government  
24 property and you can have regulations as to what it is  
25 it has with government property. I think one problem

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1 that was pointed out, I think it was by Margaret Love,  
2 is that criminal records are notoriously inaccurate  
3 and I'm in favor of anything that will help to clean  
4 up that system and to give people an opportunity to  
5 get access to their records and to clean them up, to  
6 make sure that they are at least accurate. But any  
7 attempt to tinker with the Internet, she also referred  
8 to a right to be forgotten, which is a right that is  
9 recognized in Europe, I think has all kinds of First  
10 Amendment implications and I would be personally,  
11 totally opposed to any attempt to regulate the Internet  
12 in that way. But anything that cleans up records I  
13 understand, and I also recognize that by not  
14 recognizing a right to be forgotten, that there will  
15 be people who in their past will have done something  
16 bad and that lives forever on the Internet, and that  
17 person will be, pardon my language, screwed. But I  
18 think that the cost of tinkering with the Internet in  
19 that way, and the First Amendment implications  
20 involved, are just too severe to go down that road.

21 VICE CHAIR TIMMONS-GOODSON: Well, I guess  
22 where I was coming from is that for the information  
23 often to be place on the Internet, folks have gone to  
24 the courts to access the information. Might there be  
25 a point where that information could be controlled by

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1 the courts in the sense that it certainly can and would  
2 be released, but you'd have to jump through certain  
3 hoops in order to get it?

4 MS. BURCH: I'd just like to point out that  
5 even if the processing by private companies of criminal  
6 records aside, most departments of corrections have  
7 their entire inmate population, as well as many have  
8 their entire probationary populations, and their  
9 criminal records, marks, scars, tattoos, and  
10 photographs online publicly accessible, readily  
11 available, and often don't take those records down  
12 post-release. So the issue is that all of this  
13 information has always been public, but perhaps not  
14 the identifying information and such, but because of  
15 technological advances now it's easy to access. So  
16 it's not just a problem with private companies and  
17 Internet searches, it's also a problem of millions of  
18 offenders are online because of official sources.

19 CHAIR LHAMON: So we are at time, but I know  
20 Commissioner Adegbile had some questions, so I'm going  
21 to give us five minutes over for this.

22 COMMISSIONER ADEGBILE: Thank you, Madam  
23 Chair. A couple of data points that any of you can  
24 speak to, I'd be grateful if you can clarify for us.  
25 So I'm wondering if there is any best source of

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1 evidence about how the infractions that carry  
2 collateral consequences have expanded over time.  
3 That's one.

4 And let me give you the other, I'll give  
5 them to you at the same time, since time is short.  
6 The second is there's been lots of talk about the  
7 insurance implications of re-employment following  
8 incarceration in the context of collateral  
9 consequences. Are there data sources on how prevalent  
10 these negligent hiring suits are in the category that  
11 relate to collateral consequences? There's a big  
12 range of negligent hiring cases that may have nothing  
13 to do with collateral consequences per se. Has  
14 anybody taken a look or taken a study to find out  
15 empirically how big an issue this is to inform the  
16 discussions and suggestions about the way in which  
17 that operates?

18 And then finally, there is some discussion  
19 about the role of state or local responses and federal  
20 responses. We heard from Commissioner Heriot that  
21 maybe tax incentives could be one federal response.  
22 Where are you on the role of state or federal responses  
23 to this? Would model legislation requiring a  
24 demonstration of non-tenuousness be helpful?

25 MS. LOVE: I can speak to negligent hiring.

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1 There is a chapter in the treatise that I'm a co-author  
2 of on negligent hiring, and I'd be glad to provide you  
3 with that material. Let me say that there is very  
4 little litigation on negligent hiring that involves  
5 criminal records, very little, although it looms very,  
6 very large in the thought calculus of employers. And  
7 the other issue, the third issue, you have to remind  
8 me.

9 COMMISSION ADEGBILE: Sorry, it was the  
10 state or federal dichotomy and are there ways to have  
11 some type of state model legislation, for example,  
12 that would require legislatures to go through the books  
13 and get the underbrush out of all these non-tenuous  
14 laws that are in place to have collateral consequences?

15 MS. LOVE: Yes. Well, there are several  
16 uniform law proposals; the Uniform Law Commission has  
17 one, the American Law Institute has one. My own  
18 feeling is that rather try to attack the collateral  
19 consequences themselves, it's better to provide people  
20 with a way to avoid or mitigate them. And there are  
21 many, many states that are doing that right now. There  
22 have been 40 states in the past four years that have  
23 passed laws addressing collateral consequences, relief  
24 in particular. There's been very little interest in  
25 the federal government; although just for the record,

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1 the Fair Credit Reporting Act is supposed to regulate  
2 the provision of background checks. It is not very  
3 effectively enforced. If it were, there would be a  
4 lot less of a problem with inaccurate records and with  
5 people being unfairly eliminated because of the  
6 background checking issue.

7 CHAIR LHAMON: Okay, one outstanding panel  
8 between us and lunch. So, proceed quickly.

9 MR. REDDY: Then I'll just briefly say on  
10 the question of the growth in collateral consequences,  
11 I don't have a good stab for that, but on the more  
12 narrow question on the growth in occupational  
13 licensing burdens, the Obama Administration actually  
14 put out a report in July of 2015 where I'm absolutely  
15 certain that they had a figure -- I'm going to try and  
16 find it and send it to you Commissioner -- that  
17 compared the number of professions subject to  
18 licensure in 1950 versus whatever recent year that  
19 they chose, and it was very striking to see the  
20 difference.

21 CHAIR LHAMON: Thank you, all. Obviously  
22 we were so interested in your presentations, that we  
23 wanted to go long. I really appreciate both what you  
24 had to say today and what you prepared before today  
25 and your ongoing work, thanks very much. Now I invite

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1 our next panel to come up, and as you are coming we  
2 will put out name tags so you'll know where to be, and  
3 I will begin introducing you so that we can try to  
4 make up some of our time. In the order in which our  
5 next panel will speak, they are Marc Mauer, Executive  
6 Director of "The Sentencing Project"; Hans Von  
7 Spakovsky, Senior Legal Fellow with the Meese Center  
8 for Legal and Judicial Studies at the Heritage  
9 Foundation; James Binnall, Assistant Professor of Law,  
10 Criminology and Criminal Justice at California State  
11 University Long Beach; and Anna Roberts, Assistant  
12 Professor at the Seattle University School of Law and  
13 fellow with the Fred T. Korematsu Center for Law and  
14 Equality.

15 Thank you, each of you. Mr. Mauer, when you  
16 are ready, you can begin. And I'll just say while  
17 you're pouring water, it's helpful if you turn your  
18 microphone off when you're done speaking because we  
19 can only have so many microphones on at the same time  
20 to be able to have them work. So on that, Commissioner  
21 Heriot, will you turn yours off?

22 MR. MAUER: It's on? Okay.

23 CHAIR LHAMON: We're ready. Go ahead.

24 II. PANEL TWO: Access to Civil Participation  
25 after Incarceration

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1 MR. MAUER: Sure. Well, thanks so much for  
2 inviting me here and for taking on these important  
3 issues. My focus today will be the policy of felony  
4 disenfranchisement, the loss of voting rights with a  
5 felony conviction. Last November we had, of course,  
6 a major national election, there were six million  
7 people who didn't participate in that election, not  
8 necessarily because they didn't care about the issue,  
9 but because of what I would view as antiquated policies  
10 that deny the right to vote for people with a felony  
11 conviction. These policies go back to the time of the  
12 founding of this country, they're a holdover from the  
13 colonial period when this country was founded as a  
14 great experiment in democracy, but as we know it was  
15 a very limited experiment at the time. Women couldn't  
16 vote, African-Americans, illiterates, poor people, and  
17 also people with felony convictions. Over the course  
18 of 200 years these other prohibitions have been done  
19 away with, and we now look back on them with a great  
20 deal of national embarrassment, and disenfranchising  
21 people with felony convictions is one of the main  
22 remaining blocks for full participation in voting.  
23 The state of disenfranchisement today is that these  
24 policies are state-driven. 48 states prohibit voting  
25 for people in prison, and the District of Columbia as

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1 well, 34 of these states also disenfranchise people on  
2 probation and/or parole, and of these states, 12 states  
3 disenfranchise some or all people, even after they've  
4 completed their sentence, including four states that  
5 disenfranchise everyone with a felony conviction for  
6 the rest of their lives. The only way they can regain  
7 their right to vote is by getting a pardon from a  
8 governor or a pardon board.

9 The number of people affected by these  
10 policies has risen along with the tremendous rise in  
11 the criminal justice system. Over the last four  
12 decades, we see that in 1976 about 1 million people  
13 were disenfranchised; that figure is 6 million today.  
14 Not surprisingly, the racial disparities we see in the  
15 justice system translate into disenfranchisement  
16 disparities as well, so that nationally an estimated  
17 1 of every 13 African-Americans is prohibited from  
18 voting; in four states this figure is as high as 1 in  
19 5. So why is this a problem? I think for two  
20 fundamental reasons; one is what do we mean by  
21 democracy in the 21st Century? And secondly, I think  
22 this is counterproductive for public safety goals. In  
23 democracy we don't normally impose a character test on  
24 the right to vote; if you're the right age and you're  
25 a citizen, you get to vote, that's the end of the

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1 story. If we look at other opportunities in society,  
2 even with a felony conviction, we don't normally take  
3 away people's fundamental rights of citizenship. If  
4 you have a felony conviction you can still get married  
5 or divorced, you can buy or sell property. We  
6 generally separate out legitimate punishments in the  
7 court system from your rights as a citizen. The  
8 implication of this is that we may have someone who's  
9 a parent, committed a crime, is sentenced to probation,  
10 living in the community, but he or she is not permitted  
11 to vote in a local school board election that will  
12 affect the future of their children. That's what  
13 disenfranchisement does.

14 In terms of the public safety goals; when  
15 people come back to the community and are living under  
16 probation or parole supervision or have completed  
17 their sentence, we expect them to abide them by the  
18 rules and regulations of society. We know that a  
19 critical factor in successful re-entry is engagement  
20 with positive institutions in the community, such as  
21 having a job, a place to live, and a good peer network  
22 of support. When people are trying to accomplish all  
23 those goals and they're essentially told, "Yes, you're  
24 back from prison now, but you are still a second-class  
25 citizen," I don't think that's a very helpful message

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1 that we're sending to them in terms of where we see  
2 them in our community.

3 Over the last 20 years there have been a  
4 significant number of states that have enacted reforms  
5 to these policies, beginning in 1997 in Texas, which  
6 at the time had a two-year ban on voting even after  
7 people completed their sentence. That repeal was  
8 signed into law by then Governor George W. Bush. Since  
9 then 23 other states reforms were signed into law by  
10 both Democratic and by Republican governors. A number  
11 of these have been relatively modest and involved  
12 informing people how to go about regaining their voting  
13 rights. A number of states, though, have enacted  
14 significant reconsideration of policy; so for example,  
15 New Mexico and Maryland have done away with the ban on  
16 post-sentence voting, and three states, Rhode Island,  
17 Connecticut and Maryland have extended voting to  
18 people on probation or parole. Despite these reforms,  
19 though, as I've mentioned, the numbers of people  
20 disenfranchised has gone up to six million today. As  
21 is true of our criminal justice policies, generally  
22 the United States is at one end of the spectrum among  
23 industrialized nations in the severity of our  
24 policies. If we look at how nations in Western Europe  
25 and Canada approach disenfranchisement, in many of

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1 these nations there's no prohibition on voting, thus  
2 allowing people to vote in prison as well. Of those  
3 nations that practice some type of disenfranchisement,  
4 it's almost always limited solely to the time in  
5 prison, never to probation or parole and certainly  
6 never to people who have completed their sentences.

7 There have also been constitutional court  
8 decisions in nations as diverse as Canada, Israel,  
9 South Africa and the European Court of Human Rights,  
10 all affirming that citizenship rights are very  
11 different from criminal punishment. So in general, I  
12 think disenfranchisement fails to achieve or even  
13 address any legitimate goals of the criminal justice  
14 system or sentencing, it exacerbates the racial  
15 disparities that are so prevalent in the criminal  
16 justice system are so troubling. After 200 years I  
17 think we need a very different approach than the  
18 founders had at the time in the 18th Century. Thank  
19 you.

20 CHAIR LHAMON: Thanks very much, Mr. Mauer.  
21 Mr. Von Spakovsky?

22 MR. VON SPAKOVSKY: Madam Chair and the  
23 commissioners, thank you very much for inviting me  
24 here to testify today. As you've been hearing all  
25 morning, there are a variety of collateral

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1 consequences that attach to criminal conviction;  
2 although, losing the right to vote is probably the  
3 best known. First of all, of course, there's prison  
4 and jail time; often there are other direct penalties  
5 such as fines, court costs, restitution, and possible  
6 probation and parole; but there are also the other  
7 disabilities we've been discussing, which include  
8 losing the right to own a gun, to work as a police  
9 officer in many places, to work as a public school  
10 teacher, to hold certain professional licenses, to be  
11 a notary public, or to serve on a jury. Time in prison  
12 has never been the only way a felon is punished for  
13 breaking the law, endangering his fellow citizens, and  
14 intentionally violating our rules of civil society.

15 The point I'd like to make today is it's  
16 important for the commission to understand that  
17 Congress does not have the constitutional authority to  
18 force states to restore voting rights of convicted  
19 felons. While as Marc has said, many states  
20 automatically restore the right to vote, and two states  
21 actually allow you to vote while you're in prison,  
22 others do require individual applications and impose  
23 waiting periods, which make sense frankly because of  
24 the high recidivism rate of felons. The point is that  
25 the citizens of each state are entitled to make this

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1 decision. The Constitution gives the states the  
2 authority to determine the qualifications of voters,  
3 in Article 1 and the 17th Amendment, and that exclusive  
4 authority was recently confirmed by the U.S. Supreme  
5 Court in *Arizona v. Inter Tribal Council of Arizona in*  
6 *2013*. Section 2 of the 14th Amendment specifically  
7 and very explicitly gives states the rights to abridge  
8 the right to vote of citizens for participation in  
9 rebellion or other crime.

10 The 14th Amendment simply recognizes a  
11 process which goes back to ancient Greek and Rome,  
12 which I think Ms. Love had mentioned, and it's  
13 important to understand that this was a Reconstruction  
14 amendment passed by Republicans who supported black  
15 voting rights. Now, the claim that these state laws  
16 are all rooted in racial discrimination is  
17 historically inaccurate; even prior to the Civil War,  
18 when black Americans could not vote, a majority of the  
19 states took away the voting rights of people who were  
20 convicted of a crime. In fact, 70% of the states in  
21 1861 had these types of laws on the books. It is true  
22 that five southern states passed race-targeted felon  
23 disenfranchisement laws from 1890 to 1910, but those  
24 laws have all been changed. The case cannot be made  
25 today that such laws are in any way applied in a

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1 discriminatory fashion. When they have been, they  
2 have been struck down. As the U.S. Supreme Court did  
3 to Alabama law in *Hunter v. Underwood* in 1985, no  
4 showing of intentional discrimination can be made with  
5 regard to such laws today, and all recent attempts in  
6 court to do so have failed. That includes lawsuits  
7 filed under Section 2 of the Voting Rights Act claiming  
8 that these laws have a discriminatory effect. All  
9 such cases have been thrown out by the courts including  
10 in the 1st, 2nd, 9th, and 11th Circuit Courts of  
11 Appeal.

12 As the Federal District Court said in  
13 *Johnson v. Florida*, which was the unsuccessful voting  
14 rights lawsuit against Florida's felon voting law,  
15 "Black ex-felons have not been denied the right to  
16 vote because of an immutable characteristic, but  
17 because of their own criminal acts. This is also true  
18 of the non-African American class members. Thus it is  
19 not racial discrimination that deprives felons, Black  
20 or White, of their right to vote, but their own  
21 decision to commit an act for which they assume the  
22 risk of detection and punishment." Now even if  
23 Congress had the constitutional authority to change  
24 state policies, there are sound public policy reasons  
25 why it should not. As I've said, the loss of certain

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1 civil rights is part of the sanction our society has  
2 determined should be applied to criminals.

3 If states believe that felons should be able  
4 to vote in prison, as Maine and Vermont did, citizens  
5 of that state have made that decision, that is fine,  
6 they have a right to do that. If other states, such  
7 as Nebraska, believe you should have a two-year waiting  
8 period, that is perfectly reasonable and common sense  
9 because according to the U.S. Department of Justice,  
10 two-thirds of felons are arrested for a new crime  
11 within three years and three-quarters within five  
12 years, showing that they lack the responsibility,  
13 trustworthiness, and commitment to our laws that we  
14 expect.

15 The argument, and let me again say, I  
16 actually agree with many of the things that have been  
17 said here this morning; reintegration is very  
18 important and I think there are certain other  
19 collateral consequences that don't make any sense,  
20 particularly for example, the loss of driver's  
21 licenses for crimes that have nothing to do with  
22 driving. However, the argument that automatically re-  
23 enfranchising felons will immediately integrate them  
24 into society is kind of like saying, "well, if you  
25 have a college degree, you're going to have a much

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1 higher income than other individuals and we should  
2 just automatically award college degrees to  
3 individuals and we're going to have that effect." In  
4 fact, giving felons something to strive for, which is  
5 during a waiting period of showing that they've  
6 actually turned over a new leaf, that they've changed  
7 their life around, and in fact, they can be trusted to  
8 exercise the rights of a citizen by voting, seems to  
9 be a good thing to do. But again, I want to emphasize,  
10 it's up to the people of each state to make this  
11 decision.

12 The one thing I would point out in any of  
13 this, is that there have been many bills dropped in  
14 Congress and elsewhere to automatically restore the  
15 right to vote of individuals when they get out of  
16 prison. What I always find interesting about those is  
17 that those bills don't want to automatically restore  
18 all of the other collateral rights we're talking about.  
19 And if in fact we believe that an individual has turned  
20 over a new leaf, has turned their life around, has now  
21 decided that in fact they're willing to live by the  
22 rules that previously they had intentionally broken,  
23 if we can trust them in the polling booth, well then  
24 obviously we should be able to trust them in the jury  
25 box or in the community to exercise, for example, their

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1 2nd Amendment rights. And I don't think it makes  
2 sense to say, for example, that they should  
3 automatically receive their right to vote but have all  
4 these other collateral consequences still at play.  
5 Thanks.

6 CHAIR LHAMON: Thanks very much, Mr. Von  
7 Spakovsky. Professor Binnall?

8 PROFESSOR BINNALL: Good afternoon,  
9 morning. To start, I'd like to thank the Commission  
10 for the opportunity to take part in what I consider a  
11 very important briefing. I am currently an Assistant  
12 Professor at California State University Long Beach  
13 and I am also a former offender. In 1999, I caused a  
14 DUI accident that claimed the life of my passenger,  
15 who was my best friend; I subsequently spent four  
16 years, one month, six days in two maximum security  
17 prisons. While in prison I took my LSATs in hope of  
18 one day going to law school; upon my release in 2004,  
19 I began my legal studies. In 2008, I was admitted to  
20 the California State Bar and began my legal career as  
21 a criminal defense attorney while pursuing a PhD. A  
22 year later I was summonsed to jury duty for the first  
23 time as a California resident; when I arrived at the  
24 court house on my day of service, I passed through  
25 security using the entrance designated, "Attorneys

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1 Only." Soon thereafter, courthouse personnel  
2 instructed me to complete a juror qualification  
3 questionnaire. On that questionnaire was an inquiry  
4 regarding criminal convictions, in particular whether  
5 I had been convicted of a felony or malfeasance in  
6 office. I answered yes. Moments after turning in  
7 this questionnaire, I was called to the front of the  
8 jury line where I was informed by the Jury Commissioner  
9 that I was permanently ineligible for jury service in  
10 California because of my prior felony conviction and  
11 I would never be summonsed again. I protested mildly,  
12 explaining that I was an attorney, had used the special  
13 entrance, and was told that I should write my  
14 congressman if I was unhappy about California's juror  
15 eligibility requirements. Instead of writing my  
16 congressman, I wrote an article comparing  
17 jurisdictional felon jury exclusions and bar  
18 admittance procedures; what I found was that in 29  
19 states in the federal system, a convicted felon could  
20 be admitted to the bar and practice law but is forever  
21 banned from serving as a juror in either a criminal or  
22 a civil matter.

23 I offer this background, by way of  
24 explanation, about how and why I spent the last five  
25 years studying a topic that receives very little

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1 scholarly or legislative attention. I also offer this  
2 background as the first of several examples of the  
3 contradictions and inconsistency inherent in what's  
4 commonly known as "felon jury exclusion." Of the  
5 collateral consequences that impact the citizen's  
6 ability to take part in democratic processes, felon  
7 jury exclusion is the most pervasive; 49 states, the  
8 District of Columbia, and the federal system  
9 categorically restrict a convicted felon's opportunity  
10 to serve as a juror. Of these jurisdictions, 28 bar  
11 convicted felons from the jury process permanently,  
12 eliminating an estimated 13 million citizens, roughly,  
13 from this vital form of democratic participation.

14 Maine is the only U.S. jurisdiction that  
15 places no restrictions on a convicted felon's  
16 opportunity to serve. With only two exceptions,  
17 jurisdictions that restrict a convicted felon's  
18 opportunities to serve do so categorically, barring  
19 all convicted felons, regardless of offense type, from  
20 jury service in both civil and criminal cases.  
21 Justifying these exclusionary statutes, courts and  
22 lawmakers allege that convicted felons would  
23 jeopardize the jury process because they purportedly  
24 lack the character to follow the law during  
25 deliberations, and/or harbor this inherent bias,

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1 making them adversarial towards the state and unduly  
2 unsympathetic to criminal defendants.

3 My own work contemplates the legal and  
4 policy implications of felon jury exclusion statutes.  
5 In terms of their legality, of course we all know the  
6 Supreme Court has held that jurisdictions are free to  
7 confine jury selection to those possessing good  
8 intelligence, sound judgement, and fair character.  
9 Legal challenges to felon jury exclusion statutes have  
10 taken two forms: fair cost section claims and equal  
11 protection claims. Neither has met with success. The  
12 courts seemingly accept the premise that federal and  
13 state court systems have a legitimate interest in  
14 protecting the impartiality of juries and that  
15 categorical felon jury exclusion statutes are an apt  
16 way to serve that goal.

17 As a policy, the utility of felon jury  
18 exclusion statutes is questionable. In my own  
19 research I have in part set out to test for the first  
20 time in a series of pilot studies, the proffered  
21 rationales for the exclusion of convicted felons from  
22 jury service. My first empirical study -- and the  
23 first on this topic -- focused on this inherent biased  
24 rationale and what I found was that the pre-trial  
25 biases of convicted felons were far from homogenous,

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1 in fact they varied significantly. I also found no  
2 statistically significant difference between the pre-  
3 trial biases of felon jurors in the study and those of  
4 laws student jurors in the study, which begs the  
5 question, if the inherent bias rationale is truly a  
6 mechanism for eliminating potentially corrupting bias  
7 from the jury system, and there are other identifiable  
8 that harbor other similarly dangerous biases, should  
9 they also not be excluded? And should they, too, be  
10 categorically barred from the process or is there  
11 another potentially more nefarious purpose for  
12 banishing convicted felons from jury service?

13 In another study -- and I'm short on time  
14 here -- in another study I focused on the character  
15 rationale and what I found there also was that  
16 convicted felons approached the deliberation process  
17 thoughtfully and enthusiastically -- this was a mock  
18 jury experiment -- suggesting that convicted felons at  
19 a minimum don't taint jury deliberations, but in fact  
20 may enhance the deliberation process. I also  
21 conducted some field work in Maine, where I did  
22 interviews with former offenders, and what I found  
23 there was that former offenders spoke of their  
24 inclusion in the jury selection process and in the  
25 jury process generally as a corroboration of their

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1 reformation, as a certification of their change. And  
2 they also noted how removing barriers to reentry helps  
3 a former offender build a personal narrative that  
4 acknowledges a criminal past while allowing for a law-  
5 abiding present. As many scholars have noted, this  
6 process of reconciling past events with present and  
7 future aspirations is a key component to criminal's  
8 successful reentry.

9 My research on felony jury exclusion, borne  
10 out of an embarrassing public event, demonstrates  
11 themes common I think to all collateral sanctions and  
12 discretionary disabilities, namely that all offenders  
13 are alike and that all threaten institutions and  
14 processes we hold dear. Such restrictions are rife  
15 with presumption and stereotype, and almost always  
16 lack a mechanism by which we judge a former offender  
17 based on his or her specific circumstances and  
18 characteristics. Indeed, in the case of felon jury  
19 exclusion, we even disregard an existing process  
20 designed to take the time to consider citizens at a  
21 personal, individualized level -- jury selection. As  
22 a result, we may damage our jury system by barring a  
23 citizen who can make valuable contributions to a jury's  
24 effort to find truth and justice.

25 In closing, I'd like to thank again the

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1 commission for recognizing this nearly invisible form  
2 of disenfranchisement. Look, certainly, including  
3 convicted felons in the jury process will not fix many  
4 of the issues that plague our jury system and will not  
5 assure the successful reintegration of former  
6 offenders. Still, inclusion will very likely aid  
7 broader efforts to make juries more representative and  
8 to remove obstacles for reentry that dehumanize former  
9 offenders and undermines what it means to be a citizen  
10 and to participate meaningfully in our democracy.  
11 Thank you.

12 CHAIR LHAMON: Thanks very much, Professor  
13 Binnall. Professor Roberts?

14 PROFESSOR ROBERTS: Good morning. I have  
15 seven points for my seven minutes. First of all,  
16 state legislators have found enormous variety in the  
17 ways in which by statute they exclude people with  
18 convictions from jury service. There's variety, for  
19 example, in what triggers exclusion and in how long  
20 exclusions last. We've heard that 48 of our states  
21 and the federal government have legislation that  
22 permits or demands exclusion of those with felony  
23 records, but there are also 13 states that exclude on  
24 the basis of misdemeanors. And some states have  
25 legislation that excludes on the basis of something

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1 short of a conviction, in other words an arrest or a  
2 charge or an indictment or jail. And while some states  
3 end the exclusion when prison ends or when the sentence  
4 ends, others impose lifetime bans, absent a pardon.  
5 As one federal judge has said, the variety as shown by  
6 these state approaches makes this ban seem somewhat  
7 arbitrary, as well as having other problems which I'll  
8 discuss later.

9 Second, one gets a very incomplete picture  
10 if one looks only at statutory exclusion on this basis;  
11 there are a variety of other filters that serve to  
12 remove those with criminal records from our juries.  
13 First, people may not receive a jury summons if, as  
14 commonly happens, jury lists are drawn from voting  
15 rolls. Second, jury service may not be affordable or  
16 accessible. Third, potential jurors may be removed  
17 for cause, in other words because a judge is persuaded  
18 that they can't be fair. And fourth, potential jurors  
19 with criminal records are frequently removed by means  
20 of peremptory challenges. When accused of purposeful  
21 racial discrimination in their peremptory challenges,  
22 prosecutors frequently respond by asserting that their  
23 reason for striking a juror was the juror's connection  
24 with the criminal justice system, and such reasons are  
25 typically found race neutral and non-discriminatory,

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1 despite obvious disparate impact risks and risks of  
2 pretext. Third, there are two states that do not  
3 exclude petit jurors by statute, Colorado and Maine.  
4 The abandoning of this exclusion in the 80's was  
5 important in that it took off the books the message of  
6 automatic unfitness that these exclusions send. But  
7 my conversations with trial attorneys in these states  
8 suggest that to some extent the other filtering methods  
9 step in to fill the gap.

10 Prosecutors, for example, can often access  
11 data that includes not only convictions but also  
12 arrests of potential jurors. So during jury selection  
13 they may use this data to make sure that people with  
14 records are removed, whether through challenges for  
15 cause or through peremptory challenges. Even if  
16 prosecutors don't dig into juror's records, jury  
17 questionnaires may ask the question, "Have you ever  
18 been convicted," and thus bring convictions to light.  
19 It's not that there's no concrete effect of the lack  
20 of statutory exclusions in these states; for example,  
21 one of the attorneys I spoke with in Maine says it's  
22 not uncommon for those with misdemeanor convictions to  
23 serve, but these are certainly no panacea. Fourth,  
24 what all of the filtering devices have in common is  
25 the compounding of racial disparity; if we agree that

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1 criminal enforcement in this country is racially  
2 skewed, then this process takes that skewing, uses it  
3 in the formation of the jury, which in turn through  
4 its decision-making risks creating more racial  
5 skewing. To see the extent of the problem, we need  
6 more data.

7 A scholar named Brian Kalt, in an article  
8 from 2003 on this topic, proposed the following  
9 figures; he said that 13 million people, including  
10 about 30% of Black men, are banned from life because  
11 they have felony convictions. But that data is over  
12 a decade old and it's incomplete in that it focuses  
13 only on statutory exclusions and only on felony  
14 exclusions, and as I mentioned, the exclusions go much  
15 broader. Fifth, in midst all this gloom, there are  
16 some reform proposals pending. Legislation is being  
17 debated in Nevada and in Alabama that would ease the  
18 restoration of rights. And legislation is being  
19 debated in California that would lessen the amount of  
20 jury exclusion that happens in the first place. The  
21 analysis accompanying the California bill is  
22 particularly interesting, it runs through three  
23 commonly stated purposes of exclusion and critiques  
24 each of them using Professor Binnall's work heavily.  
25 The first is the assertion that felony convictions

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1 show disrespect and disregard for the law; the second  
2 is the assertion that people with felony convictions  
3 have an inherent bias against the government; the third  
4 is the assertion that people with felony convictions  
5 lack the ability to consider evidence fairly and to  
6 follow instructions. The legislative analysis adds  
7 two other points; first, that the best jury is one  
8 that consists of people who have a wealth of experience  
9 and perspective; and second, that the racial impact of  
10 these exclusions reduces the fairness of juries.

11 My sixth point is that as you've heard that  
12 while each state provides, at least on paper, some  
13 method for some to combat statutory exclusion, this  
14 should not be seen as solving the problem. First,  
15 while some states restore rights automatically, many  
16 require affirmative efforts. These in turn require  
17 time, money, and a good attorney, things that those  
18 most need in relief aren't likely to have. And a  
19 pardon is often required. But the granting of pardons  
20 is infrequent and in some instances stained by racial  
21 disparity. And finally, even if there's a way out of  
22 the statutory exclusion, the other methods of  
23 exclusion may remain.

24 My seventh and final point, this is an area  
25 that lacks empirical data, not only to reveal the full

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1 extent of the racial disparity, but also, at least  
2 until my co-panelist began his work, to investigate  
3 the extent to which any of the justifications given  
4 for exclusion has any support. If there's inadequate  
5 support, and even more so, if as Professor Binnall's  
6 work suggests, there's empirical data that opposes  
7 these assumptions in this area, it's time to dismantle  
8 these exclusions.

9 And in my work I have recommended an end to  
10 automatic exclusion on this basis, whether that  
11 exclusion is being done through selective mailing of  
12 summonses, statutory exclusions, or automatic granting  
13 of challenges for cause. I've also recommended what  
14 I think are necessary corollaries, further policing of  
15 peremptory challenges, and a reduction of  
16 prosecutorial peremptory challenges, as well as urgent  
17 efforts to make jury service accessible and affordable  
18 for all. Thank you so much.

19 CHAIR LHAMON: Thank you very much,  
20 Professor Roberts and to the full panel. I'll now  
21 open the floor for questions from my fellow  
22 commissioners. Commissioner Kirsanow?

23 COMMISSIONER KIRSANOW: Thank you, Madam  
24 Chair and thank you to the panel. I just have two  
25 very, I think, narrow questions and I suspect either

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1 Professor's Binnall or Roberts may have the answer to  
2 this. And if it was in the material, I apologize, I  
3 confess to not completely doing my homework on this.

4 Alright, is there any data that you're aware  
5 of that compares the percentage of felons who are  
6 excluded pursuant to peremptory or cause challenges  
7 versus those who are non-felons?

8 PROFESSOR ROBERTS: No, as Professor  
9 Binnall hinted, there's just an empirical void here  
10 and that is one area of void.

11 COMMISSIONER KIRSANOW: And is there - and  
12 I suspect the answer to this is also going to be no -  
13 - is there any data that shows the percentage of felons  
14 who are struck pursuant to any challenges in criminal  
15 cases versus civil cases?

16 PROFESSOR BINNALL: No. No. Sorry.

17 COMMISSIONER KIRSANOW: Okay, thank you.

18 CHAIR LHAMON: Commissioner Adegbile?

19 COMMISSIONER ADEGBILE: Thank you for the  
20 testimony, it was very helpful. I have a question  
21 that is similar to the question I asked the last panel,  
22 which asks all of you whether or not you're aware of  
23 data that would show the expansion of crimes that are  
24 subject to felon disenfranchisement over time? That  
25 is to say, when we begin with the historical precedent

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1 that there have been disenfranchisement penalties for  
2 a long time, I think it's also important to consider  
3 how many such crimes carried that sanction. It's my  
4 understanding that over time this has expanded, which  
5 is part of why we've come to the problem of felon  
6 disenfranchisement, and I'm wondering if there is  
7 data, empirical or otherwise, that could speak to that?

8 MR. VON SPAKOVSKY: I think that certainly  
9 is true with other collateral consequences, but when  
10 it comes to voting, actually, I think it has somewhat  
11 shrunk. And you can see that in the fact that some of  
12 the laws were actually thrown out by the courts. If  
13 you go to the Alabama example, Alabama very  
14 intentionally changed its law during Jim Crow and  
15 Reconstruction to add in, it wasn't just felony  
16 convictions, but they put in this term of you could  
17 have your right to vote be taken away if you committed  
18 a crime of moral turpitude. I have no idea what moral  
19 turpitude is, but the whole point of that was to give  
20 this general ability to interpret almost any crime in  
21 order to be able to take away the right to vote. That  
22 has all been thrown out by the courts; the only crimes  
23 that can be used today to lose the right to vote are  
24 felonies and certainly misdemeanors cannot be used for  
25 that. That's what the courts have said about that.

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1                   COMMISSIONER ADEGBILE:    Sorry, Mr. Mauer,  
2                   before you jump in, is it the case that the number of  
3                   felonies in state and federal codes is much larger  
4                   today than the number of felonies in the 1800's or am  
5                   I mistaken?

6                   MR. VON SPAKOVSKY:    That very well may be.  
7                   I mean, as you know we've had this terrible increased  
8                   expansion of those, and in fact, you probably know, we  
9                   have this whole project at Heritage along with the  
10                  ACLU and others to try to de-felonize many criminal  
11                  and other laws because Congress in particular has been  
12                  very bad about passing statutes that no longer have a  
13                  knowing and intentional requirement, which should be  
14                  a basic requirement for any kind of felony conviction.  
15                  So that is certainly true, but the kind of lesser  
16                  crimes that normally could be included in prior years,  
17                  that's no longer there.

18                  MR. MAUER:    I would just add, first on the  
19                  Alabama case, yes it was thrown out.  I would add it  
20                  took 100 years before that was finally thrown out, and  
21                  100 years of discrimination, since in most states every  
22                  felony results in disenfranchisement.  It's not  
23                  necessarily a significant change, it gets complicated  
24                  in states like Alabama and Mississippi and there's  
25                  been litigation and legislation in recent years

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1 regarding how crimes of so-called moral turpitude or  
2 identified, a great deal of confusion about who is  
3 actually disenfranchised. For example, in 1890  
4 possession of crack cocaine was not a felony on the  
5 books, and so substantial numbers of people are now in  
6 prison for drug offenses and the question is, are they  
7 disenfranchised as well? So it's gone back and forth  
8 on that.

9 COMMISSIONER ADEGBILE: Is there any  
10 information about whether or not there are inter-  
11 generational consequences of the magnitude of voting  
12 bars? That is to say, one might hypothesize that  
13 voting is a learned behavior and if a large percentage  
14 of, take for instance the African-American community,  
15 is excluded from participation by virtue of these laws,  
16 might that have carry-on effects?

17 MR. MAUER: Well, there's not a lot of  
18 research, there [are] a couple of studies that suggest  
19 that there's a spillover effect of disenfranchisement  
20 in high incarceration communities. So essentially many  
21 low income African-American communities, where  
22 disenfranchisement rates are high, you get a depressed  
23 voter turnout even among African-Americans who don't  
24 have a felony conviction themselves, and I think  
25 essentially what's going on there is that voting tends

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1 to be a social activity. We discuss the upcoming  
2 election with our spouses and partners, neighbors  
3 drive to the polls together, things like that. And  
4 when you have such a substantial number of people in  
5 a given community who can't vote, it may very likely  
6 depress that conversation. So again, there's not a  
7 lot of research, but what is out there does suggest  
8 that it depresses overall turnout as well.

9 MR. VON SPAKOVSKY: Again, if I could  
10 respond to that. The Census Bureau, as you probably  
11 know, puts out a report after federal elections and I  
12 believe, I think it was the 2012 election, they put  
13 out a Census Report actually showing that the turn-out  
14 of African-Americans across the country was one of its  
15 highest levels, two percentage points about that of  
16 White Americans. So it was actually quite historic  
17 when they put out this report.

18 CHAIR LHAMON: I don't understand that to  
19 be responsive to Mr. Mauer's point, though? Am I  
20 correct?

21 MR. MAUER: Right. It's possible that the  
22 African-American rate would have been 10% higher or  
23 something like that without disenfranchisement.

24 PROFESSOR ROBERTS: Can I speak to the  
25 historical question in terms of the jury picture?

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1 There's not been any sort of systematic analysis of  
2 the sort you might be hoping for. The last tranche of  
3 data that was collected, well, there have been two; in  
4 2003 there was an article by Brian Kalt that in an  
5 appendix tries to pull together what the provisions  
6 were then. Then in 2012, I wrote an article in which  
7 I went back through, and there have been no I think no  
8 major changes in that time period, or not many. The  
9 big changes in our context happened in the 80's, when  
10 Colorado and Maine abandoned their exclusions. So what  
11 I've tried to do in order to get the most accurate  
12 data possible is for the commission, I've put together  
13 a chart of all states and what they do, and in there  
14 I've tried to flag the most recent changes. So I hope  
15 that's of some use.

16 CHAIR LHAMON: Thank you very much for that.

17 COMMISSIONER ADEGBILE: Just very quickly;  
18 Mr. Spakovsky, is there any federal power to take off  
19 the board certain qualification limitations for  
20 voters?

21 MR. VON SPAKOVSKY: If Congress wants to  
22 change the qualifications for voters, they have to do  
23 it through a constitutional amendment. I mean, that's  
24 why we had to pass a constitutional amendment, for  
25 example, when we dropped the voting age, dropped it

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1 from 21 to 18. You may recall, there was a Supreme  
2 Court case on this and because of that Supreme Court  
3 decision, we very quickly passed a constitutional  
4 amendment during the height of the Vietnam War to do  
5 that. Now the one thing that Congress certainly could  
6 do is they could change the federal law that says that  
7 once you're convicted of a felony, you no longer can  
8 exercise your 2nd Amendment right. And that could be  
9 changed so that, if for example -- they could tie it  
10 to states, just to what a state does. So for example,  
11 the state restores your civil rights either through  
12 the pardon process or through some kind of automatic  
13 process, they could tie the federal statute in to say  
14 that at the same time your other civil rights are  
15 restored, including voting, then you will also regain  
16 your 2nd Amendment rights under this federal statute.

17 COMMISSIONER ADEGBILE: Just so you can help  
18 us, can you explain the nexus between the 2nd Amendment  
19 and voting eligibility?

20 MR. VON SPAKOVSKY: No, the nexus I see is  
21 that look, we have all these different collateral  
22 consequences for the conviction of a felony and it  
23 just seems to me that if you, a state or others make  
24 the decision, that you are now trustworthy enough to  
25 once again go into a polling booth and make decisions

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1 on the rules that are going to govern our society,  
2 then why would we not trust you to also sit in a jury  
3 box or be a notary public, or to once again be able to  
4 exercise your 2nd Amendment rights? To me it doesn't  
5 make sense to say, "Well, we think you now have changed  
6 your behavior and you have the judgement to do one of  
7 these, but we don't trust you to have the judgement to  
8 do these others. To me, it's all kind of tied together  
9 and it's just inconsistent to say you should have one  
10 of these rights back, but not the other right back.

11 CHAIR LHAMON: We do appreciate that we have  
12 a materially lower bar for voting than for almost  
13 anything else that is part of democratic citizenship,  
14 though, right?

15 MR. VON SPAKOVSKY: Yes, but the whole point  
16 of a felony conviction is that you intentionally and  
17 knowingly decided to break the rules of the civil  
18 compact under which we live. When you're going into  
19 a voting booth, you are making decisions, through the  
20 people you choose, on what those rules are going to  
21 be, and I think that's very directly related. In  
22 fact, I'll give you a quick quote if I may from one of  
23 the representatives in Massachusetts; Massachusetts  
24 used to be the third state in the country that allowed  
25 felons to vote in prison, and in a 2000 referendum the

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1 people in this very blue state overwhelmingly voted to  
2 take that right away. And one of the legislators  
3 said, "We incarcerate people and we take away their  
4 right to run their own lives and leave them with the  
5 ability to influence how we run our lives," and that  
6 was what led to them getting rid of the ability of  
7 felons to vote while in prison.

8 CHAIR LHAMON: Yes, I'm going to take just  
9 one moment on this because I was deeply offended by a  
10 statement in your written testimony. You said that,  
11 "Are we to believe that a convicted child molester can  
12 be trusted to vote but cannot be a teacher in a public  
13 school?" And on behalf of our nation's great  
14 teachers, I found that equivalence very, very  
15 distressing given the material difference in what we  
16 expect from voters and what we expect from the people  
17 that educate our children. But I will pause there and  
18 invite Commissioner Yaki.

19 COMMISSIONER YAKI: Thank you very much,  
20 Madam Chair. You know, I am also somewhat offended by  
21 some of the discussion, mainly because when you go  
22 through the prison system you go through a set of  
23 procedures that are designed to take away your right  
24 of freedom, but it does not for many other instances  
25 take away other constitutional rights. You still have

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1 your right to petition; you still have your right to  
2 be treated and not be subject to cruel and unusual  
3 punishment; you have the right to be treated not in a  
4 way based on the color of your skin, even inside prison  
5 walls. And there's a fundamental disconnect, I think,  
6 in stating -- and it goes for both voting and it goes  
7 for the jury system -- the idea that somehow the fact  
8 that you were in prison or you were convicted of a  
9 felony makes you self-interested in a way that is  
10 different than how everyone else in this country is  
11 self-interested. It presumes a narrow self-interest  
12 such that you could not be trusted with any judgement  
13 beyond that very narrow interest, and I find that  
14 completely fundamentally wrong.

15           Secondly, even though Section 2 of the 14th  
16 Amendment talks about states conditioning the ability  
17 to vote based on insurrection, rebellion or what have  
18 you, it's also clear that that in itself is still  
19 subject to the protections of the 14th Amendment. And  
20 even though it will not happen certainly in the next  
21 few years, the idea that you can use the 14th Amendment  
22 as a means to create a means of a presumption that you  
23 still are allowed the right to vote, that the  
24 indisputable facts are that this disproportionately  
25 impacts minority communities. And as been stated, it

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1 therefore disproportionately impacts the ability of  
2 those communities to be able to express themselves,  
3 writ large, in the politics of America. I think that  
4 you can indeed have a federal law that has a  
5 presumption that excluding felons from voting is per  
6 se unconstitutional, absent compelling circumstances  
7 along the lines of the old pre-clearance test, where  
8 states would have to submit whether or not these laws  
9 make any sense. What does seven years have to do with  
10 whether or not you can cast a vote or not? What does  
11 even two years have to do with that?

12 Again, it's on a presumption that you're  
13 self-interested such to the point that you are outside  
14 the bounds of society. Well --

15 CHAIR LHAMON: Commissioner, I would have  
16 to encourage your brevity.

17 COMMISSIONER YAKI: I understand, but it is  
18 something that when it comes right down to it, you  
19 hear this time and time again, and you look at the  
20 websites and you see that it comes down to an issue of  
21 people who are self-interested on a partisan political  
22 level to deny people these rights, and I find it very  
23 objectionable.

24 CHAIR LHAMON: Professor Binnall?

25 PROFESSOR BINNALL: I can speak to that

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1 self-interest in terms of juries. In our first study  
2 of inherent bias, we found that in fact one-third to  
3 a little over one-third of the jurors that we tested  
4 were in fact neutral or pro-prosecution, which was cut  
5 directly against this inherent bias rationale, so.

6 CHAIR LHAMON: Thank you.

7 MR. MAUER: If I could just tell a quick  
8 anecdote that gets some of this, as Hans pointed out,  
9 Massachusetts previously allowed people in prison to  
10 vote, as did Utah for many years. Back in the 1970's  
11 there was a prisoner in a Western Massachusetts' prison  
12 who decided to run for city council of the area where  
13 the prison was located. There were four candidates  
14 for city council, and he came in fourth for the  
15 election, but what happened was he received 3,000 votes  
16 in the election, 1,500 came from within the prison and  
17 1,500 came from within the community. So 1,500 people  
18 in the community thought he was the best qualified  
19 candidate for the job at hand and that had nothing to  
20 do with the fact that he was in prison or the other  
21 ones weren't. So I think to make these gross  
22 generalizations about how people respond what they  
23 think about the issues of the day I think is very much  
24 off target.

25 COMMISSIONER NARASAKI: Good morning. I

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1 have a couple questions; one has to do with the  
2 question of what should the standards to be to allow  
3 people to get their ex-offenders to get their rights  
4 restored? So some have argued that ex-offenders need  
5 to have paid at least part of any court restitution to  
6 victims, but that strikes me as very challenging for  
7 many people who are ex-offenders. We've already  
8 talked this morning about how difficult it is to get  
9 a job and many ex-offenders come from communities where  
10 they're not coming from families of wealth and do not  
11 have the funds to pay restitution. Is anyone troubled  
12 by the fact that that might make your right to vote  
13 actually dependent on your wealth?

14 MR. MAUER: I think we should be troubled.  
15 The only good news on that front, I think, is that  
16 there's in just recent years, I think there's  
17 increasing attention to this issue a lot of those  
18 generated from the findings in Ferguson and how arrests  
19 of African-Americans in particular were being used as  
20 a form of income generating for the county and how  
21 widespread that was. And the Department of Justice  
22 and the previous administration was taking on this  
23 issue of out of control fines and fees and costs that  
24 didn't take into account a person's ability to pay, so  
25 the ripple effects are quite broad here, including

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1 potentially the right to vote as well.

2 COMMISSIONER NARASAKI: I also am very  
3 interested in the work that Professor Binnall is doing  
4 on jury duty because I confess that I actually am not  
5 enthusiastic about jury duty, so it's great to see  
6 that in fact people are fighting for that right. What  
7 recommendations do you have -- I was kind of actually  
8 surprised that the federal government itself, federal  
9 courts, have such a blanket prohibition, and I'm  
10 wondering what you would recommend that federal courts  
11 do? Is there a model? Is there something that we  
12 could be recommending in terms of what should at least  
13 be happening in federal courts?

14 PROFESSOR BINNALL: My recommendation would  
15 be follow Maine's lead. I don't know that a  
16 restriction is necessary. Funny thing, I've done  
17 field research in Maine for the last few years, it's  
18 a unique thing to see the state courthouse on one side  
19 of the street and the federal courthouse up the street.  
20 And me, if I was a Maine resident, would be a perfectly  
21 fine juror in the state courthouse but not so in the  
22 federal courthouse. It makes little sense to me, a  
23 paradox. I would say remove all restrictions,  
24 statutory restrictions, the informal restrictions that  
25 Professor Roberts speaks of, not informal but

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1 peremptory strikes, challenges for cause, I think  
2 those are more challenging. As far as the formal  
3 restrictions that I study, I'd say follow Maine's lead.

4 COMMISSIONER NARASAKI: And is there a  
5 movement to restore more participation in juries on  
6 the state level? Because we hear of course there's a  
7 lot of a national movement on the issue of ex-offender  
8 re-enfranchisement, but very little about juries.

9 PROFESSOR BINNALL: For a while I think it  
10 was us.

11 COMMISSIONER NARASAKI: You're the national  
12 movement.

13 PROFESSOR BINNALL: California does have  
14 some initiatives going, that's where I teach, that's  
15 what I'm most familiar with, but Professor Roberts may  
16 be able to speak to this as well.

17 PROFESSOR ROBERTS: Yeah, I hadn't heard  
18 much about it until I looked into the pending  
19 legislation that I mentioned, I think both Nevada and  
20 California, and there were groups that had been vocal  
21 on the side of lifting the exclusions or at least  
22 narrowing them. On the other side you had DA's and  
23 police officers, but you had a variety of organizations  
24 lobbying for the lifting or the narrowing of these  
25 exclusions, so I certainly don't want to downplay the

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1 work that's being done, I think it's just not reaching  
2 the mainstream legal scholarly audience, and I wish it  
3 was.

4 COMMISSIONER NARASAKI: And is there any  
5 research being done to connect the ability to  
6 participate in juries with reducing recidivism and  
7 increasing people's ability to reintegrate back into  
8 society?

9 PROFESSOR BINNALL: The only work I know of  
10 is the work I did in Maine, and that work seems to  
11 suggest that it can change self-perception, right,  
12 which is a tiny little piece in this big broad cloth,  
13 that it can change self-perception and the fact that  
14 the state has recognized that you are now fit to do  
15 something we ask you to do, and that's important, or  
16 was important, to the folks that I interviewed and  
17 spoke to, so.

18 PROFESSOR ROBERTS: In fact, one other study  
19 in the materials I submitted, Hans and Vidmar who  
20 produced data suggesting that jury service improves or  
21 increases other forms of civic participation. So  
22 that's in your materials, but beyond that I don't know.

23 COMMISSIONER NARASAKI: Thank you.

24 CHAIR LHARON: Yes, Commissioner Kladney?

25 COMMISSIONER KLADNEY: Thank you, Madam

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1 Chair, and thank you for your presentations. There,  
2 light's on. And this question is to everyone, but I'd  
3 like to start with Mr. Von Spakovsky. God, I've never  
4 been able to pronounce your name, I apologize. I've  
5 been trying for five and a half years.

6 MR. VON SPAKOVSKY: That's okay, I was at  
7 the Supreme Court recently and the Chief Justice  
8 stumbled over it, too.

9 COMMISSIONER KLADNEY: Well, if I may  
10 rationalize your testimony on why people should not be  
11 allowed to vote with a felony conviction, it's  
12 basically trustworthiness and I would assume  
13 judgement?

14 MR. VON SPAKOVSKY: Yes, but I just want to  
15 make it clear; I'm not saying that they should not get  
16 their right to vote back. I think they should.

17 COMMISSIONER KLADNEY: No, I understand  
18 that. And you were vague in that regard as to how  
19 because every state is different. My state has some  
20 kind of complex if you have one felony conviction and  
21 it's non-violent, you can get your right to vote back,  
22 but if you have two felony convictions you can't get  
23 your right to vote back. It took me several times to  
24 read it to understand it. Nonetheless, I wonder when  
25 you talk about trustworthiness, we have different

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1       punishments that are imposed for felonies. That would  
2       be, you can get probation which means the court and  
3       society trust you to continue to function in society  
4       with some sort of supervision. We have people in drug  
5       courts; we have people today who I guess the latest,  
6       hottest thing is the opioid epidemic where people claim  
7       to get addicted to drugs because of their doctors or  
8       medical care; and we have parole, post-prison where  
9       they trust in society with some supervision; and of  
10      course you have prison which you are confined. Do you  
11      think there's any real difference within crimes,  
12      within violations, within penalties that would alter  
13      your view of that type of total blank ban on voting on  
14      jury duty or anything like that? And if anybody could  
15      chime in after he responds, I'd love to hear it.

16               MR. VON SPAKOVSKY: Well, I think Virginia  
17      used to have, until Governor McAuliffe changed it,  
18      Virginia had I think it was you could in essence pretty  
19      much get your right to vote back after three years for  
20      a non-violent felony and five years for a violent  
21      felony, and I think the main showing you had to make  
22      in the application you filed -- and look, I agree  
23      completely, it should not be a complicated process at  
24      all. You should not have to hire a lawyer, you should  
25      be able to fill out a short form and then send it back.

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1 And I think the idea was the governor's office would  
2 look at it, and if you had beaten the statistics, two-  
3 thirds within three years, three-quarters within five  
4 years are rearrested, if you've been clean for three  
5 years, you've been clean for five years, that's a sign  
6 that you have learned your lesson, that you have turned  
7 your life around, and that you're now willing to live  
8 by the rules that previously you intentionally broke.

9 And under those circumstances then, yeah, I  
10 think you ought to get your right to vote back. I  
11 actually think you should get your ability to sit in  
12 a jury box back. There's all kinds of rights I think  
13 you ought to be able to get back, because the  
14 decision's been made that you've turned over a new  
15 leaf and have changed your judgement and the way you  
16 do things. And I think it's not just the right to  
17 vote but many of these other rights that should be  
18 restored.

19 COMMISSIONER ADEGBILE: Isn't that the  
20 point of the sentence in the first place? I mean,  
21 don't some of these things run with the sentence,  
22 meaning that people are sentenced to a period of time,  
23 a period of years, and presumably if criminal justice  
24 system is rational, the sentence that they received  
25 bears some connection -- some might argue that it's

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1 excessive -- but it may bear some connection to the  
2 crime that they've committed. So I'm wondering why  
3 there is such a focus on excluding them from attempting  
4 to rejoin the polity and be focused in the duties of  
5 citizenship? Why is that such a special thing after  
6 somebody has come outside and is living among us?

7 MR. VON SPAKOVSKY: Well, Commissioner,  
8 you're making the assumption that society has decided  
9 that time in prison and perhaps parole is the only  
10 punishment you're going to get for committing a serious  
11 crime. And we as a society have decided that there  
12 are a whole series of other collateral consequences  
13 besides prison time, besides court fines, orders of  
14 restitution. Now, I would completely agree with you  
15 and many of the panelists here that there are a number  
16 of collateral consequences that should be gotten rid  
17 of, that don't make sense, but we as a society decided  
18 that time in prison is not the only punishment that  
19 we're going to impose. If we as a society or a  
20 particular state wants to change that, they've got the  
21 ability to do it. But prison time is not the only  
22 punishment we for a long time have imposed.

23 COMMISSIONER ADEGBILE: I think that's the  
24 conception of this whole presentation today is that  
25 we're all aware of the fact that there are collateral

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1 consequences, that they have been with us for a long  
2 time. We heard references to I think Greece earlier  
3 this morning and other context, so I think we take  
4 that on board, that there are collateral consequences.  
5 I think what we're trying to get to is that many, as  
6 we've heard today, of the collateral consequences are  
7 of such a degree of tenuousness that it's hard for  
8 people to understand the nexus between the penalty and  
9 any good government purpose, and I think that's really  
10 what we're trying to drive at, not the idea about  
11 whether or not there can be collateral consequences.  
12 That all day's topic.

13 MR. VON SPAKOVSKY: I understand, but I  
14 think the right to vote is directly tied into that  
15 because of what I have said. I don't want to repeat  
16 myself since we have limited time, but again, the point  
17 is, is that when you commit a felony you have  
18 intentionally and knowingly broken the rules of  
19 society that you live in, and I think taking away your  
20 ability in the voting booth to decide what those rules  
21 are going to be, I think there's a direct connection  
22 between the two.

23 COMMISSIONER KLADNEY: I know Mr. Mauer has  
24 something to say, so.

25 MR. MAUER: If I could just say, it strikes

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1 me if we start to talk about trustworthiness or being  
2 of good character, it's a fairly slippery slope for  
3 voting qualifications. There are many kinds of  
4 behaviors that are not criminal in themselves but I  
5 wouldn't think make very good character of someone who  
6 is an admitted racist, homophobic, anti-Semitic. If  
7 it were up to me, I wouldn't want that person voting  
8 because I don't think they would exercise good  
9 judgement, but it's not up to me, that's what democracy  
10 is all about. And I don't know how many people we'd  
11 have left if we started employing those kinds of  
12 character tests for voting.

13 PROFESSOR BINNALL: I would also add, what  
14 does that character test necessarily prove? Does it  
15 prove that you are trustworthy and outstanding, that  
16 you've been three years without involvement in this  
17 system, or does it suggest that maybe you just didn't  
18 get caught for whatever it is you might be doing?

19 COMMISSIONER KLADNEY: I want to address one  
20 more issue with what you said about recidivism, I guess  
21 that's what you were talking about, three to five years  
22 beat the odds, blah, blah, blah. I know about odds.

23 COMMISSIONER ADEGBILE: You're from Nevada.

24 COMMISSIONER KLADNEY: So if we set aside  
25 these other collateral consequences, would that assist

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1 these people in beating the odds you're talking about?  
2 I mean, would that help them with their issue of  
3 trustworthiness or repetition?

4 MR. VON SPAKOVSKY: Well, I'm assuming, for  
5 example, one of the most fundamental rights we have in  
6 this country, a very fundamental civil right, is the  
7 right to work and support ourselves, and I think that's  
8 a very important right. On the other hand, I do  
9 understand the concerns of employers, particularly on  
10 the negligent hiring issue that we've seen before if  
11 they hire someone who injures a customer or something  
12 else and they end up getting sued over it, so I can  
13 understand the concerns of employers, but I think the  
14 ability to be employed is a fundamental civil right  
15 and I think --

16 COMMISSIONER KLADNEY: It helps you stay out  
17 of trouble, doesn't it?

18 MR. VON SPAKOVSKY: It certainly does, and  
19 I think many of the state boards that decide whether  
20 you can get a license in a particular profession, I  
21 agree completely with what earlier people said, many  
22 times they're just looking for a way to keep  
23 competition out of their particular profession.

24 COMMISSIONER KLADNEY: So you would agree  
25 then that would help people who finish up their time,

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1 whether it's probation or --?

2 MR. VON SPAKOVSKY: Yes, potentially so.  
3 But on the other hand, for example, if you are a bank,  
4 I can see why you would have a common sense and  
5 reasonable grounds not to hire an embezzler.

6 COMMISSIONER KLADNEY: Well, obviously, I  
7 don't think anybody would argue with you on that.

8 MR. VON SPAKOVSKY: Well Mr. Mauer might.

9 COMMISSIONER KLADNEY: I think we had that  
10 discussion when we did our employment hiring thing  
11 with "ban the box" and it was clear that you don't  
12 hire an embezzler straight out of prison, you take the  
13 job into consideration, you take time that's passed,  
14 and you take the offense. I mean, that's common sense;  
15 I don't anybody here is throwing that out.

16 MR. VON SPAKOVSKY: Well, Commissioner,  
17 look; what I would say about all of this is I don't  
18 have a problem with, for example, Vermont and Maine,  
19 having made the decision they're going to allow felons  
20 in prison to continue voting. I don't have a problem  
21 with states who want to automatically restore that  
22 right. I also don't have a problem with states who  
23 say we want to have a waiting period to see if they  
24 get over the recidivism rate and the repetition. My  
25 point is, is that all of those -- I think that all of

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1 those approaches are reasonable based on what the  
2 people in that state want to do, and I think it's  
3 common sense and reasonable for example if the small  
4 number of states that do this, actually want to have  
5 a waiting period before they restore it.

6 CHAIR LHAMON: I just want to make sure that  
7 the Vice Chair has had a chance to ask questions, if  
8 you have any?

9 VICE CHAIR TIMMONS-GOODSON: Thank you very  
10 much, Madam Chair, but I believe that Mr. Spakovsky  
11 has clarified his position well enough that it's taken  
12 care of the question that I had. But I have to say  
13 that throughout this, what's been echoing in my mind  
14 is Jean Valjean in the book that many of us read many  
15 years ago, "Les Miserables," saying I served my  
16 sentence and now my punishment begins. That's exactly  
17 what we see is going on, but no, my question has been  
18 answered.

19 CHAIR LHAMON: Okay, thank you. I see  
20 Commissioner Adegbile has another question.

21 COMMISSIONER ADEGBILE: Forgive me. So,  
22 Mr. Mauer, could you speak to me about whether or not  
23 -- speak to all us as a matter of fact it doesn't just  
24 need to be between the two of us, but we'll let others  
25 in on our secret -- but could you speak to us about

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1 this issue of the reliability of data? My  
2 understanding is that there's been some litigation  
3 that has revealed that some of these felon  
4 disfranchisement lists have the impact of  
5 disenfranchising eligible voters because the match  
6 criteria that are applied on the lists are not  
7 adequate. We heard some of these echoes on this  
8 morning's panel, I'm wondering if it had its  
9 implications in the voting area?

10 MR. MAUER: Yes, it's a very significant  
11 issue and there's one other related one. The most  
12 high level, high profile period, of course, was the  
13 historic 2000 election, presidential election in  
14 Florida. In addition to the many other controversies  
15 there was the election list that was contracted out to  
16 provide the state with a list of people with felony  
17 convictions. The error rate was huge and included in  
18 one county the Director of Elections for the county,  
19 who did not have a felony conviction himself, so the  
20 error rate is very high. There's also related to this  
21 an enormous amount of misunderstanding on these  
22 policies, and it happens on both sides of the issue;  
23 people go into register to vote, they're told by a  
24 clerk they can't vote even though that's not the policy  
25 in that state, and in other places they go in to vote

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1 and they're able to vote even though they're not  
2 supposed to be able to vote in that state. That's one  
3 of the reasons why there's a movement among many to  
4 say that anyone who is not incarcerated should be able  
5 to vote, in addition to questions about democracy and  
6 other concerns. It makes life much simpler for  
7 election officials and everyone else. If you're  
8 physically able to walk into City Hall, then you're  
9 eligible to register to vote and it would eliminate  
10 this confusion and sometimes illegal activities that  
11 are unknowingly taking place.

12 CHAIR LHAMON: Okay. Thank you very much,  
13 again, to this panel. We are just at time, but this  
14 was unbelievably productive and I really appreciate  
15 the research and the materials that you've had in  
16 advance in your testimony today, so thank you.

17 We will now take a break for lunch, we will  
18 meet back for our next panel promptly at 1:15, and I  
19 look forward to it. Thank you.

20 (Whereupon, the above-entitled matter went  
21 off the record at 12:15 p.m. and resumed at 1:16 p.m.)

22 CHAIRMAN LHAMON: I'm going to get us back  
23 on.

24 Thanks so much for coming back promptly.  
25 We're going to get started for our third panel.

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1 to try to get to those questions.

2 But, before I begin, I want to -- I'd like  
3 to respectfully raise a concern regarding the need to  
4 include additional voices of directly impacted people  
5 who have the lived experience and the policy experience  
6 in employment, housing, education, and other areas to  
7 contribute to the discussion today.

8 It's my understanding that this concern was  
9 raised with the Commission in a letter provided by the  
10 Formerly Incarcerated Convicted People and Families  
11 Movements which is the national organization  
12 representing about 30 state groups that advocate to  
13 restore the rights of people with records.

14 And, I would just ask that the letter be  
15 included in the record to recognize the indispensable  
16 voices of people with records in these discussions. I  
17 just wanted to mention that for starters, if that's  
18 okay.

19 So, first, let's talk about the challenge.  
20 We haven't gotten too much into these bigger numbers,  
21 but, you know, the challenge that's been created over  
22 decades of excessive reliance on tough and on crime  
23 policies, we're now at the point where one in three  
24 adults in the U.S. has a background -- a criminal  
25 record that can show up on a routine background check

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1 for employment.

2 And, we know also that 34 percent of all  
3 prime, working-age, unemployed men are walking around  
4 with a record.

5 Now, and skip over, there's a bunch of  
6 slides that relate to some of the new data that's out  
7 there, but like I said, I want to get to some of the  
8 policy issues that were discussed earlier.

9 So, I want to start with the guidance, the  
10 EEOC's 2012 Guidance, updated guidance, that creates  
11 the standards under Title VII to regulate employers  
12 and background check process.

13 I know you all had a hearing previously  
14 where some of these issues were discussed, but I just  
15 want to emphasize that the guidance made a big  
16 difference.

17 First, I want to mention that what it  
18 includes, it includes the basic factors that most  
19 employers probably already consider, but it's required  
20 under Title VII, given the disparate impact of  
21 background checks on people of color, that includes an  
22 analysis of the nature of the offense, the age of the  
23 offense, and evidence of rehabilitation.

24 And, that's really important because it  
25 comes down to a case by case analysis. The routine

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1 that we're still super familiar with, that folks with  
2 records have to deal with every day is, that there are  
3 these blanket restrictions against hiring people with  
4 records. And, that's totally contrary to what Title  
5 VII is all about and what the EEOC Guidance is all  
6 about.

7 And, we now have some good evidence from  
8 employer surveys that that guidance and enforcement of  
9 the civil rights laws is making a difference in  
10 employer hiring policies.

11 So, as you see -- before you flip back -- 88  
12 percent of employers report that they're complying  
13 with the guidance. That's a big increase from when  
14 the guidance was first issued.

15 Seventy-eight percent of employers are  
16 conducting this individualized assessment. Again,  
17 getting away from the blanket restrictions against  
18 hiring people with records.

19 So, I just want to put in a plug for the  
20 importance of the civil rights laws that are on the  
21 books that regulate these issues already.

22 Next slide, please?

23 And then, there was a lot of discussion  
24 earlier about "ban the box." So, I just want to kind  
25 of give a little bit of the background of "ban the

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1 box" and address some of the issues -- some of the  
2 questions that came up.

3 First of all, just so you're aware, you  
4 know, this is a movement that began over a decade ago.  
5 It was initiated by an organization called All of Us  
6 or None which is a membership organization of formally  
7 incarcerated folks.

8 We're now at the point where 28 states,  
9 bipartisan, as you can see from the map, have embraced  
10 ban the box policies. Nine of them cover private  
11 employers and many major cities also cover private  
12 employers as well.

13 About 20 percent of the workforce is covered  
14 by a law that regulates private employers under this  
15 policy.

16 And, to be clear, ban the box is not about  
17 eliminating the background check, it's about waiting  
18 until later in the hiring process to conduct the  
19 inquiry. And, it's about those EEOC Guidelines.

20 Most of the ban the box policies, in a way,  
21 it's a bit of a misnomer, ban the box, you'll hear the  
22 term fair chance hiring used often as well.

23 Most of these policies also incorporate the  
24 EEOC standards in an effort to get away from these  
25 blanket restrictions against hiring folks with

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1 records.

2 So, what we know about the research, let's  
3 talk about the studies that have been -- that are out  
4 there on this issue.

5 First of all, we know from experience in  
6 several states, that ban the box is producing  
7 measurable increases in hiring of people with records.

8 Just here in the District since the law was  
9 enacted, 33 percent increase in folks with records  
10 being hired into District positions.

11 North Carolina, sevenfold increase.

12 The studies that have been mentioned is very  
13 important to take a close look at those studies. There  
14 has been a lot of discussion in the press, but not  
15 enough scrutiny of those studies.

16 Just to be clear, the studies support the  
17 conclusion that ban the box improves hiring of people  
18 with records, in general.

19 Also support the conclusion that people of  
20 record disproportionately benefit from ban the box.

21 So, that's a myth that's out there that the  
22 studies say most people of color don't benefit from  
23 ban the box.

24 What the studies say is that young men of  
25 color, in one study, they just looked at 21 to

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1 22-year-olds, in another, they looked at 24 to  
2 35-year-olds.

3 But, young men of color without a college  
4 education are being discriminated against in the  
5 hiring process. They're being stigmatized,  
6 stereotyped as people with a record because of their  
7 race. That's what it comes down to.

8 So, we're talking about a finite population,  
9 a critical population, but a finite population of folks  
10 who already are having a hardest time finding work  
11 because of discrimination against them because they're  
12 young African-American men.

13 And, that's what those studies come down to.

14 So, for us, it's all about enforcing the  
15 discrimination laws. They're documenting that  
16 employers are discriminating, they're stereotyping  
17 young men of color as criminals which is discrimination  
18 under Title VII, plain and simple.

19 And, it's my understanding that Commissioner  
20 Lipnic from the EEOC testified to that effect at the  
21 last hearing. That's plain and simple.

22 So, again, it comes back to enforcing the  
23 civil rights laws.

24 Next slide, please?

25 Lastly, I want to talk about occupational

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1 licensing restrictions. That was the topic of  
2 conversation earlier.

3 This is from a report that we've put  
4 together based on the ABA Collateral Consequences  
5 Inventory.

6 Just to point out a couple extra facts,  
7 about half of the state laws on the books have blanket  
8 felony restrictions no matter the type of, you know,  
9 job you're applying for, any felony will deny you  
10 employment under the Occupational Licensing laws.

11 About half the states don't consider  
12 evidence of rehabilitation in the process of screening  
13 you for occupational -- when they screen for  
14 occupational licenses.

15 So, let me jump to a positive model I  
16 think --

17 CHAIRMAN LHAMON: You'll have to jump later  
18 to it because your time is up.

19 MR. EMSELLEM: Okay. All right. I have  
20 some ideas about positive models I think which came up  
21 around how to fix this occupational licensing problem.

22 CHAIRMAN LHAMON: Thanks very much. Ms.  
23 Walz.

24 MS. WALZ: Good afternoon.

25 Every year, more than 640,000 people,

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1 roughly equivalent to the population of the District  
2 of Columbia, leave state and federal prison.

3 For many, a common question emerges, where  
4 will I sleep tonight?

5 In a 2015 survey of the Ella Baker Center  
6 on Human Rights, nearly four out of five formally  
7 incarcerated individuals reported that because of  
8 their criminal history, they were denied admission or  
9 deemed ineligible for housing.

10 The risk of homelessness quadruples for men  
11 who've been incarcerated.

12 Housing barriers for justice involved  
13 individuals could also severely restrain their ability  
14 to reintegrate into society by exacerbating other  
15 collateral consequences such as limited employment and  
16 their ability to reunite with their families.

17 In that same Ella Baker Center's report,  
18 two-thirds of the formally incarcerated reported  
19 living with their families as a means to reintegrate  
20 into the community.

21 However, restrictions on where people with  
22 criminal records can live, mean that many of them are  
23 living in the shadows and they are threatening the  
24 housing of their loved ones as a result.

25 Given the often limited employment prospects

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1 for people with criminal records, the need for a chance  
2 to live in federally subsidized housing is great.

3 There are three major HUD housing programs:  
4 the Public Housing Program, the Project Based Section  
5 8 Program, and the Housing Choice Voucher Program.

6 Contrary to popular belief, there are only  
7 two narrow mandatory restrictive bans related to  
8 criminal records and screening.

9 Providers cannot admit someone who's been  
10 convicted of manufacturing methamphetamines in  
11 federally assisted housing and they cannot admit an  
12 applicant who is on the lifetime sex offender registry.

13 Beyond those narrow instances, however, PHAs  
14 and project owners have the discretion over their  
15 criminal records policies.

16 Federal law allows them to reject  
17 individuals who engaged in the following activities:  
18 violent criminal activity, drug-related criminal  
19 activity, or criminal activity that would affect the  
20 peaceful enjoyment of the premises by other residents.

21 In 2011, then HUD Secretary, Shaun Donovan,  
22 emphasized that this discretion granted to housing  
23 authorities and project owners should be used to give  
24 second chances to justice-involved individuals.

25 Yet, in our 2015 report of the Shriver

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1 Center, "When Discretion Means Denial: A National  
2 Perspective on Criminal Records Varies to Federal  
3 Subsidized Housing,"we reviewed the criminal records  
4 policies of over 300 federally subsidized housing  
5 providers and we found that, for the most part,  
6 unfortunately, PHAs and subsidized housing owners  
7 were, instead, closing the door on applicants with  
8 criminal records through one of four means.

9 First, they are denying people on the basis  
10 of a mere arrest. In one instance, one arrest in  
11 seven years automatically denied admission.

12 They are also not limiting the time period  
13 by which they look back. In some cases, they say the  
14 look back period is between 99 to 200 years.

15 They are also using over broad categories  
16 of criminal activity including any conviction  
17 whatsoever, however minor or unrelated to the ability  
18 to be a good tenant.

19 Finally, they are not considering any  
20 mitigation evidence, including the evidence of  
21 rehabilitation.

22 We found similar practices in the private  
23 market. In fact, an Austin, Texas survey found that  
24 local housing providers had essentially adopted the  
25 same rules that subsidized housing providers have.

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1           Discrimination exists not only in the way  
2 admission policies are written, but also in how they  
3 are administered.

4           As demonstrated by Fair Housing audits in  
5 Washington, D.C. and New Orleans, in these audits,  
6 African-American and White testers attempted to apply  
7 for rental units with identical criminal histories and  
8 explanations for those histories.

9           Both audits showed that landlords treated  
10 White testers more favorably than their  
11 African-American counterparts.

12           Portraying the criminal background check  
13 policy as flexible and forgiving for White testers.  
14 But, an automatic denial for African-American testers.

15           To help combat barriers for people with  
16 criminal records, HUD has taken two important steps.

17           First, in late 2015, HUD issued PIH Notice  
18 2015-19. This Notice reminded project owners and PHAS  
19 of the procedural requirements and notice entitled to  
20 by applicants before they were denied admission due to  
21 their criminal records.

22           The notice also importantly stated that  
23 using an arrest record was not a permissible basis to  
24 deny admission or to terminate their assistance.

25           Then, in April of 2016, HUD's Office of

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1 General Counsel issued important guidance that  
2 outlined the fair housing rights of people with  
3 criminal records.

4 Although criminal records is not a protected  
5 class, the guidance clarified that a housing  
6 provider's criminal records policies may, nonetheless,  
7 give rise to a Fair Housing Act violation under the  
8 theories of intentional discrimination and disparate  
9 impact.

10 A number of housing authorities have been  
11 taking important steps to reintegrate justice-involved  
12 individuals into their communities.

13 For example, the New York City Housing  
14 Authority started its family reentry pilot whose  
15 purpose is to reunite families leaving the criminal  
16 justice system with family members living in its  
17 housing.

18 These pilots can provide important evidence  
19 on how opening a door to housing for the formally  
20 incarcerated can also reduce recidivism rates.

21 A pilot out of Pennsylvania showed the  
22 recidivism rates declined by more than 30 percent for  
23 participating program -- for program participants when  
24 compared to the recidivism rates for the county and  
25 the state.

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1           However, given that these PHAs only  
2 represent a handful of the 3,000 -- more than 3,000  
3 housing authorities around the country, more impactful  
4 change will require bold leadership from HUD.

5           We commend the Commission for taking a close  
6 look at the issue of collateral consequences of a  
7 criminal record, particularly as it relates to  
8 housing.

9           Although progress has been made, more must  
10 be done to ensure the millions of people across the  
11 country are not unfairly shut out of their housing,  
12 that they may leave the criminal justice system behind  
13 them.

14           We ask for a report from the Commission that  
15 highlights the need for housing for people with  
16 criminal records and the barriers that face and to  
17 highlight as well some of the pilots that are being  
18 adopted around the country.

19           Thank you.

20           CHAIRMAN LHAMON: Thanks very much, Ms.  
21 Walz.

22           Ms. Hirsch?

23           MS. HIRSCH: Thank you very much.

24           I work in legal services. I run the North  
25 Philadelphia Office for Community Legal Services and

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1 I'm also the managing attorney for a public benefits  
2 units.

3 We represent about 10,000 low income  
4 residents in Philadelphia in individual civil matters.

5 And, a lot of our resources are spent on  
6 collateral consequences.

7 Before I talk about the particular issue I  
8 want to discuss today, which is the denial of access  
9 to TANF and food stamps, particularly to women who  
10 have criminal records, I want to just briefly say in  
11 response to things that were raised this morning, that  
12 wherever possible, there should be systemic changes.

13 There was a suggestion this morning that,  
14 where we have the opportunity for case by case  
15 individual petitions for redress, legal services can  
16 handle those cases.

17 We have a lot of work to do. We do not have  
18 enough lawyers. We do handle those cases. It's  
19 incredibly important that we handle those cases. We  
20 cannot possibly meet the demand.

21 You could divert large sums of money to us  
22 and we could not meet the demand. It's really  
23 important, as people think about these issues, that  
24 you think where ever possible about systemic changes.

25 So, in 1996, as part of welfare reform,

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1 there was a little noticed piece of a federal statute  
2 that says that, unless states affirmatively pass  
3 legislation, any individual with a felony drug  
4 conviction is banned for life from receiving TANF,  
5 which was the then new name for what used to be called  
6 AFDC, and from food stamps.

7 The states -- some states have acted to lift  
8 this lifetime ban. Some states have not.

9 Many states have modified it in a quite --  
10 I'm trying to think of a more positive word than  
11 bizarre -- with a tremendous range of variation.

12 So, there are states where you can't get  
13 benefits immediately upon release, but years later you  
14 may be able to get benefits.

15 There are states where can get cash  
16 assistance but not food stamps.

17 There are states where you can get benefits  
18 while you're pregnant but not after you have a child.

19 There are states where you can get benefits  
20 after you complete drug treatment, but not while you're  
21 in drug treatment which makes it really hard to stay  
22 in treatment because you have no source of food and no  
23 source of income. And, the odds of successful  
24 completion of treatment go way down.

25 I was lucky enough to take a year off from

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1 my caseload and to have a fellowship to do research  
2 and writing.

3 And, what I did was the first study that  
4 I've been able to find of women with felony drug  
5 convictions. Usually when people talk about women and  
6 drug usage, they focus on pregnancy, but, there is  
7 relatively little actual data about women with felony  
8 drug convictions.

9 The best estimate from the sentencing  
10 project is that there are about 180,000 women who were  
11 hit with a lifetime ban between 1996 and 2011. I  
12 haven't seen the numbers since then.

13 Because it's a lifetime ban, it continues  
14 to grow.

15 The picture that I found both with the women  
16 I interviewed, and I should say, I also interviewed  
17 prosecutors, police officials, corrections officers,  
18 public health workers, a wide range of individuals  
19 working in the field, is that the way that women get  
20 drug convictions is because they have been physically  
21 or sexually abused.

22 And, in the absence of other resources, they  
23 have self-medicated their pain.

24 There was a question raised this morning  
25 about provision of services after release versus

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1 provision of services while incarcerated.

2 I'm going to make a pitch for provision of  
3 services before people hit the criminal justice  
4 system.

5 So, the women I interviewed uniformly had  
6 been sexually abused as children. They had  
7 heartbreaking stories of the abuse that they had  
8 experienced.

9 They'd experienced domestic violence in  
10 dating relationships and marital relationships.

11 They'd used drugs to dull that pain. And,  
12 uniformly, the very first place anybody talked to them  
13 about the abuse they had experienced or offered them  
14 help with that abuse or with their addictions was in  
15 jail. And, that's crazy.

16 I mean, we should not wait until people are  
17 incarcerated to respond to domestic violence and  
18 abuse.

19 And, I want to just, in my remaining under  
20 two minutes, read you a couple of quotes because I  
21 think it's important to hear the words that they use.

22 And, I should tell you, I didn't explicitly  
23 ask about abuse, I just asked, tell me about your life.  
24 What happened? How did you end up here?

25 So, this is a quote from Lynette: "My

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1 stepfather was drunk a lot. My mom left us alone with  
2 him. I was sexually molested by stepfather. I was  
3 hurt because I told my mom and she said maybe I led  
4 him on. I was very young. They took me away when I  
5 was 13 and it was before then.

6 It went on for a year or two. The drugs I  
7 used when things really hurted me, so I wouldn't feel  
8 the hurt."

9 From another one: "when I was a child, my  
10 father used to rape me. It started when I was nine.

11 After I ran away, I wanted someone to want  
12 me. I ran into this guy, he was older. He gave me  
13 cocaine. I was 13."

14 From a third woman: "I was afraid to go to  
15 sleep at home because my mom's boyfriend came in and  
16 messed with me.

17 I thought if I could just go to sleep. I  
18 only felt safe sleeping at school. So, I went to  
19 sleep at school every day and they yelled at me."

20 Another woman I interviewed told me that she  
21 was so pleased that she could take classes at the jail.  
22 And, I said what kind of classes? And, I thought she  
23 was going to talk about GED, maybe, you know, some  
24 other literacy-related classes, and she said, well,  
25 they have a class about being raped in your home and

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1 they have a class about being raped on the street and  
2 I needed both those classes.

3 The idea that we would respond to those life  
4 experiences, to that kind of abuse, and to the  
5 addictions that resulted from that kind of abuse with  
6 a law that says that you can never be good enough to  
7 get welfare, when you think about the level of  
8 stigmatization of welfare benefits in this country,  
9 and when you think about the degree to which that cuts  
10 you off from any part of civil society, to me, is just  
11 appalling.

12 Thank you.

13 CHAIRMAN LHAMON: Thank you very much, Ms.  
14 Hirsch.

15 Mr. Levin?

16 MR. LEVIN: Yes, thanks very much. I'm  
17 pleased to be here and hopefully I can add to some  
18 excellent testimony that we've already heard.

19 Our focus at Right on Crime and Texas Public  
20 Policy Foundation is first and foremost on employment,  
21 on self-sufficiency for those people who either have  
22 a criminal record or are formally incarcerated.

23 And, as you've already heard, the research  
24 is very strong that people who get a job, especially  
25 rapid attachment to work immediately after leaving

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1 prison are far less likely to be -- far less likely to  
2 re-offend as well as to be re-incarcerated.

3 We're also facing major demographic changes  
4 in the aging of our society and we absolutely need to  
5 tap into the vitality of this large workforce.

6 So, just some of the data on that, 88 percent  
7 of probationers who are employed at the start of their  
8 supervision are successful. Only 37 percent who are  
9 unemployed at the start of their probation supervision  
10 are able to complete that without being revoked or  
11 incarceration.

12 They are also, by the way, much more likely  
13 to complete their restitution obligations to victims  
14 of crime, which is very, very important.

15 One of the solutions for addressing this is  
16 sealing old criminal records. And, fortunately,  
17 there's been a great deal of research looking  
18 longitudinally at offending patterns and dissidence.

19 And, what it has found is, this is research  
20 from the University of Maryland, University of South  
21 Carolina, but basically, after seven years, if  
22 someone's been living in the community without  
23 committing a new offense, they're no more likely to  
24 offend than someone who never had a brush with the  
25 law.

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1           And, even after five years, the risk is  
2 about the same.

3           So, what that leads to is, we really need  
4 to adopt policies that allow people to obtain a record  
5 of nondisclosure or record sealing.

6           Now, in Texas and other states, that is  
7 different from an expunction or expungement in a number  
8 of ways. Most importantly, that, if your record is  
9 sealed or nondisclosed, the prosecutor or law  
10 enforcement, judges, they can still see it, it can  
11 still be used to enhance under repeat offender  
12 statutes, so it's not a physical destruction of the  
13 record.

14           Now, of course, for people that are  
15 exonerated, we absolutely should physically destroy  
16 the record and there may be some role for that, I think  
17 even for people, especially after 20 years, if somebody  
18 had a low level drug possession, maybe we should  
19 expunge it.

20           But, certainly, more broadly, allowing  
21 people to seal those records. And, there are also  
22 exceptions in our law in Texas and other states for  
23 certain licensing boards that could still see some  
24 sealed records from some occupations that are, you  
25 know, involve potential danger to public safety and so

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1       forth.

2               So, one of the other states that's moved  
3 forward on this is actually Indiana when now Vice  
4 President Pence was governor, they adopted a record  
5 sealing law, Act 1482 in 2013, that was really  
6 excellent.

7               And then, currently pending, there's  
8 something called the Clean Slate proposal in  
9 Pennsylvania which makes a significant advance, I  
10 think, even over all the others, in that, it's  
11 automatic if the offender falls into certain  
12 categories, then they don't have to go to court.

13              In some states, you have to file a separate  
14 civil law suit to get your record sealed which means  
15 the cost of hiring an attorney, court fees and so  
16 forth. So, it's unavailable essentially to people  
17 that don't have those resources.

18              Now, certainly, we also recommend expanding  
19 these pretrial diversion, particularly in low level  
20 drug possession cases for first-time offenders,  
21 especially. So, there's no criminal record to being  
22 with.

23              Now, then, on the other end of the spectrum,  
24 there's some people that aren't going to be eligible  
25 for record sealing and certificates of rehabilitation

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1 are used in states like New York and Ohio.

2 And, we kind of wondered whether this was  
3 really effective in increasing employment. There's  
4 actually a study that came out in 2016 that found it  
5 did lead to a marked employment.

6 And, in some states, like Ohio, if you have  
7 a certificate of rehabilitation, the employer cannot  
8 be sued if -- for negligent hiring if they hire you.

9 And, that's actually one of the other  
10 recommendations we have is to immunize employers from  
11 being sued for negligent hiring in most instances.

12 And then, in Texas, we additionally passed  
13 legislation immunizing landlords from being sued  
14 simply for renting to ex-offenders. So, that's very  
15 important as well.

16 Occupational licensing is another area that  
17 we are very focused on.

18 One of the solutions which we've adopted in  
19 Texas and is also a model bill that I passed to the  
20 American Legislative Exchange Council, would allow  
21 ex-offenders to obtain a provisional or probationary  
22 occupational license, provided they meet all the other  
23 qualifications.

24 And, basically, the way it works is, if they  
25 comply with all the rules of the occupation, don't

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1 commit any new criminal offenses, then after a certain  
2 period of time such as six months, it would  
3 automatically become a permanent occupational license.  
4 So, that is a very good thing.

5 Also, declaratory orders to find out in  
6 advance from the occupational licensing agency before  
7 going to a training program or college whether they  
8 would qualify is something that can save people a lot  
9 of wasted energy.

10 Now, another collateral consequence is  
11 driver's license suspensions. This, obviously, is a  
12 federal law which says states have to affirmatively  
13 opt out if they don't want to suspend driver's licenses  
14 for drug convictions.

15 We also have a huge problem of, we discussed  
16 this at the last hearing, people who've failed to pay  
17 fines and fees.

18 So, for example, in Virginia, there are  
19 600,000 people who have their driver's license  
20 suspended simply because they can't pay fines or fees.

21 And, our view is that people should not have  
22 their driver's license suspended unless they're unsafe  
23 to drive which would be indicated by things like DWIs  
24 and so forth. So, this area needs to be totally  
25 overhauled.

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1           Now, with regard to access to public  
2 benefits, you know, conservatives and liberals, we  
3 often disagree a bit on the extent to which we should  
4 have certain public benefits, but one of the issues  
5 we're focusing on in Texas this legislative session is  
6 a bill that's already passed the House that deals with  
7 the Medicaid and disability benefits of people being  
8 discharged from county jail.

9           And, the problem is, in most states, you're  
10 terminated. So, once you get out of county jail, even  
11 if you've only been there for a short period, if the  
12 Sheriff has submitted your name to the Social Security  
13 Administration, he gets a bounty for doing that, by  
14 the way, you're benefits are suspended.

15           And so, we know people, you know, 20 percent  
16 of people in county jails are on psychotropic  
17 medications, they're severely mentally ill and then  
18 you also have now all these advances in, for example,  
19 medication assisted treatment for addiction for  
20 opiates.

21           And so, those are actually covered by  
22 Medicaid as well as private insurance. So, if we can  
23 create this continuity of care for people that are  
24 already eligible as they're getting out of jail, we  
25 can really reduce recidivism.

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1           Finally, I just wanted to address the issue  
2 of offender registries. We are working to try to  
3 particularly reduce or eliminate children who are  
4 included in sex offender registries, those who were  
5 adjudicated as juveniles.

6           The R Street Institute did an excellent cost  
7 benefit analysis. And, it basically showed the cost  
8 of including children in sex offender registries far  
9 outweigh the benefits. There's a huge reduction in  
10 long-term earnings. Virtually no public safety  
11 benefit.

12           We're also seeing proposals to create new  
13 registries in different states, animal cruelty  
14 registries and such for all sorts of other offenders.

15           And, we think legislators need to be very  
16 cautious on this because there's a lot of evidence  
17 that the sex offender registry, for example, has gone  
18 way beyond what was originally intended in terms of  
19 adult sexual predators and as it relates to children  
20 and consensual conduct, it's actually done more harm  
21 than good. So, we need to be very cautious in adding  
22 on new collateral consequences like registries.

23           Thank you.

24           CHAIRMAN LHAMON: Thanks very much, Mr.  
25 Levin and to each of the panelists.

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1           And, I'll now open it for questions from my  
2 fellow Commissioners.

3           Hearing nobody jumping in, I will jump in.

4           I have a couple follow-ups. Ms. Walz, in  
5 your statement, you include information about some  
6 private programs in New York, Chicago, California,  
7 showing that some family members who have prior  
8 convictions have been allowed to participate in public  
9 housing together and that that allows access to support  
10 services and they have been successful.

11           You mentioned that some of the -- this is a  
12 quote from you, some of the PHAs have even found that  
13 these programs have actually helped to reduce  
14 recidivism in their communities.

15           I'd love to see some cites for that or some  
16 more information that follows up about those exciting  
17 programs. And, if you have information you could  
18 share now, that'd be terrific.

19           MS. WALZ: Some of it is in our written  
20 testimony. There is many of the pilots are being  
21 studied and so they are actually looking at the  
22 recidivism rates as they're tracking the program  
23 participants.

24           But, the one that I noted in my oral  
25 presentation is out of Pennsylvania, where the

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1 recidivism rate for program participants was reduced  
2 by more than 30 percent as opposed to the average for  
3 that county.

4 So, I think it definitely does show that  
5 there's a correlation between providing stable  
6 housing. And, importantly, reuniting with their  
7 families, with their support network.

8 And so, I think if you are prioritizing  
9 that, and I think increasingly, PHAs recognize the  
10 value in doing these programs, that that's a benefit  
11 to everyone in the community.

12 But, what we've highlighted are a few  
13 examples. You know, there are more than 3,000 public  
14 housing authorities in the country.

15 I think more than 2,500 project based  
16 Section 8 owners in the country.

17 So, there's a lot more that has to be done  
18 beyond the pilots to make this part of national housing  
19 policy.

20 CHAIRMAN LHAMON: And, I took the point from  
21 Ms. Hirsch, having been in a legal services corporation  
22 organization before coming to government myself, that  
23 would be very challenging for legal services  
24 organizations to be able to represent the full scope  
25 of need.

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1           Is it your view that, or I guess I should  
2 ask, what is your view about a more systemic reform  
3 related to housing access?

4           MS. WALZ: I think systemic reform has to  
5 come from HUD. At this point, project owners and  
6 housing authorities still maintain their discretion to  
7 deny admission on the basis of criminal activity and  
8 a history of criminal activity.

9           HUD has constrained that over the last year  
10 and, you know, we're appreciative of that. But more  
11 has to be done to push PHAs so that they have actual  
12 formal written policies allowing people to reintegrate  
13 into society and to reunite with their families.

14           MR. LEVIN: Can I also comment?

15           CHAIRMAN LHAMON: Sure.

16           MR. LEVIN: One of the issues we've noticed  
17 is various city zoning laws relating to halfway houses  
18 as well.

19           In Texas and other states, even if someone's  
20 approved for parole, if they don't have a valid housing  
21 plan, they can't be released. So, they might end up  
22 serving for, in some cases, six months, a year, more  
23 even after they've been approved for parole.

24           So, of course, it's not surprising it's kind  
25 of a race to the bottom. A lot of cities don't want

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1 these folks coming back to their communities, so  
2 they've adopted zoning rules that essentially preclude  
3 halfway houses, two or more, three or more, people  
4 with a criminal record who are discharged from prison  
5 from living under one roof. So, this is something  
6 that needs to be addressed, I think, on a statewide  
7 basis, certainly, because, otherwise, there's just a  
8 tendency of some communities to try to dump their  
9 returning people on others.

10 CHAIRMAN LHAMON: So, I take it, Ms. Walz,  
11 that that's also your view of the -- the HUD view  
12 responsive to those kinds of concerns as well, is that  
13 right, with some guidance?

14 MS. WALZ: HUD is an option to be responsive  
15 to that. It's also, in addition to the zoning laws  
16 that local governments are enacting, crime free rental  
17 property ordinances or nuisance ordinances that are  
18 directly targeted towards persons who have been  
19 involved in the criminal justice system.

20 They are forcing landlords as a condition  
21 of leasing property in that community to do an  
22 aggressive criminal background check. They're telling  
23 property owners if you fail to do this or you rent to  
24 people with criminal histories, we will revoke your  
25 rental property license.

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1 HUD took some important steps over the last  
2 year to say that this could constitute discrimination  
3 of the federal Fair Housing Act.

4 More needs to be done, however, to regulate  
5 and to limit the scope of these laws.

6 CHAIRMAN LHAMON: Okay, thank you.

7 Commissioner Narasaki?

8 COMMISSIONER NARASAKI: Thank you, Madam  
9 Chair.

10 Mr. Emsellem, I want to say that I think the  
11 Commission and our staff are in full agreement that we  
12 would really like to be able to have more voices,  
13 particularly the voices of people directly engaged.

14 We have very limited resources or we would  
15 have had like a three-day hearing on this.

16 So, but, there is an opportunity because our  
17 record is open for 30 days to please, please encourage  
18 the stakeholders that you know to submit comments.

19 You know, we'd like to hear about the impact  
20 on people with disabilities, for example. We weren't  
21 able to work that in, immigrants.

22 Immigrants, of course, become vulnerable to  
23 deportation. We weren't even able to include that in  
24 the coverage of this hearing.

25 So, I really invite you think about inviting

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1 people to submit written testimony. We do pay  
2 attention to that.

3 So, I wanted to give you an opportunity  
4 because you ran out of time, and you were about to  
5 tell us about positive models for dealing with  
6 occupational licensing.

7 MR. EMSELLEM: Thank you for those comments  
8 and I will be sure to spread the word. I'm sure other  
9 folks on the panel will do the same.

10 So, I just want to mention, you asked about  
11 a model to address, and Marc mentioned the provisional  
12 licensing model, there's a law on the books, a federal  
13 law on the books, that was enacted after 9/11 when  
14 Congress imposed background checks on all the nation's  
15 port workers, everybody who worked, stepped foot on a  
16 port, so, people who were currently employed had really  
17 good jobs, had to undergo an FBI background check.  
18 And, if they had a felony, they would be considered  
19 disqualified from working at the port. That's 2  
20 million workers.

21 There was an effort to include some basic  
22 worker protections in there that really proved their  
23 weight in gold ultimately.

24 The protections required that they can only  
25 look back seven years for a felony consistent with the

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1 research that Marc mentioned, the redemption research.  
2 Folks don't -- are no more likely to get in trouble if  
3 they stayed clear of the law after seven years than  
4 anybody in the general population.

5 So, there's that time limitation. It was  
6 limited to felonies. They eliminated drug offenses  
7 from -- as a -- drug possession, felony drug possession  
8 as a crime.

9 Obviously, that impacts a lot of people of  
10 color. So, that was another smart move.

11 And, probably, most importantly, they  
12 provided for an appeal and waiver protection.

13 The appeal protection said that you can  
14 challenge inaccurate records, which we did a study  
15 documenting that there are 17 million FBI background  
16 checks conducted for employment every year, half of  
17 those are inaccurate. So, that was a big deal for  
18 these folks who are trying to keep their jobs in the  
19 ports.

20 And then, they included a waiver protection  
21 which says, here is the disqualifying offense,  
22 whatever it is, we will waive that disqualifying  
23 offense if you can produce evidence of rehabilitation.

24 So, what happened? We represented 500 of  
25 those workers through the appeal process to get a feel

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1 for whether this was really going to make a difference.

2 TSA granted 97 percent of the appeals, which  
3 goes to show how often those FBI records are  
4 inaccurate. That helped 57,000 workers going back  
5 several years now, probably more now.

6 They granted 87 percent of the waivers based  
7 on evidence of rehabilitation, which helped another  
8 15,000 people save their jobs.

9 And then, the last slide, you can just go  
10 to the last slide, disproportionately, those folks are  
11 people of color.

12 On the left side there, you see  
13 African-Americans benefitted -- 54 percent of folks  
14 who benefitted from the waiver -- from the waiver were  
15 African-American; 41 percent who benefitted from the  
16 appeal process, the inaccurate records, were  
17 African-American.

18 So, I'm just trying to put in a plug for the  
19 impact of some basic protections that we already know  
20 about that could be included both in federal law, but  
21 also more so in state laws.

22 MR. LEVIN: Yes, actually, if I could add,  
23 there's a big problem with inaccurate background check  
24 information and we've passed laws in Texas and have  
25 another one pending this session.

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1           But, you get names that are transposed,  
2           there's more than one David Smith with the same birth  
3           date.

4           And so, what we think is important is to  
5           make sure that there's a legal obligation on the part  
6           of these background check companies to update their  
7           records regularly, penalties if they don't, including  
8           not being able to purchase them anymore.

9           But, also keeping a log of who they sold  
10          them to. Because, once the genie's out of the bottle,  
11          you know, you can have another company in the Cayman  
12          Islands who bought them from this company and how do  
13          you keep figuring out who else has those records and  
14          whether they're updating them or not?

15          So, that chain of custody has to be clear.

16          COMMISSIONER NARASAKI: Thanks, that's very  
17          helpful.

18          I'd like to dig in a little bit to the look  
19          back, because one of the things I've been challenged  
20          with is, so people are saying, oh, look back seven  
21          years, five years.

22          But then, you hear the recidivism rate, you  
23          know, for the first year or second year or third year  
24          is high. But, there's a tie between your ability to  
25          get housing and a job and your likeliness of having to

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1 commit another crime.

2 I mean, some people would commit them  
3 anyway, but I think others may be forced into it by  
4 circumstances beyond their -- necessarily their total  
5 control.

6 And so, how do you address that issue? And  
7 also, what do you say to people who, I have to say,  
8 I'm not quite clear on why we have a ban on TANF  
9 recipients. I don't know if it was -- I don't know  
10 what the debate was at the time.

11 Was it, you know, people were concerned that  
12 we're subsidizing drug use? What was it and what  
13 would you respond to them now about whether it still  
14 makes sense to have that kind of ban?

15 MS. HIRSCH: Sure, there was actually next  
16 to no debate. I went back and checked the  
17 congressional record. I don't remember, because I  
18 looked a while ago, whether it was one minute per side  
19 or two minutes per side in the -- on this specific  
20 amendment and there was no debate in the House.

21 So, there was very little in terms of a  
22 record on what the thought process was. My guess,  
23 personally, was it's the sound bite of no food stamps  
24 for drug felons. That sort of thing.

25 COMMISSIONER NARASAKI: Tough on crime.

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1 MS. HIRSCH: Tough on crime. I don't think  
2 anybody thought through carefully what the impact was.

3 When you look at TANF, over 90 percent of  
4 the adults who get TANF are women. In order to get  
5 TANF, you have to either be pregnant or the custodial  
6 parent or other close relative of minor kids.

7 It's not the sort of, you know, drug lord  
8 kind of situation.

9 And, what you get with those benefits is  
10 minuscule. You know, so in Pennsylvania, for example,  
11 there's been no increase in what you get as a TANF  
12 grant since January 1st, 1990.

13 And, the maximum grant for a mother and  
14 child is \$316 a month, and there are 21 states that  
15 are less generous than Pennsylvania.

16 But, the difference between having that \$316  
17 and having nothing, is a world. I mean, it means that  
18 you may be able to double up with family or friends  
19 because you have a little something you can bring to  
20 the table.

21 It means that, if you're eligible for  
22 transitional housing, you can get it because you have  
23 to have some income to get in the door.

24 It's just incredibly huge, the impact of  
25 that miserable pittance.

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1           The response I would make and the  
2 conversation I've had with lots of very conservative  
3 folks is that it had unintended counterproductive  
4 consequences.

5           We spent seven years in Pennsylvania getting  
6 the ban lifted in Pennsylvania and a really strong  
7 ally in that process was the Pennsylvania District  
8 Attorneys Association.

9           Our prime sponsor in the Pennsylvania Senate  
10 was a Republican former prosecutor who said, "I put  
11 people in jail, I have a responsibility to think about  
12 what happens to them when they come out."

13           And, there was tremendous broad-based  
14 support once people understood who the population was  
15 and what the circumstances are.

16           And, just how much it costs to keep a kid  
17 in foster care and a parent in jail compared to TANF.

18           CHAIRMAN LHAMON: I want to follow up on  
19 that a little. I just wanted to make sure I'm clear.

20           I take it that, based on your expertise and  
21 the work that you've done with the women in your  
22 community and also the research that you've done that,  
23 it's your view that the exclusion of this category of  
24 women from eligibility for TANF is a federal  
25 communication of animus about which women are eligible

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1 and which women are not. Is that correct?

2 MS. HIRSCH: Yes, absolutely.

3 CHAIRMAN LHAMON: Thank you.

4 I think Commissioner Kladney had some  
5 questions.

6 COMMISSIONER KLADNEY: Thank you, Madam  
7 Chair.

8 I would like if each -- well, Mr. Levin, who  
9 has been here before, I was wondering if I could start  
10 with you.

11 Could you submit a packet of what you would  
12 consider model legislation for each item that you spoke  
13 about?

14 MR. LEVIN: Yes, and thankfully we have,  
15 again, it's these ALEC model bills, the liability one,  
16 the provisional licensing; and I can give you the Texas  
17 bill on liability for landlords; and our nondisclosure  
18 which we have also an ALEC one that just focuses on  
19 drug offenders for nondisclosure. The Texas laws are  
20 broader than that. So, yes, I would be glad to do  
21 that.

22 COMMISSIONER KLADNEY: And, could you  
23 explain, while I have you here, exactly how does the  
24 immunization of employers and rental housing work?

25 MR. LEVIN: Well, basically, what the bill

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1 says in Texas and Louisiana and Ohio, also the employer  
2 ones, I'm not aware of another one on the landlords,  
3 but the employer one says, there's certain exceptions  
4 like sex offenders that end up being exempted from  
5 most bills to pass them.

6 But, you know, that for most offenses and  
7 offenders that, an employer cannot be sued simply for  
8 the fact that they hired someone who has a criminal  
9 record.

10 And so, if they later did something, you  
11 know, that obviously caused a problem, it would be an  
12 immunity that the case would have to be dismissed.

13 And then, similarly, for the landlords, it  
14 basically says with those exemptions like sex  
15 offenders, they can't be sued if something happens at  
16 the complex -- apartment complex -- relating to that  
17 ex-offender.

18 Simply by -- on the fact -- now, the employer  
19 could still be sued for negligent supervision. You  
20 might have a duty if you hired somebody who, you know,  
21 was a thief, right, to make sure they didn't steal  
22 from your client or something. Right?

23 But, that -- just the negligent hiring part,  
24 they're immune from.

25 COMMISSIONER KLADNEY: And, you can send us

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1 copies of those statutes?

2 MR. LEVIN: Yes. And, I also recommend,  
3 there's a Minnesota statute which I think is very good  
4 on the licensing issue because it says, there's a lot  
5 states that say it has to be related to the occupation  
6 to disqualify. But, these occupational licensing  
7 boards, the people on them are in that occupation.  
8 They look for any way to say it's related to keep  
9 people out and reduce competition. Now, the Minnesota  
10 provision says, by virtue of the person being in the  
11 occupation, it has to be the case that it would be  
12 more likely they would recidivate, or if they did  
13 recidivate, it would cause particular damage by virtue  
14 of them being in the occupation. So, you think of, of  
15 course, a child sex offender working in child care,  
16 having a license to child care. Obviously, we don't  
17 want that. But, it's very few. And, of course, you  
18 don't want somebody guilty of insurance fraud selling  
19 insurance.

20 So, those are the things where the person  
21 would put in a position to do more damage by virtue of  
22 having that license. That, in some ways, is really  
23 the -- nails it down, I think.

24 COMMISSIONER KLADNEY: Thank you.

25 And, Ms. Hirsch, I would take it that you

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1 would want the restriction on TANF and food stamps  
2 lifted. Do you have any other items that you would  
3 like to see done in that regard? In those regards or  
4 other regards?

5 MS. HIRSCH: Yes, actually. I would very  
6 much like to see that provision lifted from federal  
7 law.

8 There's also a complicated set of provisions  
9 that -- we have a chart that I did for Pennsylvania  
10 laying out each of the public benefits programs and  
11 various different criminal record possibilities and  
12 what the implications are.

13 And so, I focused for today on the TANF and  
14 food stamp ban, but there's a complicated patchwork  
15 affecting -- with other provisions -- affecting food  
16 stamps, not affecting federally funded Medicaid, but  
17 affecting state funded medical assistance. And, there  
18 are also provisions affecting Supplemental Security  
19 Income, SSI, as aside benefits from the Social Security  
20 Administration.

21 COMMISSIONER KLADNEY: Right, that -- I  
22 think that was mentioned by Mr. Levin. What kind of  
23 recommendation would you have, or Mr. Levin, I'm sure  
24 he has a recommendation, he has a recommendation for  
25 everything, what kind of recommendation would you make

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1 regarding Social Security Disability cutoff or  
2 actually Social Security Disability, they also cut  
3 that off as well when you're in jail.

4 MS. HIRSCH: Right, they have different  
5 provisions for each of those programs. One of the  
6 very harmful things that occurs with SSI is that your  
7 benefits get suspended once you've been incarcerated  
8 plus Medicaid.

9 And, if I could say something about Medicaid  
10 in a minute.

11 On SSI, though, your benefits are suspended  
12 while you're incarcerated, but if you're incarcerated  
13 for 12 months or more, your benefits are not reinstated  
14 when you get back out. And, you have to start from  
15 scratch proving the same disability that you had at  
16 the point at which you became incarcerated. And, that  
17 reapplication process can take years, literally. So,  
18 even if benefits continued to be suspended while you  
19 were incarcerated, if they just could get reinstated  
20 at the time of release, without having to reprove  
21 disability. And, that's currently the law for Social  
22 Security Disability benefits, but not for SSI. So,  
23 that one piece would be huge.

24 Concerning Medicaid, as Marc said, there's  
25 an option under federal law for states to suspend

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1 Medicaid when someone is incarcerated and then to  
2 reinstate it, just turning it back on without requiring  
3 a whole reapplication process when they're released.  
4 That's a great idea.

5 Some states have done that and have done it  
6 really well. Other states are currently in the  
7 process of looking at it.

8 And, I just want to add a cautionary note,  
9 because, if it's not done properly, it can do more  
10 harm than good.

11 So, a state that's currently considering it,  
12 and I don't want to name the state because we're in  
13 conversations about doing it right, but the initial  
14 plan by well-meaning people was to suspend Medicaid as  
15 soon as they learn someone was incarcerated, without  
16 waiting any period of time.

17 So, for folks who are in county jails who  
18 get arrested and make bail, very quickly get released,  
19 there would be this computer exchange of data that  
20 would mean their Medicaid would have been stopped.

21 And, the state then acts on any information  
22 for any other benefits the person may be receiving.  
23 So, it would mean that their food stamps, or if it was  
24 a parent with minor kids who was getting TANF, their  
25 TANF would be terminated because those programs don't

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1 currently have a provision for suspension.

2 And, in addition to this proposal, this  
3 plan, involved cutting off the benefits for the kids.

4 So, mom or dad gets arrested, the very first  
5 thing the state is going to do is take away food,  
6 medical care, and shelter from the kids because it  
7 wasn't well thought through.

8 There are states that have done a really  
9 good job on this. New York State, I can't remember if  
10 it's North or South Carolina, checks with the family  
11 to find out who's got the kids. Does somebody else  
12 have the kids who needs the benefits? Can we get  
13 those benefits transferred to the person who's caring  
14 for the children as opposed to just cutting them off?

15 So, that Medicaid suspension idea is a great  
16 idea, but the devil is always in the details and how  
17 it gets --

18 COMMISSIONER KLADNEY: So, can you send us  
19 your Pennsylvania chart?

20 MS. HIRSCH: Yes.

21 COMMISSIONER KLADNEY: Okay, thank you.

22 MS. HIRSCH: Happily.

23 COMMISSIONER KLADNEY: Ms. Walz, I'm  
24 working my way down the line, Madam Chair, I just  
25 thought I would cover it so that my colleagues could

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1 rest and relax this afternoon.

2 Thank you, Commissioner Kirsanow.

3 CHAIRMAN LHAMON: But, yes, Commissioner  
4 Yaki in the queue waiting for you.

5 COMMISSIONER KLADNEY: Okay.

6 Ms. Walz, you were regarding housing.

7 MS. WALZ: Yes.

8 COMMISSIONER KLADNEY: And, your  
9 recommendations, do you have any model  
10 recommendations?

11 MS. WALZ: I do. We can provide copies of  
12 legislation that we think is helpful that state and  
13 local governments can pass as well as some of the model  
14 reentry pilots of housing authorities around the  
15 country. Happy to provide that.

16 In terms of a recommendation, as I said, I  
17 think it's important for there to be a limit on the  
18 discretion provided to public housing authorities and  
19 project-based Section 8 owners.

20 I think, at this point, even with the  
21 guidance from HUD as to the Fair Housing Act and the  
22 PIH Notice, they retain the ability to still look at  
23 almost any conviction. They retain the ability to  
24 define what a reasonable look back period is.

25 And, just to pick up on a question that was

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1 raised previously, I think it is different in looking  
2 at a look back period for housing versus employment.

3 In the HUD PIH Guidance from 2015, they  
4 suggest as one example of the housing authority, a  
5 24-month look back period for violent criminal  
6 activity and 12-month look back period for  
7 drug-related criminal activity.

8 Importantly, what we want housing providers  
9 to do, and I think what the Fair Housing Act requires  
10 them to do, is an individualized assessment. They  
11 have to remove from their policies the type of blanket  
12 bans that we have seen for so long. They have to  
13 evaluate the individual if they have rehabilitated  
14 themselves. And, if bringing them back to the  
15 community will reunite the family and not harm the  
16 community in that process.

17 COMMISSIONER KLADNEY: Let me ask you this,  
18 this may be my informational question, but if you were  
19 a landlord and somebody came directly to you and they  
20 had just gotten out of prison, and they were a meth  
21 manufacturer, and when you get busted for  
22 manufacturing meth in your bathtub, then you need to  
23 do a HAZMAT, a whole thing.

24 What -- how would you handle that?

25 MS. WALZ: Well, and as I said, if they --

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1                   COMMISSIONER KLADNEY: I mean, I think it's  
2 a practical problem.

3                   MS. WALZ: It is a practical problem. So,  
4 I'll say this, if you are convicted of manufacturing  
5 methamphetamines in federally assisted housing, there  
6 is a lifetime ban. It's mandatory.

7                   COMMISSIONER KLADNEY: But you want to  
8 change that?

9                   MS. WALZ: Well, no, we are actually not  
10 talking about lifting the mandatory lifetime bans. We  
11 are talking about everything else. So, there are the  
12 two bans for the manufacturing of methamphetamines in  
13 federally assisted housing and a person on the lifetime  
14 sex offender registry.

15                   Though, I agree with the concerns about the  
16 overreach of who is on the registry.

17                   Our primary concern, however, is that all  
18 other types of criminal backgrounds, whether or not  
19 you are admitted, or that is considered, is left  
20 entirely to the discretion of housing providers and  
21 that's where we need to reign it in and ensure because  
22 not all criminal convictions or histories are the same.

23                   COMMISSIONER KLADNEY: Thank you.

24                   Madam Chair, may I just ask Mr. Emsellem --

25                   CHAIRMAN LHAMON: Proceed.

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1 COMMISSIONER KLADNEY: -- my last --

2 CHAIRMAN LHAMON: Yes.

3 COMMISSIONER KLADNEY: And, your  
4 recommendations, sir, do you have written  
5 recommendations, models, things like that that you can  
6 submit?

7 MR. EMSELLEM: Yes, yeah, we have a couple  
8 publications. We have one, a recent report on  
9 occupational licensing called "Untapped and  
10 Unlicensed" and which has model legislation, all the  
11 good stuff that's been mentioned on the panels in  
12 there.

13 I would just put in a plug, you know, we're  
14 real interested in trying to move federal legislation  
15 in this area as well.

16 The Obama Administration directed all  
17 federal agencies to look at all the collateral  
18 consequences in federal laws regulating employment.  
19 That level of transparency is really important and we  
20 have to get to that point, collecting the data,  
21 understanding more of the impact.

22 So, I would just put in a plug for that.

23 And, we also have model legislation around  
24 fair chance hiring and other issues. So, that's for  
25 sure, we can pass that along.

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1           CHAIRMAN LHAMON:     Commissioner Yaki, I  
2 understand you had a question?

3           COMMISSIONER YAKI:    Thank you very much,  
4 Madam Chair.

5           Following up on my colleague's calls for  
6 model legislation, part of me, I discussed this during  
7 the break with Ms. Walz, is that, sometimes, I think  
8 a lot of these -- part of me as a former policy maker,  
9 goes back and thinks that some of these restrictions  
10 or bans were in some way a part of gating control for  
11 the fact that most of these programs are pretty  
12 strictly rationed in terms of how much money there is  
13 available.

14           Because, if you think about it, they're  
15 supposed to be enacted as a deterrent, but if no one  
16 knows about it, how can it be a deterrent? And, it's  
17 really just more punishment on the end.

18           The question -- I really don't have a  
19 question so much as just asking for your comments on  
20 this which is, you know, what Commissioner Kladney's  
21 gathering together, I presume, is to provide part of  
22 our recommendations going forward.

23           But, to what extent can there be sort of one  
24 big federal-type bill and what would it be able to  
25 accomplish going forward?

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1           Because, when you think -- when we think  
2 about this, and this dovetails on everything we've  
3 talked about earlier in the day, there's essentially  
4 an ecosystem here of how does someone get out of the  
5 recidivism trap? How does someone make it back as a  
6 productive member of society?

7           So, it's not just a job, it's also what kind  
8 of job and that goes into the licensing thing, it's  
9 where they go to stay after their job. It's whether  
10 or not if they come out and they have small kids, do  
11 they get WIC, do they get TANF?

12           All these things are go together provided  
13 the things that we all take for granted that are out  
14 there, but which are all singularly regulated in one  
15 way or another by different programs.

16           Is there an ability to have sort of  
17 comprehensive federal legislation that would either  
18 set a model for all the states, but also get rid of,  
19 in one fail swoop, sort of all the things that are out  
20 there in the federal government, at least, so that we  
21 show what is it we can do to address the collateral  
22 consequence dilemma?

23           MR. EMSELLEM: I'll just start at a couple  
24 of places, I'm sure everybody else has a bunch of  
25 ideas.

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1 I mean, part of it's just repealing all the  
2 bad stuff that was around before the SNAP and TANF  
3 restrictions, the Pell Grant restrictions. I mean,  
4 that's a matter of just repealing those limitations.  
5 That would help a lot of people.

6 I think on the housing and employment side,  
7 for sure on the employment side, you know, we really  
8 want to make sure that this idea of individual  
9 assessments, blanket restrictions against hiring  
10 folks, we're not taking away the discretion of  
11 employers or housing providers, we just want to make  
12 sure there's a fair process.

13 So, incorporating those principles into  
14 federal law, we have it down here. We have good  
15 guidance and all that, but, you know, to really make  
16 it to put teeth into the process, those sorts of  
17 protections would be helpful.

18 And, I'd just throw in, there are a couple  
19 bills on The Hill right now, one that would clean up  
20 the FBI background checks for employment, which is  
21 really important, and, we have a direct federal ability  
22 to do that. We don't have to tell the states how to  
23 clean up their records, we have our records -- the  
24 Feds have their own records that would make a big  
25 difference.

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1 I don't know if that is a, you know, gets  
2 everything in there, but there's a lot of opportunity  
3 to do that, I think.

4 MR. LEVIN: There's the REDEEM Act that  
5 Senator Rand Paul and others have that would certainly  
6 help as far as the record sealing goes.

7 Also, with these -- all these collateral  
8 consequences, a lot of states have a sunset process,  
9 so you could put a sunset date that they automatically  
10 go away unless they're renewed. And, that's, I think,  
11 a great idea for a lot of laws.

12 But, I'm glad you also brought up the kind  
13 of work because there was actually a specific study  
14 that showed that when people are in skilled, often  
15 licensed work, there's a further 11 percent reduction  
16 in recidivism over just being employed in food service,  
17 for example, the low skilled work. So, that's very  
18 important.

19 MS. WALZ: I think it's what I was talking  
20 to you about on the break in terms of the affect  
21 one-strike laws have had on federal housing policy.  
22 You know, those were passed in the 1990s with the  
23 intention of going after serious criminal activity  
24 that was a problem for public housing authorities, in  
25 particular.

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1           It has been extended to be any contact with  
2           the criminal justice system whatsoever.

3           I've seen in my own practice where children  
4           who should have their records protected as  
5           confidential in Illinois having their families be at  
6           risk for losing their housing because a child has been  
7           adjudicated as delinquent under the Juvenile Court  
8           Act. Right?

9           And so, a mother is saying, you have to leave  
10          my home and the child's 14 years old, right? And, you  
11          are permanently setting that child on a negative path.

12          And so, the laws have went too far. They've  
13          permeated into the private market where private  
14          property owners and local governments say, we need  
15          one-strike, we need to get rid of all crime.

16          And so, if we start by repealing those laws,  
17          that may have an impact on what's happening at the  
18          private level as well.

19          And, bring some reason and humanity to this  
20          process that allows people to reintegrate into  
21          society.

22          CHAIRMAN LHAMON: Great. Then I will come  
23          back to Mr. Emsellem with another question, if you  
24          don't mind.

25          The -- your materials talk about the benefit

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1 of the EEOC Guidance. And, I'm a little confused, you  
2 said at one point, that nearly 90 percent of employers  
3 conduct criminal background checks for employment  
4 which then suggests that the 2012 EEOC Guidance hasn't  
5 been as effective as we would like if they are  
6 continuing to conduct these background checks.

7 And then, later, you cited a really hopeful  
8 statistic saying that there's a very high percentage  
9 of employers who report complying with the EEOC  
10 Guidance.

11 MR. EMSELLEM: Right, right.

12 CHAIRMAN LHAMON: So, I'm trying to figure  
13 out --

14 MR. EMSELLEM: Right.

15 CHAIRMAN LHAMON: -- where the benefit lies  
16 in the guidance itself and then what, in addition, you  
17 think might be a useful federal statute?

18 MR. EMSELLEM: Right. So, and hopefully  
19 those are not inconsistent. I mean, the fact that we  
20 have a lot of employers who are still conducting  
21 background checks doesn't mean that they're not  
22 applying the EEOC standards and doing so. So, that's  
23 really the difference. Right?

24 So, and there's a lot of commercial data  
25 brokers out there really pushing background checks.

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1 It's a big profitable industry. It's very --

2 And then, there's the lot of the talk around  
3 negligent hiring which actually is, you know, not all  
4 that accurate when it comes to the reality of how many  
5 folks are actually sued or held liable for negligent  
6 hiring.

7 There's all that kind of, you know, a  
8 little --

9 CHAIRMAN LHAMON: So, kind of calls for a  
10 second distinction, I understand?

11 MR. EMSELLEM: Yeah, yeah.

12 CHAIRMAN LHAMON: Is it that the conducting  
13 the background check, but at a different point in the  
14 process which is what you had said you had hoped for  
15 or is it we don't know?

16 MR. EMSELLEM: No, so they're conducting the  
17 background check, but according to these employers --  
18 so everybody's conducting background checks, mostly  
19 bigger employers, less some of the smaller employers  
20 -- but, they're conducting the background checks  
21 consistent with the EEOC Guidelines; they're  
22 considering the age of the offense, the nature of the  
23 offense, the individual assessment process.

24 Again, which is not -- which is about not  
25 removing the discretion from employers to decide who

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1 they want to hire, just applying these kind of more  
2 fair criteria.

3 CHAIRMAN LHAMON: Okay. And so, then, is  
4 it your view the fact the EEOC Guidance from 2012 is  
5 a sufficient federal step or there is something more?

6 MR. EMSELLEM: No, I think it's a huge  
7 federal step. And, again, we need more enforcement  
8 resources and they did a great job when that guidance  
9 came out, they did a great job publicizing it.

10 There was some push back from employers, but  
11 I think over these last couple of years, really,  
12 they've been very comfortable with the guidance.  
13 That's reflected in these surveys.

14 So, now, it's really about trying to enforce  
15 the law, which is true of any labor law on the books,  
16 you know, it's like it all comes down to enforcement  
17 and they need those resources to do that.

18 CHAIRMAN LHAMON: Right, right. Thank you.

19 Mr. Levin, did you look -- you look like you  
20 had something to say.

21 MR. LEVIN: No, one interesting area that's  
22 kind of emerging is healthcare workers, which we might  
23 look at.

24 Because, I know in Texas, we have a statute  
25 that's if you had virtually any convictions, you

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1 can't -- that's excepted from all these other good  
2 bills I've been talking about.

3 So, I think the aging of society that I  
4 alluded to earlier, I mean, obviously, you don't want  
5 elderly people, people in a vulnerable position being  
6 taken advantage of, so it is a delicate balance.

7 So, that's -- no, you're not elderly.

8 MR. EMSELLEM: On the healthcare issue, I  
9 mean there's a federal initiative, I think the HHS  
10 folks are here actually, where they're promoting  
11 employment because it's such a big demand industry,  
12 they're promoting employment of folks with records in  
13 the healthcare industry.

14 We received from some funding from JP Morgan  
15 Chase to hold forums around the country. We held  
16 three forums in different cities and we have an  
17 employer guide that's all about promoting employment  
18 in the healthcare industry.

19 So, Marc's right. I mean, we really want  
20 to pay attention to these growing industries. I would  
21 put transportation in that bucket as well, child care,  
22 where we know that, you know, there's a huge demand  
23 for the workers. Some of them are really good jobs  
24 and we want to make sure that those jobs, in  
25 particular, are not leaving people out.

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1 CHAIRMAN LHAMON: Thank you.

2 I want to make sure that we hear from the  
3 Vice Chair if she has questions for this panel.

4 VICE CHAIR TIMMONS-GOODSON: I do not, Madam  
5 Chair.

6 CHAIRMAN LHAMON: Perfect, thank you.

7 Any further questions from my fellow  
8 Commissioners?

9 Commissioner Kirsanow?

10 COMMISSIONER KIRSANOW: I just want to note  
11 for the record that Commissioner Kladney has a  
12 surprising amount of information related to  
13 manufacture of methamphetamines.

14 (LAUGHTER)

15 CHAIRMAN LHAMON: I'm going to not comment  
16 at all.

17 Commissioner Narasaki?

18 COMMISSIONER NARASAKI: He is from Nevada.

19 Yes, so, I had a question, we had earlier  
20 discussions about the impact of the insurance  
21 industry. We talked about it mainly in the employment  
22 context earlier and I wanted to ask about it in the  
23 housing context.

24 Because, I understand from the written  
25 testimony that there is a role that the insurance

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1 companies play in terms of causing landlords to be  
2 more restrictive than they might otherwise have been.

3 And, I wanted to get a sense from you of how  
4 would we address that?

5 MS. WALZ: I don't believe that was from our  
6 written testimony and I didn't hear the written  
7 testimony prior in terms of the insurance industry.

8 We have certainly seen the insurance  
9 industry pose limitations on who property owners can  
10 rent to.

11 They may say you cannot rent to Section 8  
12 voucher holders. They may be asking for other  
13 screening requirements.

14 In our experience, the bigger concern  
15 nationally has been local governments requiring  
16 private property owners of all size to conduct a  
17 mandatory criminal background check and to commit not  
18 to rent to an individual if they somehow fail that  
19 test, though they don't define what that background  
20 check is.

21 And so, out of an abundance of caution, so  
22 they don't lose their profession, right, and their  
23 ability to be a property owner in that town, they will  
24 exclude anyone who's had any contact with the criminal  
25 justice system whatsoever.

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1           And so, landlords and realtors, who are not  
2 always allied with tenant advocates, actually are  
3 somewhat aligned on this issue that they have lost  
4 their ability to look a tenant in the eye and determine  
5 if they will be open to renting to them even if they  
6 have a criminal record.

7           COMMISSIONER NARASAKI:        So, in that  
8 circumstance, though, what could the federal  
9 government do?

10          MS. WALZ: It may be, and there was a notice  
11 issued by HUD's Office of Fair Housing and Equal  
12 Opportunity last year, that spoke to concerns over the  
13 proliferation of crime free and rental property  
14 ordinances -- nuisance property ordinances -- and said  
15 that, these laws could violate federal fair housing  
16 laws.

17          The focus of that guidance, however, was the  
18 impact these ordinances have on victims of domestic  
19 violence and sexual assault.

20          There was a brief recognition of the impact  
21 they may also have on individuals with criminal  
22 records.

23          I think more guidance could be brought on  
24 that issue. I think there also could be opportunities  
25 to provide funds in terms of testing where we're

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1 identifying that often times the criminal records  
2 screening is actually a proxy for race discrimination  
3 and if HUD could provide that funding to Phipps and  
4 other fair housing organizations.

5 And, I think local governments have to be  
6 discouraged from enacting these laws, particularly if  
7 they are recipients of CDBG home or housing -- other  
8 housing and community development funds, that if they  
9 are using those federal dollars which require them to  
10 affirmly for their fair housing, they must, at a  
11 minimum, evaluate the impact that type of ordinance  
12 may have on protected classes, including individuals  
13 with criminal records.

14 COMMISSIONER NARASAKI: But, what is the  
15 incentive for cities to be developing in this way? I  
16 mean, what's causing them to have such strict  
17 requirements?

18 MS. WALZ: There was, out of Mesa, Arizona,  
19 there is a National Crime Free Institute. And so,  
20 they were pushing out local governments coming to their  
21 conference and talking about this was the way to reduce  
22 crime in your community.

23 And so, we saw local sheriffs in Illinois,  
24 and police officers, come back from these conferences  
25 and believed that this was the way that they were going

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1 to reduce crime in their communities.

2 In reality, when you look at the  
3 jurisdictions that have passed the laws, they will say  
4 that they've had an increase in crime.

5 What they've actually had is a change in  
6 their racial demographics. And so, they believe that  
7 the crime is going to come based upon a stereotype and  
8 some degree of bias.

9 And so, the majority of those new home --  
10 individuals may be renters and persons of color and  
11 they believe they need to regulate that market.

12 And so, you see then the passage of these  
13 crime free and nuisance property ordinances and this  
14 aggressive screening criteria.

15 And, even where there is crime among  
16 homeowners, you don't see those policies applied to  
17 the homeowners, you see it exclusively applied to the  
18 renter populations.

19 COMMISSIONER NARASAKI: Thank you, that was  
20 very helpful.

21 CHAIRMAN LHAMON: Commissioner Adegbile?

22 COMMISSIONER ADEGBILE: Ms. Walz, one  
23 practical question, with respect to the PHAs, is there  
24 a process that you suggest in which -- through which  
25 they could conduct the type of analysis that you think

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1 is more fair?

2 And, the reason I'm asking this is that a  
3 very pragmatic concern. I represent a PHA and so I  
4 have some understanding that there are some structural  
5 under funding concerns from the federal government.

6 And so, I'm just wondering whether or not  
7 they have the wherewithal to do the type of analysis  
8 that we may want them to do in a perfect world, and if  
9 not, are there any creative ideas out there, tools  
10 that could be given, pilot programs, about how this  
11 analysis can be done in a way that sort of meets the  
12 goal of trying to reunite families?

13 I'm making that disclosure, but I think it's  
14 germane to the inquiry.

15 MS. WALZ: I'm happy to offer free legal  
16 advice.

17 COMMISSIONER ADEGBILE: And, I don't  
18 represent them on this -- for this purpose.

19 MS. WALZ: The housing authority of New  
20 Orleans, I think, has a terrific model that other  
21 housing authorities of all sizes could potentially  
22 replicate.

23 They are doing the individualized  
24 assessments of an individual who has a criminal record.  
25 Certain criminal histories are not being considered at

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1 all. So, that person can be potentially eligible for  
2 housing irrespective of their history.

3 If they don't meet those exceptions then  
4 there is a three-person panel that will meet with them  
5 and do that type of individualized assessment and give  
6 them an opportunity to show that they should be  
7 eligible for this housing, that they've shown that  
8 they do have evidence of rehabilitation.

9 So, that type of forward thinking, I think,  
10 many housing authorities can adopt.

11 When we talked to housing authority  
12 directors, they want to do this. They hear directly  
13 from families who are disconnected from their loved  
14 ones.

15 It's also a safety issue for housing  
16 authorities, I would submit, that there are many  
17 individuals who are living in the shadows in subsidized  
18 housing in the United States and they are not on the  
19 lease because they can't get on the lease, but they  
20 perceive that they can't get on the lease due to these  
21 policies.

22 And so, if the housing authority and project  
23 owners are saying, here is an opportunity for you to  
24 come forward, based upon certain conditions, whether  
25 it's the New York model where there's support services

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1 that are brought in and they are there on a temporary  
2 basis until they complete the program, or the housing  
3 authority of New Orleans model where it's forwards  
4 thinking in terms of trying to get you in at the front  
5 end to reunite with your family.

6 But, I think that actually assists the  
7 housing authority in addressing, which I think is a  
8 fairly common problem of unauthorized guests on their  
9 properties.

10 COMMISSIONER ADEGBILE: Thank you.

11 MR. LEVIN: It might be interesting to look  
12 at also if there's something similar to what we have  
13 on the employment side, which is there's a federal  
14 bonding program in the workforce agencies and each  
15 state can tap into that.

16 So, in other words, if something happens  
17 after that employer has hired somebody to which there's  
18 been a bond issued under this program, then that covers  
19 whatever the costs would be.

20 And so, it's kind of like almost like a  
21 re-insurance or backup in case something arises.

22 CHAIRMAN LHAMON: Commissioner Narasaki?

23 COMMISSIONER NARASAKI: Thank you.

24 I have one last question. There was some  
25 discussion this morning, there's some discussion in

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1 the testimony about the Fair Credit Reporting Act and  
2 how it could be used to clean up some of the data that  
3 is out there.

4 So, there's offerings of saying, well, FDC  
5 and CFPB should do more enforcement, but not exactly  
6 what kind of enforcement would be helpful and why  
7 aren't they doing it now?

8 MR. EMSELLEM: I can speak a little bit to  
9 that.

10 I think what's needed, you know, like I've  
11 saying before, it's a huge industry, the background  
12 check industry and a very profitable industry. So,  
13 you know, it's hard to regulate an industry that big.

14 So, I think what's needed is definitely some  
15 enforcement resources and CFPB was starting to do more  
16 of that. But also, some targeted audits, I think, and  
17 they have some authority to do that and some new  
18 regulations. And, you know, obviously, in this  
19 environment, it's hard to get a lot of this stuff on  
20 the books, but that's the sort thing, targeted auditing  
21 is very common in other areas where you know there's  
22 a problem, you've picked up on a problem in a certain  
23 area and then the agency has the authority to go in  
24 and ask a lot of questions about what's going on with  
25 that particular background check company.

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1           And then, you've got a lot of new products  
2           that keep coming down the pike that are not just  
3           standard background checks, but like there's a whole  
4           new product around retail. If you've ever had a  
5           problem working for a retail employer, now you end up  
6           in a database. Well, that's another form of  
7           background check.

8           So, kind of getting on top of these sort of  
9           de-regulated industries or new industries, that's  
10          another important feature of advice.

11          But, yes, the FCRA is a huge component of  
12          what we're talking about here.

13          COMMISSIONER NARASAKI: Thanks, very, very  
14          helpful.

15          CHAIRMAN LHAMON: Well, thank you.

16          Let me ask again, any further questions?

17          (NO RESPONSE)

18          CHAIRMAN LHAMON: Hearing none, thank you  
19          very much for this panel and, again, for a really  
20          informative panel and for the work that you've done  
21          that led up to it and really look forward to the follow  
22          up information that you have promised us as well.

23          Thank you.

24          Before we end this portion of our day and  
25          the briefing, I want to say, again, that the record

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1 for this briefing will remain open for 30 days and we  
2 really invite further presentations, further  
3 information to us.

4 It's very helpful to us, as the staff at the  
5 Commission generate the reports, the report that will  
6 follow from this and also as each of the Commissioners  
7 generates our statements.

8 So, if panelists or members of the public  
9 would like to submit materials, they can mail them to  
10 U.S. Commission on Civil Rights, Office of General  
11 Counsel. The address is 1331 Pennsylvania Avenue,  
12 Northwest, Suite 1150, Washington, D.C. 20425.

13 And, by email to [reentry@usccr.gov](mailto:reentry@usccr.gov).

14 So, with that, I thank the panelists and I  
15 thank our audience.

16 And, we will take a 15 minute break before  
17 proceeding with our business portion of the meeting.

18 Thank you.

19 (Whereupon, the above-entitled matter went  
20 off the record at 2:33 p.m.)

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