

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NACDL TASK FORCE ON RESTORATION OF RIGHTS

AND STATUS AFTER CONVICTION

WASHINGTON, D.C. WITNESS SCHEDULE

Day 1
Wednesday, February 20, 2013

National Association of Criminal
Defense Lawyers
1660 L Street, N.W.
12th Floor
Washington, D.C. 20036

The hearing convened, pursuant to notice, at
1:00 p.m.

BEFORE:

RICK JONES, Task Force Chairman

ANGELYN FRAZER, State Legislative Affairs Director

ATKINSON-BAKER, INC. COURT REPORTERS
(800) 288-3376
www.depo.com

REPORTED BY: CATHERINE B. CRUMP
FILE NO. A701678

1 Meeting Participants:
2 ELISSA HENDRICKS
3 MARGARET LOVE
4 JENNY ROBERTS
5 PENELOPE STRONG
6 GENEVA VANDERHORST
7 CHRISTOPHER WELLBORN
8 VICKI YOUNG

8 I N D E X

9 WITNESSES	PAGE
10 PANEL 1	6
11 June B. Kress, Executive Director, Council for	
12 Court Excellence, Washington, D.C.	
13 Peter M. Willner, Senior Policy Analyst, Counsel	
14 for Court Excellence, Washington, D.C.	
15 Judy Conti, Federal Advocacy Coordinator,	
16 National Employment Law Project,	
17 Washington, D.C.	

18
19
20
21
22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

P R O C E E D I N G S

MS. FRAZER: We are ready. Rick Jones is chair of this task force.

MR. JONES: Welcome. We are pleased to be here in Washington, D.C. This is -- I've lost track -- the fourth or fifth, I think, maybe of our hearings on the Restoration of Rights and Status After Conviction. We've been around the country taking testimony and we are now happy to be here in the Nation's capital, in Washington, D.C.

At the outset, I think we ought to thank -- obviously, this is a project of the National Association of Criminal Defense Lawyers, and we are happy to be here in their offices for the next three days of what we think are going to be phenomenal hearings, lots of interesting folks, and you guys are the kickoff to three days of really good listening for us.

I want to thank, just at the outset, Norm Reimer, who's the executive director, Angelyn Frazer, the State Legislative Affairs director, and Elsa Ohman, who I don't think I've met yet -- there she is

1 -- but who has also done really great work in putting
2 this whole three days together for us and allowing us
3 to come in here and just do the fun part and talk
4 with you all.

5 I'm Rick Jones. I'm one of the co-chairs and
6 I practice in New York. Before we get under way, I
7 want to let my colleagues have a chance to introduce
8 themselves. Then I'll give you a little sense of how
9 this works, the format, and then we'll turn the floor
10 over to you.

11 So let me start with Vicki.

12 MS. YOUNG: Good afternoon. My name is Vicki
13 Young. I'm another one of the co-chairs of the task
14 force. I'm an attorney in private practice in San
15 Francisco, California.

16 MS. STRONG: Good afternoon. My name is
17 Penelope Strong. I practice in Billings, Montana. I
18 practice primarily in the area of criminal defense,
19 civil rights, and employment law.

20 MS. LOVE: I'm Margaret Love. I'm in private
21 practice also, and my practice involves restoration
22 of rights and status, largely in the federal area,

1 but I also do some State work.

2 MS. ROBERTS: Jenny Roberts. I'm the
3 reporter for the task force and I'm a professor at
4 American University, Washington, D.C.

5 MR. JONES: And I think I saw back there
6 hiding Jerry Cox, who is NACDL president elect, and
7 we're happy to have him here as well.

8 So let me just give you guys a quick sort of
9 sense of how this works and then we'll turn the floor
10 over to you. We are going to ask you to give us five
11 or ten minutes each, a little bit of background about
12 yourselves and the work that you do, and then we've
13 got lots of questions for you.

14 The way that we do the questioning is that
15 one of us leads the discussion, and for purposes of
16 this conversation, the person who will lead this
17 discussion is Margi Love. When she has had her fill,
18 then if there's time, the rest of us will also
19 participate and ask some questions as well.

20 But let me stop talking and let me turn the
21 floor over to you and we're very interested to hear
22 what you have to say and to learn from the work that

1 you're doing.

2 PANEL I

3 MS. KRESS: Thank you very much. We really
4 appreciate the invitation to be here today.

5 Good afternoon. My name is June B. Kress,
6 and I'm the executive director at the Council for
7 Court Excellence, and I'll be referring to the
8 council as either "CCE" or "The Council".

9 With me today is Pete Willner, who is a
10 senior policy analyst at the council, and in his
11 civic capacity, he's a member of the D.C. Commission
12 on Reentry, and we're appearing today on behalf of
13 the Council for Court Excellence, and I want to point
14 out as we always do with our testimony that no
15 judicial member of the CCE Board of Directors
16 participated in the formulation of this testimony.

17 The Council for Court Excellence is a local
18 nonprofit nonpartisan civic organization that is
19 dedicated to improving the administration of justice
20 in the District Columbia. Since being founded in
21 1982, CCE has been a unique resource that brings
22 together members of the civic, legal, business, and

1 judicial communities to identify and promote justice
2 system reforms, improve public access to justice, and
3 increase public understanding and support of the
4 justice system.

5 Beginning with our work in 2005 to develop
6 and promote the Criminal Records Sealing Act,
7 legislation passed by the D.C. Council in 2006, the
8 Council for Court Excellence has continued to address
9 the effects of a criminal record on employment. We
10 have done so through our D.C. Prisoner Reentry
11 Initiative Advisement Committee which in late 2011
12 published an action plan entitled "Unlocking
13 Employment Opportunity for Previously Incarcerated
14 Persons in the District of Columbia". This is the
15 report and we have brought several copies for you
16 today.

17 The major finding of the report was an almost
18 50 percent unemployment rate in a sample of over 550
19 previously incarcerated persons. The chronic
20 unemployment among persons with criminal records
21 exacerbates the city's already high unemployment rate
22 and threatens the District of Columbia's long-term

1 economic health and safety.

2 The report was developed by the advisory
3 committee named above which includes a broad range of
4 stakeholders in the District's criminal justice
5 system, including law enforcement and corrections
6 officials, employer organizations, nonprofit
7 organizations that provide services to current and
8 former offenders, and members of the CCE Board of
9 Directors. As they began their work, there was
10 consensus among the group that employment among
11 previously incarcerated persons was a critical issue
12 and that CCE was well qualified to address it,
13 recognizing there are other equally pressing social
14 service needs among former offenders, including
15 housing, substance abuse, mental health, and
16 education among others. CCE's goal was to identify
17 consensus reforms to strengthen employment reentry
18 services, programs, and policies currently utilized
19 by the District of Columbia.

20 I'm going to talk a little bit about the
21 national context of criminal records and employment.
22 I know that many of you are familiar with the data

1 that I'm about to present, but in case you aren't,
2 which I doubt is the case, approximately 2.3 million
3 people are confined in Federal, State, or County
4 prisons or jails in the U.S. The U.S. has just five
5 percent of the world's population, but confines over
6 23 percent of the world's prisoners.

7 More than 5.1 million people are reported to
8 be under some form of correctional control.
9 According to recent estimates, between 12.3 and 13.8
10 million people have a felony conviction, and perhaps
11 the most surprising is the recent estimate of 92.3
12 million people in the United States who have a State
13 criminal record which include arrests that do not
14 result in convictions.

15 Research shows that securing meaningful
16 employment can have positive effects on reducing
17 recidivism, increasing the likelihood of previously
18 incarcerated persons successfully reentering society
19 and enhancing public safety. This notion is
20 supported by several studies showing stable
21 employment lessens the chances of re-offending
22 following release from prison.

1 Research also suggests that higher wages
2 lessen the likelihood of re-offense. Additional
3 studies suggest that at the bear minimum, employment
4 increases the amount of time that previously
5 incarcerated persons spend crime-free before
6 returning to prison.

7 And we thought we would say something about
8 the District of Columbia policy context. I think
9 it's worth noting the considerable effort that the
10 District of Columbia Government has put into
11 addressing some of the collateral consequences of
12 criminal convictions.

13 From 2006 through 2012, D.C. has enacted the
14 Criminal Records Sealing Act of 2006, the Office on
15 Ex-Offender Affairs and Commission on Reentry and
16 Ex-Offender Affairs Establishment Act of 2006, the
17 Returning Citizen Public Employment Inclusion
18 Amendment Act of 2010, and the Reentry Facilitation
19 Amendment Act of 2012. This is not meant to be an
20 exclusive list, but it represents in our view a
21 considerable amount of effort and energy from
22 District of Columbia policymakers in a relatively

1 concentrated period of time.

2 The combined effect of these legislative
3 initiatives alone brings the District of Columbia in
4 line with some of the most aggressive jurisdictions
5 in the country with respect to legislation designed
6 to assist persons with criminal records.

7 Now I'd like to briefly talk about some of
8 the report findings. An estimated 60,000 people in
9 the District of Columbia have criminal records and
10 about 8,000 of them return to the city each year
11 after serving sentences in prison or jail. After
12 just three years, some 4,000 will be back behind
13 bars. While the lack of a job is only one factor
14 leading to recidivism, research shows that when the
15 previously incarcerated have stable employment, they
16 are less likely to return to crime and public safety
17 improves.

18 CCE surveyed over 550 previously incarcerated
19 persons in the District of Columbia to learn about
20 the employment challenges they face upon leaving
21 prison or jail. Among the key findings were 46
22 percent of those surveyed said they were unemployed.

1 77 percent said they received no assistance from,
2 quote, anyone at the facility in helping them look
3 for a job. 80 percent of respondents said they were
4 asked, quote, all the time about their criminal
5 records when looking for a job. Just 50 percent of
6 those who received an education or training
7 certificate while they were incarcerated said it
8 helped them find work after their release, and there
9 was little or no difference in employment rates for
10 those who earned a GED or job certificate before or
11 after prison and those who did not earn a GED or job
12 certificate.

13 The Council for Court Excellence also
14 conducted surveys and interviews of a diverse group
15 of nearly 20 District employers ranging in size from
16 15 to nearly 700 employees and also with
17 representatives of D.C. business associations. Their
18 responses indicate that a variety of obstacles stand
19 in the way of hiring previously incarcerated persons.
20 Most, and that would be 80 percent, said they do have
21 a policy in place for hiring previously incarcerated
22 persons and instead rely on application forms that

1 ask about criminal history.

2 Although one-third of respondent employers
3 said they have hired a previously incarcerated person
4 in the past or would do so if the opportunity arose,
5 more than 50 percent said factors such as legal
6 liability protection, certificate of good standing or
7 rehabilitation, and industry-specific skill training
8 would, quote, significantly increase or influence
9 hiring.

10 And now let me turn the microphone over to
11 Pete Willner to talk about report recommendations.

12 MR. WILLNER: Thanks, June.

13 Two of CCE's recommendations in our report
14 have just been adopted as of last December in the
15 recently enacted Reentry Facilitation Amendment Act
16 of 2012. Right now, it's awaiting a congressional
17 review period before it becomes D.C. law.

18 These recommendations include the creation of
19 a liability protection standard for employers that
20 hire persons with a criminal record and the creation
21 of a certificate of good standing program. Since
22 legal liability has long been a concern of D.C.

1 employers with respect to hiring persons with a
2 criminal record, it was also an issue during the
3 legislative consideration of the Criminal Records
4 Sealing Act of 2006 which June referenced earlier.

5 CCE recommended that the D.C. Council
6 consider and enact liability protection for employers
7 that hire previously incarcerated persons. Minnesota
8 and New York provided examples of liability
9 protection legislation that were the basis for an
10 employer which increased the likelihood of reentry
11 employment by minimizing the risk of negligent hiring
12 lawsuits against businesses employing previously
13 incarcerated persons.

14 CCE analyzed the Minnesota and New York
15 statutes and held extensive committee meetings that
16 created a specific proposal for D.C. that we thought
17 combined the best of both the New York and Minnesota
18 approaches.

19 The Minnesota model is also instructive in
20 that it appears that Minnesota simultaneously enacted
21 both employer liability protection, which they call
22 safe hire legislation, and the Minnesota State

1 Government's Ban the Box legislation. Their model
2 appears to be based on the principle of having the
3 public sector take a role with respect to hiring
4 former offenders and offering softer incentives to
5 the private sector.

6 The D.C. Government has already enacted a
7 local Ban the Box bill for certain D.C. Government
8 jobs. So when the Reentry Facility Act is law, D.C.
9 will be in accord with the Minnesota model.

10 Liability protection provides that
11 information regarding the criminal history record of
12 a former employee shall not be introduced as evidence
13 in a civil action against a private employer or its
14 employees or agents as based on the conduct of the
15 employer or former employee if the employer has made
16 a reasonable good faith determination based on a
17 multifactor test of hiring or retaining the applicant
18 or employee.

19 The certificate of good standing program is
20 based on employers expressing interest in our survey,
21 and in such a program that might be issued a
22 corrections supervision agency. So certificates

1 would increase employer comfort level in considering
2 whether to hire previously incarcerated persons by
3 indicating that an individual has completed their
4 sentence and is in good standing with the conditions
5 of their release.

6 We had other recommendations in our report,
7 and those included that the D.C. Government Justice
8 Grants Administration annually review the performance
9 of D.C. Government contracts and grants related to
10 reentry and develop a compendium of best practices to
11 better direct future reentry programs. No such
12 evaluations of D.C. reentry funded programs were
13 found when we did our scan.

14 And the Federal Bureau of Prisons and, if
15 necessary, the court services and offender
16 supervision agencies in the U.S. Parole Commission
17 should regularly review and revise the employment
18 programming available to D.C. residents based on
19 current employment trends and job forecasts. At
20 present, job training opportunities in prison for
21 jobs in the District are too few, increasing the
22 focus on applicable training for previously

1 incarcerated persons reentering society.

2 I think this recommendation probably bears a
3 little bit of expansion in terms of this group
4 because D.C.'s prison system is unique in that our
5 State-level prison system is the Federal Bureau of
6 Prison and whenever someone exits the Federal Bureau
7 of Prisons, they are supervised by the court
8 Supervision Offender Agency, which is a federal
9 agency. So D.C. has a unique blend of Federal and
10 State functions in that area.

11 This concludes our statement. We'll be happy
12 to answer any questions.

13 MR. JONES: Thank you. Thank you very much.
14 Margi.

15 MS. LOVE: I'm really so happy that you all
16 were able to come today because it seemed to me that
17 the efforts being made in D.C. sort of mirror the
18 questions that we've been asking as a task force.
19 Restoration of rights and status is the what of it.
20 Relief from collateral consequences, legal
21 disabilities, the status part of it is really the
22 statement, the reputational consequences that make

1 private employers, for example, that may not be
2 subject to laws hesitant, reluctant, worried.

3 So that's kind of the what. The how that
4 we've been struggling with is this sort of
5 50-year-old conversation about forgiveness versus
6 forgetfulness and whether a kind of expungement,
7 sealing, forget about it, hide it approach -- that
8 word probably gives me away a little bit -- is better
9 than a forgiveness approach, a pardon, for example, a
10 certificate of rehabilitation.

11 And the third question I think we've been
12 asking is who should do it and what should do it,
13 institutionally who should be responsible, what's the
14 most effective way.

15 So with that, I'd like to ask you about, I
16 guess plunging right into the middle of it, the
17 certificate of good standing idea which, you know, I
18 saw is a part of your recommendation and now is a
19 part of the law. Can you explain a little bit more
20 to us about how that works? What is the legal affect
21 of a certificate? What is the predicate finding and
22 who makes the funding?

1 MR. WILLNER: So what we offered, the
2 recommendation we offered in the report, was really
3 sort of broad parameters of what a program might look
4 like based on what New York and Illinois had in place
5 already. What was enacted by the D.C. Council last
6 year was something that was quite a bit different.

7 The D.C. Council in the law they passed said
8 that right now, the D.C. Mayor is the one who issues
9 the certificate, and I guess the predicate for that
10 is someone has to have completed their sentence and
11 including a period of probation or supervised release
12 or parole and then have to have had a waiting period
13 after that before they can apply for the certificate.

14 When there was a public hearing held about
15 this component of the Reentry Facilitation Act, this
16 was actually somewhat controversial. There were some
17 people who were not in favor of a certificate program
18 at all. The D.C. Council view was that a certificate
19 program has been proposed to be adopted by the D.C.
20 executive for at least six years, and so I think that
21 their passage of kind of a shell of the law was a
22 little bit probably in frustration from, I think, the

1 Legislative Branch about having the executive adopt
2 something.

3 It's an interesting sort of facettted program,
4 but the Legislative Branch gave the Executive
5 rulemaking authority to further define the
6 certificate program in any way it saw fit.

7 So there's a lot left unformed about the
8 certificate program that's been enacted, and I assume
9 the Executive is going to be taking up their
10 rulemaking authority to further refine the program.
11 So I think there's more yet to come in this.

12 MS. KRESS: I would just add that when we
13 were talking about this within the committee that
14 produced this report, the issue of who would provide
15 the certificate, who would run that type of program,
16 this was not -- we were not able to reach consensus.
17 There was consensus that there should be a
18 certificate of good standing program or
19 rehabilitation program, but who should run it was --
20 there was no agreement whether, you know, the Parole
21 Commission -- even the Office on Returning Citizens
22 Affairs said, Well, maybe we could, which was not a

1 viable alternative.

2 So it remains to be seen how this will
3 unfold. The question of who is a very important
4 question.

5 MR. WILLNER: And the complication in D.C.,
6 of course, is always the local and federal overlap.
7 So the Mayor has no authority to have the court,
8 court services, or the U.S. Parole Commission issue a
9 certificate. You can ask them to do it and they can
10 say no. So the authority is very limited.

11 MS. LOVE: What has been -- I saw in your
12 report that there has been a little bit of pushback
13 from the justice agencies who thought it was too much
14 trouble. I think that they thought it cost too much
15 or something like that, thinking of what you said
16 about why the pushback was coming.

17 Maybe I should ask you what the source of the
18 pushback was rather than try to characterize it
19 myself and ask you, also, whether the Federal
20 Government -- I mean, you all -- the D.C. offenders
21 are prosecuted by the United States Attorney,
22 supervised by a federal agency. Release decisions or

1 revocations are made by a federal agency.

2 So what's been the role of the justice
3 agencies? What's been their attitude toward this
4 kind of a restoration mechanism?

5 MR. WILLNER: I think they've been supportive
6 of this and I think that there has been growing -- I
7 think everybody is, all the agencies, federal and
8 local, are really becoming much more focused on
9 collateral consequences and how people can overcome
10 those hurdles.

11 Let me just say that in our report, we
12 qualify employer liability protection and the
13 certificate program as likely to not have a major
14 affect. I think they're going to help certain people
15 in certain situations, but I don't think they are
16 going to have a huge giant impact on people.

17 So let me -- having said that, let me go to
18 your question about some of the pushback. I think
19 that when we were discussing the certificate program,
20 I think that the justice system agencies were very
21 mindful of the number of filings to seal criminal
22 records that have been filed since the bill became

1 law back in late 2006. There's been about 5,000
2 applications, and I think that that volume gives the
3 agencies a little bit of pause. I mean I think that
4 the agencies did have legitimate concerns about the
5 budgetary and staffing effects that, you know,
6 applications and the people -- that would have on
7 their agencies.

8 I think there was a lot of -- we had a lot of
9 discussions about what to name the program. In New
10 York, they're called certificates of rehabilitation.
11 We couldn't get any consensus on any one agency ever
12 trying to certify that someone was rehabilitated.
13 That's why we call it a certificate of good standing.

14 So I think the pushback came, I think, from
15 some legitimate areas, budgetary and staffing
16 concerns, discussions sort of philosophically about
17 what -- you know, could someone really certify that
18 someone had been rehabilitated, but I think that
19 everybody is really trying to address these issues
20 and I think that the cooperation between the local
21 and federal agencies is really actually very good,
22 but there are some legitimate questions.

1 MS. KRESS: Another issue that came up a
2 great deal was the issue of timing, how frequently
3 should these be issued, because if you have a waiting
4 period of a year, what good does it do in someone's
5 ability to get to the top of a pile of applicants for
6 a job? And so the issue of how long do you have to
7 wait in order to apply, how long do you have to wait
8 in order to get the certificate, the timing is an
9 important issue.

10 MS. LOVE: Well, it seems to me that that
11 plays into what a certificate means. I mean, if it
12 only means you are currently not in violation of the
13 law, you kind of wonder what affect that would have.

14 We had a hearing in Chicago and we heard from
15 the chief judge of the criminal court there, Paul
16 Biebel, and we heard from people about the
17 certificate of rehabilitation program. They actually
18 have two different kinds of certificates there, one
19 for licensing and there is a certification from the
20 court. The court administers the certificates there
21 as they do in most States that have developed
22 certificate programs.

1 Ohio recently just enacted a certificate
2 program that's administered by the courts. Did you
3 all think about having the certificate program
4 administered by the court? Did you talk to any
5 jurisdictions where that is the way it's done?

6 I'm thinking, for example, the Model Penal
7 Code Provision Project right now that's underway has
8 the courts responsible. The Uniform Act has the
9 courts responsible. The ABA standard says the court
10 is responsible. So I'm wondering what conversation
11 you all had about making the courts responsible.

12 MR. WILLNER: That's partly why we used New
13 York and Illinois as a model, but the challenge in
14 D.C. is that our local legislative body cannot
15 creation such a program, cannot compel the courts to
16 do such a program. Only Congress can pass a law that
17 affects the court structure and organization.

18 The courts were part of our committee, and I
19 think that there was, you know, a little bit of
20 concern about the creation of a certificate program
21 and, you know, sort of along the similar lines of
22 budget, staffing, how would this affect the court's

1 workload.

2 You know, at the end of the day, the D.C.
3 Council cannot mandate the courts adopt a certificate
4 program. It's called Home Rule in D.C. and their
5 general counsel determined that there were Home Rule
6 obstacles to having the courts issue the certificate.

7 So that limits the choices in D.C. quite a
8 bit.

9 MS. LOVE: It's kind of interesting because
10 we did not get a sense that in Illinois, for example,
11 or Ohio that there were budgetary concerns, but I can
12 see how if there are 5,000 applications for sealing
13 that the prospect of having 5,000 people apply for
14 certificates would be a little daunting.

15 I have one more question that I would like to
16 ask, reserving my time. Can we do that?

17 MR. JONES: Of course, absolutely.

18 MS. LOVE: Did anybody -- this is --
19 everybody will laugh at me for asking this question.
20 Did anybody in the course of your conversations about
21 how to sort of restore respectability, if you will,
22 restore reputation, did they talk about the one

1 remedy that is authorized for D.C. offenders, sort of
2 the mega remedy, and that's pardons, Presidential
3 pardons?

4 MR. WILLNER: That hasn't come up. I mean,
5 we briefly touched on the Mayor's authority to do
6 pardoning, but not on a --

7 MS. LOVE: No one mentioned Presidential
8 pardons?

9 MR. WILLNER: No.

10 MS. LOVE: Okay. That's interesting to me
11 since that is the remedy that's available and it's
12 sort of interesting that that didn't come up.

13 The last question is this: There's a lot in
14 your report about private employment. What about
15 public employment? Is there an issue with the
16 Federal Government employment, D.C. Government
17 employment? What are the various public licensing
18 issues for public employment?

19 MR. WILLNER: In one of the appendices in our
20 report, we have the Returning Citizen Public
21 Inclusion Employer Act of 2010. That's the D.C.
22 Government Ban the Box bill.

1 So in 2010, the D.C. Government created law
2 to Ban the Box for many D.C. Government jobs,
3 excluding jobs like teachers and corrections
4 officials and law enforcement officers, and I suspect
5 it probably mirrors other States' Ban the Box bills
6 with respect to government agencies as well.

7 MS. LOVE: Are there any barriers to
8 employment for people with a record in D.C., legal
9 barriers?

10 MR. WILLNER: I expect they're probably the
11 same as they would exist probably anywhere else. I
12 mean, D.C. is -- you know, one other unique aspect is
13 this is the hub for Federal Government employment.
14 There are lots and lots of federal barriers to
15 employment.

16 Our committee of the size of a small
17 organization like ours really couldn't begin to
18 address the area of federal barriers to employment.
19 So we excluded that from our look and focused solely
20 on the local D.C.

21 MS. LOVE: Although we've heard from the
22 Federal Government that there are no legal barriers

1 to federal employment.

2 So I'm going to turn this over.

3 MS. CONTI: I'm so sorry to interrupt. Hi,
4 Margi.

5 I'm Judy Conti. I'm also on the panel.
6 People knew I was arriving late. I apologize for
7 that.

8 MR. JONES: We are going to pause just for a
9 second and have you come around and join us.

10 MS. LOVE: I'm going to turn the questioning
11 over to my colleagues.

12 MR. JONES: So even though you don't have a
13 name tag --

14 MS. CONTI: Thank you, and I'm so sorry for
15 being late and I appreciate the accomodation of
16 allowing me.

17 MR. JONES: We're happy to have you and we're
18 going to get you all caught up.

19 MS. CONTI: Please continue with my good
20 friends, Peter and June, and you can get to me
21 whenever.

22 MR. JONES: What I'd you to do is to just

1 give us maybe five or ten minutes of an opening
2 statement by way of sort of your background, the work
3 you're doing now, and then we've got a bunch of
4 questions for you.

5 MS. CONTI: Excellent. My name is Judy
6 Conti. I'm with the National Employment Law Project.
7 We are a nonprofit and nonpartisan organization, and
8 we advocate on behalf of low wage and unemployed
9 workers across the country on statewide issues, local
10 issues, and federal issues.

11 One of our areas of expertise is what we call
12 our Second Chance Labor Project and working to help
13 remove unreasonable barriers that people with
14 criminal records face in getting employment. I have
15 done this work for well over a decade, previously on
16 the local level, and got to work very closely with
17 Peter and June on D.C. issues as well. So it's great
18 to be with my old friends again.

19 One of the things, the main thing, that Margi
20 has asked me to talk about today is our work that
21 we've done around the TWIC program, Transportation
22 Worker Identification Credential, and we bring it up

1 because we think this really is a model program that
2 helps people with records get that second chance and
3 get the look that they deserve.

4 In the aftermath of 9-11, not surprisingly,
5 there was a big concern about security on any number
6 of levels, not the least of which is people working
7 in our ports, because, obviously, those are very
8 vulnerable areas.

9 So a series of background checks was
10 instituted by law that would require everybody
11 working in ports to get this Transportation Worker
12 Identification Credential, the TWIC card, and through
13 a lot of great advocacy led primarily by labor unions
14 and transportation and trade departments in
15 particular, they got a lot of very robust worker
16 protections in this law, both to recognize that we
17 shouldn't hold stale offenses against people for too
18 long, but also that the criminal records systems in
19 our country are very flawed, and in particular, this
20 would go through the FBI database, which has about a
21 50 percent inaccuracy rate.

22 Yeah. I mean, the FBI that holds itself out

1 as the best law enforcement agency in the entire
2 world, the premier law enforcement agency, has a very
3 flawed database, not entirely their fault to be fair.
4 This was a database that was set up in the aftermath
5 of the Brady gun laws and used primarily or almost
6 exclusively to do gun checks to see if people get
7 firearms, a license to get firearms.

8 What happens is States are required to report
9 in all of the criminal activity to this database.
10 States are exceptionally good at reporting arrests
11 and convictions. Everything else in between really
12 varies. It's getting better as things are more and
13 more automated and it becomes easier for them to do
14 it, but, you know, there are just decades and decades
15 of documents and boxes that are in dusty basements of
16 courthouses that have never gotten into the database
17 and never will, and the primary inaccuracies are
18 really about incompletions.

19 Over 50 -- about 50 percent of the records --
20 now the FBI is saying it's only 46 percent of the
21 records. So about 50 percent of all of these pending
22 arrests that appear to be unresolved, still open

1 arrests, but, in fact, they have been resolved in
2 favor of most of the people in their database. Their
3 cases have been dismissed, nol prossed, no papered,
4 whatever the various dispositions are.

5 So what the unions fought really hard for
6 were a series of protections, first of all, putting
7 on really narrowly tailored disqualifications. Only
8 specific felonies would be considered a threat for
9 terrorism. Nothing more than seven years old could
10 be held against anybody or if you were released from
11 incarceration within the last five years.

12 So a recognition that if somebody has been
13 clean, so to speak, for five to seven years, they
14 really weren't much of a risk, and in particular,
15 they excluded the felony of drug possession, not to
16 say that possession of drugs isn't a serious offense,
17 but it is not something that is actually a threat, a
18 terrorism threat, on the ports.

19 They also put in a very robust system of
20 appeals and waivers. A waiver is basically when you
21 say, All right, I have one of the disqualifying
22 offenses within the timeframe, but there are

1 additional things about my history that have
2 basically shown my rehabilitation and redeemed me
3 and, therefore, I'm not a terrorism threat; and then
4 there is an appeal procedure which is saying, No, no,
5 no, the record is wrong, all the things that I was
6 just talking about, that the arrest really was closed
7 out, I was never convicted of anything.

8 Some of the other things that we think work
9 really well about this system are that there is an
10 independent entity, a contractor that reads the
11 records and makes the determination whether somebody
12 is eligible or not on their face as opposed to TSA
13 doing it. Unfortunately, people in these kind of
14 positions that are reviewing records don't always
15 really understand in total depth what the records
16 mean and what they don't mean and they make very
17 innocent errors. Instead, there is an independent
18 entity that is very specifically and rigorously
19 trained in what the records mean, what is
20 disqualifying and what isn't, and they make the
21 determination, not the agency.

22 Nothing is final. No worker is disqualified

1 from getting their credential until either their
2 appeal or waiver petition has been finally determined
3 or the time for appeal and filing of a petition has
4 run. So they basically get some breathing room to
5 let this work its way and the notice of waiver and
6 appeal rights are very well drafted and relatively
7 easy to follow. The average worker without legal
8 expertise, they would be able to navigate this system
9 on their own.

10 I think the statistics around this program
11 really bear the success of it as well. There have
12 been about 2.3 million applications for TWIC cards so
13 far since the institution of the program. About
14 114,000 people have applied for waiver or have been
15 denied cards originally, and about 58 percent of
16 those denials have filed petitions for waivers or
17 appeals. About four times as many people have filed
18 petitions for waivers. The record was wrong, and
19 then the other part is the record is right, but I'm
20 still not a terrorism risk.

21 Overall, 94 percent of these petitions are
22 resolved in favor of the petitioner. 85 percent of

1 the people who ask for a waiver, that they have the
2 criminal history, but they're not a risk, 85 percent
3 of those people get the waiver and 97 percent of the
4 people who file appeals have their appeals favorably
5 granted.

6 Of those that don't file appeals, the 42
7 percent, we gather that, you know, some percentage of
8 them know that they'll not get the credential, that
9 they have, you know, a history that would bar them
10 from getting it or, quite frankly, just don't follow
11 through either because they don't have the
12 wherewithal or there's some other decision that
13 they've made.

14 So we don't believe that that entire 42
15 percent is ineligible. There's probably some
16 percentage of people that could press through and
17 win, but don't for whatever reasons.

18 But, you know, we think the overwhelming
19 success rates show just how vital this program is.
20 We had issued a report on it saying it's basically
21 worth its weight in gold. It is. It's giving
22 workers individualized chances to make their case to

1 get that second chance, and these are really good
2 jobs. You know, the jobs in our ports pay good
3 money. It's largely a unionized workforce. They've
4 got very good benefits, very good working conditions.
5 These are jobs that keep people solidly in middle
6 class existence. So they're very important jobs for
7 our economy.

8 So that's what I wanted to just tell you
9 about a little bit. I mean, I think this really is a
10 great best practice and it's a program that is as
11 more and more -- there are more and more efforts in
12 Congress to institute background checks for people
13 that work with children in schools and as volunteers
14 and chemical and safety workers.

15 You know, over the last three or four years
16 alone, there have been more than a dozen times that
17 there have been bills at least proposed that would
18 institute more background checks. This is the kind
19 of procedure that NELP is very actively lobbying to
20 get included in any of those bills so there are ample
21 worker protections and people get that second chance
22 that they deserve.

1 MR. JONES: Margi, questions for Ms. Conti?

2 We've been joined, by the way, by Geneva
3 Vanderhorst, I see.

4 MS. LOVE: I'll just ask you a couple of
5 questions because I know that others have questions.

6 How successful -- well, first of all, how
7 critical was the union's support?

8 MS. CONTI: Critical. Yeah. They had the
9 power to make this happen in this context because
10 they represent such a high density of port workers.

11 MS. LOVE: Have they continued to be
12 supportive? I can appreciate how their existing
13 workforce at the time of 9-11 would be very
14 supportive, but they continue to be supportive?

15 MS. CONTI: They have. They continue to be
16 supportive in the overarching sense. You know, in
17 every second chance issue that we deal with, the
18 AFL-CIO is one of our most active partners, but also
19 their individual divisions or unions, like the
20 chemical workers union, whenever it has come up that
21 it's a specific part of their workforce that would be
22 impacted, that particular member union has also

1 gotten involved. We've worked a lot with the
2 American Federation of Teachers and the National
3 Education Association on school background check
4 issues. So they've been -- they remain a very vital
5 part of our work.

6 MS. LOVE: That is very interesting to me,
7 that the AFT might have been, because it's been my
8 impression that teachers have no protection at all
9 and people working in schools.

10 MS. CONTI: The teachers unions have a
11 delicate balance. They understand that they lose
12 credibility by fighting background checks too hard,
13 and we all agree that, you know, certain people
14 shouldn't have certain jobs. Right? You know, the
15 person just recently convicted of child molestation
16 should not be working in a daycare. You know, it's
17 an extreme example.

18 MS. LOVE: The usual example.

19 MS. CONTI: And the usual example, right.

20 So they do have a delicate balance because
21 they understand that their credibility is at stake to
22 some degree and the entity of their membership is at

1 stake. So they want to make sure that the right
2 people are in the classrooms.

3 But no. They've worked with us, and I'm not
4 saying we're always in complete lockstep, but on the
5 overarching goal of making sure there are appropriate
6 due process protections for workers, the union
7 movement and community at large is very supportive.

8 MS. LOVE: That's a subject area that's real
9 interesting to me and because it has sort of the
10 interaction of federal and state laws makes it a
11 little more complicated than the TSA perhaps.

12 MS. CONTI: Right.

13 MS. LOVE: Are there are any other particular
14 pieces of legislation where you've been able to get
15 these kinds of due process protections incorporated?

16 MS. CONTI: Not yet, although there are a
17 number of -- like the Protect Act that Senator
18 Schumer is -- he was pretty close to actually getting
19 it to move last term, but it didn't and they're
20 trying again this year. Again, it's about people who
21 have access to child and daycare centers and schools.

22 We've been working really closely with their

1 staff and have gotten them to amend the bill fairly
2 substantially to include all sorts of different kind
3 of protections, consideration of the -- explicit
4 consideration of the EEOC guidelines about hiring
5 people with criminal records as well as consideration
6 of some of the due process protections as well.

7 MS. LOVE: Boy, that would be a tremendous
8 accomplishment, because there are many, many laws
9 that bar people from having anything to do with
10 volatile populations. That's a really major area.

11 MS. CONTI: It is and, again, obviously, when
12 you're talking about sick people, disabled people,
13 children, it's honestly even more delicate and
14 squeamish, if you will, than port safety or port
15 workers. So there are sort of additional emotional
16 and atmospheric battles that you have to fight as
17 well, and we're working on it.

18 Honestly, right now, as many background check
19 bills as there are and have been or will likely be
20 reintroduced, it's hard to say what might actually
21 move. There's a lot of talk about it, but our
22 gridlocked Congress is not only gridlocked on budget

1 issues. It's gridlocked over a lot of things,
2 including this.

3 The more we can make a case that this is cost
4 effective, that this saves money for the government,
5 obviously, the better chance of getting this done.

6 MS. LOVE: One last question: What's the
7 role of State relief mechanisms, certificates,
8 pardons, expungements, that kind of thing? How does
9 that factor into federal legislation?

10 MS. CONTI: Well, for example, if this kind
11 of -- the TWIC program, if somebody from New York has
12 one of those certificates of relief from disability,
13 I think it what's they're called, that would be
14 almost a, you know, 100 percent guarantee of a
15 waiver, for example. You know, if the court is
16 saying, Yeah, this person is rehabilitated, this
17 person doesn't need to have these occupational
18 barriers anymore, in terms of the TSA process and the
19 waiver process for the TWIC card, that would almost
20 be a done deal.

21 So there is nothing explicit in federal law
22 that references those, but in sort of the penumbra of

1 things that people consider as evidence of
2 rehabilitation and, you know, fitness for duty,
3 safety, any sort of State certificate of
4 rehabilitation or anything along those lines is
5 probably the golden ticket in a very good common
6 sense sort of way.

7 MS. LOVE: Okay.

8 MR. JONES: Questions from the panel?

9 Penny.

10 MS. STRONG: I would like to turn back to
11 Ms. Kress. I just have a few questions, Ms. Kress,
12 with regard to the certificate of good standing
13 program that was recently passed. Does that apply to
14 both misdemeanors and felony convictions across the
15 board?

16 MS. KRESS: Yes.

17 MS. STRONG: And another question I have
18 about that process that, as I understand it, the D.C.
19 Mayor's Office is responsible for, is there's some
20 type of appeal if a person is declined or turned down
21 for such a certificate that then goes to the court
22 system?

1 MR. WILLNER: I don't think that there is a
2 provision for that that's in the bill at this point.

3 MS. STRONG: So the person would just be in
4 the process?

5 MR. WILLNER: At this point, yes.

6 MS. STRONG: All right. Thank you. I
7 appreciate that, and I had another question. I have
8 a note here.

9 On the Ban the Box, Mr. Willner, maybe I'll
10 direct this question to you: On the Ban the Box
11 legislation, returning citizens situations, so the
12 covered positions, are those actually defined in the
13 legislation?

14 MR. WILLNER: I don't recall off the top of
15 my head.

16 MS. STRONG: I was just curious to --

17 MR. WILLNER: I believe that they probably --
18 yeah. I think they are. It talks about covered
19 positions and positions that are not covered. We
20 provide a summary of it on page 27 of our report, but
21 I think the legislation delineates between covered
22 and uncovered positions.

1 MS. STRONG: I was curious to know whether
2 that referenced other laws, other federal laws, or
3 whether this legislation made an independent
4 determination of exactly what positions should be
5 covered and which should not.

6 MR. WILLNER: That's a good question. I
7 don't exactly know.

8 MS. STRONG: Okay. Thank you.

9 MR. JONES: Vicki.

10 MS. YOUNG: A question on the certificate,
11 and you said it applies to people who live in D.C.;
12 is that correct?

13 MR. WILLNER: Yes.

14 MS. YOUNG: Because within D.C., you've got
15 the D.C. Superior Court, and I guess that system, you
16 can actually apply for an expungement because it's a
17 D.C. conviction, but also within D.C., you've got the
18 federal convictions, and federal convictions, there
19 aren't any expungements or anything other than that
20 pardon.

21 MR. WILLNER: That's right.

22 MS. YOUNG: But does the certificate you are

1 talking about, since it's basically something that
2 the Mayor would administer, does that only apply to
3 the D.C. convictions or also anyone who lives in D.C.
4 who has any kind of conviction?

5 MR. WILLNER: I believe it's just D.C. Code
6 convictions, not any U.S. Code convictions.

7 MS. YOUNG: One other, you made the comment
8 or at least I thought I heard that you said you had
9 these two proposals within your report and that you
10 thought that if, in fact, there was this limited
11 liability bill and the certificate, that it would
12 make some progress towards it, but the way you said
13 some or whatever qualifier you used, it seemed fairly
14 limited, and that's what I'm having a hard time
15 getting at in this whole process, is are these
16 employers that you're talking to saying, Well, there
17 is liability and there is -- you know, it would be
18 good if we had that because right now, we don't have
19 it? So that's the excuse they give on why they don't
20 do it, or once you get this for them, they'll think
21 of another reason why they won't get the job.

22 MS. KRESS: It's possible. The underlying

1 work that we did was -- Ms. Love, you mentioned
2 stigma. We meant for this report to be a tool for
3 public education, and when I say public, I mean at
4 large in terms of educating the business community.
5 We refer to these reforms as five percent solutions
6 because there is no guarantee that even if these
7 programs are successful, that employers will hire.
8 They are meant to incent and to begin to take away
9 the excuses that we heard, one of which was, you
10 know, I'm worried about liability.

11 We think it's going to take a great deal of
12 community and public education in order to get people
13 to change their minds. In fact, we are talking to
14 employers now, and there is -- we haven't gotten to
15 the bottom of it, but there is some concern on not
16 being publicly known as an employer that hires
17 ex-offenders, and we're anxious to find out what is
18 behind it.

19 Pete Willner can tell you more about that
20 because he's conducted interviews with employers.

21 MS. YOUNG: That seems to be right now our
22 biggest group that I think they're very reluctant

1 even to speak to the task force or their lawyers
2 would like to come. I mean, this is sort of a really
3 big missing part of the puzzle because, you know, a
4 lot of policy and common sense favors are obtained in
5 employment, but if the hiring community isn't along,
6 then we're not getting very far.

7 MR. WILLNER: I think that -- you know, I
8 think some part of the answer to this is we are at
9 the very, very beginning stages of trying to change
10 culture norms about this. It took a generation at
11 least to change views about smoking and seatbelt use.
12 I think it's going to take a little bit longer than
13 that to change very, very embedded cultural views in
14 the United States about convictions.

15 You know, and so it's, I think, a question of
16 approach and, you know, approaches differ. I think
17 we've been working with some of the people in the
18 advocacy community who really want to do stuff right
19 now and right away. I think the approach behind, you
20 know, trying to incent employers to liability
21 protection through certificate programs is a way to
22 sort of ease employers gently into the process,

1 understanding that there are some employers who are
2 going to be motivated by social justice issues, just
3 trying to help people get a second chance, and there
4 are other employers who won't be motivated by that at
5 all and, you know, that's okay, but it is trying to
6 move things kind of gently along.

7 MS. KRESS: I should also add that the D.C.
8 Chamber of Commerce was a very esteemed member of the
9 committee that worked on this report, and it's very
10 important to begin to build those bridges, and one
11 part of the bridge in having the Chamber, when we
12 released the report, we had the release event at the
13 D.C. Chamber of Commerce. They were a very strong
14 partner; but, you know, they can't guarantee that
15 employers are going to hire previously incarcerated
16 persons, but they were an important champion to have.

17 MR. JONES: Geneva, do you have questions?

18 MS. VANDERHORST: I do. Thank you all for
19 coming. I have a few brief questions.

20 The first is how the expungement process
21 actually works in D.C. I've actually represented
22 folks who have gone through filing their paperwork

1 for expungements, and it really takes -- the most
2 recent, it's taken about two years for her to get
3 through the process.

4 Are there any -- have you all made any
5 suggestions, particularly to the chief judge, on how
6 to speed up that process?

7 MR. WILLNER: There were just recently on the
8 Reentry Facility Amendment Act of 2012 which just
9 passed -- a majority of that legislation included
10 technical changes to the existing Criminal Records
11 Sealing Act in D.C. I'm not a lawyer. So I can't
12 really articulate what the procedural benefits might
13 be, but I think that it's designed to kind of help
14 things along a little bit.

15 I don't know if it's going to speed up any
16 issues that might have taken two years to resolve in
17 your client's case. I think it expanded the types of
18 criminal convictions that are eligible for sealing
19 slightly and reduced the time slightly, the waiting
20 period slightly.

21 MS. VANDERHORST: The other question is given
22 that there are so many specialized courts in D.C.

1 that offer things like diversion where you will not
2 have a permanent record, has there been any
3 consideration on how to maybe start the process at
4 the point that the person comes back for the final
5 diversion hearing as opposed to having the person go
6 to a separate location, a separate area, separate
7 agency and then having to do the expungement?

8 I am familiar with the Council for Court
9 Excellence and some of their proposals from
10 practicing, and I understand that you all are not
11 particularly suggestive of having a reentry port
12 added to D.C. Superior Court.

13 MR. WILLNER: Right.

14 MS. VANDERHORST: But as an alternative, have
15 you considered suggesting to particularly the judges,
16 the prosecutor's office, the Attorney General's
17 Office, and the Metropolitan Police Department to get
18 together every once in a while to see if that process
19 can be started in court even if it's just for the
20 specialized groups?

21 MR. WILLNER: That's an interesting idea. I
22 don't think we've thought about that. I might not be

1 understanding your question, but I think part of the
2 rationale for how that process works is that the
3 person who is located in whatever specialty court
4 they're in has to demonstrate a pattern of, you know,
5 seriousness, that they're trying to go through
6 whatever program it is, and then by the time they are
7 through and they come back to the judge to say I have
8 done X, Y, and Z, that's when the judge makes the
9 determination.

10 But it's interesting idea.

11 MS. VANDERHORST: An example would be the
12 solicitation prostitution where a person goes through
13 a program. They have certain review dates. The last
14 review date, they would have completed classes. They
15 would have completed community service, and at that
16 point, they have a written agreement with the U.S.
17 Attorney's Office that the U.S. Attorney's Office
18 will not oppose a motion to withdraw any guilty plea
19 that they may have given and that there will be no
20 conviction on their record, but there are some folks
21 who are going back and finding that the records are
22 not being cleared properly.

1 So it would simply make more sense rather
2 than to have them wait 24 to 48 hours to get a
3 printout and then have to go through that process for
4 something that should have been taken care of in
5 court and then have to go through -- I mean, that's a
6 very small number, but it does take up a lot of time.
7 There are a lot of folks who are coming out of these
8 diversion-type programs even with the drug court and
9 are told to come back to court 24 to 48 hours, to get
10 a printout and make sure their record is clear and
11 find out that it's there, and then they are told to
12 go through the expungement process to actually have
13 it cleared.

14 So it seems that it would simply be a lot
15 easier to have that process done in court even if
16 it's simply a matter of the judge monitoring to make
17 sure that the record is cleared properly.

18 MS. LOVE: Are these non-convictions? These
19 are diversion records?

20 MS. VANDERHORST: Diversion and --

21 MS. LOVE: These are specialty court records.
22 So they're arrest records, arraignments. They're not

1 conviction records.

2 MR. WILLNER: Right. That's a very
3 interesting idea.

4 MR. JONES: Anything else, Geneva?

5 MS. VANDERHORST: No.

6 MR. JONES: Jenny.

7 MS. ROBERTS: Yes. Just two. The first one
8 is for Judy Conti. Since you started to talk -- oh,
9 I have to turn this on. Sorry.

10 This is a question for Judy Conti. Since you
11 started to talk about the FBI database, can I just
12 ask you, I know we do have some other witnesses who
13 are speaking about it, but it would be great to get
14 your perspective about more generally the mechanisms,
15 the legal mechanisms, of relief from either incorrect
16 or incomplete records and your opinion on how
17 effective or ineffective those legal mechanisms are.

18 MS. CONTI: You know, some of it depends
19 State by State and whatever statute authorizes access
20 to the database in the first instance, whatever
21 employer you're dealing with. It depends on the
22 level of savvy of the individual and whether they can

1 get a lawyer or not to help them.

2 You know, the fact of the matter is a lot of
3 the problems with the FBI database can be corrected
4 only by going into very dusty basements and pulling
5 out rows and rows of boxes and going through, you
6 know, reams and reams of files. So that is a
7 significant burden all around. We do understand
8 that.

9 What NELP has -- NELP has worked very closely
10 with Representative Bobby Scott, who is in the
11 tidewater area of Virginia, and he has previously
12 introduced and plans to reintroduce a bill that would
13 mandate that the FBI has to clean up the records as
14 it goes along when it gets an employment background
15 check.

16 What they do right now in terms of gun checks
17 is when they see those cases that don't have a
18 disposition that could be a disqualifying offense,
19 they go back to the particular court where that
20 arrest was filed and they work with the clerk's
21 office to track down what the disposition of that
22 was, and in doing so, they report that they're able

1 to complete and correct 65 percent of the records
2 within three days. There is an entire unit within
3 the FBI that does that.

4 What we would like to do is mandate that same
5 kind of procedure for employment background checks.
6 The bill would authorize a fee that would be either
7 absorbed by the employer or the worker, and the bill
8 doesn't mandate who would have to pay it, and as we
9 understand it, those things sort of vary by industry,
10 but it would authorize a fee so that this unit would
11 be self-funding and what they would have to do for a
12 period of about 10 years or so, depending on the
13 severity of the crime, is go back and check the
14 status and complete the record and make those
15 corrections in the database.

16 At least as written, there is a presumption
17 that if they can't find a disposition within five
18 days of an arrest that's more than a year old, it
19 would be presumed to be resolved because it is that
20 old and it probably has gone through the system, and
21 if they can't verify a conviction, then it would be
22 assumed that the case was resolved favorably for the

1 defendant.

2 It would also mandate a number of protections
3 much like the Fair Consumer Reporting Act where
4 people would have to get copies of their records,
5 notice of how to make corrections, where to do them.

6 I will be honest. There's a lot of
7 opposition from the FBI on that. Some of it -- I
8 believe that one of the things that they pointed out
9 to us, which is correct, with Brady checks, they keep
10 going until they find a disqualifying offense. If
11 the first thing they check for ends up being
12 disqualifying, they don't do it for anything else.
13 They're done; whereas, with the employment checks,
14 they would really have to keep checking everything
15 within that 10-year framework, so to say, and it
16 could be a much more onerous process.

17 That's the one bit of pushback that we've
18 gotten from them that really rings true to us and is
19 valid. The rest of it, quite frankly, I think is
20 really more borne out of these are our records, we'll
21 handle it. They understand there's a problem and
22 they are trying to work with the States to get

1 better, but as I said earlier, what's happening is
2 that the reporting is getting better, you know, from
3 about a year ago moving forward, but there is still
4 all of those decades where nothing was ever reported
5 in and it's not likely ever going to be reported in.
6 The only hope we have is that there is some sort of
7 mandate that people go back and check the records and
8 make those corrections.

9 MS. ROBERTS: Thank you. That's very
10 helpful.

11 And one other question to either Ms. Kress or
12 Mr. Willner about the either Ban the Box or the
13 certificate programs. I'm wondering -- well, the
14 certificate program is not in effect yet. So maybe
15 this goes more to Ban the Box, but discussions
16 perhaps. I'm wondering about what discussions or
17 efforts there have been on the educational side of
18 these mechanisms so that people who might benefit
19 from them know that they are available and also what
20 discussion, if any, you've had about legal
21 representation particularly for certificates or
22 something. Even though I realize it's in the Mayor's

1 Office and not going to a court, has there been any
2 discussion about who might offer legal
3 representation?

4 MR. WILLNER: No. I mean, there hasn't, and
5 on your first question about the way we're
6 communicating all of these legislative efforts, it
7 has been very fragmented. I think we got lucky on
8 the Criminal Records Sealing Act when the public
9 defender service really, I think, took up a call to
10 arms as it were, and every year, they hold an
11 expungement seminar. I think it's in June, and that
12 really is, I think, one very effective way to get the
13 word out.

14 I would not be surprised if the 5,000 people
15 who applied to seal their records, that a substantial
16 chunk of them have come through the public defender
17 service's efforts, but I think that the
18 communications about these various bills have not
19 been that great.

20 I keep looking to Judy because she was on our
21 committee that worked on the Records Sealing Act.

22 MS. CONTI: I used to be the executive

1 director of the D.C. Employment Justice Center and
2 have worked with them, and we saw a lot of people
3 every week in our clinics that came to us with
4 criminal records problems, honestly, many of them
5 sent by employers who wanted to hire them and said
6 just get your records sealed and then I can hire you;
7 and we confronted what was previously a sealing
8 system that was completely counterintuitive.

9 The older and staler the crime was, the
10 harder it used to be to seal. Now, we've at least,
11 you know, switched that around, that kind of
12 presumption. It's still harder than it probably
13 should be, but it's getting better and better thanks
14 to the efforts of CCE.

15 But, you know, the groups in D.C. that work
16 on these issues are ridiculously under-resourced,
17 ridiculously overworked, and I can say in my own
18 tenure at the EJC, we always wanted to do more
19 education and communication strategies because we
20 knew that that was really important, but in the
21 day-to-day when there are people just coming through
22 the door, coming through the door, that just keeps

1 falling to the bottom, and it's not an excuse. It's
2 just an explanation.

3 I think that, you know, gradually, you see
4 more and more advocates and communities across the
5 country coming together to help people with criminal
6 records and working in a more concerted fashion and,
7 you know, trying to lift up the issues in the press
8 and everything. There have been a couple of really
9 good "Washington Post" articles, for example. You
10 know, the D.C. Public Defender Service always gets
11 coverage of the expungement seminar every year. So
12 that's obviously, a good resource. It certainly
13 comes like a virtuous cycle, if you will.

14 MR. WILLNER: There's also the Office of
15 Returning Citizens Affairs is increasingly a port of
16 entry for people who are returning from prison. In
17 the last two years, about 9,000 people have gone
18 through their offices at 2100 Martin Luther King
19 Avenue in Southeast. They're just a three-person
20 office and they're seeing an credible volume and it's
21 increasing. It went from 3600 in 2011 to almost, you
22 know, 5300 in 2012.

1 So I think there's an opportunity. They just
2 created a new reentry resource center there as well.
3 So I think there might be a way to kind of sort of
4 centralize at least to an extent where people are
5 going and hopefully, you know, that creates
6 efficiencies of -- economies of scale in terms of
7 being able to communicate messages.

8 So but have we taken advantage of that yet?
9 I don't think, not yet.

10 MS. KRESS: You know, it may be that the
11 District of Columbia is at a point with reentry that
12 we were at several years ago around the issue of
13 homelessness. There was a home bazaar in the D.C.
14 Government. The V.A. was really making incredible
15 inroads. Organizations were working together.

16 You know, it's not the same yet with the
17 reentry community. There's still some fragmentation,
18 competitiveness, lack of resources, lack of funding,
19 but I think with the commission being appointed and
20 the Office of Returning Citizens Affairs, we're
21 closer to there now being this rising to a greater
22 degree of importance, and clearly the Mayor and the

1 D.C. Council are solidly behind this.

2 So I think we're going to soon see more of a
3 turning point, but it's been difficult all of these
4 years.

5 MR. JONES: So -- go ahead.

6 MS. YOUNG: As part of what you've done with
7 NELP, the same question I sort of said if you have
8 the certificate or if you had a liability, is that an
9 excuse or is that really a vehicle, and everybody has
10 always been talking about Ban the Box. If we can get
11 Ban the Box in place, that's really going to help;
12 and I'm not really sure if we've heard data or
13 anecdotally around the communities. Does it? You
14 know, what has it done?

15 MS. CONTI: It does. The short answer is it
16 does and the data is short lived and we need some
17 evaluation. One of the things NELP is actually
18 working on is trying to secure funding to do a really
19 formal rigorous evaluation of the communities that
20 have done Ban the Box already to put some numbers
21 behind this.

22 We know not just anecdotally, but from

1 Minneapolis' Ban the Box policy, and I'm not going to
2 remember the numbers exactly, but it is my firm
3 recollection that since they have instituted their
4 Ban the Box law, which I think was about three years
5 ago, there has been a 40 percent increase of
6 employment of people with criminal records in the
7 Minneapolis Government.

8 You know, the flood gates are opening in a
9 very good way. There's absolutely great impact there
10 because people are getting that foot in the door and
11 then they are evaluated based on themselves, not just
12 on the conviction that they have. It's always been
13 our experience anecdotally doing direct services both
14 through NELP and my work in D.C. that when somebody
15 is a person and a face and they can compellingly and
16 articulately explain their history and what they've
17 learned from it and why they're different now, that's
18 something that people actually really usually admire
19 and it speaks highly of a person that they've been
20 able to turn their lives around and it says wonderful
21 things about their determination and their character.

22 So giving people that foot in the door and a

1 chance to explain in person makes a difference, and
2 Minneapolis already is one of the best proofs that we
3 have of that, but we're trying to get the money
4 together for a rigorous evaluation whether it's Ban
5 the Box. It's missing from the literature and from
6 the --

7 MS. YOUNG: We want it and --

8 MS. CONTI: Yeah. We're working on it.

9 MR. WILLNER: We are trying to do the D.C. --
10 we're trying to interview the D.C. Department of
11 Human Resources to find out in the two years since
12 they've had it what has the effect been. So yeah.

13 MS. LOVE: Could I just ask if the Minnesota
14 Ban the Box statute, does that apply to private
15 employment?

16 MS. CONTI: No.

17 MS. LOVE: Are there any Ban the Box laws --

18 MS. CONTI: Massachusetts, I believe.

19 MS. LOVE: Yeah. I think you're right.

20 MS. CONTI: Massachusetts, and Massachusetts
21 is unique because not only is it for all employment,
22 but Massachusetts has through its legislation also

1 undertaken to build its own comprehensive accurate
2 database through which they can check, you know,
3 everybody that applies for employment within the
4 State. The State takes on a massive responsibility
5 to do it and to do it right. There aren't many other
6 jurisdictions that are going to make that much of a
7 commitment. So God bless Massachusetts.

8 MR. JONES: Okay. Penny.

9 MS. STRONG: This is a question for
10 Ms. Conti. I'm on line and I'm looking at your
11 organization's website and it is quite impressive.
12 The question I have for you in terms of, I guess, the
13 national uniform legislation or even something within
14 the Equal Employment Opportunity Commission that
15 talks about impact of discrimination due to criminal
16 arrests or conviction records, is there any talk
17 within your organization or nationally expanding that
18 from the current disparate impact analysis that only
19 applies, basically, to certain minorities to
20 everyone, so to speak?

21 MS. CONTI: There isn't, and it's, honestly,
22 for largely like sort of tactical and strategical

1 reasons as well as I'm sure you understand that the
2 civil rights community is loathe to reopen Title 7,
3 especially with this Congress, if you will. I think
4 we all sort of feel like as much as there may be to
5 gain, there is even more to lose.

6 So people are very protective of Title 7 as
7 it is and are interested in making sure that we use
8 the disparate impact analysis as rigorously as
9 possible, but I don't think there's really any
10 appetite to reopen it to include like additional
11 protections like, you know, somebody with a criminal
12 record being its own individualized protected status.

13 You're right. It does form a -- it does
14 present a problem for white people, for example, who
15 have got criminal records, although there was one
16 court case in the early 2000s in Pennsylvania that
17 actually under the disparate impact theory did, in
18 fact, rule that a white person with a criminal record
19 was a victim of discrimination. Sharon Detrich at
20 Community Legal Services in Philadelphia won that
21 case. She's the godmother of all of this great work
22 on behalf of people with criminal records in the

1 legal system; but I think the downside of reopening
2 Title 7 is just too scary for people. So, instead,
3 we just are trying to work through this disparate
4 impact analysis.

5 MS. STRONG: Just following up on that, I did
6 used to practice in Wisconsin, and we had a
7 generalized discrimination statute that I think is
8 still in place, and for anyone to be denied
9 employment, public or private, on the basis of either
10 an arrest and/or conviction record that is not
11 substantially related is a protected or a barred
12 employment practice.

13 On your website, I'm looking at this
14 wonderful map that --

15 MS. CONTI: Yeah. There's a number of States
16 that have gone well beyond.

17 MS. STRONG: There are a couple of other
18 States that have done that.

19 MS. CONTI: Yeah. They've gone well beyond
20 what the Federal Government does and, you know,
21 really sort of like codified the EEOC criteria. Like
22 Connecticut and Hawaii, for example, I remember both

1 have very, very good laws, and there are localities
2 that are going beyond it as well.

3 You know, like with many things, and this
4 sort of gets to what June and Pete were talking about
5 as well, you know, you sort of start to build the
6 movement. The States are the laboratories of
7 experiment, and when they do progressive things well
8 and we see that the sky doesn't fall and capitalism
9 as we know it doesn't, you know, crumble to its
10 knees, it then -- you know, there is momentum then to
11 build on federal solutions.

12 We needed a critical mass of States doing
13 family medical leave before the Federal Government
14 would do it. Generally, critical masses of States
15 need to do minimum wage increases before the Federal
16 Government will do it.

17 I think this is very much the same thing.
18 It's not to say that there aren't better uniform
19 federal solutions that should be considered and
20 passed, but I think we're going to need to see more
21 of a tidal wave among the States, you know, the
22 liberal, the progressive States and jurisdictions

1 doing things, doing them well, showing success, and
2 then that can hopefully lead to maybe within the next
3 decade or so us talking about more robust federal
4 solutions.

5 MS. STRONG: Because I understand, of course,
6 the EEOC prosecutes certain test cases or class
7 actions, and I am a practitioner who does employment
8 work. To do the disparate impact analysis is
9 something that's very difficult and the individual
10 litigant often lacks those resources.

11 MS. CONTI: It's absolutely true. The recent
12 guidance that they put out last summer did in some
13 ways reduce the burdens on litigants in terms of, you
14 know, sheer statistical analysis and all of that.
15 They were -- it was very balanced and they worked
16 really hard to get the support and did. It was voted
17 by four out of five members.

18 It doesn't eliminate it altogether. I think
19 it's safe to say that it would be darn near
20 impossible for an individual litigant without a
21 lawyer or who wasn't a lawyer to prevail in a
22 disparate impact case, but they've certainly done

1 what they can to make it easier for lawyers to bring
2 those cases.

3 MR. JONES: All right. I have just a handful
4 of questions, two or three, but really to try to sort
5 of wrap it up and bring it back to where we started.
6 Just, first of all, though, the TWIC program, it
7 sounds wonderful and the involvement with the other
8 industries. When someone does an appeal or files for
9 a waiver, who is the arbiter of that? Who determines
10 whether they're successful?

11 MS. CONTI: There's a unit within TSA that
12 does it.

13 MR. JONES: I see. So is that they sit like
14 en banc; it's a number of people or is it one person?

15 MS. CONTI: You know, it's -- they don't sit
16 en banc. I don't think there's panels. There's a
17 number of people that do it and it's just sort of
18 assigned to whichever hearing examiner, if you will,
19 that ends up getting it.

20 MR. JONES: Okay. And then in New York, it's
21 called a certificate of relief from civil
22 disabilities in New York.

1 MS. CONTI: Yes.

2 MR. JONES: And I think, Mr. Willner, you
3 said that the certificate program here in D.C. that's
4 sort of being constructed and didn't really have a
5 name, they sort of, you know, were arguing about
6 whether someone is actually rehabilitated. You said
7 that you didn't really have high hopes that it was
8 going to have a gigantic impact, and I think that if
9 you, you know, queried the Defense Bar in New York
10 that I think they would confirm that lots of folks
11 don't think that the certificate of relief from civil
12 disabilities has got a lot of teeth in it and is very
13 meaningful.

14 You also sort of talked about, you know, the
15 sort of chipping away of excuses for employers and
16 sort of this gradual sort of tectonic move, you know,
17 to one day being [inaudible], is what I think you
18 said, which gets us sort of all the way back to where
19 we started with Margi's first question about
20 forgiving versus forgetting and that sort of -- and
21 everything we sort of talked about today has really
22 sort of been about forgiving -- right? TWIC

1 certificates -- and very little discussion about
2 forgetting. Right?

3 MS. CONTI: That's a tall order.

4 MR. JONES: But my question, I guess, is just
5 in sort of listening to you and when we were in
6 Chicago, we had, I believe, the general counsel from
7 the Governor's office, I believe it was, and somebody
8 can correct me if I'm wrong. He basically said you
9 can't legislate morality. Right?

10 And so it's hard to really from the
11 Governor's perspective create laws and policies and
12 practices that have to do with forgiving, but you can
13 when it comes to forgetting and expungements and
14 those kind of things. Right?

15 So I just wonder is -- you know, where is the
16 balance and what should we be doing? Are we sort of
17 going to gradually inch our way to a forgiving
18 society and is that a goal that's always going to be
19 off on the horizon or should we be thinking and
20 talking more about, you know, aspects of forgetting
21 and having people, you know, get their records
22 expunged and not have to worry about the forgiveness

1 of employers? What do you guys think about that?

2 MS. CONTI: I actually have an answer.

3 Okay. When Congress passed the Civil Rights
4 Act of 1964, the arguments on the floor were you
5 can't make people accept African Americans or women
6 in the workplace, you can't legislate feelings, you
7 can't legislate what's in somebody's heart; but over
8 the course of a generation or two or three, we've
9 changed hearts and minds because people have had to
10 interrelate with people of different races,
11 nationalities, religion, sexes, and they found out
12 that it's okay. Right?

13 If you told me 15 years ago, we would be at
14 the beginning of a groundswell of a movement for same
15 sex marriage, of marriage equality across the
16 country, I would have laughed in your face. When I
17 was in law school, if you told me that the tide would
18 be firmly turning against the death penalty 18 years
19 later, I wouldn't have thought that would be possible
20 either.

21 So I think that you can't legislate what's in
22 people's hearts in the first instance, but when you

1 force people to deal with each other and accept
2 people based on reality instead of preconceived
3 notions, over the course of generations, you do, in
4 fact, provide the mechanism to change hearts.

5 So it's a long process, but if we legislate
6 forgetting, we might get to a place where our
7 grandchildren can forgive.

8 MR. WILLNER: I would just -- I like Judy's
9 answer a lot, but I would just add that we've been
10 doing a lot of interviewing of people who have
11 records and, you know, trying to profile them,
12 really, and I think --

13 MS. CONTI: Profile in a good way.

14 MR. WILLNER: Profile in a good way, yeah,
15 absolutely. There's a lot of great stories, but I
16 think that, you know, the people that we're talking
17 about and trying to help, they're sort of in between
18 forgetfulness and forgiveness as well. I think there
19 are a lot of people, if you sort of sit down and talk
20 with them will say, you know, that wasn't me 15 years
21 ago, here's who I am now, judge me by this standard,
22 don't judge me by that standard.

1 I don't think it's -- I think for some
2 people, it's not an element of forgiveness. They
3 don't want to be -- they're not that personal. They
4 want to just move forward from this point forward.

5 So it's a really interesting framework,
6 forgetfulness versus forgiveness, but it's a very
7 complicated question once you get down to talking to
8 people, and I think you're not -- there's not a clear
9 answer.

10 MR. JONES: Ms. Kress, you get the last word.

11 MS. KRESS: You know, I think whether it's
12 forgiving or forgetting, what is -- to me, what is
13 critically important is that it's got to be a mix of
14 stories and data, because if you just hear stories
15 that move your heart without data, it's just a story,
16 and by the same token, if you just have data without
17 the heart in it, it's just data.

18 You know, as we get closer and closer to
19 these five percent solutions, I think it's incredibly
20 important to collect data about success stories so
21 that we don't just talk about why it's so important,
22 but how it's working and how it's working well.

1 MR. JONES: That's great. This really is a
2 great way to end and lead us into the next segment of
3 the work that we're about to do.

4 Thank you. This has really been an
5 information rich panel for us.

6 MS. CONTI: Thanks for inviting us and for
7 the work you are all doing. It's really important.

8 MR. JONES: And this has really been a great
9 start for the work that we're going to do in the next
10 couple of days. So thank you very much.

11 [Whereupon, at 2:37 p.m., the hearing
12 concluded.]

13

14

15

16

17

18

19

20

21

22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF COURT REPORTER AND NOTARY PUBLIC

I, CATHERINE B. CRUMP, a court reporter and Notary Public, hereby certify that the foregoing proceedings were recorded by me stenographically and thereafter reduced to typewriting under my direction; that the foregoing transcript is a true and accurate record of the proceedings to the best of my knowledge, ability, and belief; that I am neither counsel for, related to, nor employed by any of the parties to the action in the proceeding; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.

CATHERINE B. CRUMP
Notary Public in and for the
Commonwealth of Virginia
Notary Registration No. 252644

My Commission Expires: May 31, 2013