

1

FOURTH SESSION

2

UNIFORM ACT ON COLLATERAL

3

CONSEQUENCES OF CONVICTION

4

SATURDAY AFTERNOON, JULY 19, 2008

5

Boris Auerbach of Ohio, presiding.

6

CHAIRPERSON AUERBACH: Okay. We will

7

now shift gears dramatically and head into another

8

subject matter.

9

I would like to call on the chairman of

10

the Drafting Committee, Richard Cassidy, to

11

introduce the members of the committee and advisors

12

who are on the dais.

13

COMMISSIONER RICHARD T. CASSIDY

14

(Vermont): Thank you, Chair Auerbach. I'm happy to

15

do that. Can you hear me?

16

As I mention each of your names, please

17

raise your hand so the reporter can identify who you

18

are. I'm the chair of the committee. My name is

19

Richard Cassidy.

20

Our committee members are Ann Walsh

21

Bradley.

22

John Cary.

23

Greg Curtis.

24

Brian Flowers. Brian may join us later.

25

He's not here.

1 Jessie French.

2 Roger Henderson.

3 Lane Kneedler.

4 Harry Leinenweber.

5 Marian Opala.

6 Michele Timmons.

7 Our reporter is Jack Chin.

8 Also with us is our ABA advisor,

9 Margaret Colgate Love. I don't see her, but I'm
10 sure she will join us.

11 Special advisor from the National
12 Association of Attorneys General, Stuart Suss.

13 Finally with us last, but hardly least,
14 our Division Vice Chair, Commissioner Jack Davies.

15 CHAIRPERSON AUERBACH: Thank you. I
16 will now call on the chairman of the Drafting
17 Committee to make a few preliminary comments. Thank
18 you.

19 COMMISSIONER CASSIDY: Thank you again.
20 Thank you to members of the Conference for this
21 opportunity to present this proposed uniform act to
22 you.

23 I want to just touch upon the history of
24 the act briefly. As those of who you were on the
25 floor during our previous presentations may recall

1 this act was inspired by the adoption by the
2 American Bar Association House of Delegates of
3 criminal justice standards on the subject of
4 collateral sanctions and disqualifications. That is
5 the subject of our act. It is a phrase that is used
6 and causes people to scratch their heads and say,
7 what is it that you are talking about? Let me begin
8 with the idea of collateral consequences.

9 The idea is this, that there are,
10 indeed, many consequences or penalties that come
11 with the conviction of a crime that are other than
12 the penalties that are specifically imposed by the
13 judge. They come in two flavors, what we call
14 collateral sanctions, which are penalties or
15 disabilities that are imposed by operation of law
16 that is automatically in connection with the
17 conviction, and so-called collateral
18 disqualifications. Those are penalties and
19 disabilities that are imposed or may be imposed
20 through the exercise of discretion by some
21 governmental authority. This act relates to these
22 two concepts which we refer to together as
23 collateral consequences.

24 A huge population of Americans are
25 subject to these consequences. Some seven million

1 people have at one time or another served time in
2 prison and a far greater number of people have a
3 conviction of a crime. In fact, the Justice
4 Department estimates that 71 million people have a
5 criminal record. That is close to 25 percent of the
6 population of our nation. The percentages are far
7 higher when it comes to members of racial and ethnic
8 minorities in this country.

9 The legal disabilities that this huge
10 population faces are legion. Most states don't even
11 know how many collateral consequences they impose as
12 a result of a particular conviction. Some states
13 have studied the subject and collected their
14 collateral consequences, states like Minnesota,
15 Ohio, and Maryland have found that they have
16 literally hundreds of collateral consequences.
17 Those collateral consequences limit the ability of
18 persons who have convictions to work in certain
19 occupations, to have or hold or obtain licenses for
20 activity, permits to obtain government benefits, to
21 participate in the civic life of their communities,
22 including typically jury service and/or the ability
23 to vote or hold public office.

24 This proposal, the statute that is
25 before you is a very modest effort to improve public

1 and individual understanding of the nature of this
2 problem and to provide some modest means by which
3 people who suffer from these disabilities may, in
4 appropriate circumstances, gain partial relief from
5 those disabilities.

6 We certainly heard many concerns about
7 this proposal when we presented it to the Conference
8 in Pasadena. The committee listened very hard to
9 those concerns and has taken significant action to
10 be responsive to the concerns. The foremost concern
11 that we heard was the concern that the provision of
12 the statute which would require that each state
13 collect its collateral consequences, develop a list
14 of them, would prove to be very burdensome for the
15 governmental official called upon to do this work,
16 which we thought would likely be the revisors of
17 statutes or similar officials in each state.

18 We have requested that Congress assist
19 us with this problem. Congress has responded, as I
20 suggested that it would. The Court Security Act of
21 2007 at Section 510 requires that the Justice
22 Department do a survey of the collateral
23 consequences in each of the 50 states and four
24 territories and make the results of that survey
25 available to each state. I don't mean to suggest

1 that that means that there will be no burden on any
2 state official to deal with this issue. But the
3 burden should be considerably lessened by virtue of
4 the federal assistance that will be available to
5 this effort. It is an effort that tracks our
6 definitions of collateral consequences almost
7 precisely. It should produce a study that will be
8 useful for these purposes.

9 We also significantly changed the act by
10 eliminating the anti-discrimination provisions of
11 the section that was presented in Pasadena, and by
12 making it clear that governmental agencies can, if
13 they pursue this approach through a proper
14 administrative procedure, impose collateral
15 consequences in appropriate cases. We have set out
16 two methods by which individuals can get relief from
17 collateral consequences. We have more carefully
18 defined the effects and means by which they might
19 get this sort of relief.

20 That's a general introduction to how it
21 is that we came to the draft which is before you
22 today.

23 Before I ask one of the members of the
24 committee to begin reading, I'll just invite the
25 reporter, Jack Chin, to add anything that he would

1 like to my comments.

2 Jack, you are satisfied? Okay.

3 With that, we will proceed with the
4 reading of the act. Thank you.

5 CHAIRPERSON AUERBACH: Commissioner
6 Bradley will read Sections 1 and 2.

7 COMMISSIONER ANN WALSH BRADLEY
8 (Wisconsin): Thank you.

9 "SECTION 1. SHORT TITLE. This [act]
10 may be cited as the Uniform Act on Collateral
11 Consequences of Conviction."

12 CHAIRPERSON AUERBACH: Proceed.

13 COMMISSIONER BRADLEY: "SECTION 2.
14 DEFINITIONS. In this [act]:

15 "(1) 'Collateral consequence' means a
16 collateral sanction or a disqualification.

17 "(2) 'Collateral sanction' means a
18 penalty, disability, or disadvantage, however
19 denominated, imposed on an individual as a result of
20 the individual's conviction or juvenile adjudication
21 for a felony, misdemeanor, or other offense, that
22 applies by operation of law whether or not it is
23 included in the judgment or sentence. The term does
24 not include imprisonment, probation, parole,
25 supervised release, forfeiture, restitution, fine,

1 assessment, or costs of prosecution.

2 "(3) 'Disqualification' means a
3 penalty, disability, or disadvantage, however
4 denominated, that an administrative agency,
5 governmental official, or a court in a civil
6 proceeding is authorized, but not required to impose
7 on an individual on grounds relating to the
8 individual's conviction or juvenile adjudication for
9 a felony, misdemeanor, or other offense.

10 "(4) 'Felony' means a criminal offense
11 as defined in [insert citation to state criminal
12 code] or a criminal offense in any jurisdiction that
13 would be a felony under the law of this state."

14 CHAIRPERSON AUERBACH: Thank you.

15 The commissioner at Microphone 6.

16 COMMISSIONER JOHN J. STIEFF (Indiana):

17 First of all, I would like to thank the committee
18 for addressing many of the substantive issues that
19 concerned me at the last Annual Meeting.

20 On Page 6, Lines 8 and 9, there is a
21 phrase, 'juvenile adjudication for a felony,
22 misdemeanor, or other offense,' and that phrase is
23 repeated on Line 16. Now, in our state, and I
24 suspect most other states, that isn't exactly right.
25 In our state when you have a juvenile adjudication

1 it's for what is called a juvenile act, a delinquent
2 act. That is defined as an act that would be a
3 felony or misdemeanor if committed by an adult.

4 I would like to suggest an amendment to
5 remove the phrase "juvenile adjudication for a
6 felony, misdemeanor, or other offense" in both
7 places, and create a definition of "conviction" that
8 would include a conviction for a felony,
9 misdemeanor, or other offense, or a juvenile
10 adjudication for an act committed by a child that
11 would be a felony misdemeanor or other offense if
12 committed by an adult." Then you can have a
13 sentence that says, "convicted has a corresponding
14 meaning." This will make it substantively accurate.

15 CHAIRPERSON AUERBACH: Mr. Chairman.

16 COMMISSIONER RICHARD T. CASSIDY

17 (Vermont): Commissioner Stieff, thank you. Your
18 comment is similar to one that we heard through our
19 style liaison, Dennis Cooper, who is also serving as
20 parliamentarian on this act. The committee
21 discussed that suggestion this morning and agrees
22 that it would be an appropriate revision of the act.

23 COMMISSIONER STIEFF: Thank you very
24 much.

25 COMMISSIONER CASSIDY: We anticipate

1 that before this goes to a vote you will see
2 something very much like what you suggested.

3 COMMISSIONER STIEFF: Thank you very
4 much.

5 CHAIRPERSON AUERBACH: Curtis,
6 Microphone 3.

7 COMMISSIONER CURTIS R. REITZ
8 (Pennsylvania): Just for my information, it may be
9 somewhere later in the act, does this act have
10 anything to do with collateral consequences for sex
11 crimes?

12 COMMISSIONER RICHARD T. CASSIDY
13 (Vermont): Commissioner, to say that it has nothing
14 to do with it, I suppose it would be an
15 exaggeration. However, if you do look later in the
16 act, you will find that with respect to the
17 penalties that are imposed, the collateral
18 consequences that are imposed with respect to sex
19 crimes, they are not able to get relief from those
20 under this act.

21 COMMISSIONER REITZ: They are included
22 in the act? They are either a collateral sanction
23 or disqualification?

24 COMMISSIONER CASSIDY: I think if you
25 were to ask whether they fall within the definition,

1 the answer is yes. If you ask whether they are
2 among the things that the studies should collect,
3 the answer to that question is yes. And in that
4 sense, they do have something to do with the act.

5 COMMISSIONER REITZ: I was surprised
6 that there was nothing anywhere in the introduction
7 or the comments to make that clear. That's the
8 reason I rose to ask the question.

9 COMMISSIONER CASSIDY: Thank you.

10 CHAIRPERSON AUERBACH: Okay.

11 Commissioner Burton, Microphone 5.

12 COMMISSIONER JOHN P. BURTON (New
13 Mexico): Very often it happens that upon conviction
14 for a first offense, a minor offense, a court in my
15 state imposes what is known as a deferred sentence
16 where after the period of the deferred sentence, I
17 guess the conviction is wiped off the books, at
18 least that is what is supposed to happen. Is this a
19 conviction for purposes of your act?

20 CHAIRPERSON AUERBACH: Chairman.

21 COMMISSIONER CASSIDY: I don't see
22 anything about the definition that would say that
23 such an item is not a conviction. However, there
24 are provisions in the act later on that deal with
25 some of the special problems those sorts of

1 convictions present.

2 COMMISSIONER BURTON: Okay. Thank you.

3 CHAIRPERSON AUERBACH: The commissioner
4 at Microphone 2.

5 COMMISSIONER BARBARA ANN ATWOOD
6 (Arizona): Thank you. I also want to compliment
7 the committee on what I think is a really well
8 drafted act.

9 I have a question on Section 2, the
10 definition of "collateral sanction," Line 10. I
11 understand that collateral sanction is one that is
12 imposed by operation of law that's not
13 discretionary. But you say, "whether or not it is
14 included in the judgment or sentence," and in the
15 comments you say that a sanction that a court
16 includes as part of the sentence, as part of
17 punishment, is not a collateral sanction.

18 I find it a bit confusing whether or not
19 it is included in the judgment or sentence. For
20 example, if a court knows that it will be imposed by
21 operation of law but also announces that it's part
22 of this sentence, does it then remove it from the
23 act? That doesn't seem like it does. Could you
24 just address that?

25 CHAIRPERSON AUERBACH: The reporter, do

1 you want to respond?

2 MR. JACK CHIN (Reporter): Well, the
3 idea is that there are some things that could be a
4 collateral sanction or could be part of the
5 sentence. In some states a judge might be able to
6 order as a part of the sentence that you lose your
7 right to possess a firearm. If they do impose that
8 condition as part of a sentence, then the relief
9 provisions later on in the act wouldn't apply
10 because in that particular case, that particular
11 provision is part of the sentence, not a collateral
12 sanction.

13 COMMISSIONER ATWOOD: Okay. I
14 understand that.

15 MR. CHIN: Okay.

16 COMMISSIONER ATWOOD: I think the way
17 it's worded, it says a collateral sanction means, et
18 cetera, et cetera, that applies by operation of law
19 whether or not it is included in the judgment or
20 sentence. That could be read to mean even if it is
21 included in the judgment or sentence, so long as it
22 is imposed by operation of law, it is still a
23 collateral sanction.

24 CHAIRPERSON AUERBACH: Reporter.

25 COMMISSIONER ATWOOD: Do you understand

1 what I'm saying?

2 MR. CHIN: Yes. Yes. But in the
3 example that I gave you, that individual would be
4 under two -- there would be two sources of law that
5 prevent that person from possessing a firearm, the
6 sentence and the general law that is applicable to
7 all felons. In that circumstance, the sentence part
8 would not be a collateral sanction. The general law
9 that is applicable to all felons would be.

10 To the extent that there is a general
11 law that is applicable to all felons, that is a
12 collateral sanction because it applies whether or
13 not it's included in the sentence.

14 COMMISSIONER ATWOOD: If a court imposes
15 as part of this sentence a sanction that also is
16 imposed by operation of law, it then is no longer a
17 collateral sanction for that individual, right?
18 It is part of the punishment.

19 MR. CHIN: The version of it that is in
20 the sentence is.

21 COMMISSIONER ATWOOD: Is what?

22 MR. CHIN: Is not a collateral sanction.

23 COMMISSIONER ATWOOD: Okay. Maybe I'm
24 the only one in the room who finds that somewhat
25 ambiguous in the definition. I think you meant to

1 say when it applies by operation of law without
2 regard to whether it's in the sentence or not. But
3 it can be read to mean, even if it is in the
4 sentence, as long as it's imposed by law it's still
5 a collateral sanction. I think you don't mean that.
6 Do some people seem to think that ambiguity --

7 CHAIRPERSON AUERBACH: The chairman of
8 the committee will take a shot at this.

9 COMMISSIONER ATWOOD: Okay. Thanks.

10 COMMISSIONER RICHARD T. CASSIDY
11 (Vermont): Let me offer one other suggestion. The
12 major problems that your question raises I think
13 dealt with the last sentence of the definition which
14 says, "The term does not include imprisonment,
15 probation, parole, supervised relief, forfeiture,
16 restitution, fine, assessment, or cost of
17 prosecution." What you do is you take a number of
18 things that might also be applied by operation of
19 law, might arguably be within the definition, you
20 take them out and make clear that they're not what
21 you're talking about.

22 COMMISSIONER ATWOOD: Okay. I didn't
23 see that last sentence really as clarifying my
24 particular ambiguity. I've highlighted it. Maybe
25 you can try to make it somewhat clearer. Thank you.

1 CHAIRPERSON AUERBACH: Good. Thank you.

2 The commissioner at the Microphone 6.

3 COMMISSIONER JAMES BOPP, JR. (Indiana):

4 My questions go to the suitability of this act to be
5 treated as a uniform act by the Conference. It is
6 my understanding that relief from collateral
7 sanctions is most often obtained in the United
8 States through either clemency, pardon, sealing of
9 criminal records, expungement of criminal records,
10 or deferred prosecution, as has already been
11 mentioned, and that every state in the United States
12 has one or more, and a substantial number of states
13 have more than one of these means to relieve
14 collateral sanctions that would attach to a
15 conviction.

16 Now, it's my understanding that this act
17 does not seek to impose uniformity on any of those
18 methods, is that correct?

19 CHAIRPERSON AUERBACH: Chairman.

20 COMMISSIONER RICHARD T. CASSIDY

21 (Vermont): The relief that this act would provide
22 would stand side by side with whatever existing
23 relief a particular state may have.

24 COMMISSIONER BOPP: Okay. So the effort
25 here is to create a new and comprehensive method,

1 certainly Section 10 would be a comprehensive
2 method, to relieve people of collateral sanctions.
3 Full relief could be granted under Section 10 for
4 all collateral sanctions as I understand the act.

5 COMMISSIONER CASSIDY: Well, I would
6 have to take issue with a number of the things that
7 you say. "New" is mostly true, but not true in
8 every state. "Comprehensive" is mostly true but not
9 entirely true. Even under Section 10 there are some
10 disabilities that persist.

11 COMMISSIONER BOPP: Well, yes, because
12 you have Section 11 that proposes four separate
13 offenses that would not be relieved or circumstances
14 in which they would not be relieved. I understand
15 that. And as to "new," I understand that there are
16 only four states that offer comprehensive relief of
17 collateral sanctions other than through the other
18 methods that this act does not address. Those
19 states are Arizona, New Hampshire, and Washington
20 that enacted those laws in the Seventies which have
21 been subject to significant amelioration, frankly,
22 of their broad effect, and New York. Are there any
23 others that offer comprehensive relief through a
24 standalone method other than clemency, pardon,
25 sealing of records, expungement or deferred

1 prosecution?

2 COMMISSIONER CASSIDY: I simply don't
3 know the answer to your question. The reporter may.
4 I don't know if Advisor Love is here. Has she
5 joined us?

6 Margaret, do you know the answer to that
7 question.

8 MS. MARGARET COLGATE LOVE (ABA Advisor):
9 I actually wrote a book about the very subject that
10 you're speaking of. I did a kind of a state by
11 state survey of the various mechanisms that exist in
12 the states to relieve collateral sanctions, and
13 disqualifications as well.

14 You're right, every state has a pardon
15 system. Most states have only a pardon system, and
16 that is the only mechanism. There are some judicial
17 remedies. It's pretty hit or miss. Utah and Kansas
18 have a pretty broad expungement system. The
19 terminology is very different. New York is really
20 the only state that has a comprehensive
21 administrative certificate of relief from
22 disabilities right now, and that system has been
23 around for a long, long time, since the 1940's.
24 Illinois tried to emulate what New York did.

25 The other states, New Hampshire, for

1 of admission. It's a very useful book in trying to
2 elucidate the problems that exist, the different
3 mechanisms that are provided by different states.

4 After having enjoyed the reading of your
5 book on this and the -- I was reading from Page 10
6 and 11 of your study where you point out, after
7 having pointed out that there are these other
8 mechanisms, clemency, pardon, expungement, et
9 cetera, that only in those states and probably, from
10 my understanding of your study, only New York now
11 really has a comprehensive, standalone,
12 administrative mechanism to relieve collateral
13 sanctions, other than the other mechanisms.

14 That's why I felt, Mr. Chairman, that to
15 say that this is new is at least fair. Of course,
16 what I'm referring to is Section 10, which is that
17 stand alone administrative mechanism.

18 However, there is one section, Section
19 9, that does involve matters that a number of states
20 have different statutes on, as I understand it.
21 Please correct me if I'm wrong. Section 9 deals
22 with state employment and state licensing, and that
23 there are a number of states that do have statutes
24 that address that question. It is my understanding
25 that really all of the substantive sections of this

1 act are new, meaning that there are very few, if
2 any, states that do them. Section 9 is not of that
3 kind. In other words, it is one in which there are
4 a number of state statutes.

5 In that regard, I have a question. I
6 discovered also in my research that this Conference
7 tried to deal with the questions addressed in
8 Section 9 previously. We had the Uniform Act on
9 Status of Convicted Persons. The principal
10 operative section, in my read of that uniform act,
11 dealt with the issue of disqualification because of
12 conviction, in other words, a collateral sanction or
13 disqualification from employment with the state or
14 obtaining licensing from the state.

15 Now, in that regard, I understand that
16 this uniform act has been abandoned by the
17 Conference and enjoyed little success. My
18 understanding is that it was adopted by two states,
19 Hawaii and New Hampshire.

20 So, my question is, why was that act
21 abandoned? Why isn't this act an amendment to that
22 act since it addresses the only subject of the act
23 where there is substantial action by the states
24 which is state employment and licensing? Is there a
25 lesson there that we are to learn that when we try

1 to address this subject in a uniform way, through
2 the Uniform Act of Status of Convicted Persons? Of
3 course, I do not know the history of that and would
4 be interested in that.

5 CHAIRPERSON AUERBACH: Commissioner
6 Davies.

7 COMMISSIONER JACK DAVIES (Minnesota):
8 We have a committee called the Committee to Review
9 Conference Acts. What it is designed to do is take
10 those acts which were either before or after their
11 time and therefore have not be picked up widely and
12 put them in our attic. That's generally what has
13 happened on the act you referred to. Except some
14 provisions of that act, particularly the right to
15 vote, have had effect in a number of states, not as
16 many as some of us think ought to have been done.

17 This is quite a different environment
18 right now. We have the ABA asking us to tackle this
19 subject matter. We're responding to that. Our
20 mother organization or father organization,
21 depending on your point of view. They gave birth to
22 this organization. We have always acted as a
23 drafting agency, in effect, for the ABA. We have
24 that support.

25 We also have at this particular moment

1 in time a number of states that are really lusting
2 for this act. Two members of this committee are
3 from those states -- well, more. Those of us from
4 Minnesota are from one of those states. My
5 understanding is that Washington is also very, very
6 interested in this subject matter.

7 We may for one of the few times in the
8 Conference history actually have been timely instead
9 of behind the curve.

10 COMMISSIONER BOPP: When was this act
11 put in the attic?

12 COMMISSIONER DAVIES: I have not a
13 memory of that. The years have sort of blended
14 together in my memory.

15 COMMISSIONER BOPP: In fact, it's even
16 expunged from the archives at the request of the
17 Conference, which I did not understand that
18 situation. Is that common, too? That's unusual.

19 CHAIRPERSON AUERBACH: Not unusual.

20 COMMISSIONER BOPP: Thank you.

21 CHAIRPERSON AUERBACH: Thank you,
22 Commissioner.

23 Microphone 5.

24 COMMISSIONER SANDRA S. STERN (New York):
25 My question is to sub (2), the words in the third

1 line, "operation of law," whether that means
2 operation of the laws of this state or operations of
3 the -- operation of the laws of this state and
4 federal law.

5 In a broader sense, my question also
6 goes to Section 4, which is whether the designated
7 government agency or official should not also be
8 collecting information about the major disabilities
9 that arise under federal law. I'm wondering how
10 much extra effort this would be in the interest, of
11 course, of full disclosure to the defendant at the
12 time of pleading.

13 CHAIRPERSON AUERBACH: Chairman.

14 COMMISSIONER RICHARD T. CASSIDY
15 (Vermont): Commissioner Stern, I don't think it has
16 been considered that by operation of law it was
17 intended to include federal law. I can tell you,
18 and perhaps Advisor Love would like to tell you
19 more, that a study on the federal side is under way.

20 Advisor Love, do you want to comment?

21 MS. MARGARET COLGATE LOVE (ABA Advisor):
22 Sure. You've raised a very, very difficult question
23 as to what effect a state relief procedure would
24 have on the federal laws. Some of those federal
25 laws, like the federal firearm statute, the

1 immigration laws, and there are some others,
2 actually incorporate state pardon or set aside
3 expungement relief procedures right in them. I
4 think that that would be certainly a trend to
5 encourage. There are a lot of federal collateral
6 sanctions, particularly since 9-11. There have just
7 been a ton of them.

8 I think you have raised a very important
9 point. I think the best you can do is just to deal
10 with your own law, frankly. If that has an effect
11 on the federal sanctions, that would be good.

12 COMMISSIONER STERN: In that case, I
13 would suggest that the phrase be expanded to
14 "operation of the laws of the state," just to make
15 it clearer.

16 COMMISSIONER RICHARD T. CASSIDY
17 (Vermont): We'll consider that. Thank you.

18 CHAIRPERSON AUERBACH: Okay.

19 Commissioner Langrock.

20 COMMISSIONER PETER F. LANGROCK
21 (Vermont): The last sentence in (2), "the term does
22 not include," is that meant to be an inclusive list?
23 For instance, right now the most common is
24 pre-approved furlough. I don't think that that fits
25 in any of the other categories. I am sure there are

1 other ones around the country which use different
2 phrases, different results. Either you can define
3 what you mean, which is any type of nonincarceration
4 with some sort of state supervision, or
5 incarceration. But using this variety of terms,
6 probation, patrol, et cetera, they take on different
7 meanings in different circumstances. I assume you
8 mean to include all of these and not just these
9 specific items.

10 COMMISSIONER RICHARD T. CASSIDY
11 (Vermont): As I understand the structure of the
12 definition, Commissioner Langrock, it is that the
13 first sentence sort of states the principle and the
14 second sentence identifies a list of particular
15 items that probably are within the principle but
16 makes absolutely clear that they are within the
17 principle. If you take something like pre-approved
18 parole, which I think is what you made reference to,
19 that would be something that is imposed on the
20 defendant by the court at sentencing as the
21 sentence. I would think it's not a collateral
22 sanction.

23 COMMISSIONER LANGROCK: You have
24 enumerated a lot of terms in here.

25 COMMISSIONER CASSIDY: Yes.

1 COMMISSIONER LANGROCK: And there is
2 some overlap. I don't know whether it's meant to
3 keep to these specific terms or the general
4 principle that you're involved there, and this is
5 really a noninclusive list and maybe something you
6 can put in the comments and maybe something you can
7 include in the text itself.

8 COMMISSIONER CASSIDY: In that sense I
9 think it is a noninclusive list. The principle
10 that's in the first sentence tells us or should tell
11 us what is a collateral sanction and what is not.
12 The second sentence is intended to make it perfectly
13 clear if there were any doubt that these items are
14 not collateral sanctions.

15 COMMISSIONER LANGROCK: Would it be
16 possibly worthwhile to take that second sentence out
17 and move it to the comment?

18 COMMISSIONER CASSIDY: I will tell you
19 that we are loathe to change the definitions of
20 "collateral consequence" or "disqualification" in
21 any way because Section 510 of the Court Security
22 Act of 2007 which mandated this study uses these
23 definitions. We want that template to carry
24 through.

25 CHAIRPERSON AUERBACH: Commissioner

1 Davies.

2 COMMISSIONER JACK DAVIES (Minnesota):
3 Peter, we will consider adding, for example, to the
4 list to establish the proposition that it's not
5 exclusive.

6 CHAIRPERSON AUERBACH: Moving right
7 along, Commissioner Cary will read Section 3.

8 COMMISSIONER JOHN M. CARY (Washington):
9 "SECTION 3. LIMITATION ON SCOPE. This [act] does
10 not:

11 "(1) provide a basis for invalidating a
12 conviction or plea;

13 "(2) affect the duty an individual's
14 attorney owes to the individual; or

15 "(3) create a cause of action for money
16 damages."

17 CHAIRPERSON AUERBACH: Microphone 3.

18 COMMISSIONER DEBORAH E. BEHR (Alaska):
19 I'm looking at Page 7 adding potentially a Line 4.
20 I'm probably the one in my state who is going to
21 have to explain this to legislators and to victims
22 groups. I was wondering if it might help the
23 situation by saying it doesn't invalidate claims for
24 damages based on the criminal conviction.
25 Oftentimes civil damage claims are many years out.

1 I wouldn't want them to think that this act could in
2 any way invalidate pending civil actions.

3 COMMISSIONER RICHARD T. CASSIDY
4 (Vermont): Commissioner, let me be sure I
5 understand your comment. Your concern is that there
6 might be some language in the act that would
7 eliminate the private civil rights of a victim of
8 crime to pursue a civil claim against the defendant
9 for their damages?

10 COMMISSIONER BEHR: Yes. And the
11 perception. Even if we can't point to an express
12 provision, the perception might be there, that it
13 might do that. I think it might be helpful to add.

14 COMMISSIONER CASSIDY: I don't think
15 there is anything in the act that was intended to
16 create a contrary impression. I wonder perhaps a
17 comment might not take care of your concern.

18 CHAIRPERSON AUERBACH: Thank you.

19 Commissioner Billings.

20 COMMISSIONER RHODA B. BILLINGS (North
21 Carolina): On Line 25, Section 3, I don't think
22 this act can create a cause of action. I think it
23 could perhaps create a basis for a cause of action.
24 I think you need to insert in 3 "creates the basis
25 for a cause of action."

1 COMMISSIONER RICHARD T. CASSIDY

2 (Vermont): Commissioner Billings, let me be sure I
3 understand you. As I understood what was intended
4 by the language, it was to make very clear there is
5 no private right of action to enforce this statute.
6 That's what we intended to say. I think that's what
7 we've said. I'm not sure that I quite get the
8 distinction that you're making. Maybe others do.

9 COMMISSIONER BILLINGS: Well, maybe it
10 is that I didn't quite understand what you're doing
11 in terms of saying it doesn't provide for a private
12 right of action to enforce it. What I thought you
13 were trying to say is that this couldn't provide a
14 right for anybody to claim an action for money
15 damages because of a collateral sanction having been
16 imposed or something of that kind, denying something
17 for a collateral sanction that had been removed. I
18 thought you were saying there is nothing in here
19 that provides a basis for somebody suing someone who
20 has denied and --

21 COMMISSIONER CASSIDY: I think we're on
22 the same wavelength. We just have to be sure we
23 have the right words.

24 CHAIRPERSON AUERBACH: Good. Thank you.

25 The commissioner at Microphone 6.

1 COMMISSIONER LANE SHETTERLY (Oregon):
2 Thank you. A question under this section and as it
3 relates to Sections 4 and 5 as well is whether this
4 act gives rise to a defense against the imposition
5 of a collateral sanction. You've stated clearly
6 here that it doesn't create a cause of action for
7 money damages. In Section 4 you say in sub (d), the
8 noncompliance with the collection of publication of
9 laws doesn't give rise to a cause of action for
10 relief, and also in 5, failure to give notice -- in
11 sub (b) of that section also doesn't give rise to a
12 cause of action. I see that being something
13 different than a defense to the initial imposition
14 of a collateral sanction. I'm wondering if that's
15 the intent of the committee, if you might not be
16 more clear about that so that somebody doesn't raise
17 failure to give notice as a basis to oppose the
18 initial imposition of some collateral sanction.

19 CHAIRPERSON AUERBACH: Okay. Thank you.

20 Continuing with Microphone 6.

21 COMMISSIONER JAMES BOPP, JR. (Indiana):

22 Thank you, Mr. Chairman. Is there any part of this
23 act that tells what the relief is that someone can
24 seek? I know this has what relief you cannot seek.
25 Is there any section that says what relief you can

1 seek?

2 COMMISSIONER AUERBACH: Chair.

3 COMMISSIONER RICHARD T. CASSIDY

4 (Vermont): My recollection, and I don't have the
5 particular section in front of me, is that one of
6 the things that the act does say at a later point is
7 that if you had a certificate that entitled you for
8 consideration for a job, a government job, for
9 example, and you sought the job and did not get it,
10 you might be able to seek to have that governmental
11 action reviewed, set aside and reconsidered if you
12 improperly were deprived from some job or benefit
13 you should have gotten.

14 COMMISSIONER BOPP: Well, that is
15 something that came to my mind. Section 9 being
16 administered by an agency under the act. The agency
17 is considering whether or not to grant the relief
18 from a particular collateral sanction that affects
19 employment or licensing. There are under subsection
20 (b), and this is Page 17, standards by which that
21 determination is to be made by the agency. I assume
22 that that decision of the agency would be reviewable
23 under the Administrative Procedure Act, for
24 instance.

25 COMMISSIONER CASSIDY: I think that's

1 right.

2 COMMISSIONER BOPP: And any relief that
3 would be provided there would be available. Of
4 course, I guess the possibility is in a given state,
5 failure to employ, which -- or failure to get a
6 license could be challenged, they could be required
7 to employ. I even wonder whether or not damages
8 would be provided for in some states under their
9 Administrative Procedure Act.

10 COMMISSIONER CASSIDY: I think if you
11 look at -- we're getting well ahead of ourselves
12 here -- I guess it's Section 12, sub (g), it really
13 addresses this question. It says that with respect
14 to --

15 COMMISSIONER BOPP: What page, sir?

16 COMMISSIONER CASSIDY: It's on Page 28.
17 "With respect to an individual to whom an order of
18 relief from collateral sanctions or certificate of
19 restoration of rights has been issued, this [act]
20 does not eliminate any legal right or remedy, or
21 give rise to a cause of action other than a
22 declaration that a policy imposing a collateral
23 sanction on an individual to whom such an order or
24 certificate has been issued is invalid or, if an
25 individual has shown that an opportunity was denied

1 in violation of this section, for an order that the
2 individual's application be reconsidered in
3 accordance with this section."

4 That's really the remedy.

5 COMMISSIONER BOPP: The only other
6 comment I would have on Section 3, if the intent is
7 to ensure that a private cause of action is not
8 provided for by the act, then I think that has to be
9 explicit. I do not believe that that point is
10 covered by 1, 2, or 3.

11 COMMISSIONER CASSIDY: Well, perhaps we
12 should look at that language again. It's certainly
13 our intention to do that.

14 CHAIRPERSON AUERBACH: Okay. Thank you.

15 Commissioner Langrock at Microphone 5.

16 COMMISSIONER PETER F. LANGROCK
17 (Vermont): I'm concerned about the whole setting of
18 Section 3. Right now there exists all sorts of
19 bases for invalidating a conviction. There are
20 duties of an attorney to advise the individual of
21 collateral sanctions. There may well be causes of
22 action for money damages that are there. I
23 understand that this act is not to create new ones.
24 It also, as I understand it, is not to interfere
25 with those that exist.

1 COMMISSIONER CASSIDY: You're correct.

2 COMMISSIONER LANGROCK: What I'm worried
3 about, when you simply state here that this does not
4 provide for these matters here, that there is a
5 negative pregnant situation which says it also
6 cancels or curtails in some ways those existing
7 matters that are out there presently. I'm not sure
8 whether Commissioner Bopp's suggestion is
9 appropriate. A simple statement that this act is
10 neutral on existing remedies, does not create any
11 new remedies for damages, whatever the case may be,
12 would be better than the way it's said here. I read
13 this and I was concerned about it.

14 I was also concerned about Commissioner
15 Billings' point. I thought that she was right. I
16 had read it the way she had the first time.

17 I ask you to take another look at the
18 setting of this matter.

19 CHAIRPERSON AUERBACH: Microphone 6.

20 COMMISSIONER HARRY J. HAYNSWORTH, IV
21 (Minnesota): I might be getting things off track
22 here. I'm wondering if you even need subsection
23 (3). You can cover it in a comment about making it
24 clear you're not trying to create any additional
25 remedy. But what you've done is you have set up,

1 you can tell by all these questions, you have set up
2 a dynamic here of interpretation and potential
3 misinterpretation. If you just eliminated this
4 section you could probably eliminate those
5 questions.

6 COMMISSIONER RICHARD T. CASSIDY
7 (Vermont): Commissioner Haynsworth, there certainly
8 was a lot of consideration to approaching it that
9 way. There is just concern that we make clear that
10 doing these things is not what this act is about.
11 In order, really, to reassure our critics that we
12 weren't headed in that direction, we felt we needed
13 the language.

14 COMMISSIONER HAYNSWORTH: Well, then you
15 need to use Commissioner Langrock's approach, being
16 just specific across the board.

17 CHAIRPERSON AUERBACH: Okay. Microphone
18 5, Commissioner Burton.

19 COMMISSIONER JOHN P. BURTON (New
20 Mexico): Have you thought about rephrasing (3) to
21 say, "this act does not create a private right of
22 action for violation of this act"? That's the
23 normal way I see acts phrased. Does it create a
24 private right of action for violation or does it
25 not? Would that sweep too broadly for what you're

1 trying to do? I just ask the question. That's how
2 it's normally phrased. But that may be broader than
3 what you want. Thank you.

4 COMMISSIONER RICHARD T. CASSIDY

5 (Vermont): Let us think about it. Thank you.

6 CHAIRPERSON AUERBACH: Microphone 1.

7 I'm sorry, Commissioner Davies.

8 COMMISSIONER JACK DAVIES (Minnesota):

9 Commissioner Burton, I think that there is an
10 expectation that causes of action and equity,
11 mandamus or whatever, to make people do what they're
12 supposed to do under the act, might be contemplated
13 here. As we go through the act you will see
14 situations. I think the issue is too early to
15 address at this point.

16 COMMISSIONER BURTON: Well, if you want
17 to preserve the right for equitable relief, then
18 maybe the way you've got it is right, but it isn't.
19 I would agree with Commissioner Billings that it's
20 not as clear as it could be. I would say this act
21 does not create a private right of action for money
22 damages for violation of the act, something like
23 that. That would be broader than what you've got
24 and clearer than what you've got, but it wouldn't
25 affect any other causes of action and it wouldn't

1 limit it to equity, would allow for injunctive
2 relief, which in some states might not be equitable
3 relief.

4 CHAIRPERSON AUERBACH: Commissioner
5 Davies, one last word.

6 COMMISSIONER DAVIES: One last word.
7 I'm reminded of the situation where the state public
8 defender was in front of one of our panels. We
9 couldn't figure out why he was arguing because he
10 never argued in our court. I leaned over and asked
11 the presiding judge if he could figure out why he
12 was. He finally said, "Mr. Stewart, why are you
13 here today? Is this a test case?" The response of
14 the state public defender was, "I'm certainly glad
15 you asked," because it was.

16 COMMISSIONER ROGER C. HENDERSON
17 (Arizona): Mr. Chairman. Mr. Chairman, behind you.
18 Don't forget the second tier up here.

19 CHAIRPERSON AUERBACH: Commissioner
20 Henderson.

21 COMMISSIONER HENDERSON: Normally in
22 drafting an act, you don't put a provision in here
23 saying what the act doesn't do. This act doesn't do
24 a lot of things. It doesn't establish a lottery.
25 It doesn't outlaw that. It doesn't do this. It

1 doesn't do that.

2 We put this provision in here out of
3 concern, first of all, by the law enforcement
4 community that somehow or another some court would
5 interpret this thing so that it would be a basis for
6 invalidating a conviction or plea if somebody didn't
7 comply with the act. And I think that's a
8 legitimate concern.

9 The duty with regard to an individual
10 attorney, I think that's the weakest one being
11 included here. That duty exists apart from this
12 act. I don't think anybody would think that this
13 act affects it, but, nonetheless, some people raised
14 some concerns.

15 The last one, there is a legitimate
16 reason for this, because more and more, at least
17 over the last 20 to 30 years, courts have been
18 persuaded that the violation of a statute can give
19 rise to a tort action for money damages. Thirty
20 years ago, that was not all that common. It is
21 relatively common today.

22 This provision does have a substantive
23 effect. I can give you another example. The Unfair
24 Trade Practices Act that deals with insurance, that
25 was a question for years because the act didn't say

1 anything about whether it created private action or
2 action for money damages. When they revised it some
3 years later they put a provision in there saying it
4 doesn't that.

5 That's the basis for this. The language
6 differs from state to state. But I think the
7 meaning is pretty clear in all three provisions, and
8 particularly the one for money damages.

9 CHAIRPERSON AUERBACH: Thank you.

10 The patient commissioner at Microphone
11 1.

12 COMMISSIONER PETER J. DYKMAN

13 (Wisconsin): I have an example that is right on
14 point from about 20 years ago. A legislator walked
15 into my office with an act similar to this, and she
16 said she wanted a provision that said, "(4) this act
17 does not permit the Department of Natural Resources
18 to condemn land," and that I think is word for word.

19 I think some of this does this. Namely,
20 this act -- I agree with the commissioner from
21 Minnesota -- this act doesn't do a whole bunch of
22 stuff. This belongs in the whole statute book. I
23 don't think that these scope provisions or even
24 limitation on scopes are desirable. They leave what
25 is not included in (1), (2), and (3). I think

1 taking it out is the best way. I don't see why we
2 need to have any of these in here.

3 CHAIRPERSON AUERBACH: Okay. Thank you.

4 The commissioner at Microphone 6.

5 COMMISSIONER LANE SHETTERLY (Oregon):

6 First, just relative to the conversation a few
7 minutes ago about equitable relief. I think that
8 would be precluded by Sections 4 and 5, at least
9 relative to the noncompliance with those sections.
10 I'm wondering if you might be thinking about moving
11 those, "does not give rise to provisions," into this
12 because again the negative pregnant question. Are
13 there other sections of the act that do give rise to
14 a cause of action for something other than money
15 damages, for instance?

16 Also, what I was up here for this time
17 was, again, kind of the negative pregnant issue, but
18 in subsection (1) it doesn't provide a basis for
19 invalidating a conviction or plea, but does it
20 provide a basis for invalidating a sentence or a
21 part of a sentence, which really is separate from
22 the conviction itself. Again, when you list
23 conviction or plea but you don't list sentence, do
24 you create the implication that it does give rise to
25 a relief from some imposition as part of the

1 sentence?

2 CHAIRPERSON AUERBACH: I think it's
3 clear, the chair of the committee has made clear, at
4 least to me, that they're going to look at those
5 words, give it a long and hard look.

6 Let's move forward to Commissioner
7 Curtis reading Section 4.

8 COMMISSIONER GREG J. CURTIS (Utah):
9 Thank you.

10 "SECTION 4. IDENTIFICATION, COLLECTION,
11 AND PUBLICATION OF LAWS REGARDING COLLATERAL
12 CONSEQUENCES.

13 "(a) The [designated governmental
14 agency or official]:

15 "(1) shall identify or cause to be
16 identified any provision in this state's
17 Constitution, statutes, and administrative rules
18 that imposes a collateral sanction or authorizes the
19 imposition of a disqualification, and any provision
20 of law that may afford relief from them;

21 "(2) within [insert time] after the
22 effective date of this [act], shall collect or cause
23 to be collected citations to, and the text or short
24 descriptions of, the provisions identified under
25 paragraph (1);

1 "(3) in complying with paragraph (1) and
2 (2), may rely on the study of this state's
3 collateral sanctions, disqualifications, and relief
4 provisions prepared by the National Institute of
5 Justice described in Section 510 of the Court
6 Security Improvements Act of 2007; and

7 "(4) shall update or cause to be updated
8 the collection within [specify period] after each
9 [regular session] of the [legislature].

10 "(b) The [designated governmental
11 agency or official] shall include or cause to be
12 included the following statements in a prominent
13 manner at the beginning of the collection described
14 in subsection (a):

15 "(1) This collection has not been
16 enacted into law and does not have the force of law.

17 "(2) An error or omission in this
18 collection is not a reason for invalidating a
19 conviction or plea or for otherwise avoiding a
20 collateral sanction or disqualification.

21 "(3) The laws of the United States,
22 other jurisdictions and [insert term for local
23 governments] impose additional collateral sanctions
24 and disqualifications not listed in this collection.

25 "(4) This collection does not include

1 any law or other provisions regarding a collateral
2 sanction or a disqualification or relief from them,
3 enacted or adopted after the collection was
4 prepared.

5 "(c) The [designated governmental
6 agency or official] shall publish, or cause to be
7 published, the collection, created and updated as
8 required under subsection (a). The collection must
9 be available to the public on the Internet without
10 charge.

11 "(d) Noncompliance with this section
12 does not give rise to a cause of action for relief
13 from a collateral consequence."

14 CHAIRPERSON AUERBACH: Microphone 6.

15 COMMISSIONER JOHN J. STIEFF (Indiana):
16 I would like to encourage the committee to move Page
17 8, Lines 10 to 12, to comments. I think I
18 understand why you've put it in the bill. But with
19 all of the other guarantees that you have that, no
20 matter how badly the list is put together, it's not
21 going to affect rights or penalties. I don't think
22 you really need this. I would like you to consider
23 that.

24 CHAIRPERSON AUERBACH: Committee
25 comment.

1 COMMISSIONER RICHARD T. CASSIDY

2 (Vermont): We can certainly talk about that.

3 COMMISSIONER STIEFF: Then in subsection
4 (c), you don't really say when it has to be put on
5 the Internet. I think your intention is to tie it
6 to the time when the collection is initially created
7 and the time when it's annually updated, but you
8 don't quite get there.

9 I will share with your reporter a fix.
10 I also would like you to consider reorganizing it,
11 but it's a little involved to discuss on the floor.

12 CHAIRPERSON AUERBACH: Okay. Thank you.

13 COMMISSIONER CASSIDY: Before the
14 commissioner leaves the microphone, I would just
15 like to go back to your earlier point about lines --
16 I believe they were Lines 10 through 12, is that
17 right?

18 COMMISSIONER STIEFF: That's correct.

19 Page 8.

20 COMMISSIONER CASSIDY: That's the
21 provision that says that the revisor -- I'm assuming
22 the revisor is the person in your state called upon
23 to do this -- can rely upon the collection. You
24 don't think it's useful for the person who is going
25 to have to do this --

1 COMMISSIONER STIEFF: I think what
2 you're doing there is you're giving good advice to
3 the person who is responsible for making the
4 collection. But I don't think that that needs to be
5 in the black letter law.

6 COMMISSIONER CASSIDY: Let us suppose
7 that the work that comes from the Justice Department
8 has some serious defect. Without this language I
9 think we would have imposed upon the reviser an
10 obligation to go and fix it. Now, if the revisor,
11 for example, is willing to take that on, I would
12 love to see it happen. We're trying to keep this
13 simple for them. That's really my theory.

14 COMMISSIONER STIEFF: Okay. I'm fine
15 with that then.

16 CHAIRPERSON AUERBACH: Thank you.

17 COMMISSIONER STIEFF: Thank you.

18 CHAIRPERSON AUERBACH: Microphone 5.

19 COMMISSIONER RYAN LEONARD (Oklahoma):
20 I'm looking at subsection (c). To follow up on a
21 point that Ms. Love made earlier, why not -- the
22 principal purpose of this obviously is to provide
23 information. Why not expand that to include a link
24 to federal collateral sanctions? A state conviction
25 can obviously give rise to a federal sanction. That

1 seems consistent with the note, the comment on Page
2 12 that says advising a defendant of some collateral
3 sanctions without addressing all of them may be
4 misleading. I have had a client where that is very
5 relevant. Had they known the federal collateral
6 sanction they would have made a different decision.

7 I would suggest including a link to the
8 federal collateral sanctions if they exist.

9 COMMISSIONER RICHARD T. CASSIDY
10 (Vermont): I certainly think the committee would be
11 willing to think about it. There are a couple of
12 things in my mind that mitigate against it. One of
13 those things is that this is a state collateral
14 sanctions statute, so it's a little off the point,
15 although it's certainly useful information. The
16 other is that, although we hope this federal
17 collection will be available and useful, it doesn't
18 exist today. We can talk about it, but I'm not sure
19 we dare do it.

20 COMMISSIONER LEONARD: Well, I thought
21 if it did exist -- I do recognize this is,
22 obviously, a state act. But the principal purpose
23 being information, that link would be very helpful,
24 I would think.

25 COMMISSIONER CASSIDY: It certainly

1 would be useful information.

2 CHAIRPERSON AUERBACH: Commissioner
3 Ring.

4 COMMISSIONER CARLYLE C. RING, JR.
5 (Virginia): Somewhat on the same themes that have
6 been mentioned. If I understood the introductory
7 remarks, (a)(3) where you're having the National
8 Institute of Justice addressing or may address the
9 concern expressed last year about the cost of
10 compiling that list in an individual state. In
11 subsection (2) of (a), you say insert a time. Are
12 you intending by that that the time will be
13 coordinated with the timing of the availability of
14 the list?

15 CHAIRPERSON AUERBACH: Chairman.

16 COMMISSIONER RICHARD T. CASSIDY
17 (Vermont): I think that makes good sense.

18 COMMISSIONER RING: It might be helpful
19 in guidance to each state to make that clear in your
20 comments because otherwise we are back into the trap
21 that the state has a duty to come up with a list,
22 can't rely upon the federal list because it doesn't
23 exist yet.

24 COMMISSIONER CASSIDY: Commissioner
25 Ring, I understand what you're saying. One of the

1 things that is relevant from my perspective is that,
2 frankly, the National Institute of Justice has not
3 been speedy off the block in complying with the
4 provision of the statute. My recollection is that
5 the statute tells them that it must be done within a
6 certain period of time. I think it was the end of
7 the calendar year or one year from the date of
8 adoption, I'm not sure which. We want to be
9 cognizant of these concerns.

10 COMMISSIONER RING: Well, in that
11 regard, those of us who either are in state level or
12 federal level ask for freedom of information,
13 information rarely at the time limit that it's
14 complied with and sometimes it's ancient before you
15 get it.

16 The other comment that I would make is
17 in subsection (d). I frankly can't recall whether
18 that was in last year's draft or not. But in any
19 event, I don't see a comment in relationship to it.
20 I assume that if this list is incomplete that this
21 is to assure that it doesn't give rise to any right
22 for relief from that collateral consequence that
23 otherwise would apply and is in the law. Is that
24 correct?

25 COMMISSIONER CASSIDY: That's correct.

1 CHAIRPERSON AUERBACH: Good. Thank you.
2 Commissioner Langrock.

3 COMMISSIONER PETER F. LANGROCK
4 (Vermont): I'm going to make the suggestion that
5 you strike paragraph (3) on Lines 10, 11 and 12,
6 Page 8. I think it's totally unnecessary. (1) and
7 (2) they can rely upon the information here, they
8 can rely upon other information. This is just a
9 provision saying, take a look here. It has no
10 specific guidance. It does not bind in any way.
11 When you throw that into the fact that it's relying
12 on something which doesn't exist, it adds nothing to
13 the act. You can put it in a note, you can deal
14 with it. It has no structure. I think it just
15 looks silly to have a single thing which we could
16 rely on, nothing doesn't exist, may never exist, may
17 not be worth relying upon when it comes out.

18 COMMISSIONER CASSIDY: I think the
19 committee should talk about it, Commissioner.

20 CHAIRPERSON AUERBACH: Let's go over to
21 Microphone 3.

22 COMMISSIONER HARRY M. WALSH (Minnesota):
23 Several of the last few comments really refer to the
24 ordinary difficulties of editing statutes. Anyone
25 who has ever done it runs into these things all the

1 time. This entire section is redundant to the usual
2 process of publishing and editing statutes. There
3 is nothing here that isn't done with a properly
4 indexed ordinary set of statutes. The information
5 provided by the federal study can be integrated into
6 an index. This is just a waste of time.

7 COMMISSIONER CASSIDY: Commissioner, let
8 me just suggest to you that if this were being done,
9 it would be a waste of time. But if you were to go
10 to the indexes in most states and look for this
11 information, you will not find it there.

12 COMMISSIONER HARRY M. WALSH (Minnesota):
13 Well, it might be enough then for the Conference to
14 instruct -- to write a uniform act to instruct the
15 editors to have a good index. That's really all
16 you're doing here.

17 CHAIRPERSON AUERBACH: Any other
18 comments on this section? We will now proceed to
19 section -- I'm sorry. You bobbed up and down a
20 little fast for me.

21 COMMISSIONER VINCENT C. DeLIBERATO, JR.
22 (Pennsylvania): I would reiterate the importance of
23 having the reference to the federal statutorily
24 prepared list because it is going to be critical in
25 the cost benefit analysis of enacting the statute.

1 In your considerations, my urging is that you do not
2 eliminate the reference to Section 510 as it's there
3 and that you do not relegate it to a comment. Thank
4 you.

5 CHAIRPERSON AUERBACH: Thank you.

6 The commissioner at the Microphone 3.

7 COMMISSIONER ARTHUR H. PETERSON

8 (Alaska): In response to the commissioner who
9 spoke, I would totally object to -- you know,
10 disagree with his comments. Having been the revisor
11 of statutes for a number of years in Alaska, long
12 ago when we did everything by paper, I think this
13 would have been a fun project and a worthwhile
14 project.

15 The idea that this is merely an index, I
16 think is flat wrong. In an index you're looking for
17 a certain word. You would have to have the word
18 "disqualification," what does that mean?
19 Disqualification for a conviction? Well, okay.
20 What word would you look for to find the fact that
21 your voting rights are restricted or your right to
22 carry a gun is restricted. It's not just an index.
23 And I support the committee in this.

24 CHAIRPERSON AUERBACH: Thank you. Jack,
25 quickly. Microphone 5.

1 COMMISSIONER JOHN P. BURTON (New
2 Mexico): I just noticed that subsection (b)(2) and
3 subsection (d) are not parallel. (b)(2) says an
4 error or omission in the collection is not a reason
5 for invalidating a conviction or plea or for
6 otherwise opposing a collateral sanction or
7 disqualification. And (d) says noncompliance
8 doesn't give rise for cause of action for relief of
9 a collateral consequence.

10 I guess my question is whether (d) ought
11 to say something about whether it doesn't give rise
12 to a cause of action for post conviction relief or
13 for overturning a plea, or is your nonparallel
14 language. Is that intentional between the two?

15 CHAIRPERSON AUERBACH: The reporter.

16 MR. JACK CHIN (Reporter): It is
17 intentional because the conviction or plea stuff is
18 in Section 3.1.

19 COMMISSIONER BURTON: Okay. If it's
20 intentional, that's fine. Thank you.

21 CHAIRPERSON AUERBACH: Okay. We'll try
22 again and move forward to the reading of Section 5.
23 Commissioner Flowers.

24 Commissioner Flowers is not here. The
25 chair will read it.

1 COMMISSIONER RICHARD T. CASSIDY
2 (Vermont): "SECTION 5. NOTICE OF COLLATERAL
3 CONSEQUENCES IN PRETRIAL PROCEEDING.

4 "(a) At or before arraignment or other
5 judicial proceeding at which an individual is
6 formally advised of the potential sentence for an
7 offense with which the individual is charged, [the
8 designated government agency or official] shall
9 communicate to the individual a notice substantially
10 similar to the following:

11 "NOTICE OF ADDITIONAL LEGAL CONSEQUENCES

12 "If you are convicted of an offense you
13 may suffer additional legal consequences beyond
14 imprisonment, [probation] [insert jurisdiction's
15 alternative term for probation], [insert term for
16 post-incarceration supervision] and fines. These
17 consequences may include:

18 "being unable to get certain licenses,
19 permits, or jobs;

20 "being unable to get benefits such as
21 public housing or education;

22 "a higher sentence if you are convicted of
23 another crime in the future;

24 "the government taking your property; and

25 "prohibiting you from voting or possessing

1 a firearm.

2 "Also, if you are not a U.S. citizen,
3 conviction may result in your deportation, removal,
4 exclusion from admission to the United States, or
5 denial of citizenship.

6 "The law may provide ways to obtain some
7 relief from these consequences. Further information
8 about the consequences of conviction is available
9 [on the Internet] [at [list website]].

10 "(b) Noncompliance with this section
11 does not give rise to a cause of action for relief
12 from a collateral consequence."

13 CHAIRPERSON AUERBACH: Thank you.
14 Microphone 3.

15 COMMISSIONER DEBORAH E. BEHR (Alaska):
16 I have two questions about Section 5. Could the
17 state official use a video tape or a pod cast, some
18 kind of taped presentation to meet the intent of
19 this section? I don't see anything that makes an
20 individualized language to the defendant.

21 COMMISSIONER CASSIDY: Well, it would
22 certainly meet the intent of the statute if that was
23 done in addition to the written notice. The statute
24 provides for communication to the individual, and
25 that leaves some leeway to the person who is going

1 to have to do it.

2 COMMISSIONER BEHR: Just following up.
3 You said written notice. I don't see that it has to
4 be in writing to the person.

5 COMMISSIONER CASSIDY: You're right. I
6 misspoke. It does say communicate to the individual
7 a notice. The way in which that is done is not
8 specified.

9 COMMISSIONER BEHR: That would be
10 helpful in a comment.

11 My next question is, how do you handle
12 it when the person receiving it does not speak
13 English? In some of these large states are they
14 supposed to have translators there available to do
15 this or translated videotapes to do it?

16 COMMISSIONER CASSIDY: Well, the section
17 doesn't provide for that. I would think that that
18 would be appropriate.

19 COMMISSIONER BEHR: Could that be
20 addressed in the comment as well then?

21 COMMISSIONER CASSIDY: I don't see any
22 reason not to.

23 CHAIRPERSON AUERBACH: Commissioner
24 Dykman.

25 COMMISSIONER PETER J. DYKMAN

1 (Wisconsin): I'm looking at Pages 11, 7 and 8,
2 subsection (b). This comes up in other sections.
3 It says noncompliance with this section. Why don't
4 you have a separate section that says noncompliance
5 with this act? Possibly also Commissioner Burton's
6 language that he said was more standard maybe as an
7 addition? Why doesn't the section apply to the
8 whole act, not just this section?

9 CHAIRPERSON AUERBACH: The reporter.

10 MR. JACK CHIN (Reporter): The answer to
11 that is because noncompliance with some of the later
12 sections does give rise to a cause of action for
13 relief. That is, if a collateral consequence is
14 prohibited under one of the later sections, and it's
15 imposed anyway, then there may be a cause of action
16 on the part of the defendant.

17 CHAIRPERSON AUERBACH: Commissioner
18 Ring.

19 COMMISSIONER CARLYLE C. RING, JR.
20 (Virginia): In your listing, you may want to
21 consider some revision in language used, for
22 example, unable to get in some instances, you might
23 be unable to retain or use a license or in
24 connection with public housing or education. It's
25 not only unable to get but unable to continue to

1 benefit from public housing. Education may be a
2 little different. You may want to consider some
3 modification of that language.

4 CHAIRPERSON AUERBACH: Chair.

5 COMMISSIONER RICHARD T. CASSIDY
6 (Vermont): Commissioner Ring, after our last
7 reading, we had the benefit of a member of the
8 Conference, whose name I can't remember, who was
9 kind enough -- he is a person who has experience
10 with writing in a way that is readable to persons
11 with limited education. We worked through this list
12 in an effort to be very simple, understanding that
13 it is only exemplary information. It's not complete
14 information. We really tried to balance simplicity
15 against accuracy here. It's really meant as a "you
16 had better look into this problem" notice.

17 COMMISSIONER RING: I rest with your
18 judgment in that regard. But, for example, on
19 public housing, in many instances, in my experience
20 as vice chair of the housing commission, what we're
21 really doing is not denying them a right, but we are
22 taking away their right.

23 COMMISSIONER CASSIDY: I understand.

24 CHAIRPERSON AUERBACH: The commissioner
25 at Microphone 1.

1 I'm sorry.

2 COMMISSIONER H. LANE KNEEDLER

3 (Virginia): I think Commissioner Ring has a point.

4 We can keep the language simple. I could see a
5 person being confused between originally obtaining
6 and keeping a license. It seems to me we ought to
7 take a look at two concepts, both receiving
8 initially and keeping the various benefits or
9 licenses.

10 COMMISSIONER RICHARD A. LORD (North
11 Carolina): Two points that I think are related in
12 Section 5(a) at Line 23 and again in the notice on
13 27. You use the term "offense." But "offense" is
14 not defined in Section 2 that has the definitions.
15 It's used there as well, along with a list of felony
16 misdemeanor or other offense. I think it probably
17 needs a definition.

18 Related to that, are you intending to
19 say that regardless of the nature of the charge, a
20 criminal defendant who is being arraigned has got to
21 be given these warnings or this notice? Again,
22 depending upon the definition of "defense," it would
23 include things like presumably traffic citations. I
24 assume that's not your intention.

25 COMMISSIONER RICHARD T. CASSIDY

1 (Vermont): This goes back to the earlier comment
2 that we had from the Style Committee which I think
3 has led us to conclude that we do need to define
4 "offense."

5 CHAIRPERSON AUERBACH: Okay. So that
6 will happen.

7 Microphone 3.

8 COMMISSIONER HARRY M. WALSH (Minnesota):
9 You have this protective language about cause of
10 action in paragraph (b). Is there anything in the
11 act that prevents the inference that failure to give
12 this notice at arrangement will not affect the
13 validity of the criminal proceeding itself?

14 COMMISSIONER CASSIDY: Yes, I think
15 there is.

16 COMMISSIONER WALSH: I beg your pardon?

17 COMMISSIONER CASSIDY: I believe that
18 there is.

19 COMMISSIONER WALSH: Could you possibly
20 direct me to that language? Thank you.

21 COMMISSIONER CASSIDY: Section 3,
22 subsection (1).

23 COMMISSIONER WALSH: Thank you.

24 CHAIRPERSON AUERBACH: Microphone 2.

25 COMMISSIONER BARBARA ANN ATWOOD

1 (Arizona): Actually, I was going to make the same
2 point. On that same point, you repeat sometimes,
3 for example, in Section 4, you say that an error or
4 omission is not a reason for invalidating a
5 conviction or plea otherwise avoiding a collateral
6 sanction. You say that in Section 3. Here, because
7 you don't say that -- I'm wondering whether you --
8 you should be consistent. You don't say that here
9 and you don't say it in the next section about
10 consequences at the time of sentencing. I think
11 maybe either Section 3 covers it all or you need to
12 just repeat that simple language, that it is not a
13 basis for invalidating a plea or conviction.

14 CHAIRPERSON AUERBACH: Commissioner
15 Henderson will respond.

16 COMMISSIONER ROGER C. HENDERSON
17 (Arizona): We actually discussed this this morning.
18 I said you have this in here more than once. It's
19 something we need to deal with. We agreed that
20 perhaps we can roll it all into Section 3. My
21 personal opinion is that you don't need to say it
22 four times.

23 The point is that there is some relief
24 provided in these later sections so you can't just
25 say the act doesn't provide any relief other than

1 what already exists under the APA. We did agree to
2 look at it, and we will.

3 COMMISSIONER ATWOOD: Thank you.

4 CHAIRPERSON AUERBACH: Commissioner
5 Langrock, Microphone 5.

6 COMMISSIONER PETER F. LANGROCK
7 (Vermont): I've been having trouble with the
8 language of section (a). I've tried to figure out
9 what is bothering me about it. I can make certain
10 observations. What you're trying to get at here is
11 that a person be given meaningful notice prior to a
12 court taking either a verdict of guilty or a plea of
13 guilty. When you say at arraignment it must be
14 furnished, I'm not sure what "at arraignment" means.
15 Before arraignment. I'm don't know how far back it
16 goes. You can satisfy this by giving a list as the
17 person is arrested and put in jail for a week before
18 being brought before the court. At arraignment, the
19 person could plead guilty and it would have no
20 meaning at all because he would not have a chance to
21 take a look at it.

22 The operative function here is the
23 determination of guilt. It's not the arraignment or
24 other proceeding. I think what you want to do is to
25 make sure that there is a reasonable period of time

1 before this person has things happen that they can't
2 take back, to look at it.

3 I don't think this language really
4 covers that well. I've been unsettled with it. I'm
5 not sure how to deal with it. But I would ask you
6 to take a look at it.

7 COMMISSIONER RICHARD T. CASSIDY
8 (Vermont): Commissioner Langrock, our effort here
9 has been to say that at the same time they're
10 advised of the charges, they should get this
11 information. The reason for trying to put it at
12 that point in the process is hopefully to initiate
13 an appropriate discussion between counsel and the
14 defendant about what this all means and what kind of
15 impacts this might have that are meaningful for me
16 as the defendant. That's the best we've been able
17 to come up with so far about how to tell you when in
18 the process it should happen. It should happen when
19 they are formally advised of the charges. Does that
20 make sense to you?

21 COMMISSIONER LANGROCK: It does, when
22 you say at the time that they are. But at the time
23 they are formally charged, they may enter a plea of
24 guilty. It may be a matter of 30 seconds. That's
25 not what you're trying to get at. The worst thing

1 that can happen is somebody pleads guilty to a drunk
2 driving charge because they say that they're guilty
3 and all of a sudden realize they are excluded from
4 Canada. It can happen so fast. What you really
5 want to do is to give a period of time before it.
6 Yet, you don't want that time to be satisfied by a
7 slip of paper at the jail that they put in their
8 back pocket.

9 I don't know the answer on how to get to
10 it. But I'm not comfortable with this language. It
11 may be better to focus on not the arraignment, but
12 that some meaningful time prior to the conviction
13 being entered.

14 COMMISSIONER CASSIDY: I understand what
15 you're saying. You and I, I think, both are
16 familiar with one hearing cases in which the
17 defendant is picked up on Friday, comes to court on
18 Monday, pleads guilty at 9:00 a.m. and goes home at
19 9:02. It's very difficult to find the right time in
20 this case to do that.

21 COMMISSIONER LANGROCK: That even
22 happens at times when there is a retainer.

23 CHAIRPERSON AUERBACH: Okay. We will
24 move ahead to Section 6. Commissioner French will
25 read it.

1 COMMISSIONER JESSICA FRENCH (Virginia):

2 "SECTION 6. NOTICE OF COLLATERAL CONSEQUENCES AT
3 SENTENCING OR UPON RELEASE.

4 "(a) An individual convicted of an
5 offense must be given notice that collateral
6 sanctions and disqualifications may apply because of
7 the conviction, notice that there may be ways to
8 obtain relief from them, and notice of where the
9 collection of relevant laws published under Section
10 4(c) can be found. Notice substantially similar to
11 the notice set forth in Section 5(a) is sufficient,
12 but it must also include contact information for
13 government or nonprofit agencies, groups, or
14 organizations, if any, that offer assistance to
15 individuals seeking relief from collateral sanctions
16 and disqualifications, and information about when an
17 individual convicted of a crime may vote under this
18 state's law.

19 "(b) The [designated government agency
20 or official] shall give the notice at sentencing if
21 an individual is not sentenced to imprisonment or
22 other incarceration. If the individual is sentenced
23 to imprisonment or other incarceration, the officer
24 or agency releasing the individual shall give the
25 notice not more than [30], and, if practicable, at

1 least [10] days before release.

2 "(c) Noncompliance with this section
3 does not give rise to a cause of action for relief
4 from a collateral consequence."

5 CHAIRPERSON AUERBACH: The commissioner
6 at Microphone 6.

7 COMMISSIONER JAMES BOPP, JR. (Indiana):
8 With respect to Lines 26 to 30, is there any other
9 comparable circumstance in which this sort of notice
10 is given? I am familiar with when you have a pauper
11 defendant who has pled guilty to a crime and you
12 appoint a public defender and you give them
13 information of how to go find those people for
14 appeal. But I don't know of a comparable situation.

15 COMMISSIONER RICHARD T. CASSIDY
16 (Vermont): I can't think of one.

17 COMMISSIONER BOPP: There are many times
18 when the government acts with respect to individuals
19 that gives rise to a cause of action or a claim that
20 the individual might make, but we don't have the
21 government informing these individuals where to go
22 find a lawyer to go challenge them. I just think
23 this is unprecedented and unwarranted unless you're
24 expecting to create a regime in which every criminal
25 defendant is out challenging the collateral

1 consequences or this would facilitate that regime.

2 COMMISSIONER CASSIDY: Well, I can tell
3 you where this language came from.

4 COMMISSIONER BOPP: Okay.

5 COMMISSIONER CASSIDY: One of the things
6 that our committee did in October of 2006, if I'm
7 not mistaken, is that we held a public hearing in
8 Brooklyn along with ABA Commission on Effective
9 Criminal Sanctions. We learned a lot about what
10 they are doing. They have a huge problem with three
11 or four thousand inmates being released every month
12 into that particular jurisdiction. They're trying
13 really hard to run some reintegration programs that
14 will work. New York, as you heard earlier, has some
15 of the same opportunities to get some relief from
16 some of the consequences of conviction that our
17 statute provides for. The provisions are very
18 rarely used.

19 One of the things that we heard from
20 some of the people who testified, in fact, some of
21 the ex-offenders who testified, is they didn't use
22 them because they didn't know they existed.

23 CHAIRPERSON AUERBACH: Commissioner, you
24 wanted to add something.

25 COMMISSIONER H. LANE KNEEDLER, III

1 (Virginia): Commissioner Bopp, the purpose of this
2 is not to set up a system whereby people get an
3 attorney to go out and challenge these collateral
4 sanctions. The purpose is -- remember the context
5 now. They will have been given notice, it could be
6 some time ago, of potential collateral sanctions.
7 Now they have been convicted. If the person is not
8 going to be incarcerated, they're going to be
9 released into the public. We want them to know what
10 the potential collateral sanctions are. If they've
11 been in prison for some time and they're going to be
12 released, we want them to know what the potential
13 collateral sanctions are, both in terms of what
14 employment they will not be able to qualify for,
15 what housing they might not be able to qualify for,
16 and also things like you may not carry a firearm.
17 The relief is not relief in terms of challenging the
18 collateral sanction. There are ways down the line
19 for either an order of relief or a certificate of
20 restoration of rights. We want them to know that
21 that is possible and what terms are, what the
22 requirements are for obtaining such an order or
23 certificate. It's not meant to be a way of
24 providing everybody with an attorney to challenge
25 the collateral sanction. It is that we want them to

1 know what is out there that they might not otherwise
2 know about.

3 COMMISSIONER BOPP: I appreciate that.
4 Maybe I wasn't clear. I agree with that goal.

5 What I was referring to is beginning on
6 Line 27, after the comma, but it must also include
7 contact information of groups that offer assistance
8 to individuals seeking relief. That was the part of
9 that section which my comments were directed to.

10 CHAIRPERSON AUERBACH: Okay. Thank you.
11 Commissioner Langrock.

12 COMMISSIONER PETER F. LANGROCK
13 (Vermont): There is a policy issue here, which I
14 think should be raised, and I may be crying in the
15 wind. It comes under subsection (c), noncompliance
16 does not give rise to a private cause of action. It
17 seems to me that if we're setting up a system where
18 we're giving information to a variety of people, and
19 if that information is blatantly wrong and people
20 rely on it, they should get some relief from it.
21 Now, I recognize that may be unpolitic, but I don't
22 know of anyplace else in our law where we don't give
23 some relief to a situation where there is flagrant
24 information and reliance.

25 I just don't know where the committee

1 has come down on it. I would like to see you come
2 down on the opposite side with whatever protections
3 that are there. And certainly when somebody is hurt
4 and is an individual who has relied upon the
5 sanction and suffers the consequences, that person
6 is able to carry the burden of spreading the risk,
7 as is the government. The government is the best
8 possible insurer, in a sense.

9 I would like to hear what the
10 committee's position is. I'm sure you have talked
11 about it.

12 COMMISSIONER RICHARD T. CASSIDY
13 (Vermont): Commissioner Langrock, we certainly
14 have. This is very much a situation in which we do
15 not want the perfect to be the enemy of the good.
16 The situation we have now is very bad. A person who
17 is subject to these hundreds of collateral sanctions
18 does not know what they are and has no practical
19 means of finding out what they are, and may violate
20 the law by failing to comply with them and may have
21 their freedom permanently removed as a result.
22 That's a terrible situation.

23 Now, I'll admit to you, I think it would
24 be a perfect situation or a more perfect situation
25 if the consequence of failing to give the right

1 information was that that person got some
2 appropriate measure of relief. I don't think we can
3 get there. I think saying instead, the government
4 is going to make a serious and good faith effort to
5 give the right information. If the government makes
6 a mistake and you get no relief for it is a much
7 better situation than the one we're in now.

8 COMMISSIONER LANGROCK: I'm willing to
9 accept that. I'm not going to make a motion to try
10 and change it.

11 I would ask a commentary be put in the
12 comments along those lines, that the committee
13 recognizes that this is not a perfect situation,
14 that in other areas of the world there would be some
15 relief. We have not provided for it here for the
16 very practical situation of the perfect not being
17 the enemy of the good. Look, there are
18 prosecutorial interests out there that are
19 tremendously powerful. They don't want in any way
20 to have sanctions for some of these activities.

21 We may have to live with that, but we
22 don't have to do it proudly, at least this
23 organization, which should say something along those
24 lines of what we believe to be correct and right.

25 COMMISSIONER ROGER C. HENDERSON

1 (Arizona): Peter, we all share your concern. But
2 if you think about what this act does, first of all,
3 we try to provide some sunshine, you know, collect
4 this stuff, publish it, make it available. But some
5 of these things are so obscure that it would really
6 be unrealistic to think that every provision could
7 be found even in one state. Moreover there are
8 going to be some arguments about whether this is a
9 collateral consequence. We do the best we can
10 there.

11 Then when it comes to the notice, we
12 don't provide any specific information. What we do
13 is, is say you may be subject -- may be subject --
14 to some things that you haven't thought about. We
15 try to get it as early in the process as possible.
16 We say at or before arraignment. By the time you
17 get the guilty plea, it's too late. You walk into
18 the court, the deal is made, they're not paying
19 attention to what they are told at that time. We
20 trying to move it as far back as we can. And then
21 when they're released, we also say it. By the way,
22 you may be subject to these sanctions.

23 What we really do is, the notice at or
24 before arraignment, we try to put it off on you so
25 they can sue you. What we're trying to do is get

1 them to have a conversation with their lawyer.
2 After they're released, we cannot protect people
3 from their own foolishness. You describe your one
4 day hearing and guilty plea. The vast majority of
5 people in this country waive their right to an
6 attorney. They plead guilty. We can't protect them
7 from that. Once they're released, we say, look, you
8 should -- here's some people you might want to go
9 talk to if you're really concerned and upset about
10 this, go talk to them, and there may be some relief,
11 there may not.

12 We don't do anything in this act that
13 would really give them some relief. I'm not so sure
14 we even need to say anything about it doesn't give
15 you any relief for private money damages or
16 anything.

17 CHAIRPERSON AUERBACH: The Commissioner
18 at Microphone 3.

19 COMMISSIONER CURTIS R. REITZ
20 (Pennsylvania): Sections 4, 5, and 6, I think the
21 committee obviously means that these should be more
22 than just a statement of good practice. The black
23 letter spends a lot of time saying how not to
24 enforce the sections. As far as I can tell, it
25 doesn't say anything about how to enforce the

1 sections if for whatever reasons the agencies or
2 officials who are mandated by the act fail to act in
3 a consistent way.

4 Earlier I heard discussions about the
5 possibility of equitable actions or some form of a
6 judicial order in a prospective form to enforce the
7 act. Am I correct that that is what the committee
8 believes is the way in which 4, 5, and 6 will be
9 enforced if there is simply failure to act or
10 failure to act sufficiently?

11 MR. JACK CHIN (Reporter): Yes. The
12 disclaimers here do leave open the possibility --

13 COMMISSIONER REITZ: I'm sorry, I can't
14 hear you.

15 MR. CHIN: The disclaimers leave open
16 the possibility of a mandamus, a class action, a
17 disciplinary action by the courts or the attorney
18 general. Whatever other methods are available to
19 make governmental officials do their jobs are
20 available here, just not money damages.

21 COMMISSIONER REITZ: Do you make
22 reference to that anywhere?

23 MR. CHIN: Not specifically, no.

24 COMMISSIONER REITZ: Is there any reason
25 why that's not specifically made?

1 MR. CHIN: Because it's going to vary a
2 lot state by state. I suppose we could put it in
3 comments.

4 CHAIRPERSON AUERBACH: Commissioner
5 Davies.

6 COMMISSIONER JACK DAVIES (Minnesota): I
7 was going to suggest that there could be a comment.
8 I think the reality is that the failure to comply
9 would be spotty. In other words, there might be
10 some judicial districts where the judges are
11 careless or angry or whatever and don't do it. But
12 most of the districts in the state, most of the
13 courts in the state, it would be well done. And
14 most of the prisons, correctional institutions, it
15 would be complied with consciously. But there might
16 be some resistance here and there, and then you
17 could seek some sort of mandamus or whatever, or go
18 to the Supreme Court and just petition that they do
19 something about this particular area.

20 COMMISSIONER REITZ: Thank you. I would
21 suggest to the committee at least put in a comment
22 what you're thinking about as the way to enforce.

23 My hunch is that there will be places
24 where the agencies will say we just don't have
25 enough money to do this, there are greater

1 priorities. It won't be defiance, it will just be a
2 failure to comply. If there is to be any form of
3 redress, I think you ought to at least give a hint
4 as to what you have in mind.

5 CHAIRPERSON AUERBACH: Thank you.

6 Commissioner Bopp at Microphone 6.

7 COMMISSIONER JAMES BOPP, JR. (Indiana):

8 Thank you, Mr. Chairman. I must admit that this
9 discussion we've just had is very troubling. As I
10 expressed in the last meeting, I support the
11 proposition that reasonable and practical steps be
12 made to collect this information and to provide it
13 in a timely way to criminal defendants. But I
14 strongly disagree, and I understand that the
15 comments are under the jurisdiction of the
16 committee, not the Conference.

17 I would strongly object to incorporating
18 the suggestion of Mr. Langrock, a good friend of
19 mine, who I disagree with on this issue, and that
20 is, I do not consider it an unjust state of affairs
21 that criminal defendants are not advised of each
22 potential collateral sanction or disqualification,
23 and that they may challenge their conviction, their
24 guilty plea because at some future date what the
25 chairman describes as hundreds and unknowable --

1 perhaps hundreds -- but many unknowable potential
2 collateral sanctions or disqualifications may
3 ultimately apply. I don't consider that to be
4 unjust at all. The current state of the law, as I
5 understand it, is that a guilty plea cannot be
6 challenged based upon the failure to inform of a
7 collateral sanction.

8 To have this Conference through comments
9 go on record with that rather radical position, I
10 think is not faithfully reflecting the full views of
11 the Conference.

12 Secondly, the committee member at the
13 top -- I'm sorry, I am new and I don't know
14 everybody's name -- suggested that one effect of
15 these provisions would be that the lawyer gets sued.
16 Now, I assume what he's referring to is the criminal
17 defense lawyer who has failed to advise his client
18 of collateral sanctions that ultimately the
19 defendant is subjected to. In a legal malpractice
20 action or does he mean a challenge to his conviction
21 because of incompetence of counsel? If we're
22 creating all this, you know, this would mean that
23 every conviction is ultimately -- and every sentence
24 and every guilty plea is ultimately subject to
25 failure to disclose each one of these hundreds and

1 many unknowable collateral consequences or
2 disqualifications. That would be very bad public
3 policy.

4 COMMISSIONER ROGER C. HENDERSON
5 (Arizona): Just on this one point. That is why we
6 have the provision in Section 3 that says it does
7 not alter the attorney's duty to the client. We
8 haven't changed that one bit. Of course, I was
9 being facetious when I said suing Peter. But the
10 fact of the matter is that we are trying to put the
11 responsibility of someone providing this information
12 other than the judge.

13 COMMISSIONER BOPP: I'm willing to
14 support these requirements that we are talking about
15 right now on the assumption that there is absolutely
16 no possibility by the adoption of these state laws
17 that convictions or sentences or guilty pleas can
18 ultimately be challenged, that this act gives no
19 support for -- I know that is a position of some,
20 that would want to make it that way -- but that our
21 actions will give no support for that proposition.

22 CHAIRPERSON AUERBACH: The chairman
23 would like to respond to that.

24 COMMISSIONER RICHARD T. CASSIDY
25 (Vermont): Commissioner Bopp, I am of the school

1 that one should hardly ever say "never" because you
2 can't be honest and do that.

3 What I would say to you about this is
4 that you've already won your argument with this
5 committee. Now, there are some of us who might not
6 be in perfect sympathy with your argument. But even
7 if we're not in sympathy with it, we think that it's
8 the right outcome for this statute -- that is to
9 say, there is law out there about what is
10 malpractice and what is not malpractice. This
11 statute doesn't change it. There is law out there
12 about what is the competent representation of
13 criminal defendants in a criminal action. This
14 statute does not change it.

15 I hope you will be satisfied with having
16 won the black letter argument and not ask me to try
17 and see the world through your eyes, because we
18 probably won't come to that conclusion.

19 COMMISSIONER BOPP: Oh, I'm not asking
20 that you see the world through my eyes. I am very
21 satisfied with the position of the committee if that
22 is your position.

23 COMMISSIONER CASSIDY: Thank you.

24 COMMISSIONER BOPP: I'm just trying to
25 fend off a boarding party over here, my friend Mr.

1 Langrock, through comment to the act. Thank you.

2 [Laughter]

3 COMMISSIONER CASSIDY: If you're
4 accusing my brother from Vermont of being a pirate,
5 I can't comment on that either.

6 [Laughter]

7 CHAIRPERSON AUERBACH: I've got to go to
8 Microphone No. 3.

9 COMMISSIONER LYLE W. HILLYARD (Utah):
10 As I listened to this debate and this discussion
11 going on, I wear two hats. One, I do enough
12 criminal defense work to be a little bit dangerous.
13 Secondly, as a state legislator, trying to figure
14 out how I'm going to get this bill passed or
15 introduced and discussed.

16 I have two reactions to it. No. 1, when
17 you say "may," "the sanctions may," I understand
18 what you're trying to do. But it becomes a little
19 bit like when I go to the medical office and I want
20 to have a procedure done and I get pages and pages
21 of all these things that may happen to me, I usually
22 quit reading it after the first paragraph. I turn
23 to my doctor and say, "What does all this mean?"
24 And he says, "Oh, don't worry about it. We have to
25 satisfy the lawyers who may sue us for malpractice."

1 I look at this and I wonder if we really
2 are going to accomplish what we want when we say
3 "may," because the collateral sanctions may be
4 beyond what we can even think about, and especially
5 if someone has some concern about having some
6 liability. Well, I tell you that is going to be
7 just like that medical release that you sign when
8 you go to the hospital.

9 The second point is this. I'm convinced
10 in my legislature if I were to introduce this bill,
11 I'm going to be asked this question, does this mean
12 that if a collateral sanction or something that we
13 may impose in Utah is not imposed in Colorado or is
14 in some way changed and now we get the information
15 back and forth, am I giving up any of my prerogative
16 in this state for what may occur in another state if
17 there's a sanction or some other change over there?

18 I think this may fit more into a model
19 bill than a uniform act. I just tell you those
20 things, sitting back and looking at this, taking a
21 deep breath, and saying where am I going to go with
22 this, even though my colleague, Speaker Curtis, is a
23 member of your committee. I think we have some real
24 challenges in those two areas.

25 COMMISSIONER RICHARD T. CASSIDY

1 (Vermont): Commissioner, could I comment very
2 briefly and say about your concerns about sort of
3 interstate relationships here, I think you will see
4 that they been dealt with later in the act quite
5 effectively. I hope you will find that.

6 As for your earlier comments, there is a
7 certain resemblance here to the warnings that come
8 with drugs, and we understand that -- with
9 prescription drugs, that is to say.

10 [Laughter]

11 COMMISSIONER CASSIDY: We understand
12 that.

13 COMMISSIONER HILLYARD: We don't know
14 what the others are in Utah. Go ahead.

15 COMMISSIONER CASSIDY: I would suggest
16 to you that if the result of this act is that this
17 study of collateral sanctions and disqualifications
18 is well done in each state, and this information
19 that's now unknowable for some people becomes
20 knowable, and if then the notice provision results
21 in starting some conversations between responsible
22 defense counsel, in my experience, most defense
23 counsel are responsible, they will be able to do
24 their job much more effectively than they can today,
25 and the situation will be much improved. That's the

1 objective.

2 COMMISSIONER HILLYARD: Let me just go
3 one step if I can respond, Mr. Chairman, to that
4 point. My concern, I think it was said when you
5 first talked about this bill, is that my colleagues
6 in Utah may look at what sanctions are identified in
7 the other states who adopt this act, and the
8 question will be, why do we only have 120 when
9 Colorado has 150.

10 [Laughter]

11 COMMISSIONER HILLYARD: And what may
12 very well happen is the other ones that Colorado
13 has, I pick on my good fellows from Colorado, we may
14 adopt in Utah. The ultimate result of this may be
15 you may make it even more difficult for these people
16 trying to come back into society, which I think we
17 understand is piling up and piling up, it gets to
18 the point they have really no choice. You may have
19 an adverse impact of what you're really trying to
20 do.

21 CHAIRPERSON AUERBACH: Okay.

22 COMMISSIONER ROGER C. HENDERSON
23 (Arizona): Mr. Chairman, can I be indulged one
24 short moment. I think this is a point that needs to
25 be need. I wish every legislator was like Lyle

1 because it would be a wonderful world.

2 Every so often we revisit the criminal
3 code, because it gets out of kilter from time to
4 time, to bring it up to date. No one ever revisits
5 collateral sanctions or consequences. They're added
6 ad infinitum. No one person, other than maybe our
7 ABA representative, Margaret Love, knows what lurks
8 out there.

9 It isn't, I think, that everybody is
10 going to rush to adopt more. We're hopeful that
11 someone like Commissioner Hillyard can say, gee,
12 maybe we ought to revisit this whole thing about
13 collateral sanctions just as we revisit the criminal
14 code every once in a while to modernize it and bring
15 it up to date.

16 CHAIRPERSON AUERBACH: Thank you.
17 Advisor.

18 MR. STUART SUSS: Stewart Suss, the
19 National Association of Attorneys General.

20 In Hilton Head and Pasadena we had
21 communicated our opposition to this draft. The
22 committee, through its chair and members, has worked
23 in a very harmonious and accommodating way with us
24 such that we are in the position now to withdraw our
25 opposition to the draft. But that is obviously

1 contingent on the final product, including any
2 amendments from the floor of this Conference and any
3 language in the comments.

4 As we stand here today, the text of this
5 proposal will lead to our withdrawing any objections
6 to the proposal. But that has resulted because the
7 text has some of the provisions that have been
8 discussed here, specifically No. 1, that there is no
9 basis in the act for removing a collateral sanction
10 based on noncompliance with the provisions of the
11 act, that it states in Section 3 that there is no
12 basis for removing a conviction or guilty plea for
13 noncompliance with the act, and because in Section
14 3, this committee has agreed to remain silent and
15 not change the status quo on what is or is not
16 effective assistance of counsel or the duties of
17 counsel.

18 I would plead with the committee on
19 behalf of my organization, the law enforcement
20 community we represent, that if you believe this
21 statute otherwise accomplishes some positive
22 purpose, to please recognize that it is at that
23 stage because of the compromises reflected in what
24 I've just summarized, and to consider that
25 respectfully as we work to change comment language

1 that isn't yet at this stage that the text is, and
2 as you contemplate amendments from the floor of this
3 Conference.

4 I thank you respectfully for your
5 consideration in that regard.

6 CHAIRPERSON AUERBACH: Thank you.

7 The other commissioner from Vermont.

8 COMMISSIONER PETER F. LANGROCK

9 (Vermont): I will be very short. I'm not going to
10 say take on the attorney generals.

11 I do practice in the area. The concept
12 that Commissioner Bopp said that small matters would
13 result in litigation just isn't the case. The
14 chances of success on a post conviction matter is so
15 small. In DNA cases across the country we have
16 cleared people of horrendous crimes, and they have
17 spent a year, two years, five years in jail, getting
18 the procedures out. The idea that there is going to
19 be a mass collection of removable pleas or changing
20 things because of some errors in a list is not
21 there.

22 The only thing I was suggesting is that
23 when there is a clear error and there is clear
24 reliance and there is clear damage, that is the type
25 of situation where we should not be afraid as a

1 country to give some restitution for it.

2 CHAIRPERSON AUERBACH: Okay. Thank you.

3 Commissioner Billings.

4 COMMISSIONER RHODA B. BILLINGS (North
5 Carolina): Commissioner Hillyard's comments prompt
6 me to make a comment about something that has
7 bothered me about this for quite some time. As I
8 think of the collateral consequences that I'm
9 familiar with, most of them relate to convictions
10 for felonies. If we require in every instance that
11 a person is brought before a judicial body for
12 arraignment, that they're handed this thing that
13 tells them that they might lose their property or
14 all other sorts of bad things will happen to them,
15 they are charged with a misdemeanor that carries no
16 collateral sanctions. I can't imagine the trauma
17 that this person is going to go through as they
18 think, these awful, awful things can happen to me or
19 possibly can happen to me.

20 Now, I realize that one of the results
21 of that is that a lot of people who otherwise would
22 have waived the right to counsel, probably won't. I
23 don't guess we think that is a bad result. It's
24 just the consequence that is going to occur when a
25 lot of people who are not really charged with

1 offenses that have with them collateral consequences
2 are going to be traumatized, and maybe that's
3 overuse, it simply bothers me.

4 I don't know if you've looked at ways to
5 limit in any way the number of people or the kinds
6 of people to whom this kind of information or
7 warning is given. I would assume that it would
8 apply in all cases of felony. I'm concerned about
9 the misdemeanor situation. I just wanted to express
10 that concern about the act.

11 Another point, and this takes us back to
12 Section 5, there is advice required at the bottom of
13 Page 10, No. 32, "a higher sentence if you are
14 convicted of another crime in the future." Now, I
15 know, of course, that there are collateral
16 consequences if you are convicted a second time for
17 a similar offense then it is a more serious offense.

18 How does the collateral consequences
19 idea apply in the case of a situation where a state
20 has, as our state does, a sentencing grid that
21 includes the previous criminal history as a basis
22 for movement up on the grid for sentencing. That's
23 not, in my mind, a collateral consequence, but it
24 could be construed as such.

25 Do you know what I'm talking about? The

1 federal sentencing guidelines are similar, but we
2 have a grid that is similar to the federal
3 sentencing guidelines. Would you consider that a
4 collateral consequence?

5 CHAIRPERSON AUERBACH: Okay. I'm going
6 to let Commissioner Davies lead off here.

7 COMMISSIONER JACK DAVIES (Minnesota):
8 It is a collateral consequence because it's not part
9 of the sentence for the current conviction, but it's
10 a cloud over your future. That is what we're
11 worried about.

12 COMMISSIONER BILLINGS: Well, it's back
13 with your definition of collateral consequence --
14 that is, it's imposed as a matter of law. There is
15 still some discretion in the sentencing under those
16 grids. I'm not sure it's imposed as a matter of
17 law.

18 COMMISSIONER DAVIES: Well, I'm not sure
19 there is discretion in the presentence investigation
20 in states even without the guidelines. In states
21 with guidelines it goes on the chart. No. The
22 judge who is sentencing for the second offense, he
23 or she can -- my vocabulary is missing me here now.
24 He can divert from the guidelines pattern, up or
25 down and so on, can give more weight to that

1 previous conviction. But it is something that is a
2 problem for you in the future, and that is what
3 we're worried about.

4 CHAIRPERSON AUERBACH: Let me make a
5 general comment. I am not in charge of scheduling.
6 That's the first comment.

7 The second, we're going to start at 8:00
8 o'clock in the morning and finish at 5:00 o'clock
9 tonight. The president, because she wants to make
10 sure that everyone has the opportunity to be heard,
11 there are people for various reasons who can't be
12 here or who would like to make general statements
13 about the act, this is an appropriate time to do it.
14 We are going to recess at 5:00 o'clock. If there
15 are people who want to add general comments at this
16 point, rather than the line by line, that would not
17 be inappropriate.

18 COMMISSIONER RICHARD T. CASSIDY
19 (Vermont): Can I ask --

20 CHAIRPERSON AUERBACH: The chair has a
21 comment.

22 COMMISSIONER CASSIDY: Commissioner
23 Billings, I don't know whether your question about
24 misdemeanors was addressed because I was occupied in
25 this logistical matter. If it wasn't, I am happy to

1 address it.

2 COMMISSIONER DAVIES: It was not.

3 COMMISSIONER CASSIDY: It was not.

4 Okay.

5 Commissioner, let me just say that with
6 respect to misdemeanors, there are very significant
7 collateral consequences that attach to many
8 misdemeanors. In fact, we can tell you some
9 horrible stories where, in effect, people's legal
10 lives are sort of brought to a halt by a misdemeanor
11 conviction that they thought they were going to walk
12 away from the court and be done with forever.

13 It's not possible certainly for us using
14 the misdemeanor felony dichotomy to say we're not
15 going to give this notice. And if more people get
16 the notice than should, that is a better situation
17 than if fewer people do than should. That's where
18 we came out.

19 CHAIRPERSON AUERBACH: Okay. Thank you.
20 Commissioner --

21 COMMISSIONER PETER J. DYKMAN
22 (Wisconsin): On the same issue on offense. I was
23 more worried about that, that would be a forfeiture.
24 Why are you including those in the act? I think
25 that's something I would need to know about. I know

1 you say you're going to come up with a definition.

2 What are the things other than felonies
3 and misdemeanors that really should be covered?

4 MR. JACK CHIN (Reporter): In some
5 jurisdictions there are sub criminal violations that
6 are not felonies and not misdemeanors that
7 nevertheless carry with them substantial collateral
8 consequences.

9 CHAIRPERSON AUERBACH: Okay. Over on
10 this side, Microphone 5.

11 COMMISSIONER SANDRA S. STERN (New York):
12 Actually, I have a similar point to that of
13 Commissioner Billings, and that is where reference
14 is made to the government taking your property. To
15 me that means asset forfeiture laws. I can't think
16 of anything else. Wouldn't that be part of the
17 criminal sentence itself?

18 MR. JACK CHIN (Reporter): Certainly,
19 not always.

20 COMMISSIONER RICHARD T. CASSIDY
21 (Vermont): In fact, I can think from my own
22 practice of instances in which there are forfeitures
23 without convictions. A defendant is caught with a
24 large sum of money very close to the border. We're
25 taking the money, would you like to claim it?

1 COMMISSIONER STERN: Okay.

2 COMMISSIONER CASSIDY: Under oath?

3 [Laughter]

4 CHAIRPERSON AUERBACH: Microphone 6.

5 COMMISSIONER MARLIN J. APPELWICK

6 (Washington): Mindful that to my right it has
7 thinned out greatly and that Sunday morning usually
8 looks like that everywhere, I would like to raise a
9 more general point, if I could.

10 In the comments on Page 19 at Lines 16,
11 17, 18, it says, "Relief is not restricted to
12 individuals with collateral sanctions based on
13 convictions from the enacting state." That would
14 seem to imply that you can grant relief in this
15 state for collateral sanctions imposed by another
16 state. Now, rights -- well, I'm hoping you don't
17 mean to imply that. But rights tend to follow the
18 individual wherever they go. Collateral
19 consequences may originate in a jurisdiction and be
20 limited to a jurisdiction. That comment bothered me
21 with respect to the content that you prescribe for
22 the certificate. Nowhere in the certificate does it
23 indicate that the restoration of rights, I presume
24 statutory rights, are limited to the restoration of
25 those rights curtailed by virtue of the collateral

1 consequences of the law of this state. Frankly, if
2 you don't embrace that, the person who gets a
3 certificate thinks they got more than they got, and
4 their gun right is restored in Washington, goes back
5 to Oregon where they had a prior conviction and ends
6 up serving time again.

7 If you would take a look at that comment
8 and consider an express limitation that is on the
9 face of the certificate, I think it would be
10 helpful.

11 CHAIRPERSON AUERBACH: Any comments?

12 COMMISSIONER RICHARD T. CASSIDY
13 (Vermont): Well, let me say that we have addressed
14 in the statute some of the cross border, cross
15 jurisdictional implications of these problems.
16 There are ways in which, under the statute, as I
17 recall it, an individual with a conviction in one
18 state may be able to come to another state and say,
19 I live here, I'm working here, I would like to have
20 permission to be a barber here, and get that
21 permission.

22 Without trying to go into the details,
23 because they're pretty complicated, let me say we
24 have addressed those issues.

25 CHAIRPERSON AUERBACH: Jack.

1 COMMISSIONER JACK DAVIES (Minnesota):

2 Marlin, were you concerned about any statutory
3 language or was your problem entirely in the
4 comment?

5 COMMISSIONER APPELWICK: The comment
6 raises the issue to me. I agree with what the chair
7 just said. You could come to Washington, and
8 Washington could say we will not disable you by
9 virtue of your Oregon conviction.

10 I'm also concerned that the discharge
11 doesn't purport to discharge the disabilities that
12 may exist in another jurisdiction. The person knows
13 this discharge is good in Washington. We granted
14 it. That's all we can do.

15 COMMISSIONER DAVIES: The comments will
16 be reviewed to take account of your concern. When
17 the committee meets again, we will --

18 COMMISSIONER APPELWICK: I'm also
19 concerned about --

20 COMMISSIONER DAVIES: Read the language
21 of the statute itself to see if they are a problem.
22 We welcome any suggestions from any member of the
23 Committee of the Whole as to any language that
24 creates the problem that has been discussed.

25 COMMISSIONER RICHARD T. CASSIDY

1 (Vermont): Commissioner Appelwick, let me give you
2 a more detailed idea of the scheme here. Section 8
3 really is the place to look. What it says is, if
4 the conviction has been reversed in the state of
5 origin, then it doesn't give rise to a collateral
6 consequence in this state.

7 COMMISSIONER APPELWICK: I understand
8 that.

9 COMMISSIONER CASSIDY: And then it says
10 in the next section, if a conviction from another
11 jurisdiction has been vacated, expunged, or set
12 aside based on rehabilitation or good behavior,
13 either the -- it says "does" or "does not," it's a
14 state election -- as to whether or not to give that
15 effect in this state.

16 COMMISSIONER APPELWICK: That's not my
17 concern. My concern is on the certificate that
18 Washington issues that it advise the person carrying
19 it and the person who receives it that this is only
20 Washington removing disabilities under Washington
21 law, and it does not remove a disability that any
22 other state might impose when you go to that state.

23 COMMISSIONER CASSIDY: I understand you
24 better now. Thank you.

25 CHAIRPERSON AUERBACH: Commissioner

1 Needler.

2 COMMISSIONER H. LANE KNEEDLER

3 (Virginia): Commissioner Appelwick, let me
4 understand. You do not mean to exclude the
5 situation, as I heard you say earlier, that
6 Washington could say we're going to remove the
7 disability in Washington that was imposed on you in
8 Oregon, but it's only good in Washington.

9 COMMISSIONER APPELWICK: Washington can
10 remove whatever disabilities it would impose or
11 recognize.

12 COMMISSIONER KNEEDLER: Or recognize.
13 Washington could say --

14 COMMISSIONER APPELWICK: I mean no
15 change to that.

16 COMMISSIONER KNEEDLER: Okay.

17 CHAIRPERSON AUERBACH: Thank you.
18 Commissioner Vigdor.

19 COMMISSIONER JUSTIN L. VIGDOR (New
20 York): I apologize for this question. I think you
21 probably covered it earlier and I just missed it.
22 In Section 3, sub (1) where you say that it does not
23 provide a basis for invalidating a conviction or
24 plea, sentence is not included. I think you said it
25 was deliberately not included, if I understood you

1 at the time. I think that by not saying it, there
2 is a rule of construction that might assume that it
3 was not intended to be a basis for invalidation.

4 COMMISSIONER RICHARD T. CASSIDY

5 (Vermont): I have a note to take a look at that.
6 We didn't take a position on it.

7 COMMISSIONER VIGDOR: Oh, I see. You're
8 going to come back to it. Thank you.

9 CHAIRPERSON AUERBACH: The other
10 commissioner from New York.

11 COMMISSIONER NORMAN L. GREENE (New
12 York): I was wondering in making your choices, have
13 you looked at any foreign or international models
14 dealing with collateral consequences and see how
15 they handle this? Sometimes it is good to know what
16 other people have done in order to decide what we
17 should do. That's the first question. I suppose
18 maybe there are no foreign situations in modern
19 democracies where you have collateral consequences.

20 The second question would have to do
21 with federal models, what they would do -- model --
22 whether it has any comparable provision.

23 Let's start with the international.

24 COMMISSIONER RICHARD T. CASSIDY

25 (Vermont): Our reporter and our advisor are the

1 people who know the most about this.

2 MR. JACK CHIN (Reporter): In terms of
3 international models we have looked mostly at
4 disenfranchisement. There is not really much of a
5 model there because most other nations don't
6 disenfranchise people convicted of crimes.

7 The federal model is pretty simple. All
8 they have in terms of relief from collateral
9 consequences is pardon, which is very difficult to
10 get.

11 COMMISSIONER GREENE: They don't have to
12 provide information in the federal world on
13 collateral consequences?

14 MR. CHIN: Provide information? No.

15 COMMISSIONER GREENE: Are there any
16 collateral consequences in other nations besides
17 America, or is this a uniquely American institution?

18 CHAIRPERSON AUERBACH: Why don't I ask
19 our author-advisor here to make a comment.

20 MS. MARGARET COLGATE LOVE (ABA Advisor):
21 As a very general matter, in Europe, mostly
22 collateral consequences are offense specific and
23 very narrowly tailored to the particular conduct
24 that gave rise to the conviction. That's a very
25 general comment. They don't usually have this sort

1 of blanket bar. Usually courts impose things that
2 under our law are regarded as collateral
3 consequences. It's a very much more individual and
4 tailored situation in Europe.

5 It's a real problem for the federal
6 because, of course, presidential pardons are
7 available only to people with federal convictions.
8 State offenders are really kind of out of luck on
9 federal, except for the statutes that specifically
10 incorporate the state relief procedures.

11 I'm really hopeful that in the next few
12 years there is going to be a lot more attention to
13 this subject as we get a larger and larger prison
14 population, convicted population. It is of all
15 classes of people. Business people have a terrible
16 time being able to enter into contracts, getting
17 loans, all kinds of things. It's not a very neat
18 situation right now. I think the kind of work that
19 is being done here is tremendously helpful in
20 getting the ball moved along.

21 CHAIRPERSON AUERBACH: Microphone No. 3.

22 COMMISSIONER MICHAEL B. GETTY
23 (Illinois): First of all, I want to compliment the
24 committee on working hard and long in trying to
25 resolve the differences with the attorney generals.

1 Having said that, as the act now is, I
2 have serious problems. First of all, we have a
3 requirement on a state officer to do certain things
4 with absolutely no consequences for not doing it.
5 That's a strange animal indeed.

6 Secondly, we have a laundry list of
7 things that are collateral consequences that are
8 different from one place to another. We're never
9 going to get them all. It's the problem of
10 expressio unius, exclusio est alterius.

11 Again, I suggest to you that it might
12 have been a lot simpler had we just had the judge
13 have a requirement to say that there are collateral
14 consequences to your entering a plea or being found
15 guilty of this offense. You should consult with
16 your attorney. That takes all of the onus off the
17 state officer. It's not so much more for a judge to
18 do. We do it anyway. We have to admonish people
19 when they enter pleas. You have one more line,
20 that's all. They should be given an opportunity to
21 consult their attorney.

22 I suggest to you that maybe since we
23 have no consequences for a failure to do any of
24 these things that we might go back to a little bit
25 simpler way of addressing the problem. Thank you.

1 CHAIRPERSON AUERBACH: Thank you,
2 Commissioner.

3 COMMISSIONER ANN WALSH BRADLEY
4 (Wisconsin): May I comment. I had occasion at 2:00
5 o'clock today to be on the telephone with a former
6 colleague of mine from the Wisconsin Supreme Court.
7 She said to me, "Bradley, whatever you do, don't
8 extend the colloquy that judges have to make."

9 [Laughter]

10 COMMISSIONER BRADLEY: As this committee
11 knows well, I think, my comments at the many, many,
12 many meetings that we've had to discuss this, that I
13 have been concerned about that very thing. I say no
14 more.

15 [Laughter]

16 CHAIRPERSON AUERBACH: Okay. Any final
17 comment?

18 If not, Madam President, the Committee
19 of the Whole rises and reports that it has had under
20 consideration the Collateral Consequences of
21 Conviction. We have made progress and we humbly ask
22 leave to sit again.

23 ---00o---

24

25

1 FIFTH SESSION

2 UNIFORM ACT ON COLLATERAL

3 CONSEQUENCES OF CONVICTION

4 Boris Auerbach of Ohio, presiding.

5 CHAIRPERSON AUERBACH: Good morning.

6 I'm delighted and slightly surprised to see the
7 turnout which is very good for 8:00 o'clock in the
8 morning.

9 We are going to start with Section 7. I
10 think we finished with Section 6.

11 COMMISSIONER RICHARD T. CASSIDY
12 (Vermont): We should reintroduce the committee
13 members.

14 CHAIRPERSON AUERBACH: I'm going to ask
15 the chair to reintroduce the members of the
16 committee to help our staff back there.

17 COMMISSIONER CASSIDY: I'm Richard
18 Cassidy from Vermont.

19 The other members of the committee are
20 Ann Bradley.

21 John Cary.

22 Greg Curtis. I guess Greg is not with
23 us this morning.

24 CHAIRPERSON AUERBACH: He's missing.

25 COMMISSIONER CASSIDY: Brian Flowers.

1 Jessica French.

2 Roger Henderson.

3 Lane Kneedler.

4 Harry Leinenweber.

5 Marian Opala.

6 Michele Timmons.

7 Our reporter is Jack Chin.

8 The ABA Advisor is Margaret Colgate

9 Love.

10 Advisor Suss is not with us this

11 morning.

12 CHAIRPERSON AUERBACH: Thank you. We

13 will start with Section 7. Roger Henderson will

14 read that.

15 COMMISSIONER ROGER C. HENDERSON

16 (Arizona): "SECTION 7. AUTHORIZATION REQUIRED FOR

17 COLLATERAL SANCTION; CONSTRUCTION IN CASE OF

18 AMBIGUITY.

19 "(a) A collateral sanction may be

20 imposed only by statute, ordinance or rule

21 authorized by law and adopted in accordance with

22 [insert citation to State Administrative Procedure

23 Act].

24 "(b) If a law is ambiguous as to

25 whether it imposes a collateral sanction or

1 authorizes a disqualification, it must be construed
2 as authorizing a disqualification."

3 CHAIRPERSON AUERBACH: Section 7.

4 Microphone 4.

5 COMMISSIONER K. KING BURNETT (Maryland):
6 Subsection (b), when I first read that I said, well,
7 gee, why would they want to construe something as a
8 sanction when it's ambiguous. That's what it says,
9 of course, which is the opposite rule of most things
10 in criminal law. If it's ambiguous you would not
11 construe it to be a penalty. I'm not a criminal
12 lawyer, but that's sort of my understanding, you
13 wouldn't normally do that. Of course, the reason I
14 guess for where it is is that you want to make sure
15 it's in the list. I assume. I'm not really sure.
16 I see shaking of heads, maybe if you would address
17 that question.

18 CHAIRPERSON AUERBACH: Chairman.

19 COMMISSIONER RICHARD T. CASSIDY
20 (Vermont): Commissioner Burnett, the distinction
21 that we're working with is between a sanction, on
22 the one hand, and a disqualification on the other.
23 The instruction to a decision-maker that the
24 subsection provides is this. If you have something
25 and you know that it's a collateral consequence and

1 you're not sure whether it is a sanction or
2 disqualification, you are instructed to construe it
3 to be a disqualification. The difference being that
4 a sanction is an automatic penalty by operation of
5 law. A disqualification calls upon a decision-maker
6 to exercise some discretion and make a decision in a
7 particular case.

8 COMMISSIONER BURNETT: Do you feel
9 confident that you can do a construction like this
10 that relates to statutes all over the code? That is
11 what you're --

12 COMMISSIONER CASSIDY: Well, I think the
13 point is that there are a group of statutes as to
14 which it will be difficult to determine what was
15 originally intended.

16 I'll give you a good example. Many,
17 many, many licensing statutes say that you must be
18 of good moral character in order to participate in
19 this particular occupation. Many of the decisions
20 of those licensing boards say that if you have a
21 criminal conviction that you are not of good moral
22 character.

23 The direction in this case, since it's
24 not really clear on the face of the statute whether
25 what was intended by the legislature, was an

1 automatic disqualification or a discretionary
2 disqualification, would be to say in cases of doubt,
3 make it discretionary and exercise some judgment
4 about this person and this person's circumstances.

5 COMMISSIONER BURNETT: Okay. Thank you.

6 COMMISSIONER CASSIDY: You're welcome.

7 COMMISSIONER ROGER C. HENDERSON

8 (Arizona): Mr. Chairman, I would like to add a
9 comment. I think it's important to remember that
10 the vast majority of these collateral sanctions that
11 have sprung up or disqualifications that have sprung
12 up in the last ten, fifteen to twenty years have
13 been adopted by an administrative agency, by rule.
14 They are not generally the most artfully drafted
15 provisions. Sometimes it's difficult to know
16 whether or not this is going to be imposed
17 automatically by law or the agency has discretion.
18 We would like to have the lesser of the consequences
19 apply if there is any doubt.

20 CHAIRPERSON AUERBACH: Thank you.

21 The commissioner at Microphone 2.

22 COMMISSIONER LARRY L. RUTH (Nebraska):

23 I think at 8:00 o'clock in the morning we're not
24 quite in sync here. I take Commissioner Burnett's
25 point very well. If read literally, it would say

1 that if it's vague as to whether or not there is a
2 collateral consequence, then you would have a
3 disqualification. You need to have a little bit
4 more in there because it is susceptible to being
5 read either way. I know the way you're wanting to
6 read it. That's the reasonable way to do it. But
7 read very literally, it says if there is a dispute,
8 if it's vague as to whether or not there is a
9 collateral consequence, then you have a
10 disqualification.

11 COMMISSIONER HENDERSON: I don't think
12 it says that. It says that if there is a question
13 as to whether or not it's a collateral sanction,
14 which is imposed by operation of law or merely
15 authorizes a disqualification, then construe it to
16 be the latter. You read it differently. How do you
17 read it?

18 COMMISSIONER RUTH: Well, I read it to
19 say either way actually. I know which way you're
20 trying to go, the difference between a collateral --
21 a disqualification or a sanction. But read
22 literally it goes the other way.

23 CHAIRPERSON AUERBACH: The chair advises
24 me that he would be happy to consult with the Style
25 Committee to make sure that the ambiguity is taken

1 care of.

2 Commissioner Bopp, Microphone 6.

3 COMMISSIONER JAMES BOPP, JR. (Indiana):

4 Thank you, Mr. Chairman. First, could I inquire
5 what is going to be the procedure for consideration
6 of this act? Are we going to complete the reading
7 and then the committee will consider the comments
8 from the floor and then this act will return to the
9 floor? If so, then I'm happy to defer to the
10 committee with any amendments that I might have,
11 just raise points. Is that the procedure?

12 CHAIRPERSON AUERBACH: I think it is
13 quite clear that the committee will come back.
14 There are several points that we have said that have
15 to be considered. In fairness to everyone, we will
16 bring it back. I don't know if that helps, but
17 that's the road map.

18 COMMISSIONER BOPP: Yes, thank you.

19 On Section 7, sub (a), I am familiar
20 with, for instance, the departments of correction
21 where they have extensive discretion on where they
22 place within the department of correction people who
23 are convicted of offenses and sentenced to a term in
24 prison. They do consider in determining which is
25 the appropriate place -- you know, maximum security,

1 et cetera -- the nature of the crime that the person
2 is convicted of. Furthermore, within a prison they
3 may be placed in different types of facilities
4 within the prison. They also consider that.

5 Now, I would gather from subsection (a),
6 that unless that policy is promulgated by rule,
7 which I am not familiar with it being such, that it
8 would be unlawful.

9 CHAIRPERSON AUERBACH: Does the chair of
10 the committee want to respond?

11 COMMISSIONER RICHARD T. CASSIDY
12 (Vermont): I don't understand why you would think
13 that.

14 CHAIRPERSON AUERBACH: Quick answer.

15 COMMISSIONER BOPP: Well, the people
16 convicted of murder and sentenced to death are often
17 placed in solitary confinement in a particular wing
18 of a maximum security prison based upon the
19 conviction.

20 COMMISSIONER CASSIDY: That's part of
21 their term of imprisonment. It's not a collateral
22 sanction.

23 COMMISSIONER BOPP: Well, that's my
24 question. It is not part of the sentence because
25 the discretion for placement is with the department

1 of corrections.

2 COMMISSIONER CASSIDY: Well, I don't
3 know if this is true in every jurisdiction,
4 Commissioner Bopp. But in several that I know of,
5 the way in which de minimus reads is that the inmate
6 is committed to the care and custody of the
7 commissioner of corrections for "X" number of years.

8 COMMISSIONER BOPP: Yes. True. That's
9 what I'm referring to. I'm just trying to determine
10 whether -- the term does not include imprisonment in
11 the definition of collateral sanction.

12 I understood that to mean the fact that
13 you're sentenced to imprisonment is not considered a
14 collateral sanction. I would agree with that.

15 What I'm talking about is how they deal
16 with them in prison. That's an agency. I don't see
17 an exception for the department of corrections in
18 how they deal with prisoners in prison.

19 COMMISSIONER CASSIDY: Well, my view,
20 Commissioner, is that no exception is needed because
21 these are the direct incidences of the sentence of
22 imprisonment. This is not a correctional code.
23 It's not intended to regulate the disciplinary
24 processes or transfer processes or assignment
25 processes of department of corrections dealing with

1 an imprisoned inmate.

2 COMMISSIONER BOPP: Thank you for your
3 answer.

4 CHAIRPERSON AUERBACH: Okay. Microphone
5 2, the commissioner from Nebraska. Harvey, this is
6 your chance.

7 COMMISSIONER HARVEY S. PERLMAN
8 (Nebraska): I understand subsection (b) has been
9 changed.

10 I want to go to (a) then. I'm trying to
11 figure out what freight this subsection carries. A
12 collateral sanction is defined as something that is
13 done by operation of law. Then you come back in (a)
14 and say that it can be only imposed by statute,
15 ordinance or rule authorized by law and adopted in
16 accordance with the State Administrative Procedure
17 Act. Is the only thing you're doing here assuring
18 that if it's done by an administrative agency it has
19 to be done in accordance with the State
20 Administrative Procedure Act.

21 CHAIRPERSON AUERBACH: Chairman.

22 COMMISSIONER RICHARD T. CASSIDY
23 (Vermont): Commissioner, in effect, that's right.
24 Our experience as members of the committee has been
25 that, in fact, there are many collateral sanctions

1 and disqualifications that are adopted by agencies
2 and departments informally as rules of thumb but
3 without going through the process and notice of
4 hearing that most Administrative Procedure Acts
5 would require.

6 COMMISSIONER PERLMAN: Well, this looks
7 like there could be a collateral sanction that is
8 done somehow other than by a statute, ordinance, or
9 rule authorized and adopted in accordance with State
10 Administrative Procedure Act. The only way I can
11 think that could be would be a rule adopted not in
12 accordance with the State Administrative Procedure
13 Act.

14 COMMISSIONER CASSIDY: In fact, we think
15 that there are many boards -- I know of some boards
16 that simply say we don't license ex-felons here. We
17 don't deal with you folks.

18 COMMISSIONER PERLMAN: Would that be by
19 operation of law?

20 COMMISSIONER CASSIDY: Well, that's a
21 question.

22 COMMISSIONER PERLMAN: Well, that's the
23 problem. There is nothing in here that says that a
24 collateral consequence that is not defined as a
25 sanction or a disqualification can't be imposed.

1 What you've done, you've defined "sanctions" as
2 those things that happen by operation of law and you
3 define "disqualification" as those things that other
4 people do that are discretionary. But you've never
5 said that if there is some consequence that's
6 imposed that is outside those two definitions, that
7 you shouldn't do it. That's what I thought you were
8 trying to get at with (a), but (a) doesn't work that
9 way because you're just repeating the definition of
10 "criminal sanction."

11 CHAIRPERSON AUERBACH: The chair is
12 nodding affirmatively. It sounds like there is some
13 work to be done.

14 COMMISSIONER CASSIDY: You understood
15 our point and I understand your point. I think we
16 need to fix it.

17 COMMISSIONER PERLMAN: Okay. Thank you.

18 COMMISSIONER CASSIDY: If you have a
19 suggestion, we would love to have it.

20 COMMISSIONER PERLMAN: Well, I will say
21 it will raise, I suspect on the other side of the
22 room, some more serious issues. Then you will be in
23 a position where this act will, in fact, provide a
24 provision that would allow someone to challenge a
25 penalty, disqualification or something that is not

1 done in accordance with the provisions of the
2 statute. That's the dilemma you are facing.

3 COMMISSIONER ROGER C. HENDERSON
4 (Arizona): Mr. Chairman.

5 CHAIRPERSON AUERBACH: Roger.

6 COMMISSIONER HENDERSON: And well that
7 should be. You have to remember that there are a
8 lot of other laws out there, including the U.S. and
9 the state constitution, civil rights laws, so if
10 some board says we don't allow Armenians to do this,
11 we don't really try to deal with something like
12 that, but there are plenty of other laws that will.
13 You have to consider this in the context of the
14 other laws. It's not a complete answer to the issue
15 you raise. I think we need to look at it again.
16 There are these other laws that will take care of
17 some of this stuff.

18 COMMISSIONER PERLMAN: Thank you.

19 CHAIRPERSON AUERBACH: Thank you.

20 The commissioner at Microphone 3.

21 COMMISSIONER DEBORAH E. BEHR (Alaska):
22 I had a question about Page 16, Line 3, when it says
23 rule adopted in accordance with the Administrative
24 Procedures Act. In our state our court does not
25 adopt penalties against attorneys under the

1 Administrative Procedures Act. I didn't know if
2 this act is intended to cover sanctions against
3 licensed attorneys.

4 COMMISSIONER RICHARD T. CASSIDY
5 (Vermont): One of the questions that we thought
6 about is whether the provisions of this act will
7 relate to the profession that we are members of,
8 lawyers. In most states, by virtue of the
9 separation of powers, the courts do what they do and
10 we won't have the authority to reach them.
11 Obviously, I don't know how that works in Alaska,
12 but we would hope that the courts would voluntarily
13 adopt this sort of approach.

14 COMMISSIONER BEHR: I would suggest that
15 you need a comment on that subject. It seems like a
16 clear question that needs to be answered.

17 CHAIRPERSON AUERBACH: Thank you.

18 We will now proceed with Section 8.
19 Commissioner Kneedler.

20 COMMISSIONER H. LANE KNEEDLER
21 (Virginia): "SECTION 8. EFFECT OF OVERTURNED OR
22 PARDONED CONVICTION.

23 "(a) A conviction that has been
24 reversed, vacated, or otherwise overturned by a
25 court of competent jurisdiction, or that has been

1 pardoned, does not give rise to a collateral
2 consequence in this state.

3 "(b) A conviction from another
4 jurisdiction that has been vacated, expunged or set,
5 aside based on rehabilitation or good behavior,
6 [does not] [does] give rise to a collateral
7 consequence in this state."

8 CHAIRPERSON AUERBACH: Okay. The
9 commissioner at Microphone 2.

10 COMMISSIONER BARBARA ANN ATWOOD
11 (Arizona): In subsection (b) I assume that the
12 committee couldn't decide one way or the other and
13 you basically leave it for a state to choose. It's
14 kind of an odd thing since it's such a clear debate
15 in policy to have that choice in a uniform law of
16 "does not" or "does."

17 I'm wondering if you've thought about
18 the alternative of having the collateral consequence
19 be determined by the state's law of the state that
20 has vacated the conviction. In other words, use a
21 kind of "we'll go by what they do" rather than make
22 our own independent determination.

23 CHAIRPERSON AUERBACH: Chair.

24 COMMISSIONER RICHARD T. CASSIDY
25 (Vermont): You put your finger on it. There was

1 substantial disagreement on the committee about
2 which way we should go. What I call the Saint Peter
3 approach, what is loosed in heaven is loosed on
4 earth, or vice versa, I guess it was, is one of the
5 alternatives here. That is to say, if the state
6 that imposed the sanction is satisfied, why should
7 the next state care?

8 There is substantial disagreement on the
9 committee about whether we should make that choice
10 for the state or the states should make them on
11 their own. We think what is most important in terms
12 of the development of the law in this area is if the
13 states consciously make a decision to go one way or
14 the other.

15 COMMISSIONER ROGER C. HENDERSON
16 (Arizona): Mr. Chairman. One of the points of
17 dispute, and we alluded to this yesterday, there are
18 many existing ways to set aside a conviction in the
19 various states. State A says, gee, State B, the
20 governor pardoned this guy, did whatever he did, and
21 it wasn't on the merits. It wasn't because he
22 didn't think he's guilty, it's because he's a big
23 campaign contributor. We're not going to honor
24 that. That's one problem you have given the variety
25 of ways of setting aside some of these situations.

1 On the other hand, if a governor based
2 on DNA tests pardons someone, you think, well, gee,
3 why would you want to honor or at least enforce a
4 collateral sanction on this state if it has been set
5 aside on another state.

6 You've got this dichotomy here.
7 Frankly, the committee was just so split on it, we
8 said, all right, let the state choose.

9 COMMISSIONER ATWOOD: I think,
10 Commissioner Henderson, the example you gave would
11 be covered by subsection (a) if it's a pardon. I
12 read this as saying you don't have a choice. There
13 are no collateral consequences. Well, that's what
14 subsection (a) says.

15 COMMISSIONER RICHARD T. CASSIDY
16 (Vermont): Commissioner, you are right. Subsection
17 (a) is the pardon section. Subsection (b) really
18 was generated from concerns that our advisor from
19 the National Association of Attorneys General raised
20 relating to deferred adjudication programs and
21 things like that, which leave one in very grave
22 doubt about just what has happened in the first
23 state.

24 COMMISSIONER ATWOOD: That's why I
25 really recommend that we go by the collateral

1 consequence law of that state and let it be decided
2 by that state.

3 COMMISSIONER CASSIDY: There are very
4 good reasons for the policy you propose. There
5 simply aren't the votes on the committee to go one
6 way or the other. If there was direction from the
7 floor, we would have to accept that direction.

8 COMMISSIONER H. LANE KNEEDLER, III
9 (Virginia): I think there are very good reasons for
10 saying that the states should not do it. If the
11 person was, in fact, convicted, was, in fact, guilty
12 and the state decided -- this became known as the
13 mercy provision. If a state decides that, in this
14 state anyway, we're going to forgive the conviction
15 for whatever reason, why should that be binding on
16 the other state?

17 I think it's perfectly reasonable to say
18 the state where you're trying to give it effect
19 ought to make that decision itself.

20 COMMISSIONER ATWOOD: But what you're
21 doing under (b) is I think locking the state into an
22 absolute position, it either does or doesn't give
23 rise to collateral consequences without regard to
24 what the original state believes. Anyway, I can
25 tell that --

1 COMMISSIONER KNEEDLER: We're saying
2 that the state where you are trying to give it
3 effect has to decide which way it's going to go.
4 Does it want to give effect to these basically
5 mercy, we won't count the conviction any more, or
6 does it not. Make up your mind so at least people
7 will know. The committee was split on what the
8 answer should be.

9 COMMISSIONER ATWOOD: Thank you.

10 CHAIRPERSON AUERBACH: The commissioner
11 at Microphone 4.

12 COMMISSIONER ALEXANDRA T. SCHIMMER
13 (Ohio): Thank you, Mr. Chairman. I have a question
14 and depending on the answer potentially another
15 question and comment.

16 Is it correct that the meaning of 8(a)
17 is that at as of the moment the conviction is
18 vacated or reversed that person should not be
19 subject to any collateral consequences from the
20 conviction?

21 COMMISSIONER RICHARD T. CASSIDY
22 (Vermont): Once you're operating from a final
23 judicial decision, I think that's logically
24 necessary.

25 COMMISSIONER SCHIMMER: My question

1 about that, what about the situation, which I think
2 is common and maybe even the norm, that collateral
3 consequences will attach immediately upon conviction
4 in the trial court and don't wait for the judgment
5 to wind its way up through the appeals. I was
6 concerned then about the language of "does not give
7 rise to" because in those situations, the collateral
8 consequences have already arisen and then you're
9 dealing with the situation of a person who would
10 need to have their rights restored. In that case,
11 if that's right, my question was, what mechanism is
12 there? Is there a mechanism in the act for
13 restoring the rights of those individuals?

14 COMMISSIONER CASSIDY: Your concern is
15 with the sort of future tense tone of the phrase
16 "give rise." I appreciate what you're saying. It
17 was certainly not our intention to say that only new
18 collateral consequences wouldn't apply. On the
19 other hand, neither is it our intention to say that
20 consequences that have been imposed in the past are
21 somehow retroactively withdrawn. It's the present
22 that we're aiming at -- the present and the future.
23 Perhaps we need to look at those words again.

24 COMMISSIONER SCHIMMER: That's
25 reassuring.

1 In terms of the issue of the mechanism
2 for restoring those person's rights -- I know
3 getting I'm a little bit ahead of the game. I know
4 9 and 10 cover an order or certificate of
5 restoration or order of relief. I haven't been able
6 to read those as covering those people, particularly
7 people who are convicted and whose convictions are
8 either reversed or vacated within five years of the
9 date of the conviction. Nine would require a
10 showing of substantial need, which is sort of a
11 higher burden than what seems to be restoration as a
12 matter of right in 8(a). Ten doesn't seem to allow
13 it in any period less than five years.

14 COMMISSIONER CASSIDY: Those sections
15 shouldn't have to apply to such a person. It should
16 be an automatic.

17 COMMISSIONER SCHIMMER: Well, it might
18 be worthwhile for the committee to insert a
19 provision that references back to these people. As
20 I read it, particularly if you have someone who is
21 convicted, three or four years later if their
22 conviction is overturned under 9 they would have to
23 show substantial need. Then it's not as a matter of
24 right as you're suggesting in 8(a). Then under 10
25 for the certificate, they wouldn't get it until five

1 years has lapsed since the time of their conviction
2 which, again, would go against what I think is the
3 committee's intent to effectuate an immediate
4 restoration of rights.

5 COMMISSIONER CASSIDY: Let us take a
6 look at this language and see if we can't come up
7 with something that makes clearer that what is
8 intended is an automatic and immediate restoration
9 of those rights.

10 COMMISSIONER SCHIMMER: Thank you.

11 CHAIRPERSON AUERBACH: The commissioner
12 at Microphone 5.

13 COMMISSIONER PETER F. LANGROCK
14 (Vermont): I rise to make a motion. The motion
15 being that the Committee of the Whole adopt "does
16 not" as the policy statement in Section 8(b).

17 I'll speak very briefly to it at this
18 point. To leave this open is an abdication I think
19 of our responsibility. What we're talking about
20 here is somebody in another state which has -- say
21 this person has been rehabilitated, this person, for
22 all practical purposes is being restored to full
23 citizenship. I've got enough faith in the states of
24 this union that go in that direction that I'm
25 willing to bind my state to that. I think the

1 opposite has even -- say it does create the
2 collateral consequences doesn't even make sense.
3 What you're saying is that you have a situation
4 where in your own state you have a rehabilitative
5 program. But you're saying that in another state
6 which has a similar rehabilitative program, that has
7 collateral consequences in this state where our own
8 situation does not.

9 I think the issue is a clear issue for
10 the floor. I appreciate the committee's politic. I
11 appreciate the power of the attorney generals of the
12 United States. I would prefer speaking for the
13 people of the United States and getting people
14 rehabilitated and back into the system is more
15 important.

16 I think this Conference should take a
17 strong position on this.

18 CHAIRPERSON AUERBACH: The motion, as I
19 understand it, Commissioner Langrock, is that the
20 section reads "does not" and takes out the brackets.

21 COMMISSIONER LANGROCK: The actual
22 structure is to strike the brackets and strike the
23 word "does."

24 CHAIRPERSON AUERBACH: And strike the
25 word "does."

1 COMMISSIONER LANGROCK: Yes.

2 CHAIRPERSON AUERBACH: I think that is
3 clear. Let us stay with the motion.

4 Do you want a preliminary comment,
5 chair?

6 COMMISSIONER RICHARD T. CASSIDY
7 (Vermont): I'm afraid I need to make some
8 preliminary comment. I would say to you,
9 Commissioner Langrock, that I'm in sympathy with the
10 motion that you make, as I think many members of the
11 committee are.

12 There were provisions of this act that
13 we felt were very important -- notably the notice
14 provision that we read yesterday that requires that
15 persons who may be convicted get notice of the idea
16 of collateral consequences that the association was
17 not happy with. A compromise was struck between me
18 on the behalf of the committee and the association
19 to allow this language to go forward in brackets.
20 In exchange, certain concessions were made to us.

21 I think you may have the right policy.
22 But I am concerned about the effect on our
23 enactability should you prevail.

24 CHAIRPERSON AUERBACH: Thank you.
25 Commissioner Perlman.

1 COMMISSIONER HARVEY S. PERLMAN

2 (Nebraska): It's hard for me to figure out what to
3 do on the motion since I don't understand the
4 section.

5 Subsection (a) talks about a conviction
6 that has been reversed, vacated, or otherwise
7 overturned, or that has been pardoned. Subsection
8 (b) seems to suggest to me that (a) applies to this
9 state and (b) applies to things happening in another
10 jurisdiction. The language in the other
11 jurisdictions are different. That's vacated,
12 expunged or set aside, not including pardon. I
13 could argue that if you were pardoned in another
14 jurisdiction, I have no idea what the rule is.

15 The next language is based on
16 rehabilitation or good behavior, which tells me that
17 if the other jurisdiction vacated the conviction
18 because of lack of guilt, this doesn't speak to it
19 at all.

20 If you had an explicit provision in here
21 that said that a conviction from another
22 jurisdiction has been vacated, expunged or set aside
23 on some basis other than lack of guilt or lack of
24 process or something like that, then I might be able
25 to stay with you on the enactability thing. But

1 this is so ambiguous we don't know what it covers.

2 CHAIRPERSON AUERBACH: Chair.

3 COMMISSIONER RICHARD T. CASSIDY

4 (Vermont): It's intended that subsection (a) is a
5 more comprehensive subsection that relates to both
6 convictions in this state and convictions in another
7 state, and then deals with what happens when there
8 is a pardon or a vacation of that conviction.

9 That's the basic rule. The basic rule is from
10 whatever state, no sanctions apply.

11 COMMISSIONER PERLMAN: What happens if
12 it's expunged in the home state?

13 COMMISSIONER CASSIDY: That is a
14 conviction that has been expunged.

15 COMMISSIONER PERLMAN: That's not
16 covered in (a).

17 COMMISSIONER CASSIDY: Well, I would
18 think that if you look at the expungement, that the
19 effect of expungement is to vacate a conviction.

20 COMMISSIONER PERLMAN: Then why do you
21 need it in (b)?

22 COMMISSIONER CASSIDY: Subsection (b) is
23 intended to cover a more narrow set of grounds, and
24 those are the vacations that are based upon
25 rehabilitation or good behavior, typically the

1 deferred sentence arrangements in another state.

2 COMMISSIONER PERLMAN: If Commissioner
3 Langrock really wanted to get to where he wants to
4 go, I think the answer would be just to eliminate
5 (b) completely, wouldn't it?

6 COMMISSIONER CASSIDY: That would work.

7 [Laughter]

8 COMMISSIONER PERLMAN: I wonder if
9 Commissioner Langrock would accept that as a
10 friendly amendment just so at least what we do is
11 clear as opposed to this.

12 COMMISSIONER LANGROCK: My concern is
13 the situation where you have a deferred sentence,
14 you hold off and sentence somebody to impose this
15 sentence provided they act in good behavior. In the
16 state of Vermont, that's fine. That takes care of
17 it. If New Hampshire has the same thing and it's
18 completed, that does not come under the -- maybe it
19 does come under the other --

20 COMMISSIONER PERLMAN: There are no
21 grounds listed in (a). It's anything.

22 COMMISSIONER LANGROCK: Let the debate
23 go on and let me think about it a second.

24 CHAIRPERSON AUERBACH: All right. We
25 will hold that point in abeyance.

1 The commissioner at Microphone 3, on the
2 motion.

3 COMMISSIONER RAYMOND P. PEPE
4 (Pennsylvania): I wonder if Commissioner Langrock
5 would consider a substitute motion to basically
6 strike subsection (b) and substitute in Section 10 a
7 provision that says that a certificate of
8 restoration of rights may be based upon a vacation,
9 expungement, or set-aside of a conviction in another
10 state based on rehabilitation made in that state.

11 That would somewhat cut the baby in
12 half, you know, and would balance the equities
13 because, on one hand, it would authorize recognizing
14 a determination of rehabilitation made in another
15 state. But on the other hand, it would allow the
16 home state, the state in which it is being applied
17 to determine whether or not it is appropriate based
18 on all the facts and circumstances in that
19 particular state.

20 CHAIRPERSON AUERBACH: That is a
21 suggestion and not a motion, Commissioner Pepe?

22 COMMISSIONER PEPE: It was a question
23 whether or not Commissioner Langrock would agree to
24 that as a substitute motion.

25 COMMISSIONER PETER F. LANGROCK

1 (Vermont): One of the problems is drafting on the
2 floor, but I really like the substance of what you
3 said. I think it goes to the course of what we're
4 trying to accomplish here, but gives some discretion
5 and maybe a little bit better politic. I would
6 accept that as a substitute motion.

7 CHAIRPERSON AUERBACH: All right. I
8 would ask, Commissioner Pepe, if you could put it in
9 writing very quickly. Thank you.

10 We now are dealing with the substitute
11 motion which will be read several times once we have
12 it up here rather than the original motion.

13 Commissioner Burnett.

14 COMMISSIONER K. KING BURNETT (Maryland):
15 I agree with the motion, the substance of it. There
16 is another way to handle this, is just to take the
17 words "expunged and set-aside" out of (b) and put
18 them in (a) and delete (b), which is essentially
19 what Commissioner Perlman was suggesting.

20 As to the policy here, it is as a state
21 organization in a nation where we have the full
22 faith and credit clause and we're trying to
23 recognize each other's rights and decisions, it's
24 kind of an anomaly for us to sit here and say, well,
25 if a state expunges a conviction, I might not

1 recognize it.

2 I just have a lot of trouble with us,
3 unless you had some -- I mean, for us to say that, I
4 just don't feel at ease with saying that. We do
5 have respect for each other. We have respect for
6 each other's decisions. Why would we feel that we
7 need to do that. I mean, is there something, we
8 don't trust each other? I just think as an
9 organization, that's not a defensible, appropriate
10 action to take.

11 Now as to the politics, which seems to
12 be one of the things driving this, I gather, if you
13 do go the route of deleting (b) and just sticking it
14 in (a), I think you have -- I don't know, there is
15 not a very good way to put it -- somewhat obfuscated
16 the issue and perhaps avoided it, you know, instead
17 of head on. You've taken care of it and it won't
18 maybe rise in the ways that you think.

19 COMMISSIONER H. LANE KNEEDLER, III
20 (Virginia): Mr. Chairman.

21 CHAIRPERSON AUERBACH: Commissioner
22 Kneedler.

23 COMMISSIONER KNEEDLER: I want to go
24 back to Commissioner Perlman's question about the
25 difference between (a) and (b). Think of (a) as the

1 conviction has been reversed, vacated or otherwise
2 overturned by a court for some legal reason. What
3 we typically think of what courts do, and we decide
4 with pardons, executive pardons, we're not going to
5 try to distinguish between the types of pardons,
6 although we did debate that. In some states there
7 is an absolute pardon for people where the governor
8 pardons because the person is believed to have been
9 innocent, as opposed to in Virginia we just call
10 them regular pardons, where it is basically a mercy
11 pardon. Yes, the person did it, but we're going to
12 forgive them. We decided not to distinguish there.

13 (b) is intended for the kind of
14 situation where some states may have a law that says
15 first time possession of marijuana, after a year if
16 you've behaved yourself we're going to set aside the
17 conviction. That's a mercy decision. We decided,
18 for a number of the reasons that have been
19 suggested, that we ought to leave the situation
20 where the conviction is being set aside, not because
21 the person was innocent, not because the person --
22 there was a legal mistake made in the trial of the
23 person, but for some mercy reason, good behavior,
24 that we ought not to impose -- we ought not to
25 require one state to accept that decision by the

1 other state.

2 On the other hand, we thought it was
3 important for each state, whichever way it went, to
4 make it clear in the statute whether or not they
5 were going to accept these mercy set asides or not.
6 That was the reasoning. It was part of a compromise
7 among members of the committee and with the outside
8 folks that we were working with. Frankly, I think
9 it was a -- I would have to judge it as an extremely
10 important compromise we reached that will be
11 important, I think anyway, to the enactment of this
12 act.

13 CHAIRPERSON AUERBACH: Commissioner,
14 you're saying that your view on what we will call
15 the Perlman point goes to the substitute motion, is
16 not a separate item.

17 The reason I'm saying that is I want to
18 keep it from being totally confused. To the extent
19 that it is separate, I would like to get rid of the
20 substitute motion.

21 COMMISSIONER NEEDLER: Well, I don't
22 understand the substitute motion. I'm waiting to
23 see it.

24 CHAIRPERSON AUERBACH: Well, we are at
25 that point. I have Commissioner Pepe's handwritten

1 holographic amendment, with the understanding that
2 we are not -- assuming the motion passes, this would
3 not necessarily be the specific language, but the
4 committee would work on it given the difficulty of
5 drafting on the floor.

6 The substitute motion is to add to
7 Section 10(b) authorization for states to base a
8 decision regarding a restoration of rights upon a
9 vacation, expungement or set-aside of a conviction
10 by another state based on rehabilitation or good
11 behavior.

12 Is that correct, Commissioner Pepe?

13 COMMISSIONER RAYMOND P. PEPE

14 (Pennsylvania): Yes.

15 CHAIRPERSON AUERBACH: Good. Thank you.

16 [Off-mike comment from the floor]

17 CHAIRPERSON AUERBACH: That's a good
18 point. Commissioner Pepe, the question is, this
19 goes along with deletion of (b) of 9.

20 COMMISSIONER PEPE: That is correct.

21 CHAIRPERSON AUERBACH: Good. Thank you,

22 COMMISSIONER PEPE: (b).

23 CHAIRPERSON AUERBACH: Thank you.

24 COMMISSIONER KNEEDLER: Mr. Chairman,
25 may I ask a clarifying question of Commissioner

1 Pepe?

2 Commissioner Pepe, your amendment goes
3 to a certificate of restoration of rights which is
4 not available until after five years. What if I am
5 living in one state and want to go to your state and
6 get employment. That's what an order of relief
7 under -- this is getting a little ahead of the game.
8 But Section 9 and Section 10 relief are different.
9 It would seem to me if we're going to do this that
10 we ought to do it for Section 9 as well as Section
11 10.

12 COMMISSIONER PEPE: That's why
13 specifically I didn't try to draft it because I was
14 aware of that particular issue. My sense is that if
15 a conviction is -- if there is a determination of
16 rehabilitation based on good behavior made by
17 another state, a particular state applying this act
18 should be able to consider that in making its
19 decision, and that should be alternative grounds for
20 making a decision other than the five-year rule that
21 would otherwise be applicable. In other words, you
22 can't simply add this as a new subsection (4) in
23 10(b). You have to restructure 10(b) a bit
24 somewhat. You probably need to look at how it
25 applies to 9.

1 COMMISSIONER KNEEDLER: But the
2 certificate under 10 isn't available to anyone until
3 after five years. What happens in the intervening
4 five years when I could have gotten an order of
5 relief? Are you suggesting that the state ought to
6 be able to take the same factors into account in
7 deciding whether to issue an order of relief in that
8 first five years or not?

9 COMMISSIONER PEPE: Yes.

10 COMMISSIONER KNEEDLER: So you would
11 have it cover 9 and 10?

12 COMMISSIONER PEPE: I would like to
13 allow the committee to consider that.

14 COMMISSIONER KNEEDLER: Okay.

15 COMMISSIONER PEPE: The basic thrust
16 here is that there are very good policy reasons for
17 recognizing a determination made by another state
18 and very good policy reasons in certain
19 circumstances for not recognizing a determination
20 made by another state. We ought to find a way to
21 balance those competing goals by allowing a state to
22 consider the action taken by another state,
23 determine whether it is appropriate in this state,
24 and then make a decision to either relieve
25 collateral consequences or disqualifications.

1 CHAIRPERSON AUERBACH: Thank you. The
2 chair.

3 COMMISSIONER RICHARD T. CASSIDY
4 (Vermont): Commissioner Pepe, one thing you should
5 understand is that under Section 10 as it exists, in
6 Section 10(e)(6), one of the things that the
7 administrative agency that is charged with applying
8 this can consider is the individual's other criminal
9 history, if any, and rehabilitation and conduct
10 since the offense, including the individual's
11 receipt of an order for relief from collateral
12 sanctions, a certificate of restoration of rights, a
13 pardon or other relief.

14 I would argue that to the extent that
15 you want to do this in Section 10, it's already
16 done. That would be other relief that the
17 decision-maker could and should take into account
18 under the section as it stands.

19 COMMISSIONER H. LANE KNEEDLER, III
20 (Virginia): Mr. Chairman.

21 CHAIRPERSON AUERBACH: Commissioner
22 Kneedler.

23 COMMISSIONER KNEEDLER: Commissioner
24 Pepe, the other problem I have with this, 9 and 10
25 deal with how you get relief from a collateral

1 sanction or disqualification that has already been
2 imposed. What your proposal doesn't do is say what
3 happens in the meantime. Let's suppose I've been
4 convicted in a state of a certain felony, meaning I
5 can't carry a firearm. For whatever reason, that
6 state now vacates it because I've been on good
7 behavior for six months. Now I come to another
8 state. What does that other state do? Does that
9 conviction count where I can't carry a firearm in
10 that state?

11 Your suggestion of, well, we'll look at
12 it in an order of relief, that's a relief from a
13 collateral sanction. I guess that assumes that the
14 collateral sanction does apply in that second state,
15 not that it does not.

16 COMMISSIONER PEPE: Yes, that's correct.

17 COMMISSIONER KNEEDLER: Okay. The basic
18 motion then becomes it does become a collateral
19 sanction in the state, not that it does not? Your
20 solution, is that correct? I think that would be
21 the result.

22 COMMISSIONER PEPE: I believe that's
23 correct.

24 COMMISSIONER KNEEDLER: Okay.

25 CHAIRPERSON AUERBACH: Commissioner

1 Henderson.

2 COMMISSIONER ROGER C. HENDERSON

3 (Arizona): I wish that Commissioner Langrock had
4 not acceded to the suggestion so quickly. I would
5 urge the floor to defeat the motion to delete
6 subsection (b) of Section 8 and to try to go in and
7 redraft 9 and 10, which would be necessary under the
8 motion that's made by Commissioner Pepe.

9 Then we can get back, and I assume that
10 Commissioner Langrock would renew his motion on
11 whether or not to adopt the "does not" rather than
12 the "does" language. That's a clear way to deal
13 with it. Each of us on the committee has our own
14 view about whether the bracketed language should
15 stay or whether or not they would agree with
16 Commissioner Langrock that the house should take a
17 position, and that's, of course, the prerogative of
18 the house to do so.

19 This is not a good thing that we are now
20 considering because 9 and 10, we spent hours on
21 trying to perfect those things. Here at the last
22 minute you want us to go back in there. There are
23 lots of issues lurking there.

24 CHAIRPERSON AUERBACH: Okay. The chair
25 will ask the commissioner from Vermont whether he

1 wants to withdraw his motion at this time,
2 recognizing that the committee has got a fair amount
3 of work to do now dealing with the confusion that
4 has been generated, and to come back again.

5 COMMISSIONER PETER F. LANGROCK
6 (Vermont): Let me just respond. When I acceded to
7 Commissioner Pepe's approach it was in the concept
8 of non-drafting. It did not deal with 9 or 10.

9 What I was basically saying is the
10 motion of eliminating (b) was fine, but if you
11 wanted a safety valve, somewhere along the line in a
12 method to insert exceptional circumstances to
13 overrule the situation in another state, I would
14 think that might be a worthwhile compromise. How
15 that could be effectuated, I don't know.

16 What I would like to do at this point is
17 amend my motion to say that this be a sense of the
18 house motion and go forward at this point. The
19 sense of the house being that we believe that
20 collateral consequences of a sister state, we should
21 honor those with possible rare exceptions.

22 CHAIRPERSON AUERBACH: I'm going to need
23 the parliamentarian before I'm through, that's
24 obvious.

25 In effect, you are withdrawing, if you

1 can do such a thing, your acceptance of the
2 Commissioner from Pennsylvania's substitute and
3 instead pressing a sense of the house motion.

4 I think to clarify, I'm going to ask Ray
5 if he wants to withdraw his motion for the time
6 being.

7 COMMISSIONER RAYMOND P. PEPE
8 (Pennsylvania): I agree that based on the
9 committee's comments, if this is already considered
10 in 10, in other words, there already is the
11 authorization to consider an action taken by another
12 state and not be bound by it, to consider it, then
13 simply striking (b) probably is the appropriate way
14 to go. However, if that upsets your political apple
15 cart, then you might want to find a different
16 solution.

17 I don't understand enough based upon
18 your description of the political apple cart you're
19 trying not to offend as to whether striking (b) and
20 perhaps tweaking 9 and 10 a little bit is or is not
21 a good approach in terms of enactability.

22 CHAIRPERSON AUERBACH: The bottom line,
23 what you just said, you are backing off your
24 substitute motion.

25 COMMISSIONER PEPE: That is correct.

1 CHAIRPERSON AUERBACH: Thank you. Thank
2 you. That clears the air somewhat.

3 I think now what we have before us is a
4 substitute motion from the commissioner from
5 Vermont, which I may ask you to put in writing just
6 in light of everything that has happened.

7 COMMISSIONER PETER F. LANGROCK
8 (Vermont): I'll make it easy. A sense of the house
9 motion that we eliminate (b). That should give
10 enough direction. That motion is clear. Obviously,
11 the committee has heard all sorts of things and they
12 can deal with it, but this would be a sense of the
13 house --

14 CHAIRPERSON AUERBACH: Is the sense of
15 the motion your very first effort?

16 COMMISSIONER LANGROCK: Excuse me.

17 CHAIRPERSON AUERBACH: Your very first
18 effort was putting "not" -- well, let's go back to
19 it. Leaving in "does not" and taking out "does" as
20 the sense of the house motion, with the
21 understanding of looking at the other sections as
22 well.

23 COMMISSIONER LANGROCK: No.
24 Commissioner Perlman suggested that we eliminate
25 (b). Then commissioner Pepe said eliminate (b) but

1 add something else.

2 Right now, to give some guidance to the
3 committee, my motion is the sense of the house
4 motion that we eliminate (b).

5 CHAIRPERSON AUERBACH: All right. That
6 is somewhat different. Now we eliminate (b) and
7 look at what we have done as a result thereof?

8 COMMISSIONER LANGROCK: Yes.

9 CHAIRPERSON AUERBACH: Okay. That is a
10 sense of the house motion.

11 On the sense of the house motion,
12 Commissioner Davies.

13 COMMISSIONER JACK DAVIES (Minnesota):
14 (b) really addresses the issue -- it's not full
15 faith and credit, but it's comity state to state.

16 In one version of the bracketed material
17 is a rejection of comity. It says what that other
18 state has done subsequent to the conviction makes no
19 difference in our state. The other one accepts the
20 principle of comity and says what the other state
21 has done is to be honored and respected and used in
22 our state.

23 To eliminate (b) leaves that question
24 totally unaddressed. I think that the motion to
25 drop (b) should be rejected. Then we should get to

1 the real issue, is this act going to include a
2 comity provision or is it going to have a provision
3 to reject comity. That was Commissioner Langrock's
4 initial motion.

5 I don't know, maybe the committee should
6 be bound to abstain on that last vote.

7 CHAIRPERSON AUERBACH: All right. Let's
8 remove ourselves from this, let us stay with the
9 sense of the house motion.

10 The commissioner at Microphone 2.

11 COMMISSIONER JAMES M. CONCANNON
12 (Kansas): I'm not sure what effect eliminating (b)
13 would have on the point that I want to make.

14 I do see a problem with the language of
15 the current 8(b), and perhaps it's unique to Kansas.
16 I don't know whether the law of Kansas on
17 expungement differs from that in other states. At
18 least in Kansas, even though a conviction has been
19 expunged, there are certain circumstances in which
20 the individual must disclose that expunged
21 conviction and there are certain collateral
22 consequences that still flow. For example, can't
23 work for the lottery, certain disqualifications from
24 working for law enforcement that continue to attach
25 despite the expungement based on rehabilitation.

1 It would be very odd if you had a Kansas
2 conviction that had been expunged but still had
3 collateral consequences to have a section here that
4 told Missouri it couldn't impose the same collateral
5 sanctions.

6 CHAIRPERSON AUERBACH: Okay. I will
7 recognize the president for comment.

8 PRESIDENT WALTERS: I had told the
9 Record Owners Drafting Committee that they would
10 come on at 9:00. I can see a lot of people
11 conferring about this issue. Probably rather than
12 taking more comments now, we will excuse this
13 committee, give people a chance to talk about this,
14 get their heads together about it. We will be
15 coming back. Hopefully, Record Owners will be a
16 quick act and we'll come back up, unless there is
17 any objection to that procedure.

18 COMMISSIONER LYLE W. HILLYARD (Utah):
19 Point of order, if I may. In our procedure, when
20 you stop a debate in the process, when we reconvene,
21 we are at that point.

22 PRESIDENT WALTERS: Yes.

23 COMMISSIONER HILLYARD: The issue before
24 the body would be the --

25 PRESIDENT WALTERS: The amendment. I

1 realize this is a little unusual, but I see a lot of
2 people conferring about it. Maybe the time would be
3 helpful.

4 COMMISSIONER PETER F. LANGROCK

5 (Vermont): I think the idea is great.

6 PRESIDENT WALTERS: All right. We need
7 a report from the committee.

8 CHAIRPERSON AUERBACH: Madam President,
9 the Committee of the Whole rises and reports that it
10 has had under consideration the Uniform Act on
11 Collateral Consequences of Conviction, and beg leave
12 to sit again.

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FIFTH SESSION

2

UNIFORM ACT ON COLLATERAL

3

CONSEQUENCES OF CONVICTION

4

SUNDAY MORNING, JULY 20, 2008

5

Boris Auerbach of Ohio, presiding.

6

CHAIRPERSON AUERBACH: Okay. Round 3.

7

I think we have everybody up here.

8

I'm going to call upon Peter to restate

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that which we had before us, and that will be the

10

focus of our limited time here. The commissioner

11

from Vermont, Commissioner Langrock.

12

COMMISSIONER PETER F. LANGROCK

13

(Vermont): The original motion that I made was to

14

be a sense of the house that we strike the word

15

"does" and the brackets in line (b). As I

16

understand it, there was a suggestion by

17

Commissioner Perlman to change that. I did not

18

accept that. I did suggest that. He withdrew it.

19

I think we're back to the original motion at this

20

point. I think that's where we should be.

21

CHAIRPERSON AUERBACH: This is a sense

22

of the house. The committee will then take that

23

sense and go back and see what they can do with. We

24

will have to come back with it.

25

COMMISSIONER LANGROCK: I attended some

1 of the short portion of the committee's
2 deliberations. I know that there are people working
3 on language. This is not meant in any way to limit
4 that, but mainly to get the sense of the house why
5 we should go in this direction.

6 CHAIRPERSON AUERBACH: I would ask the
7 floor to concentrate on this particular issue.
8 There are other issues that have come up within this
9 section which will be considered. But we would,
10 given the limited time available, really like to
11 focus on what Peter has just presented.

12 With that, I'll turn to Microphone No.
13 2.

14 COMMISSIONER BARBARA ANN ATWOOD
15 (Arizona): Thank you. With that being the
16 understanding of the motion, I think it will be
17 putting this state in a position of possibly
18 eliminating collateral consequences when the state
19 that has done the expunging may not have eliminated
20 all collateral consequences. Maybe the reporter can
21 speak to that. I'm not an expert at all in this
22 area. I thought some of those set-asides probably
23 don't wipe the slate clean always. It's taking a
24 position that seems not to be one of comity but
25 maybe of policy of erasing when the issuing state

1 may not have taken that position.

2 CHAIRPERSON AUERBACH: Thank you.

3 Microphone No. 6.

4 COMMISSIONER EDWARD LINDSEY (Georgia):

5 Thank you, Mr. Chairman. I am concerned about the
6 possibility of handcuffing one state where the
7 individual now resides based on the actions of the
8 previous state. There are reasons both under full
9 faith and credit and under comity for accepting a
10 conviction in one state by another state because
11 there is certain uniformity that takes place in a
12 conviction. All states require trial by jury. All
13 states require that a conviction be held up, a clear
14 -- beyond a reasonable doubt.

15 However, there is no uniformity when it
16 comes to the issue of rehabilitation. One state's
17 rehabilitation may be complete while another state
18 may have a very different public policy view of
19 that. To handcuff the state where the individual
20 now resides based on the determination of another
21 state in terms of rehabilitation brings some serious
22 questions to the ability of a state's ability to
23 protect its citizenry.

24 For that reason, I would ask that this
25 motion be defeated.

1 CHAIRPERSON AUERBACH: Okay. Thank you.

2 Again, at Microphone 6. Commissioner
3 Bopp.

4 COMMISSIONER JAMES BOPP, JR. (Indiana):
5 Thank you, Mr. Chairman. I rise to oppose the
6 amendment and to support the compromise position of
7 the committee. I think subsection (b) presents to
8 the states a very serious and important policy
9 question for which there are arguments on both sides
10 and that the states should be -- and its importance
11 means that we should signal it clearly to them that
12 that is a choice for them to make.

13 The way I come down on this issue is I
14 do not support the proposition that the whole state
15 should have all of its collateral sanctions waived
16 because the other state has by grace, such as New
17 York, which is the only place I know that does this,
18 has decided that by good behavior or rehabilitation,
19 they are setting aside the conviction. That is
20 because of this. In Section 9, what we are talking
21 about is in the host state whether or not you can
22 obtain employment with the state, not private
23 parties, but with the state, or obtain a state
24 license.

25 Further, in Section 10, we are talking

1 about the restoration of civil rights. That is, the
2 ability to vote in the host state, not in the old
3 one, but in the new one, or to serve in public
4 office. While I support the idea of comity, these
5 questions -- that is, questions of employment by the
6 state or gaining a license from the state or voting
7 or serving in public office in the state are all
8 peculiarly important matters of the state's own
9 interest and public policy. I do not agree that
10 because New York is willing to provide by grace
11 relief of some of the collateral sanctions that
12 would affect whether a felon gets employed by the
13 state in New York, that that same public policy
14 would exist in other states. These are things that
15 peculiarly a state should decide.

16 I support the proposition that we should
17 retain subsection (b) as proposed by the committee,
18 so that each state can make a determination based
19 upon this important public policy question.

20 CHAIRPERSON AUERBACH: Thank you.

21 Microphone 3.

22 COMMISSIONER JAMES M. CONCANNON

23 (Kansas): I'm not certain that the correct answer
24 is either a black or white, does or does not. It
25 would help me in deciding how to vote on the sense

1 of the house motion if Commissioner Langrock could
2 tell me how his proposal would affect this situation
3 in Kansas when someone applies for admission to the
4 bar. Our bar admission application requires
5 disclosure of all prior convictions, whether they
6 have been expunged in another state or not.

7 Would the effect of your proposal be to
8 say that the Kansas Supreme Court could not require
9 disclosure of expunged convictions which, under
10 current procedure they consider, it's not an
11 automatic disqualification one way or the other.

12 CHAIRPERSON AUERBACH: Commissioner
13 Langrock, would you like to respond.

14 COMMISSIONER PETER F. LANGROCK
15 (Vermont): I don't think so. I don't know enough.
16 Those are the things that would have to be worked
17 out about it. That's not the thrust of where I'm at
18 here, to prevent that from happening.

19 CHAIRPERSON AUERBACH: Commissioner
20 Kneedler.

21 COMMISSIONER H. LANE KNEEDLER, III
22 (Virginia): I don't think this act affects the
23 disclosure issues at all either way.

24 COMMISSIONER CONCANNON: Well, it's more
25 than disclosure. Once it's disclosed, then the bar

1 admitting authorities take it into consideration in
2 deciding whether or not the person meets the
3 character and fitness requirement. That strikes me
4 as a collateral consequence.

5 CHAIRPERSON AUERBACH: Okay.

6 COMMISSIONER KNEEDLER: I think the
7 answer is that individual inquiry is always
8 permitted.

9 CHAIRPERSON AUERBACH: Commissioner
10 Burnett.

11 COMMISSIONER K. KING BURNETT (Maryland):
12 I would ask the floor to try to treat this as I
13 think it's intended to be, and it's not binding the
14 committee to the language, it may be that some
15 wording gets added to (a), (b) may get deleted. We
16 may add something to 9 or 10.

17 The question before us really is whether
18 we as a body should say bluntly in a section that
19 one state can disregard the decision of another
20 state, not to impose a disqualification or sanction
21 but to remove one -- only to remove it. When we
22 have an enforcement of foreign judgment statute that
23 says we give comity to foreign judgments of other
24 countries, in (a) we say pardons that are often
25 political or whatever are going to be honored.

1 Why in the world would we do this?

2 That's what this motion is about.

3 CHAIRPERSON AUERBACH: Thank you.

4 Commissioner Pepe, Microphone 3, and
5 hopefully not to make a motion.

6 [Laughter]

7 COMMISSIONER RAYMOND P. PEPE

8 (Pennsylvania): No. I'm just have to confess being
9 confused. I thought that we were coming into this
10 debate with the assumption that we were getting rid
11 of the word "does" so collateral sanctions would be
12 recognized unless they were removed pursuant to 9
13 and 10, and that in removing the sanctions pursuant
14 to 9 and 10, you could consider what another state
15 had done but you would not be bound by it.

16 If the effect of this motion is now to
17 say that you are automatically going to recognize a
18 decision be made in another state to remove a
19 sanction, I am now opposed to that amendment and
20 would either propose to -- I think the committee got
21 it right the way they first drafted it and I would
22 oppose the amendment.

23 CHAIRPERSON AUERBACH: Okay.

24 Commissioner Davies.

25 COMMISSIONER JACK DAVIES (Minnesota):

1 This section, contrary to a couple of comments from
2 the floor, does not require full faith and credit --
3 or comity to the certificate of relief. This
4 relates to actions that are taken regarding the
5 conviction.

6 CHAIRPERSON AUERBACH: Okay.

7 COMMISSIONER PEPE: Jack, I understand
8 that. I guess my position is this. If this state
9 has imposed a sanction upon someone, and another
10 state, based on the conviction, says, well, no, we
11 think you have been rehabilitated, this state ought
12 to make a decision whether or not you are
13 rehabilitated. They can take into consideration
14 what the other state did, but they should not
15 automatically be bound by what the other state did.
16 I would oppose the motion.

17 CHAIRPERSON AUERBACH: Okay.

18 COMMISSIONER DAVIES: Mr. Chairman.

19 CHAIRPERSON AUERBACH: Commissioner
20 Davies.

21 COMMISSIONER DAVIES: Ray, it's only the
22 jurisdiction of conviction that has to be honored,
23 Not some third party state.

24 CHAIRPERSON AUERBACH: Okay. The
25 commissioner at Microphone 3.

1 COMMISSIONER TERRY L. THURBON (Alaska):

2 I wish to oppose the motion for many of the reasons
3 that have been stated here. I want to point out
4 that the division among the Drafting Committee that
5 led us to leaving the states with the two options is
6 indicative of, I think, an issue we're going to end
7 up debating later, whether or not this really is an
8 act that is more suitable to a model act than a
9 uniform act. Uniformity among the states is not
10 required on this issue. The states need to have the
11 autonomy to decide what treatment they're going to
12 give to the other state's decisions to vacate and
13 expunge, et cetera.

14 For that reason and as well as some of
15 the others that you have heard, I speak against the
16 motion.

17 CHAIRPERSON AUERBACH: Your timing is
18 very good because at this point I'm going to call on
19 the chairman of the committee to speak on behalf of
20 the committee. Then I will call on Commissioner
21 Langrock to close.

22 COMMISSIONER RICHARD T. CASSIDY
23 (Vermont): I just want to begin by giving some
24 clarity, I hope, to the issue. The question before
25 you is what effect an act of judicial mercy in the

1 state of conviction should be given in a host state,
2 a state where the former defendant is now a
3 resident. I think there are very strong policy
4 arguments favoring both sides of this debate.

5 The committee opposes the motion, has
6 voted to oppose the motion because we do have a
7 prior commitment to the Association of Attorneys
8 General to support leaving this choice and those
9 policy decisions to the states.

10 CHAIRPERSON AUERBACH: Okay.
11 Commissioner Langrock to close.

12 COMMISSIONER PETER F. LANGROCK
13 (Vermont): This is a time when I think the
14 Conference should take a principal position, and
15 this is the appropriate policy. It's a policy that
16 I think is supported by two major prongs. One of
17 which is the promotion of uniformity among the
18 states. The other is comity to the other states.

19 What we have here in State A, State A
20 has a miscreant of some sort before it. It deals
21 with that person by incarceration, by probation, by
22 whatever it may. Sometimes in State A that person
23 who has committed the crime is given no punishment
24 at all because they've sold information to the
25 state. We have no control under State B what

1 happens in State A. State A makes certain
2 decisions, and among those decisions are that there
3 will no longer will be a conviction, for whatever
4 reason. It can be political. It can be
5 forgiveness. It can be for any other number of
6 reasons.

7 For State B to take a piece of that, to
8 take a piece that was temporarily allowed in State A
9 as a collateral consequence and reject all of the
10 other proceedings, in effect, at this point and hold
11 on to that piece, I don't think is an appropriate
12 judgment.

13 It seems to me that there is nothing
14 wrong with -- if State B has jurisdiction of a
15 problem, a crime, they can deal with it. But it's
16 only transporting from the other state to this state
17 the collateral consequences after they have been
18 removed from that other state.

19 I think this is the appropriate policy.
20 I think uniformity is there. I appreciate the
21 politics that have to go into this in enactment.
22 The reason it's a sense of the house motion is to
23 give ultimate flexibility for the Drafting Committee
24 to try and come up with the best possible solution
25 and to try and still keep the attorney generals on

1 board.

2 CHAIRPERSON AUERBACH: Thank you. I
3 believe we are ready for the question. Does
4 everyone understand the motion? All right.

5 All those in favor of the sense of the
6 house motion, please say "aye."

7 All those opposed.

8 The "noes" have it, appear to have it.

9 A COMMISSIONER: Division.

10 CHAIRPERSON AUERBACH: Call for a
11 division. All those in favor of the sense of the
12 house motion, please rise.

13 Parliamentarian, would you count that
14 wing. Jack, would you count the center, the tough
15 job. And would you count the far wing.

16 Please sit down. All those opposed to
17 the motion, please rise. The same people will
18 count.

19 I don't think there is much surprise on
20 the result. Peter's people are very noisy.

21 By a vote of 54 to 30, the motion fails.
22 Thank you very much for your consideration.

23 Here comes the president.

24 Madam President, we report that we have
25 completed what we wanted to today and ask to sit

1 leave again.

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1

NINTH SESSION

2

UNIFORM ACT ON THE COLLATERAL

3

CONSEQUENCES OF CONVICTION

4

TUESDAY MORNING, JULY 22, 2008

5

Boris Auerbach of Ohio, presiding

6

CHAIRPERSON AUERBACH: Good morning.

7

The evening session is over. We are starting again.

8

I will ask the chair to -- and he's getting good at

9

it -- once again to introduce the members of the

10

committee.

11

COMMISSIONER RICHARD T. CASSIDY

12

(Vermont): Thank you. All compliments accepted.

13

I am Richard Cassidy. The members of

14

the Committee are:

15

Ann Walsh Bradley.

16

John Cary.

17

Brian Flowers.

18

Jessica French.

19

Lane Kneedler.

20

Harry Leinenweber.

21

Marian Opala.

22

Michelle Timmons.

23

Our reporter is Jack Chin.

24

There are some other members of the

25

committee who are on their way.

1 CHAIRPERSON AUERBACH: Thank you. The
2 last time we were on the floor we dealt with a sense
3 of the house motion on Section 8 and received a
4 number of suggestions. As a result of that, we have
5 revised that section, and you should all have a
6 single sheet in front of you which says Amendment
7 July 22, 2008.

8 After we get done with that, we will
9 then proceed with the rest of the act. Finishing
10 that, we will go back on the matters on which the
11 committee was instructed to examine and report back.
12 So that is our schedule. We will start with the
13 reading of the amendment to Section 8. I will call
14 on Commissioner Kneedler for that purpose.

15 COMMISSIONER H. LANE KNEEDLER, III
16 (Virginia): Good morning. The chair referred you
17 to this one-page, two-sided sheet, the amendment to
18 Section 8. What I am going to do is walk you
19 through it quickly so you will conceptually
20 understand what it does, then I will read it.

21 The old Section 8 appears first and is
22 stricken, so you will have that in front of you for
23 comparative purposes, if you want it.

24 New Section 8(a), which begins on Line
25 14, simply says, for purposes of imposing or

1 authorizing collateral consequences, a conviction
2 elsewhere will be treated as a conviction in this
3 state.

4 (b) says that if a conviction has been
5 reversed, et cetera, on grounds other than
6 rehabilitation and good behavior -- we have been
7 talking about that as the legal grounds or innocence
8 basis -- in another state and it has none, there
9 will be no collateral consequences in this state.

10 (c) says pardons, and pardons are a
11 little different. Pardons, in effect, are going to
12 be given the same effect in this state as they are
13 given in other states.

14 Now flip over to the back page. The
15 back page contains a fleshing out of the "does not"
16 and "does" alternatives from the earlier draft. I
17 want to thank the floor both for your written
18 comments and your oral comments at the last meeting.
19 They were very helpful to us in fleshing that out.

20 Alternative A is the "does not" -- that
21 is, does not lead to collateral consequences
22 version, and I would describe it as the "does not"
23 with a slight modification so that the individual is
24 not better off in the receiving state than in the
25 convicting state. For example, in the state where

1 convicted if the conviction is reversed, et
2 cetera -- or vacated is a better word to use here --
3 on good behavior grounds but you're still subject to
4 a collateral sanction in that state, then that
5 carries over to the receiving state if they have
6 that collateral sanction. Plus we said you still
7 should be subject to the sanctions in Section 11
8 which can't be waived in this state.

9 Alternative B is the "does" alternative
10 -- namely, the vacated conviction in the other state
11 still does lead to collateral sanctions in this
12 state but you can go to Sections 9 or 10 for relief.

13 With that background, I will read it.

14 "SECTION 8. EFFECT OF CONVICTION BY
15 ANOTHER STATE OR THE UNITED STATES; OVERTURNED
16 CONVICTION.

17 "(a) For purposes of imposing or
18 authorizing collateral consequences, a conviction
19 for a felony or misdemeanor in a court of another
20 state or the United States is deemed a conviction of
21 the same offense in this state, or, if there is no
22 such offense, a conviction for the most serious
23 included offense in this state.

24 "(b) A conviction that has been
25 reversed, overturned, set aside, or otherwise

1 vacated by order of a court of competent
2 jurisdiction of this state, another state or the
3 United States on grounds other than rehabilitation
4 or good behavior, shall not be deemed a conviction
5 in this state and is not the basis for a collateral
6 consequence in this state.

7 "(c) Pardons issued by another state or
8 the United States shall have the same effect for
9 purposes of imposing or authorizing collateral
10 consequences in this state as in the issuing state
11 jurisdiction.

12 "ALTERNATIVE A

13 "(d) A conviction expunged, sealed,
14 annulled, set aside, or otherwise vacated by order
15 of a court of competent jurisdiction of another
16 state or the United States on grounds of
17 rehabilitation or good behavior shall not be the
18 basis for a collateral consequence in this state,
19 except for collateral consequences applicable under
20 the law of this state for which relief could not be
21 granted under Section 11, or for which relief was
22 expressly withheld by the court order or by the law
23 of the jurisdiction that vacated the conviction.
24 The individual convicted of the offense may apply
25 for relief as provided in Section 9 or 10 from any

1 collateral consequence for which relief was
2 withheld, and the [designated board or agency] shall
3 consider that the conviction was vacated in deciding
4 whether to grant relief.

5 "ALTERNATIVE B

6 "(d) If a conviction was expunged,
7 sealed, annulled, set aside, or otherwise vacated by
8 a court of competent jurisdiction of another state
9 or the United States on grounds of rehabilitation or
10 good behavior, the convicted individual is subject
11 to the collateral consequences provided by the law
12 of this state for a conviction in this state for the
13 same offense in this state, or, if there is no such
14 offense, for the most serious included offense in
15 this state. The individual convicted of the offense
16 may apply for relief from any imposed or authorized
17 collateral consequence as provided in Section 9 or
18 10, and the [designated board or agency] shall
19 consider the fact that the conviction was vacated in
20 deciding whether to grant relief."

21 CHAIRPERSON AUERBACH: Thank you. In
22 passing I will simply note that the title needs to
23 be corrected. We have been playing around once too
24 many and we would have to put a reference in to this
25 state because it does appear in one subsection.

1 The commissioner at Microphone 5.

2 COMMISSIONER THEODORE C. KRAMER

3 (Vermont): Good morning. In subsection (a), "For
4 purposes of imposing or authorizing collateral
5 consequences, a conviction for a felony or
6 misdemeanor in a court of another jurisdiction is
7 deemed a conviction of the same offense in this
8 state, or, if there is no such offense, a conviction
9 for the most serious included offense in this
10 state."

11 I have a couple of questions about this
12 provision. Do you mean here that if I commit a
13 crime in Vermont that is characterized as a
14 misdemeanor that it may be treated as a felony in
15 another state if that is the closest
16 characterization of the crime I committed in
17 Vermont? Is that a possible scenario?

18 COMMISSIONER RICHARD T. CASSIDY

19 (Vermont): Commissioner Kramer, that is possible.
20 It's an element-by-element comparison of the two
21 acts, so if in the latter state the act was a
22 felony, then it would be treated as a felony for
23 collateral consequences purposes in that other
24 state.

25 COMMISSIONER KRAMER: I do a fair amount

1 of criminal work and there is a substantial
2 difference between the defendant pleaing to a
3 misdemeanor and pleaing to a felony. It seems to me
4 we are providing a protocol here where an individual
5 may inadvertently subject themselves to very grave
6 consequences in another state.

7 Was there a significant amount of
8 discussion about this by the committee?

9 COMMISSIONER CASSIDY: There was not,
10 but it is obvious that that is the case. Although
11 it is obvious that that is the case today if a
12 defendant in Vermont pleads guilty to a misdemeanor
13 assault in Vermont and goes to a state in which the
14 same crime is deemed to be a felony and the other
15 state says, if you're convicted of felony assault in
16 any state and if the elements line up, you may have
17 that consequence already.

18 COMMISSIONER KRAMER: All right. So
19 that presently exists as the law stands today.

20 COMMISSIONER CASSIDY: It could.

21 COMMISSIONER KRAMER: All right. If two
22 crimes are defined pretty clearly similarly in two
23 states, the application of this provision is not
24 particularly difficult. But who makes the judgment
25 as to a conviction for the most serious included

1 offense in this state? Who is it that makes that
2 judgment? Who is it that compares the two
3 provisions and decides how to impose the
4 consequences?

5 COMMISSIONER CASSIDY: You would have to
6 be the official in the receiving state who is called
7 upon to make that decision about the defendant that
8 is relevant.

9 COMMISSIONER KRAMER: Right. So if
10 you're a bar association, you may make that
11 judgment. If you're some sort of public housing
12 employer, you may make that judgment. In other
13 words, you are beholden to the particular judgment
14 of whichever bureaucracy deals with the conviction.

15 COMMISSIONER CASSIDY: As I would submit
16 you are today.

17 COMMISSIONER KRAMER: It doesn't appear
18 as if the committee has any concern about that
19 problem that at least from my point of view would be
20 a significant problem. Is the committee of the
21 position that that is the law today and we are not
22 going to tamper with that?

23 COMMISSIONER CASSIDY: I think the issue
24 is this. Two kinds of possible likely scenarios in
25 what we call a receiving state, a state to which a

1 person who has been convicted in other state may
2 encounter. You may come to a state where the
3 collateral consequence is defined by reference to a
4 specific citation to that state's law. So that if
5 you have violated Montana statute so and so, the
6 following consequences attach to you.

7 In that circumstance the defendant would
8 be worse off, because today no collateral
9 consequence attaches to that person. In many
10 situations the statutes that impose collateral
11 consequences aren't that specific and say something
12 more generic, like if you have been convicted of
13 aggravated assault, these consequences attach.
14 Those people would certainly be better off because
15 essentially the same analysis is going to occur and
16 there will be some relief provisions available to
17 them that are not available today.

18 CHAIRPERSON AUERBACH: Commissioner
19 Davies.

20 COMMISSIONER JACK DAVIES (Minnesota):
21 Let me put your mind a little more at ease. If you
22 look on the first clause of Line 14, it is only for
23 the purpose of a collateral consequence that the
24 conviction from the other state is applied here.
25 All the direct consequences of the conviction would

1 be in the state of the original conviction, so it
2 doesn't really convert a misdemeanor into a felony.
3 It is still a felony where the conviction was, but
4 all of these unfortunate collateral consequences
5 would follow by matching the crimes.

6 COMMISSIONER THEODORE C. KRAMER

7 (Vermont): Another classic consequence would be if
8 Vermont imposes a 90-day license suspension for a
9 first offense DWI and Montana imposes a one-year
10 license suspension for a first offense DWI, then we
11 should understand it more likely than not there
12 would be a one-year license suspension imposed in
13 Montana. That would be the practical application of
14 this provision, if I understand it correctly. It
15 may be the law of the land right now. But just so
16 we have a full understanding of that, that looks
17 like that would be the implications of Section A, is
18 that correct?

19 CHAIRPERSON AUERBACH: The chair and
20 reporter are consulting.

21 COMMISSIONER CASSIDY: Do you understand
22 the question, Reporter Chin?

23 COMMISSIONER KRAMER: A collateral
24 consequence of a DWI conviction is a license
25 suspension, and each state sets their own imposition

1 as far as that is concerned. So if Vermont has a
2 90-day license suspension for a DWI first offense
3 and Montana has a one-year license suspension for a
4 DWI first offense, we should understand that by
5 application of this provision it's more likely than
6 not the individual would be subject to a one-year
7 license suspension in Montana. Is that correct?

8 COMMISSIONER JACK DAVIES (Minnesota):
9 Mr. Chair?

10 CHAIRPERSON AUERBACH: Commissioner
11 Davies.

12 COMMISSIONER DAVIES: It would be the
13 enacting state's sanction or collateral consequence
14 rather than the convicting state.

15 COMMISSIONER KRAMER: Right.

16 COMMISSIONER CASSIDY: But the other
17 point to remember, Commissioner Kramer, about
18 license suspensions is that there are already more
19 specific reciprocity provisions that typically
20 govern that particular subject.

21 COMMISSIONER KRAMER: Yes. I was just
22 using that as an example. Thank you.

23 CHAIRPERSON AUERBACH: Thank you very
24 much.

25 Microphone 3 seems to be milling around.

1 I am not sure anybody is up there or not, so I will
2 go to Microphone 2 while 3 sorts out.

3 COMMISSIONER LARRY L. RUTH (Nebraska):
4 Your definition of "collateral sanction" is a
5 penalty as a result of an individual's conviction of
6 a felony misdemeanor or other offense. I think in
7 your draft here you don't talk about "or other
8 offense."

9 In Nebraska we have something called an
10 infraction, and other states may have something that
11 are not misdemeanors or felonies. I think you need
12 that language "or other offense" in there also.

13 COMMISSIONER RICHARD T. CASSIDY
14 (Vermont): Commissioner Ruth, in meetings since we
15 were on the floor previously we have changed the
16 definitions a bit and imposed a functional
17 definition of conviction that would pick up lesser
18 offenses if they in fact impose collateral sanctions
19 as included within the act.

20 COMMISSIONER RUTH: My question goes to
21 offenses which are not felonies or misdemeanors --

22 COMMISSIONER CASSIDY: Right.

23 COMMISSIONER RUTH: -- state may be
24 called an infraction or something else.

25 COMMISSIONER CASSIDY: Correct.

1 COMMISSIONER RUTH: So you're picking
2 that up?

3 COMMISSIONER CASSIDY: Yes.

4 CHAIRPERSON AUERBACH: In an earlier
5 section, which we'll hopefully cycle back to.

6 COMMISSIONER RUTH: Thank you. Another
7 question on the section dealing with pardons, which
8 is subsection (c), by another state or the United
9 States.

10 I assume the United States, that is what
11 we would call a presidential pardon? That's the
12 appropriate way to refer to that kind of a pardon?
13 I just had not seen that.

14 COMMISSIONER CASSIDY: I am not sure
15 that it is necessary to refer to it as a
16 presidential pardon.

17 COMMISSIONER RUTH: I don't know. Just
18 a question. That is the way we refer to a
19 presidential pardon, pardon of the United States?

20 COMMISSIONER CASSIDY: That is the way
21 we have done it so far.

22 COMMISSIONER RUTH: Okay.

23 Then, finally, do you pick up pardons by
24 the state -- by this state, not by other states?
25 Was that in the original draft? In other words, a

1 pardon by the state where it's not -- you're where
2 you're looking to another state, but the state that
3 you're in.

4 COMMISSIONER CASSIDY: Typically,
5 although not always, but typically pardons are
6 covered by the state constitution, and we felt the
7 best thing to do was to leave the effect of an
8 in-state pardon to existing in-state law.

9 COMMISSIONER RUTH: Okay. Thank you.

10 CHAIRPERSON AUERBACH: Thank you. Now I
11 will go to Microphone 3.

12 COMMISSIONER KEN H. TAKAYAMA (Hawaii):
13 If the understanding or assumption is there, this
14 can be taken care of by a note. But I just wanted
15 to ask, in the new Section 8, subsection (a), Line
16 14, 15, is the Drafting Committee of the same mind
17 or at least understanding that the court of a state
18 or the United States includes courts martial,
19 military courts martial in the case of active duty
20 forces, or also for the state military forces such
21 as National Guard?

22 COMMISSIONER CASSIDY: I believe they're
23 courts of the United States.

24 COMMISSIONER TAKAYAMA: Then if that is
25 the case, that could be taken care of with a

1 comment.

2 CHAIRPERSON AUERBACH: Thank you.

3 Microphone 6.

4 COMMISSIONER DAVID A. GIBSON (Vermont):

5 In Vermont we have a mechanism called a deferred
6 sentence, and I expect other states have it also,
7 where a person can plead guilty to a crime, the
8 court accepts the plea, defers sentencing, places
9 him on probation, I think if it's a misdemeanor for
10 a period up to two years, for a felony a period up
11 to five years, and if the person satisfactorily
12 completes that probationary period, then the court
13 does not impose any judgment of conviction and the
14 person does not have a record of a conviction.

15 Would other states faced with that
16 situation be able to impose a collateral consequence
17 as a result of that Vermont proceeding?

18 CHAIRPERSON AUERBACH: Chair.

19 COMMISSIONER CASSIDY: I think,
20 Commissioner Gibson, that will depend upon whether
21 it is concluded that there was ever a conviction in
22 Vermont. If the answer is "no," then there is no
23 basis to impose a collateral consequence. If the
24 answer is "yes," then what you have is a conviction
25 that has been vacated on the grounds of relocation

1 or good behavior and Alternative A or Alternative B
2 would apply.

3 COMMISSIONER GIBSON: I don't have the
4 precise language of the Vermont statute with me, but
5 it seems to me similar to a situation where a jury
6 has found a person guilty, the court accepts the
7 jury's verdict, the person stands convicted until
8 sentenced when you enter the judgment order of
9 conviction and sentence, and it may well apply.

10 I am not sure that is an appropriate
11 application of the collateral consequences, but I
12 guess there is not much we can do about it here.

13 COMMISSIONER CASSIDY: I think we have
14 to start from the proposition that these are things
15 that happen in the event of conviction, so the
16 analysis has to begin with the answer to the
17 question, is this a conviction?

18 COMMISSIONER GIBSON: A matter of
19 drafting question. In both Alternative A and B, you
20 set up the scenario of a conviction that has been
21 expunged or otherwise vacated, and then you go on to
22 use the term "the convicted individual" in about
23 three different places. Should that not be "the
24 formerly convicted individual"?

25 COMMISSIONER CASSIDY: It seems like

1 there must be a better way to put it. We will look
2 for a better way.

3 COMMISSIONER GIBSON: Would the
4 committee accept inserting the word "formerly" in
5 those three places? I will identify them by a note
6 to you.

7 COMMISSIONER CASSIDY: I would ask you
8 not to bind us to that formulation but to look for
9 the best phrase.

10 COMMISSIONER GIBSON: All right, but
11 understanding this is up for final reading, can I
12 reserve my right to make such a motion at a later
13 time?

14 COMMISSIONER CASSIDY: If it's up to me,
15 you can. Mr. Chairman?

16 CHAIRPERSON AUERBACH: We will do what
17 we can.

18 [Laughter]

19 COMMISSIONER GIBSON: That is not a
20 "yes" or a "no." I will rely on your good graces.

21 I am also concerned with Alternative B,
22 about the concept of double jeopardy. Is there any
23 precedent allowing imposition of collateral
24 consequences from a vacated conviction in another
25 state?

1 CHAIRPERSON AUERBACH: Reporter.

2 MR. JACK CHIN (Reporter): Yes. Many
3 states don't give effect to an expungement, et
4 cetera, from another state.

5 COMMISSIONER GIBSON: Has that been
6 ruled on by the U.S. Supreme Court?

7 MR. CHIN: I can't think of a specific
8 instance, but since they generally don't treat these
9 things as punishment, the double jeopardy ex post
10 facto problems are, in my mind, not large.

11 COMMISSIONER GIBSON: Well, that may be
12 so, but I think forfeitures, which are not
13 necessarily criminal punishment, can invoke the
14 double jeopardy clause concept, but I may be wrong
15 on that.

16 The second question I have relates to
17 the full faith and credit provision of the U.S.
18 Constitution. Is there any precedent allowing
19 imposition of collateral consequences from a vacated
20 conviction in another state?

21 CHAIRPERSON AUERBACH: Reporter.

22 MR. CHIN: Once again, I can't think of
23 one offhand, but the general idea is that if Montana
24 expunges the conviction, they're saying that their
25 collateral consequences won't apply. So full faith

1 and credit doesn't really require other states to
2 not apply their collateral consequences because
3 Montana didn't purport to do anything with respect
4 to the other state.

5 COMMISSIONER GIBSON: But there is no
6 conviction at that point in time.

7 CHAIRPERSON AUERBACH: Commissioner
8 Davies, on that point.

9 COMMISSIONER JACK DAVIES (Minnesota): I
10 was not really going to answer. I was just going to
11 say, the best way to avoid that problem is to enact
12 Alternative A, which most of us prefer
13 substantially.

14 [Laughter]

15 COMMISSIONER GIBSON: I think
16 Commissioner Kneedler --

17 CHAIRPERSON AUERBACH: Commissioner
18 Kneedler.

19 COMMISSIONER H. LANE KNEEDLER, III
20 (Virginia): I will begin by saying some disagree
21 with Commissioner Davies, but that is okay.

22 [Laughter]

23 COMMISSIONER KNEEDLER: I think the
24 answer here is, when you look at full faith and
25 credit, I agree with the reporter, it really isn't

1 applicable here. This is something in between full
2 faith and credit of a judgment and what kind of
3 recognition must you give under choice of laws. As
4 you know, under choice of law, one state can say to
5 another state, we are not going to enforce your law
6 based on public policy grounds. Public policy is
7 not a grounds for refusing to enforce a judgment.

8 In this area in general -- that is, in
9 the criminal law area -- courts have stayed away
10 from saying that one state has to recognize
11 something in the criminal law system from another
12 state. So I agree with the reporter, I do not
13 believe there is a serious full faith or credit
14 problem here.

15 COMMISSIONER GIBSON: But do you not in
16 fact have a judgment vacating the conviction?

17 COMMISSIONER KNEEDLER: You have a
18 judgment vacating the conviction, but that is
19 different from what the consequences of that are.

20 COMMISSIONER GIBSON: Well, I beg to
21 differ, and we have had this discussion --

22 COMMISSIONER KNEEDLER: Yes. We did
23 have it last night.

24 COMMISSIONER GIBSON: Thank you.

25 CHAIRPERSON AUERBACH: Thank you very

1 much. Microphone 2.

2 COMMISSIONER JAMES M. CONCANNON

3 (Kansas): I am not certain I understand how
4 subsection (a) would be applied. Is what this
5 contemplates that State 2 would look at what the
6 statutory elements are of the crime in the
7 conviction state and then make a determination of
8 what those statutory elements, what crime that would
9 constitute in State 2? Or would it be possible for
10 the court in State 2 to look behind the conviction
11 to see what the actual facts were that the jury
12 would have had to find in order to have convicted in
13 the other state and make the determination based on
14 those underlying facts rather than simply the
15 statutory element?

16 CHAIRPERSON AUERBACH: Reporter.

17 MR. JACK CHIN (Reporter): I think the
18 idea here was to borrow the federal law of double
19 jeopardy under Blockburger, which as we understand
20 it looks at the elements of the offense out of the
21 statute book and finds either an identical offense
22 or unnecessarily included offense.

23 COMMISSIONER CONCANNON: I guess my
24 concern was that the federal rules of evidence in
25 dealing with convictions for impeachment allow a

1 court in certain instances where it's readily
2 determinable what facts the jury had to find to lead
3 to a conviction actually consider those facts in
4 determining whether it's a dishonesty fault
5 statement crime. I just want to make sure you
6 weren't really contemplating that sort of look
7 behind the conviction.

8 MR. JACK CHIN (Reporter): No.

9 CHAIRPERSON AUERBACH: Thank you.
10 Microphone 3.

11 COMMISSIONER LYLE W. HILLYARD (Utah):

12 As you're discussing the issues, it raises some
13 questions to my mind I am just going to raise with
14 you, and just the question, if you really thought
15 about this.

16 One of the concerns I have is that going
17 in either at the time of the charging or when you're
18 sentenced, one of the things with this bill is that
19 we want to let people know all the collateral
20 consequences so that they really understand what is
21 going to happen to them not in addition to the
22 crime.

23 Let me give three issues. No. 1 is that
24 it would also carry with it an implication that you
25 would let them know what would happen in other

1 states. There is probably no way to know that
2 because you don't know where they're going to move.
3 For example, sex offenses. If you're convicted of a
4 sex offense in State A, you may have the exact same
5 sex offense in B when you move to State B, but the
6 consequences may be much more. For example, some
7 states will not allow a sex offender to buy or live
8 in a home within so many feet or yards of a school.
9 You may have to register in one state and they may
10 be much more aggressive on the registration so that
11 people on the computer can pick that up, so when you
12 move in you may have that.

13 One application, if you go from state to
14 state, is warning these people when they plead
15 guilty what the implications may be.

16 The second thing is, and I think you've
17 accurately said it, that these penalties are not
18 double jeopardy. We have lost a case in our state
19 where a young man was sent to prison for a charge.
20 While he was in prison they amended the registration
21 so now when he got out of prison he had to register.
22 And the argument was, well, he was given the penalty
23 at the time of conviction. The court said, no, that
24 is not double jeopardy. So, future lock and chains.
25 So you can plead somebody into crime on one day, a

1 year later the legislature can change these
2 collateral consequences and it's not double jeopardy
3 and they have that impact there as well.

4 The third thing I raise. Two things. I
5 would suspect that if someone were convicted of a
6 sex offense in Colorado and then moved to Utah so
7 they were now in the registration, and Colorado then
8 expunged the record, where Utah does not allow you
9 to expunge a sexual offense, you may have a
10 situation that Utah may say, we are not going to,
11 even though Colorado is the law that took it, our
12 law on sex offenders would not allow that to be
13 expunged. So you have that kind of question.

14 I know another case I had where the man
15 was guilty of securities frauds, we were able to do
16 it in such a way that we got an expungement, and
17 Utah law specifically says that when you get an
18 expungement, if you're asked the question, have I
19 been convicted of a crime, you can answer it "no."
20 That is what the statute says on expungement.

21 Well, this man went to register as a
22 securities dealer and the federal law said, we don't
23 care what Utah law says, we will not allow you to
24 get a federal securities because of this prior
25 conviction. So you have those implications all

1 going back and forth.

2 I raise that as you talk about this. My
3 question is, there are some pretty deep issues and I
4 don't know whether you've really talked about the
5 implications. Because we may be creating here an
6 idea that we solve people's problems.

7 Another one is that our DCFS, if there
8 is an abuse situation, even though you can get that
9 expunged on the criminal record, they have a private
10 record they keep there so that when offenses come
11 in, they can check that and they can see that what
12 may appear to be a relatively minor complaint where
13 you're currently living, they can see a pattern that
14 there have been four complaints of this in other
15 areas in the state you moved in. So you expunge the
16 criminal record but the DCFS record may still have
17 something there so they can look at it and say, oh,
18 my gosh, this is the fifth complaint we've had
19 against this family and they just moved from
20 situation to situation to try to avoid that.

21 These are some pretty deep issues that
22 we may end up saying, well, we've solved the problem
23 but only touched the tip of the iceberg because
24 there are so many other things that are floating
25 around there that we may create a false sense of

1 security.

2 So, Commissioner Cassidy as chairman, my
3 question is, have you talked about the deep
4 implications of some of the things we are talking
5 about?

6 COMMISSIONER RICHARD T. CASSIDY
7 (Vermont): Commissioner Hillyard, we have. And you
8 point out I think in a pretty graphic way how
9 serious the problems that a convicted person faces
10 from a legal perspective.

11 Another one of the commissioners,
12 Commissioner Bopp, was kind enough to put out for
13 the commissioners the Ohio study, which shows a
14 summary of what is out there in Ohio.

15 I don't think anybody on this committee
16 feels that this act will solve the problem. What it
17 will do is take, we hope, a significant step in the
18 right direction. With respect, for example, to the
19 problem you mention of people being advised of the
20 idea that there may be consequences in other states
21 that might apply to you if you go to or move to
22 another state, that is certainly a very real issue
23 and we hope that by virtue of the notice that is
24 given and by virtue of the higher profile to this
25 problem that the act will bring, this is going to

1 initiate some communication between defendants and
2 their attorneys and some good advice. Because
3 people do face these problems now, and the problem
4 right now is beneath the radar screen for almost,
5 for most defendants and for many defense counsel.

6 CHAIRPERSON AUERBACH: Thank you. Here
7 we go. Microphone 2. Commissioner Perlman.

8 [Laughter]

9 COMMISSIONER HARVEY S. PERLMAN
10 (Nebraska): I was so hoping you would have gotten
11 this done last night so I wouldn't have to do this.

12 I want to commend the committee. I
13 think it has done an extraordinarily good job of
14 thinking through the nuances of this. This is a
15 much better draft. I have just a couple of
16 questions.

17 On (a), for example, if --

18 COMMISSIONER H. LANE KNEEDLER, III
19 (Virginia): Alternative A or --

20 COMMISSIONER PERLMAN: No, no. This is
21 (a). This is just (a). If I have been convicted of
22 an offense in Virginia which was a misdemeanor and I
23 come to Nebraska to apply for a hunting license and
24 the application for a hunting license says, have you
25 ever been convicted of a felony, and what I did in

1 Virginia would be a felony in Nebraska but not in
2 Virginia, how do I answer the question?

3 You're going to make me figure that out?
4 I think one possibility would be to limit (a) to
5 those collateral consequences that are imposed for a
6 specific offense as opposed to those that are just
7 generally felonies and misdemeanors. You could do
8 that if that seems right to you by just saying, for
9 purposes of imposing or authorizing collateral
10 consequences imposed for or conviction for a
11 specific offense, a conviction for an offense in a
12 court of another state.

13 I think that would be helpful, because
14 otherwise you've got some of these general things
15 that are just felonies and misdemeanors, and it's
16 hard to answer the questions in the real world when
17 you're applying things. I don't know what you think
18 about that.

19 COMMISSIONER RICHARD T. CASSIDY
20 (Vermont): I think it's a very good point. I think
21 the right answer under the statute as it is set up
22 now to the question you asked is, have you ever been
23 convicted of a felony? No.

24 That does not mean to say that this
25 statute doesn't mean that the collateral

1 consequences that apply to you aren't those that are
2 associated with a felony.

3 COMMISSIONER PERLMAN: Okay. If that is
4 what you want to leave, that is fine.

5 CHAIRPERSON AUERBACH: I think that is
6 where it is.

7 COMMISSIONER PERLMAN: I would move to
8 eliminate Alternative A. Strike it. Yes. I just
9 want to test the floor. It is a simple,
10 straightforward --

11 CHAIRPERSON AUERBACH: Are you testing
12 it by means of a motion, Commissioner?

13 COMMISSIONER PERLMAN: I am. I move to
14 strike Alternative A.

15 CHAIRPERSON AUERBACH: All right. We're
16 now on the motion. Do you have a preliminary
17 comment on the motion?

18 COMMISSIONER CASSIDY: I was just trying
19 to poll the committee very quickly as to whether we
20 would agree to that.

21 CHAIRPERSON AUERBACH: Good luck.

22 COMMISSIONER CASSIDY: I gather not. I
23 would say this in opposition to your motion,
24 Commissioner. I feel some sympathy for it, but I
25 would point out that what subsection (a) does --

1 COMMISSIONER PERLMAN: No, no, no.

2 Alternative A. I am sorry. I probably got
3 confused. I am moving to strike Lines 3 through 11
4 on Page 2.

5 COMMISSIONER CASSIDY: You transitioned
6 rather quickly.

7 COMMISSIONER PERLMAN: I know. Sorry
8 about that.

9 COMMISSIONER H. LANE KNEEDLER, III
10 (Virginia): The modified "does not," in effect,
11 right? The modified "does not" alternative is the
12 one you would eliminate.

13 COMMISSIONER PERLMAN: Yes. Yes. Lines
14 3 through 11 on Page 2. And could I speak to that?

15 CHAIRPERSON AUERBACH: Why don't we get
16 floor discussion, and, above all, Commissioner
17 Langrock from Microphone 5.

18 COMMISSIONER PERLMAN: Could I speak to
19 my motion first?

20 CHAIRPERSON AUERBACH: Oh, I'm sorry.

21 COMMISSIONER PERLMAN: Just to set the
22 stage. I think Commissioner Hillyard pointed out a
23 variety of reasons why having an automatic no
24 collateral consequence flowing in another state is a
25 bad idea.

1 I am normally, I think, against these
2 collateral consequences, but I worry if we have a
3 rule that says that these -- first you've got to
4 remember, these are only for setting asides or
5 vacating that are based on good behavior. If there
6 is an expungement or a set aside or any other
7 reversal that eliminates the underlying conviction,
8 there is no collateral consequences in any
9 jurisdiction. So all this conversation about double
10 jeopardy and all that kind of stuff really doesn't
11 apply. These are only cases where the court or
12 somebody else has said, this guy has been good, he
13 was convicted, he was guilty, but he's been good, so
14 we're going to expunge the conviction for some
15 reason.

16 I worry about a rule like Alternative A
17 that would serve as a disincentive for courts to do
18 set asides and expungements and other ameliorative
19 activities because they don't know what they're
20 doing. They don't know what the consequences are.
21 They're focused on the offense, the penalty, the
22 imprisonment, the fine, whatever it is, and now
23 we're going to tell them that if they do this, it's
24 going to have consequences for all the collateral
25 things that occur, including, for example, rules of

1 evidence that say if a person testifies and claims
2 to be of good character, that you can introduce the
3 prior offenses. Is that impacted by (d)?

4 See, I don't think it should be. I
5 think it's too complicated. I think what you want
6 is a simple, straightforward provision, which is
7 Alternative B, which says, look, if somebody gets
8 good behavior in another state, we will consider it,
9 we'll look at it, but we're going to apply the law
10 of the state that we are in.

11 CHAIRPERSON AUERBACH: That is it.
12 Commissioner Langrock.

13 COMMISSIONER PETER F. LANGROCK
14 (Vermont): I was about to rise to move to strike
15 Alternative B.

16 [Laughter]

17 COMMISSIONER LANGROCK: I don't know
18 whether this is a compromise that you feel is
19 necessary to make the act adoptable. I mean, you
20 have come so far. I would like to push you a little
21 further, but if this is a real compromise, I think
22 we should know about it.

23 COMMISSIONER RICHARD T. CASSIDY
24 (Vermont): Commissioner Langrock, you put your
25 finger on the fact that there is a compromise here.

1 The compromise also I think reflects the fact that
2 these are pretty important policy choices in an area
3 where the law hasn't developed very much at this
4 point. People haven't thought a lot about this, so
5 the committee's view thus far has been that the best
6 thing to do is to present the alternatives to the
7 states and let the states decide.

8 COMMISSIONER LANGROCK: Just very
9 briefly. As much as I would like to see us make
10 this act even better, there is so much good in this
11 act from where we are now, I can certainly live with
12 this, and I would suggest that we honor the
13 committee's compromise and defeat this motion.

14 CHAIRPERSON AUERBACH: Okay.
15 Commissioner Bopp. Microphone 6.

16 COMMISSIONER JAMES BOPP, JR. (Indiana):
17 I was originally going to oppose the motion even
18 though I sympathize with the policy choice because
19 -- to support the committee's choice that these two
20 choices be presented to the states. But am I now
21 informed that the committee would prefer a
22 resolution by the Conference on this choice of
23 policy?

24 CHAIRPERSON AUERBACH: The chair will
25 respond to that.

1 COMMISSIONER CASSIDY: No, Commissioner.
2 We would prefer to present the alternatives to the
3 states, let the states decide between A and B.

4 COMMISSIONER BOPP: If that is still the
5 position of the committee, I would support the
6 position of the committee. I did so before and I
7 would continue to do so.

8 I do sympathize with the motion, I must
9 admit, and both for policy reasons and also for the
10 very reasons stated by the commissioner, and that
11 is, we are dealing here with a subject that is novel
12 among the states. There is only New York that has a
13 comprehensive scheme that provides for certificates
14 of good behavior, et cetera. As a result, we do not
15 have experience that would guide us in what in the
16 heck we are doing and the consequences, collateral
17 consequences of what we may be doing.

18 I mean, one of the criteria for acts to
19 be avoided are ones that, according to the policy of
20 the Conference, are ones that are novel and
21 legislative and administrative experience is not
22 available. So we are in such uncharted waters here
23 and legitimate questions are continually being
24 raised about the effect, the result, the
25 consequences of each of these provisions, and we're

1 just speculating on the result.

2 COMMISSIONER H. LANE KNEEDLER, III

3 (Virginia): Mr. Chairman.

4 COMMISSIONER BOPP: So in conclusion,
5 that being said, I would oppose the motion.

6 CHAIRPERSON AUERBACH: Two brief
7 comments from members of the committee.

8 Commissioner Davies asked first.

9 COMMISSIONER JACK DAVIES (Minnesota): I
10 yield.

11 CHAIRPERSON AUERBACH: He yields to
12 Commissioner Kneedler.

13 COMMISSIONER KNEEDLER: I am going to
14 ask our reporter to comment on what I am about to
15 say. But, Commissioner Bopp, I think the answer is
16 that there are states now that do recognize the
17 collateral consequences, the results of a vacated
18 conviction in other states. Not many, but some do.
19 And our answer here was, why should we in this new
20 area tell those states they have to reverse what
21 they're doing now? That is one of the reasons for
22 the choice.

23 CHAIRPERSON AUERBACH: Commissioner
24 Davies.

25 COMMISSIONER JACK DAVIES (Minnesota):

1 Those of us on the committee who prefer Alternative
2 A very substantially are perfectly willing to have
3 Alternative B offered. There is quite a bit of
4 difference. If you remember that a lot of these
5 collateral consequences are automatic, they're not
6 discretionary, they are compelled. And we feel,
7 those of us who support Alternative A think it's
8 inappropriate to compel a result in the second state
9 that is not compelled in the convicting state, that
10 that is inappropriate.

11 CHAIRPERSON AUERBACH: All right. Any
12 other comments from the chair? If not, Commissioner
13 Perlman, would you like to close? I see he passes
14 on closing.

15 The motion is to eliminate Alternative
16 A.

17 All those in favor, say "aye."

18 Opposed.

19 The chair is not in doubt. Any other
20 comments on 8?

21 THE STENOGRAPHER: Commissioner, would
22 you please for the record indicate how the vote
23 went.

24 CHAIRPERSON AUERBACH: I am sorry. The
25 motion fails.

1 Microphone 2.

2 COMMISSIONER LARRY L. RUTH (Nebraska):

3 Now that we are going to have Alternative A and B, I
4 bring to your attention in A, Line 4, it talks about
5 shall not be the basis for a collateral action.

6 In B, Lines 13 and 14, it talks about an
7 individual is subject to collateral action.

8 It seems to me that you ought to be
9 using the same kind of test there. I don't know
10 what the difference is, if anything. It's a test,
11 but the same language.

12 I have some language that would use the
13 "subject to," which seems to me to be reasonable,
14 rather than "the basis for," and I will bring that
15 up. I don't know if you think we should have those
16 parallel.

17 COMMISSIONER RICHARD T. CASSIDY

18 (Vermont): We agree, they should be parallel.
19 There is another place we've noted in the two
20 alternatives where there is a lack of parallelism
21 that we will fix.

22 CHAIRPERSON AUERBACH: The committee
23 will respond to that. Let's try Microphone 5.

24 COMMISSIONER THEODORE C. KRAMER

25 (Vermont): I still have some concern about small

1 (a) and that an offense in one state shall be
2 treated as a conviction for the most serious
3 included offense in another state.

4 I have a vague recollection of a rule of
5 lenity, and I am curious as to whether or not there
6 was any discussion in the committee about whether
7 the rule of lenity applies in this type of scenario.

8 My recollection is pretty vague, but
9 it's my understanding that when a court is imposing
10 a sanction and there is some ambiguity or
11 uncertainty as to which sanction should be imposed,
12 the rule of lenity applies, that it will be the
13 lesser sanction. In very, very vague terms that is
14 my very vague recollection of the rule of lenity.

15 Has anyone on the committee discussed
16 whether the rule of lenity is appropriate for
17 purposes of this discussion, or am I off base on
18 that?

19 MR. JACK CHIN (Reporter): Well, I think
20 the way the Blockburger analysis works is that
21 unless it is clear that the offense in the state
22 that has adopted this act is included with the
23 offense of conviction, it's not going to be treated
24 as the same offense. So I think built into the
25 Blockburger analysis is the idea that it has to be

1 unambiguous from the face of law that the offenses
2 are identical. So you never get to lenity because
3 there is never any ambiguity.

4 COMMISSIONER KRAMER: But I think the
5 practical reality is, and I know in my small
6 experience in dealing with crimes in Vermont and
7 whether or not they're enhanced because of crimes in
8 another state, that is often a very difficult
9 analysis and it frequently is very ambiguous and it
10 frequently generates a lot of litigation as to
11 whether or not a conviction from another state
12 should be applied in a particular way in the
13 subsequent state. It seems to me there is no
14 question that ambiguity arises all the time.

15 If the committee is saying that
16 whichever particular bureaucrat in a second state is
17 analyzing the consequences of the earlier
18 conviction, it seems to me it is very clear that
19 there is ambiguity all the time. It seems to me
20 that as we go into this analysis a little bit
21 further, the committee may have wished to discuss
22 whether or not the rule of lenity should be
23 considered as part of this analysis. There is
24 ambiguity all the time. It is not crystal clear,
25 many times.

1 Was there any discussion on the
2 committee about discussing the rules of lenity and
3 whether or not that should be applied here so that
4 instead of the most serious offense having
5 application in the consequence of an earlier
6 conviction that perhaps it would be a lesser
7 offense?

8 CHAIRPERSON AUERBACH: Chair, would you
9 care to respond?

10 COMMISSIONER RICHARD T. CASSIDY
11 (Vermont): I will respond with the understanding
12 that the reporter will correct me if I am wrong. As
13 I understood what the reporter was saying to you, if
14 there is doubt, if there are two potential crimes
15 that might line up from a Blockburger perspective
16 and there is doubt, you go to the lesser one. Is
17 that right, Jack?

18 MR. JACK CHIN (Reporter): We do say you
19 go to the most serious one, but the idea is to go to
20 the most serious one that is clearly established by
21 the elements of the offense of conviction. I agree
22 with you that that is not always going to be a
23 simple or unambiguous exercise.

24 COMMISSIONER KRAMER: But do you want to
25 talk about that in this provision so that there is

1 some guidance to the state that is trying to . . .

2 MR. CHIN: Well, certainly we can do a
3 comment.

4 COMMISSIONER KRAMER: Is the committee
5 comfortable in discussing in a comment that the rule
6 of lenity applies to this analysis?

7 COMMISSIONER CASSIDY: What I hear is
8 doubt as to whether or not the principle itself
9 applies in this situation.

10 CHAIRPERSON AUERBACH: I think in order
11 to move things along, the committee will consider
12 whether it is appropriate for a comment or not,
13 without making a commitment.

14 COMMISSIONER KRAMER: Okay. Thank you.

15 CHAIRPERSON AUERBACH: Microphone 6.

16 COMMISSIONER JAMES BOPP, JR. (Indiana):
17 A couple of things. First, I would ask whether or
18 not this matter is going to come back to the floor.
19 There were several items on previous sections that
20 the committee committed to the Conference that they
21 would consider. One item I recall is the definition
22 of "offense," which I see as a problem also, and
23 needed for the act.

24 Are there other matters pending so that
25 you will be coming back and so that I can defer any

1 amendments I have on previous sections or even, for
2 that matter, future amendments?

3 COMMISSIONER RICHARD T. CASSIDY

4 (Vermont): The committee has reviewed the comments
5 that were made the first day that we were up and has
6 some proposed changes to the act. I don't believe
7 it's possible for the act to be adopted with respect
8 to those changes without them somehow being
9 presented to the Conference. Now, getting time,
10 that is above my pay grade.

11 COMMISSIONER BOPP: So we should
12 operate, Mr. Chairman, on the proposition that this
13 act will return in the future.

14 COMMISSIONER CASSIDY: I see the
15 president rising. She may have a comment.

16 PRESIDENT WALTERS: One possibility is
17 that we will finish the first read and then start
18 back right again with the second read of this act.
19 But we will, whether we do it that way or not, we
20 will return, all the new changes will be read and
21 opportunity for comment before this goes before the
22 floor for final adoption.

23 COMMISSIONER BOPP: So I would
24 understand that also to mean that any amendments
25 that we might have would still be in order.

1 CHAIRPERSON AUERBACH: Absolutely.

2 PRESIDENT WALTERS: Bring them up in the
3 section at which they're addressed. Don't bring
4 them up out of order.

5 COMMISSIONER BOPP: Secondly, I would
6 thank the chairman for drawing the Conference's
7 attention to the Law Review article that I had the
8 staff copy and distribute. I would draw the
9 commissioners' attention to this. This is the Ohio
10 study on collateral sanctions which was published at
11 the University of Toledo's College of Law and it
12 hopefully provides not only gross figures but also
13 each of the specific collateral consequences that
14 they were able or the disabilities they were able to
15 identify in Ohio law.

16 Now, I have had some commissioners look
17 at the size of this and say, well, we've got to get
18 rid of all this stuff. Other commissioners look at
19 the size of this and say, wow, the legislature has
20 really been considering these things and if we're
21 going to go to them and say, you know, they passed a
22 hundred laws and they were wrong every time, how are
23 they going to react?

24 What I would invite you to do is to
25 actually look at the specific laws. What I find is

1 that in a remarkable number of cases these
2 collateral sanctions or consequences are very
3 specific -- that is, they are not broad brush, they
4 are applying specific sanctions to, for instance,
5 specific license holders, and they do so in a way
6 that is, in my view, rationally related to the goal
7 of preventing those individuals from committing
8 future crimes.

9 Two examples that I would like to use to
10 this is, one, which is that a pharmacist who is
11 convicted of a drug felony loses his license. It
12 seems sensible to me. Another example is a
13 chiropractor who commits what is called in Ohio a
14 gross sexual imposition, end of quote, also loses
15 his chiropractor license.

16 I invite you, rather than just hear the
17 numbers, I invite you to take a look at what is
18 being affected by this act.

19 I mention the sex crime in particular
20 because I thought that in a prior answer to a
21 question by the committee chairman he was ambiguous
22 about the application of this act to sex crimes. My
23 understanding of this act is that all sex crimes are
24 treated just like every other offense that is
25 subject to having their collateral sanctions waived

1 except for one lone exception found in Section 11,
2 and that is collateral consequences that flow from
3 Megan's Law. That is it.

4 Now I have two questions on Alternative
5 A. The first is, and I think these are ambiguities
6 that you might consider resolving. The first is on
7 Line 9, starting on Line 8. You say an individual
8 convicted of the offense may apply for relief as
9 provided by 9 and 10 from any collateral
10 consequences.

11 But, of course, the section previous to
12 that said that no collateral consequences can be
13 granted under Section 11. So the ambiguity is, are
14 you authorizing by this sentence an application
15 under Section 9 or 10 for relief from collateral
16 consequences in Section 11?

17 COMMISSIONER H. LANE KNEEDLER, III
18 (Virginia): Mr. Chairman. The answer is "no."
19 Take a look at, on Line 9 it says "may apply for
20 relief as provided in 9 or 10 from any collateral
21 consequence for which relief was withheld," which is
22 a reference back to the prior sentence, the second
23 type, for which relief was expressly withheld by the
24 court order or by the law of the jurisdiction that
25 vacated the conviction.

1 So, no, just as you couldn't with a
2 domestic conviction apply for relief for a Section
3 11 sanction, you can't here either.

4 COMMISSIONER BOPP: Okay. I was
5 confident that that was your intent, but I think
6 that it is ambiguous whether that intent is
7 fulfilled, because you say on Line 6 and 7 that
8 relief cannot be granted under Section 11, and then
9 you say that you can petition for relief under 9 and
10 10 for any withheld.

11 I would suggest that Section 11
12 withholds relief for those few specific instances
13 provided in Section 11. I just invite you to
14 consider that.

15 CHAIRPERSON AUERBACH: Make sure the two
16 parts are consistent. Okay.

17 COMMISSIONER BOPP: Yes. The final
18 question is, let us suppose that Minnesota and
19 Indiana adopt this act as it currently exists and a
20 chiropractor is convicted of gross sexual imposition
21 in Minnesota but then obtains relief under either
22 Section 9 or 10, and I think it would be available
23 under either one, and then comes to Indiana and
24 seeks a chiropractor license, which would be denied
25 under our collateral consequences.

1 Does that Section 9 or 10 bind Indiana
2 with respect to its collateral consequences?

3 COMMISSIONER RICHARD T. CASSIDY
4 (Vermont): I am not sure I understand your example,
5 but if I do, you have to look at -- Indiana is the
6 receiving state in your case. You have to look at
7 how Indiana has filled in the brackets in Section 11
8 with respect to what statutes are off limits. That
9 is Indiana's choice.

10 COMMISSIONER BOPP: Yes. But let's
11 assume that it's not in there. I am talking about
12 the general proposition -- that is, a collateral
13 consequence that could be relieved under the act.

14 COMMISSIONER CASSIDY: Well, you've got
15 to fill in the blank. I mean, unless Indiana
16 decides that its choice is to allow applications for
17 anything, which I guess you could do. But the way
18 the uniform act is set up, the idea is that there
19 are some sex crimes that would be off limits. I
20 assume Indiana will make a wise choice about how to
21 fill in the blank.

22 COMMISSIONER BOPP: I understand that is
23 one way to handle it, but I want to assume they
24 didn't handle it that way.

25 COMMISSIONER CASSIDY: That is not a

1 sensible assumption.

2 COMMISSIONER BOPP: The only assumption
3 I can make in Indiana is they would never pass this
4 act if that was to be sensible. I am trying to
5 determine what the act means and what effect relief
6 under Sections 9 and 10 in Minnesota has in Indiana.
7 Are they obligated to respect a Section 9 or Section
8 10 determination that a particular collateral
9 consequence is going to be waived? In other words,
10 they waive it in Minnesota, we've got the same one
11 in Indiana, the guy moves to Indiana and says here
12 is my Minnesota Section 9 thing that says I can be a
13 chiropractor even though I commit a gross sexual
14 imposition.

15 CHAIRPERSON AUERBACH: Reporter.

16 MR. JACK CHIN (Reporter): A Section 9
17 certificate doesn't cross state lines because it
18 relieves a collateral sanction in a particular
19 state, of a particular statute, and presumably
20 Illinois compiles statutes annotated 57, whatever,
21 doesn't apply in Montana. So you lift the
22 particular statute under Section 9, doesn't cross
23 state lines.

24 Section 10 certificate, there is another
25 bracketed option in 10(d) which gives each state the

1 choice about whether to honor Section 10

2 certificates that have been issued by other states.

3 COMMISSIONER BOPP: Thank you very much.

4 CHAIRPERSON AUERBACH: Thank you. Thank

5 you for the Law Review. I would be delighted to

6 finish this section before we break, and the

7 president is hovering in the background.

8 Commissioner Stern.

9 COMMISSIONER SANDRA S. STERN (New York):

10 Yes. I would like to understand what we have done

11 this morning. Is it our understanding that we can

12 now take this bill back, a state can enact either

13 version of 8, either A or B, and law enforcement

14 authorities would support that state's choice, or

15 did we essentially reach a compromise in this act by

16 giving law enforcement officials the option of

17 opposing enactment at a later date?

18 CHAIRPERSON AUERBACH: Would you like to

19 comment on where we are with the AG's.

20 COMMISSIONER RICHARD T. CASSIDY

21 (Vermont): The law enforcement group that was

22 represented in our deliberations was the National

23 Organization of Attorneys General, and they agreed

24 that they would not oppose the adoption of this act

25 if it met certain standards. One of those standards

1 is the inclusion of Alternative B.

2 COMMISSIONER STERN: Right. But there
3 is no understanding about what happens later.

4 CHAIRPERSON AUERBACH: Commissioner
5 Kneedler, quickly.

6 COMMISSIONER H. LANE KNEEDLER, III
7 (Virginia): I think the answer is, they have agreed
8 not to oppose it in the act. When it gets to
9 particular states, there are probably AG's who are
10 going to support A and others that are going to
11 support B, just as there are going to be others,
12 like Peter Langrock, who are going to say, I am
13 going to support A and not B.

14 So we can't guarantee that on either
15 side of the issue when it gets to the particular
16 state.

17 COMMISSIONER STERN: Thank you.

18 CHAIRPERSON AUERBACH: This is a very
19 good breaking point. We're not going to break?
20 Madam President, whatever you would like to do.

21 PRESIDENT WALTERS: Thank you. I had
22 announced earlier that we would consider amendments
23 to the constitution at 9:00 o'clock today. I would
24 prefer to proceed with this act and make real
25 progress. Unless there is an objection, I will do

1 so. Thank you very much. Thank you.

2 CHAIRPERSON AUERBACH: Thank you, Madam
3 President. I will take advantage of this and say
4 we'll move to Section 9. Commissioner Leinenweber.

5 COMMISSIONER HARRY D. LEINENWEBER
6 (Illinois): "SECTION 9. ORDER OF RELIEF FROM
7 COLLATERAL SANCTIONS.

8 "(a) An individual convicted of an
9 offense may petition for an order of relief from one
10 or more collateral sanctions related to employment,
11 education, housing, public benefits, or occupational
12 licensing, except those listed in Section 11. The
13 petition shall be presented to:

14 "(1) the sentencing court at or before
15 sentencing, and shall be heard at the sentencing
16 hearing only if the court does not impose a period
17 of incarceration on the convicted individual, other
18 than for time already served; or

19 "(2) the [designated board or agency] at
20 any time after sentencing.

21 "(b) Unless the court or [designated
22 board or agency] finds that granting the petition
23 would pose a substantial risk to the safety or
24 welfare of the public or any individual, or that
25 some other substantial reason warrants denial of the

1 petition, the court or the [designated board or
2 agency] shall grant a petition requesting relief,
3 and issue an order of relief, from one or more of
4 the collateral sanctions specified in subsection (a)
5 if, after reviewing the record, including the
6 individual's criminal history, and any filing by a
7 prosecutor or victim, it finds that the individual
8 has established by a preponderance of the evidence
9 that:

10 "(1) granting the petition is likely to
11 assist the individual in living a law-abiding life,
12 including obtaining or maintaining employment, or
13 reentering the community; and

14 "(2) if less than five years has elapsed
15 since the individual was sentenced for any felony,
16 the individual has substantial need for the relief
17 requested in order to live a law-abiding life.

18 "(c) The state acting directly or
19 through its departments, agencies, officers, or
20 instrumentalities, including municipalities,
21 political subdivisions, educational institutions,
22 boards, or commissions, or their employees[, and
23 government contractors, including subcontractors,
24 made subject to this section by contract, law other
25 than this [act], or ordinance,] may not impose a

1 collateral sanction that is the subject of an
2 unrevoked order of relief from collateral sanctions
3 issued [in this state] [in any state], but may in
4 its discretion impose a disqualification based on
5 the conduct underlying the conviction.

6 "[(d) An order of relief from
7 collateral sanctions may be introduced in a judicial
8 or administrative proceeding by a decisionmaker as
9 evidence of the decisionmaker's due care in deciding
10 to hire, retain, license, lease to, admit to a
11 school or program, or otherwise transact business or
12 engage in activity with the individual to whom the
13 order was issued, if the decisionmaker had knowledge
14 of the order at the time of the alleged negligence
15 or other fault.]"

16 CHAIRPERSON AUERBACH: Thank you. (d)
17 is in brackets, right?

18 COMMISSIONER LEINENWEBER: Correct.

19 CHAIRPERSON AUERBACH: Thank you. On
20 the section. Commissioner at Microphone 6.

21 COMMISSIONER DAVID A. GIBSON (Vermont):
22 I note in the first section that the collateral
23 sanctions are listed, and that would exclude any
24 other collateral sanctions that have not been
25 included in that list?

1 CHAIRPERSON AUERBACH: Chair.

2 COMMISSIONER GIBSON: For example, the
3 right to vote.

4 COMMISSIONER RICHARD T. CASSIDY
5 (Vermont): That is right. Only the types of
6 collateral sanctions that are identified are within
7 the ambit of a Section 9 order.

8 COMMISSIONER GIBSON: Is the right to
9 vote considered elsewhere?

10 COMMISSIONER CASSIDY: In most states --

11 CHAIRPERSON AUERBACH: Would you repeat
12 the question, Commissioner.

13 COMMISSIONER GIBSON: Yes. The question
14 is, why not include the right the vote in this list?

15 COMMISSIONER CASSIDY: In most states
16 there are already provisions for permitting persons
17 who have convictions to resume the right to vote.

18 COMMISSIONER GIBSON: So why not put it
19 in this?

20 COMMISSIONER CASSIDY: The feeling is
21 that the Section 9 order for relief is about helping
22 convicted persons resume a law-abiding life. It's
23 to assist them in getting the essentials of life
24 that are necessary to live a law-abiding life.

25 COMMISSIONER GIBSON: It seems to me the

1 right to vote is one of those essential parts of
2 being a productive citizen in this country.

3 COMMISSIONER CASSIDY: It is certainly
4 very important, but it does not put bread on the
5 table.

6 COMMISSIONER GIBSON: No, but to the
7 extent that somebody is granted that right to vote,
8 they may be less apt to return to a life of crime if
9 they feel invested in the society.

10 COMMISSIONER CASSIDY: I would like to
11 believe that. I do believe that, Commissioner. We
12 attempted to keep the scope of Section 9 narrow and
13 make the burdens relatively light in order to allow
14 the agencies that will be making these decisions to
15 be reasonably generous with them.

16 COMMISSIONER GIBSON: Has the committee
17 discussed whether or not to include the right to
18 vote in this section?

19 COMMISSIONER CASSIDY: The right to vote
20 has been discussed extensively and in connection
21 with this section.

22 COMMISSIONER GIBSON: Then I would move
23 that we add the right to vote to the list of things
24 that can be ordered for relief.

25 CHAIRPERSON AUERBACH: Anything else you

1 want to say at this time? I will call you to close,
2 obviously.

3 COMMISSIONER GIBSON: No. I think I've
4 outlined my argument.

5 CHAIRPERSON AUERBACH: We are on the
6 motion now, and I assume that the six people
7 standing are not all on the motion. Commissioner
8 Kneedler.

9 COMMISSIONER H. LANE KNEEDLER, III
10 (Virginia): Mr. Chairman. We talked about the
11 right to vote extensively. In fact, in one part of
12 one of our drafts there was a specific provision
13 dealing with the right to vote.

14 I think we would all agree that it is an
15 important right. I would agree with the chairman,
16 that it is not one that puts food on the table.
17 Moreover, from a political perspective -- this has
18 nothing to do with the AG's. From a political
19 perspective, probably the biggest hot button is the
20 right to vote. Since states have already addressed
21 this issue, our answer was, putting them all
22 together with 9, we ought to treat 9 narrowly and
23 ask what really is needed to put food on the table
24 and leave the right to vote to what states do with
25 it now.

1 CHAIRPERSON AUERBACH: Thank you. All
2 right. On the motion. Commissioner Henderson.

3 COMMISSIONER ROGER C. HENDERSON
4 (Arizona): Mr. Chairman. I think there is another
5 important point with regard to right to vote, which
6 many of us think is a fundamental right. In fact, I
7 suppose that is the problem. How does this agency
8 determine whether or not a person should vote? You
9 can determine whether or not somebody needs housing,
10 educational benefits, or the other limited relief.
11 So the person appears, says, I want to vote. Hum.
12 What party are you a member of? Hum. You're too
13 dumb to vote.

14 There is no standard. It's an
15 all-or-nothing proposition. Either you have a right
16 to vote or you don't, and to put it in the hands of
17 an agency to determine whether or not a person gets
18 to vote is a bad idea.

19 CHAIRPERSON AUERBACH: Commissioner
20 Flowers.

21 COMMISSIONER BRIAN K. FLOWERS (District
22 of Columbia): The right to vote was in this act
23 when it was introduced and I believe it was in this
24 act last summer.

25 I don't know that it belongs in this

1 section, because this section is very narrowly
2 tailored. The way it was in the act before, I
3 believe it was at the end. It was a separate,
4 stand-alone provision. It was just the Conference's
5 reaffirmation that there should be a right to vote.
6 It may have been bracketed, but I would ask the
7 commissioner if he would consider holding that
8 motion for a later section or a separate stand-alone
9 provision. I certainly support that.

10 COMMISSIONER DAVID A. GIBSON (Vermont):

11 I am willing to do that. Thank you.

12 CHAIRPERSON AUERBACH: The motion has
13 been withdrawn for the time being.

14 We will go to Microphone No. 2.

15 COMMISSIONER LARRY L. RUTH (Nebraska):

16 I am having a little trouble with your subsection
17 (2), (a)(2). Help me understand. Actually (b),
18 right underneath that, starting with Line 19.

19 As I understand it, on Line 19 you first
20 have the court having to find something, and that is
21 without a standard of proof. You drop down a little
22 later on in that same subsection and you do have a
23 standard of proof for certain other factors, and
24 that is a preponderance of the evidence. That is
25 one observation.

1 Now the big question to me is that
2 starting with Line 19 and going through the next
3 page with Line 3, we have about five different
4 factors or findings that you're supposed to be
5 looking at, the court is supposed to be looking at.
6 The first one is on Line 20, risk to the safety.
7 The second one is on Line 21, where there is any
8 substantial reason. And then you drop down on Line
9 26, something that is likely to assist the
10 individual in living a law-abiding life. The next
11 page, after the five years language, it is where
12 there is a substantial need in order to live a
13 law-abiding life.

14 I am wondering if all these five could
15 be put in some kind of a one test as opposed to a
16 two-step process. It just doesn't make any sense to
17 me to have the first two being in a process where
18 you find something without a standard of proof and
19 then you drop down later and you have to find or you
20 have opportunities to find these other factors or
21 elements.

22 I just think it's rather awkwardly
23 drafted.

24 CHAIRPERSON AUERBACH: It's an
25 organization problem?

1 COMMISSIONER RUTH: Yes. I would be
2 happy to suggest some language if you see that same
3 problem. If you don't see the problem, then I am
4 not going to do any drafting. Commissioner Kneedler
5 is shaking his head. You don't see a problem.

6 COMMISSIONER RICHARD T. CASSIDY
7 (Vermont): If I understand your comment, and I had
8 a little trouble following where you were in the
9 section. The policy issue here is that it's
10 intended to leave quite open to the agency or court
11 the question of substantial risk, so that we don't
12 want to bind the decision-makers' hands if they see
13 some reason to see a risk that we haven't
14 enumerated.

15 COMMISSIONER RUTH: Is that a finding
16 then by a preponderance of the evidence, or what is
17 that finding?

18 COMMISSIONER CASSIDY: If it's not
19 stated, I think it's fair to assume that the finding
20 would be by a preponderance of the evidence.

21 COMMISSIONER RUTH: Okay. It doesn't
22 state it there, but it does down on Line 25, so
23 maybe it should be both places. I am looking at
24 some regularity there.

25 CHAIRPERSON AUERBACH: Commissioner

1 Kneedler.

2 COMMISSIONER H. LANE KNEEDLER, III

3 (Virginia): I was nodding my head. I don't see any
4 problem with the standards and will come to those in
5 a moment. I agree with you that the finding
6 implicitly was by a preponderance, but by stating it
7 one place and not the other, it seems to me it's a
8 problem. Then I would support adding it to the
9 "finds."

10 If you go to the last two standards, the
11 bottom of Page 17, granting the petition is likely
12 to assist the individual. If you flip over to the
13 next one, it's "if less than five years has
14 elapsed," it's a substantial need. What that is
15 saying is, if it's --

16 COMMISSIONER RUTH: I understand that
17 now. Thank you.

18 COMMISSIONER KNEEDLER: It's because
19 it's a shorter period of time that we make it a
20 substantial need for --

21 CHAIRPERSON AUERBACH: I think the
22 committee is, at least parts of it, are at least
23 leaning favorably to making the change.

24 COMMISSIONER RUTH: One further
25 observation on that, Mr. Chairman, and that is on

1 Line 27 on Page 17. It says, including obtaining or
2 maintaining employment or reentering the community,
3 which is a further expression as to what it takes to
4 be a law-abiding, lead a law-abiding life. Then you
5 don't use that same language over there on the
6 second page, that "including" language. If you
7 don't use it in the second page, the question is
8 going to be whether it does include or doesn't
9 include, and you might look at that language, too.

10 CHAIRPERSON AUERBACH: Comment from the
11 chair?

12 COMMISSIONER RUTH: Do you understand
13 what I am saying? Okay.

14 COMMISSIONER RICHARD T. CASSIDY
15 (Vermont): We are certainly happy to look at your
16 suggestion.

17 CHAIRPERSON AUERBACH: Okay. Let's go
18 to Microphone 3.

19 COMMISSIONER TERRY L. THURBON (Alaska):
20 I'll limit my comments to three comments or
21 questions on this section, the first relating to
22 enactability. What I see as an enactability problem
23 certainly in my state and I assume in others for
24 this act as a uniform act as a whole, i.e., for
25 Sections 7 through 12 as opposed to the compilation

1 and notice provisions in the earlier part of the
2 act, is the way that this allows for the courts and
3 this what we'll call the super board, whether it's a
4 parole board or some other specialized board, to tie
5 the hands of the occupational licensing boards and
6 commissions.

7 We are going to get huge resistance if
8 we ever try to put this in in Alaska from those
9 groups. One thing that we were kicking around
10 within my group was whether it might be possible to
11 try to address that in Section 9, and perhaps this
12 comment would go to Section 10 as well, by somehow
13 giving those boards, the designated occupational
14 licensing boards who have the regulatory authority
15 over licensing certain professions and occupations,
16 notice and an opportunity to be heard before relief
17 is given in just that one category, the occupational
18 licensing.

19 I think there are problems with doing
20 that in that those boards normally can't just come
21 on in and send one representative and go try to make
22 a pitch to the judge as to why this person shouldn't
23 be given their occupational license.

24 COMMISSIONER RICHARD T. CASSIDY
25 (Vermont): Let me interrupt you, if I may, because

1 we did anticipate the concern that you have. I
2 think that we dealt with it.

3 The parole board, which presumably in
4 states that still have boards, and most do, would
5 probably be the agency that would be doing the bulk
6 of these, is not going to be a super licensing
7 board.

8 This is the question of whether or not
9 an automatic disqualification will apply. That is
10 the collateral sanction. So if the board lifts that
11 collateral sanction, what that means to, say, the
12 barber board, is you can't say to the convicted
13 person, because you were convicted of assault from a
14 bar fight ten years ago, you can't ever be a barber.
15 But they can look at the merits of the application,
16 look at the facts of the crime, look at what it is
17 the person wants to do, and they can individualize
18 judgment and say "no."

19 COMMISSIONER H. LANE KNEEDLER, III
20 (Virginia): Mr. Chairman.

21 CHAIRPERSON AUERBACH: Commissioner
22 Kneedler.

23 COMMISSIONER KNEEDLER: The whole idea
24 here was to try to get boards, if this kind of
25 determination is made that the person needs it for a

1 law-abiding life, and we're going to come to the
2 same thing with the certificate of restoration of
3 rights in 10 -- the whole idea was, if somebody has
4 made the judgment that there is no risk to the
5 public safety and the person really needs it, we
6 want these individual boards to stop just saying
7 automatically, felon, you're out of here. But we
8 also want them to say, go ahead and make an
9 individualized determination. All we want them to
10 do is to look at the individual.

11 You may find, for example, and let's
12 take the drug offenses, there is a big difference
13 between the drug dealer who ended up pleading guilty
14 to the same offense that the possessor of marijuana
15 had. What we want the board to say is, what were
16 the facts? And if they decide in their discretion
17 they're going to say "no license," that is fine.
18 We're just trying to make them make individualized
19 decisions once an order for relief has been issued.
20 It doesn't tie their hands.

21 COMMISSIONER TERRY L. THURBON (Alaska):
22 I will accept that that is your intent and I will go
23 back and study it a little closer. I don't actually
24 see this section allowing the boards to do that, but
25 I could be wrong, and let me look at that and not

1 take any more time on the floor.

2 The second one has to do with the choice
3 that either the court or the designated board or
4 agency has here either to grant relief or not,
5 period, one or more of the collateral consequences.
6 And that doesn't really give the decisionmaker,
7 let's just say it's a court in this instance, the
8 flexibility to perhaps grant partial relief, if you
9 will.

10 For example, you have somebody convicted
11 of a felony domestic violence who works as a big
12 game guide in Alaska and needs to use guns and one
13 of the collateral consequences is you can't have a
14 gun, can't possess a gun.

15 Under this scheme of relief, I believe
16 that the court could only say either, okay, we will
17 lift that sanction, you can have a gun any old
18 where, any old time you want, or we're not going to
19 lift the sanction and you can't do your job.

20 There is no flexibility, as near as we
21 can tell, and this is a comment I am actually
22 bringing forward for one of my colleagues who isn't
23 able to be here today. There is no ability for the
24 court to say, okay, we are going to put some
25 conditions on relief, i.e., you can have possession

1 of the gun when you are out in the field, it's a
2 company gun, you can use the company gun when you're
3 in a company car but you cannot carry a handgun,
4 cannot use rifles and have them in your home and in
5 your car.

6 That is just one example of many where
7 you put the decisionmaker here in the box of being
8 able to either say all or nothing as a consequence
9 rather than having some authority to condition the
10 relief.

11 COMMISSIONER RICHARD T. CASSIDY
12 (Vermont): Commissioner, it's not the intention of
13 the committee to tie the board's hands in the way
14 that you describe.

15 The comments certainly will indicate
16 that the parole board or the agency or the court
17 that is doing this should have the discretion to
18 fashion relief that is appropriate in the
19 circumstances.

20 COMMISSIONER THURBON: I can appreciate
21 that. I am just not sure a comment will be good
22 enough as opposed to putting language in here that
23 would allow them to condition the relief.

24 The third thing. I just wanted to ask.
25 There was a question raised by one of the

1 commissioners on the first day about sex offenses,
2 and someone represented that later on in the bill
3 that was dealt with. I don't see that in Section
4 11, so I am wondering if that answer was based on
5 this sort of flexibility provided in 9 and 10 that
6 some other substantial reason warrants denial of the
7 petition.

8 Is that the basis on which you're saying
9 that the states could or the decisionmaker or the
10 board or the court could handle -- whether it is a
11 sex offense, a domestic violence offense -- some
12 other kind of offense differently.

13 COMMISSIONER CASSIDY: I think I was the
14 speaker you were referring to. What I had in mind
15 was the provisions of Section 11(1) that allow the
16 state to place off limits certain sex crimes. Now,
17 that is not to say that the point you make wouldn't
18 also apply, but it wasn't what I was thinking of.

19 COMMISSIONER THURBON: I will save this
20 comment for 11, but I don't think a reference to
21 Megan's Law is going to cover the whole gamut in
22 most states.

23 COMMISSIONER H. LANE KNEEDLER, III
24 (Virginia): Mr. Chairman. If I can reference the
25 commissioner to subsection (c) of Section 9, that

1 answers the question of you can't impose a
2 collateral sanction but you may impose a
3 disqualification. You were saying you would read
4 it. Take a look at (c).

5 CHAIRPERSON AUERBACH: Thank you.
6 Commissioner Ring at Microphone 6.

7 COMMISSIONER CARLYLE C. RING, JR.
8 (Virginia): I think we all tend to look at it from
9 the parochial experience that we have. As the
10 committee is aware, I have been serving for the last
11 eight years on the housing authority in my
12 community. So I look at it from the perspective of
13 the political problems that we have in terms of
14 maintaining and increasing the supply of housing for
15 those that are in desperate need of public housing.

16 Of course, one of the areas where we get
17 the greatest political resistance, and indeed I am
18 going back for meetings shortly and as pro bono
19 activity in which we are trying to expand the amount
20 of public housing in an area of the City of
21 Alexandria. The opposition is always on the basis
22 that these are trouble areas, they're where crime
23 and drug activity occurs with great frequency and
24 other neighbors would like to get it out and no
25 longer serve that particular area.

1 We're charged politically with the
2 responsibility of being the advocates and
3 spokespersons for these needy people within our
4 community.

5 Having given you that background,
6 Commissioner Lane Kneedler had previously pointed
7 out what had just been explained to the commissioner
8 from an Alaska.

9 I have some questions how that gets
10 specifically implemented. First, it is likely, if I
11 understand from the chairman of the committee, that
12 the parole board or similar body or a court is going
13 to be hearing this petition. When the petition is
14 heard, the petitioner is going to be saying, I am no
15 longer a threat to the health and safety.

16 Is a housing board or any other agency
17 that may have an interest going to have notice of
18 the fact that the petition has been filed?

19 COMMISSIONER RICHARD T. CASSIDY
20 (Vermont): Commissioner, we talked about this at
21 some length and about whether to make this, in
22 effect, a contest before the super board or to do
23 what we did, which is quite different.

24 Let me say before I go to what we did, I
25 have great sympathy for the position you are in.

1 For the last eight years I served as a school board
2 member and for the last two years as the chair of a
3 school board. And like the housing board, we face
4 these problems and balancing these problems.

5 The idea is that the question whether a
6 collateral sanction, an automatic disqualification,
7 would apply would be decided by the parole board or,
8 in a few instances, the court. If the decision is
9 "no," no automatic disqualification applies, then
10 that person is free to make their application to
11 your board or to mine to be housed or employed as a
12 custodian in my school district, and we're charged
13 at that point to make a discretionary judgment about
14 that person.

15 COMMISSIONER RING: And that is under
16 subsection (c).

17 COMMISSIONER CASSIDY: That is correct.

18 COMMISSIONER RING: What happens in the
19 interim while the petition has resulted in an order
20 by the parole board, or whoever, that housing is now
21 to be provided or that --

22 COMMISSIONER CASSIDY: That is not the
23 order, Commissioner. The order is the sanction that
24 you are ineligible for public housing is lifted.
25 Now you must go through the hoops that anybody else

1 would have to go through in order to get housed, and
2 the housing authority has the ability to say, given
3 your particular circumstances and the particular
4 circumstances of this authority, we cannot grant
5 your application.

6 COMMISSIONER RING: Well, let me give
7 you a little different fact circumstance, if I may.
8 Under ruling of the Supreme Court a few years ago,
9 we debar people from trespassing on our property.
10 They have generally been debarred either because
11 they have been convicted or they are otherwise a
12 troublemaker in our public housing community. What
13 happens to that debarment?

14 COMMISSIONER CASSIDY: Nothing.

15 COMMISSIONER RING: So that if an order
16 has been entered saying that this automatic sanction
17 that we have imposed because of a conviction -- does
18 our order of debarment continue to be in place until
19 there is an application to us to remove him from the
20 debarment list?

21 COMMISSIONER CASSIDY: Perhaps I spoke
22 too quickly, and I apologize for that. If the
23 application to the parole board was to lift the
24 automatic sanction of debarment, perhaps it would be
25 lifted. But if you think about it, that is not as

1 likely an order to be made, because you're not
2 talking about getting somebody housing at that
3 point. So I am not even sure that it would -- well,
4 it's not even clear to me that that is something
5 that would be granted under Section 9 or grantable
6 under Section 9. It doesn't give the person
7 housing.

8 CHAIRPERSON AUERBACH: Commissioner
9 Kneedler.

10 COMMISSIONER H. LANE KNEEDLER, III
11 (Virginia): Commissioner Ring, if I understand your
12 situation, this is somebody who is not living in the
13 housing but is somebody you're trying to keep off
14 the grounds, is that correct?

15 COMMISSIONER RING: It can be both
16 situations. They have been removed from public
17 housing and one of the added sanctions is debarment
18 so that they don't trespass on our property.

19 COMMISSIONER KNEEDLER: I think my
20 answer would be, to the extent we're talking about
21 the debarment, that is not affected by this. The
22 housing means the right to live in the housing.

23 Just so the sequence is understandable,
24 let's suppose, and I don't know that you have this,
25 but let's suppose that your housing board adopts a

1 policy -- that you're authorized to adopt a policy
2 and you formally adopt a policy, however that is
3 done, in your locality as opposed to some just
4 general practice. As long as you formally adopt a
5 policy. You could say, we don't want any felon in
6 housing.

7 If the person gets an order of relief,
8 all that says is, you can't bar them just because
9 they have a conviction but you may look at the
10 underlying facts. The result of that may be, and my
11 guess is would be in the kind of situations you
12 posited, you're going to go ahead and say they can't
13 live there. But all it does is say you can't do it
14 automatically; look at it on a case-by-case basis.

15 If I remember from prior conversations
16 we had, you essentially do that now, your board
17 does, look at the underlying facts in a case,
18 because I think you said in some instances you might
19 allow the person into housing. That is all we're
20 asking.

21 COMMISSIONER RING: We have a grievance
22 procedure under which you can petition, and the
23 board ultimately may let you in. We never bar
24 felons automatically. If we did, we would have many
25 people not served by public housing. So it pretty

1 much is a case by case basis.

2 COMMISSIONER RICHARD T. CASSIDY

3 (Vermont): Commissioner, you are already aware of
4 the statute --

5 COMMISSIONER KNEEDLER: I would agree.

6 COMMISSIONER CASSIDY: You're already
7 there. You are ahead of the game, from our
8 perspective.

9 COMMISSIONER RING: Well, in terms of
10 the next section when we get to disqualification, I
11 may have some suggestions on wording. But in this
12 subsection (c), it seems to me that you may want to
13 look at the wording of subsection (c) in Lines 9 and
14 10, and I may bring something up to you.

15 COMMISSIONER CASSIDY: Thank you,
16 Commissioner.

17 CHAIRPERSON AUERBACH: Thank you,
18 Commissioner.

19 Let's go over to this side for a change.
20 Microphone 1.

21 COMMISSIONER JOANNE B. HUELSMAN

22 (Wisconsin): Thank you. A person who has been
23 convicted of domestic violence is not allowed to
24 possess a gun.

25 Under this section, in order to receive

1 an order of relief for that person to be able to
2 possess a gun, the court would have to find that
3 granting the petition would pose a substantial risk,
4 dah, dah, dah, or some other substantial reason.

5 There is a concern on the part of
6 victims groups that that creates too high a burden
7 for the victim to essentially have to prove.
8 Commissioner Kneedler said earlier that if the court
9 finds there is no risk to the public, then this
10 could be granted. Has the committee considered
11 deleting the word "substantial" on Lines 20 and 21?

12 COMMISSIONER RICHARD T. CASSIDY
13 (Vermont): We have in our deliberations talked
14 about that. I think the view of the committee was
15 that to delete the word "substantial" would in
16 effect be to say if there is any risk to the safety
17 or welfare of the public that the order could be
18 denied.

19 That would, I think, deprive the
20 convicted person of almost any chance of getting
21 relief under this section.

22 CHAIRPERSON AUERBACH: Commissioner.

23 COMMISSIONER MICHELE L. TIMMONS
24 (Minnesota): The intent of the committee -- and we
25 did talk about gun issues quite a bit -- is that

1 there would be no relief for being able to carry
2 firearms under Section 9 because that would not
3 relate to employment, education, housing, public
4 benefits, or occupational licensing. So, anything
5 relating to carrying firearms would fall under
6 Section 10, which has a five-year waiting period and
7 significantly higher standards.

8 COMMISSIONER HUELSMAN: Excuse me, but
9 if you're a police officer or sheriff's deputy,
10 you're going to want to carry a firearm. And those
11 guys are as likely to commit domestic violence as
12 anybody else.

13 COMMISSIONER RICHARD T. CASSIDY
14 (Vermont): Commissioner, if you look at Section 11,
15 I think it is, one of the things that the section
16 says, that the statute says, is that an order for
17 relief from collateral sanctions may not be issued
18 to relieve ineligibility for employment with a law
19 enforcement agency.

20 COMMISSIONER HUELSMAN: Okay. So you're
21 saying that the ability to go out and shoot the buck
22 that you need to put meat on the table doesn't count
23 in Section 9.

24 COMMISSIONER CASSIDY: I would submit to
25 you that there might be cases in which the parole

1 board would have a serious decision to make, for
2 example, if you were dealing with a professional
3 hunter. But the relationship to employment is not
4 alone enough to entitle the person to relief under
5 Section 9, and other considerations like the fact
6 that in the hypothetical case you and I are
7 imagining, the person engaged in domestic abuse with
8 that gun certainly ought to be and can be taken into
9 account, and I would submit such an application
10 should be denied.

11 CHAIRPERSON AUERBACH: Go ahead, Roger.

12 COMMISSIONER ROGER C. HENDERSON

13 (Arizona): Just briefly. You also have to keep in
14 the mind that although you might apply for relief
15 under this statute, you get no relief under federal
16 law with regard to carrying firearms, so he is still
17 out.

18 COMMISSIONER HUELSMAN: Thank you.

19 CHAIRPERSON AUERBACH: Good. Thank you.

20 Commissioner Perlman at Microphone 2.

21 COMMISSIONER HARVEY S. PERLMAN

22 (Nebraska): If I understand, Section 9 now applies
23 only to sanctions and not to disqualifications,
24 right?

25 COMMISSIONER RICHARD T. CASSIDY

1 (Vermont): Its effect is to relieve sanctions,
2 leaving disqualifications in place.

3 COMMISSIONER PERLMAN: So there is no
4 way other than if the public housing agency or
5 something else has a provision to come back in and
6 try and seek, relieve a disqualification, there is
7 nothing in this act that authorizes a party to come
8 in and request relief from a disqualification.

9 COMMISSIONER CASSIDY: I don't think I
10 understand your question. I guess I would say this.
11 If you imagine Commissioner Ring's circumstance, if
12 the regulations of his agency provide for
13 case-by-case determinations, that is a
14 disqualification. The person doesn't need a Section
15 9 certificate in order to apply.

16 COMMISSIONER PERLMAN: Well, I apply for
17 public housing and I am denied because I committed
18 some offense, and three years later I want to try it
19 again. I want to be relieved of this
20 disqualification.

21 I take it I am relegated to whatever
22 provisions the public housing authority has, whether
23 they will hear me again or whether they're not. So
24 there is nothing in this act that assures that a
25 person that is subject to a collateral consequence

1 can have it relieved unless the agency that imposes
2 it provides provisions for that. Is that correct?

3 COMMISSIONER CASSIDY: I would agree
4 with the substance of what you are saying. I
5 wouldn't use the terminology the way you have. I
6 would say such a person is subject to a
7 disqualification and they're still subject to that
8 disqualification. Section 9 doesn't affect it.

9 COMMISSIONER PERLMAN: Well, I'm a
10 little troubled now by Alternative A to Subsection
11 8, which now says that if a court in another
12 jurisdiction says I am of good behavior, then you
13 can't impose any collateral consequence. So if a
14 court of another jurisdiction says I am a good
15 person and expunges or sets aside the conviction,
16 then Connie Ring's public housing authority cannot
17 disqualify me whether they want to or not. But if a
18 court in this jurisdiction says I am a good guy and
19 I ought to be free of this stuff, he can. Is that
20 how you read this section?

21 COMMISSIONER CASSIDY: Alternative A is
22 in the nature of a conditional pardon of some sort,
23 so what you're saying is, in effect, that to the
24 extent that the order provides for it, the
25 consequences have been lifted.

1 COMMISSIONER LANE H. KNEEDLER, III

2 (Virginia): Mr. Chairman.

3 CHAIRPERSON AUERBACH: Commissioner
4 Kneedler.

5 COMMISSIONER KNEEDLER: Commissioner
6 Perlman, you're making the case for Alternative B.

7 COMMISSIONER PERLMAN: I was trying to
8 do that before.

9 COMMISSIONER KNEEDLER: I understand.

10 COMMISSIONER PERLMAN: But right now I
11 am just trying to understand -- and, really, I am
12 not trying to go back and do that. I am trying to
13 understand. I think you have a problem with respect
14 to how even Alternative B under 8, where we thought
15 we were saying that the compromise is no relief but
16 you can go back under Section 9 and 10, but now we
17 discover in 9 and 10 that it doesn't apply to the
18 full range of collateral consequences, it only
19 applies to those that are sanctions, right? So, we
20 didn't get what we thought we were going to get in
21 B.

22 And in A you have the problem that you
23 are now giving greater weight to other states'
24 determinations of "this is a good person" to this
25 state's determination of "that's a good person."

1 I just think you have got a problem of
2 relating these sections together in some way.

3 One possible out would be to have a
4 subsection in 9 or 10 that speaks to
5 disqualifications as opposed to sanctions. I guess
6 my preference would be to require the agency under
7 certain circumstances -- whatever the agency is that
8 imposes disqualification have a procedure that
9 allows periodic review and that would make, I think,
10 everything consistent. But I think you just have an
11 issue here now.

12 CHAIRPERSON AUERBACH: Thank you.

13 COMMISSIONER KNEEDLER: Your concern,
14 Harvey, is that the board is not allowed to have a
15 collateral sanction, which is all it had. It's a
16 disqualification, but there is nothing in place that
17 says, okay, now hear it on a case-by-case basis. Is
18 that correct?

19 COMMISSIONER PERLMAN: That is my
20 concern for people within the state. My concern for
21 people outside the state is that now our state under
22 your Alternative A, our state agency who retained
23 discretion to disqualify someone even though a court
24 in this jurisdiction has said you're a good person
25 but retains no discretion if a court of another

1 jurisdiction said that. That is a consequence of
2 what you've got here. I don't think that is what
3 you intended, but that is what you got.

4 COMMISSIONER KNEEDLER: Vote for B.

5 COMMISSIONER RICHARD T. CASSIDY

6 (Vermont): Commissioner Perlman, the other thing I
7 would say is that traditionally speaking a pardon is
8 much more significant relief than a Section
9 9 certificate.

10 COMMISSIONER PERLMAN: We are not
11 talking about pardons in subsection (a), we are
12 talking about expungements and all the other kinds
13 of stuff that is based on the same factors that
14 you've got in Section 9(b).

15 COMMISSIONER CASSIDY: I would submit to
16 you that those kinds of judicial relief are in the
17 nature of a judicial pardon, a conditional judicial
18 pardon.

19 COMMISSIONER PERLMAN: What would the
20 determination under Section 9(a)(1) be if it isn't a
21 determination that this is a good person?

22 COMMISSIONER CASSIDY: I admit it's very
23 much like it.

24 CHAIRPERSON AUERBACH: Okay. Let's move
25 over to Microphone 5.

1 COMMISSIONER MARK H. RAMSEY (Oklahoma):

2 Am I correct in assuming that a petition filed under
3 (a)(2) can only apply to sanctions that are not
4 contained in the judgment and sentence?

5 COMMISSIONER CASSIDY: Yes.

6 COMMISSIONER RAMSEY: That was easy.
7 Thanks.

8 CHAIRPERSON AUERBACH: Thank you for
9 that.

10 We will go to Microphone 6.

11 COMMISSIONER LANE SHETTERLY (Oregon):

12 Thank you. I have a question about (a)(1). It says
13 the petition shall be presented to the sentencing
14 court at or before sentencing and shall be heard at
15 the sentencing hearing only if the court does not
16 impose a period of incarceration.

17 My question is, if a court imposes a
18 period of 30 days, we're talking about misdemeanor
19 conviction where the collateral sanction or
20 disability may be much more significant than the
21 time spent in jail. This seems to disqualify that
22 individual from a hearing at sentencing, and I am
23 wondering what the committee's sense of that was,
24 because it seems to me that if happens, you default
25 down to sub (2), where you have to go later, I

1 guess, as soon as you can, but there is going to be
2 some time lag to get before this designated board or
3 agency to seek relief.

4 Why not allow the court discretion to
5 hear a petition even if incarceration is going to be
6 imposed?

7 COMMISSIONER RICHARD T. CASSIDY
8 (Vermont): Commissioner, you're reading the section
9 correctly. It's reflective of the committee's view
10 about what the appropriate thing to do from the
11 perspective of judicial economy is. That is to say,
12 we want it to be very careful about how extensive a
13 burden we imposed upon the courts. We wanted to
14 have a bright line test that said, only in a very
15 narrow range of cases would the courts be expected
16 to act upon these applications, and in all the rest
17 of the cases they will go to the parole board or
18 similar agency.

19 COMMISSIONER SHETTERLY: I appreciate
20 that, I guess, as to judicial economy, although it
21 goes give rise to my other concern that I wanted to
22 address and that is shifting the burden then from
23 the court to this super agency. And assuming it's
24 the parole board, which I suppose would be the most
25 natural of any existing board or entity in any

1 state, I have, I think, an enactability concern
2 about this, whereas certainly in Oregon, and I
3 expect it's similar in most states, the parole board
4 right now deals with a fairly discrete number of
5 felony convicts coming out of the state corrections
6 system. Now we're going to impose on the parole
7 board responsibility to hear these petitions for
8 relief not only from the felony convicts but from
9 every misdemeanor convict that may have been
10 sentenced to 30 days in any county jail around the
11 state. That is going to be a very significant
12 impact on the workload of this parole board or
13 whatever agency.

14 So I am afraid we're shifting the burden
15 simply from the court system then in that case to an
16 even greater load on this administrative agency that
17 will probably have significant budget impacts in
18 most states and I think be a substantial barrier to
19 getting this enacted.

20 COMMISSIONER CASSIDY: There is no
21 question, Commissioner, that there are some fiscal
22 implications to this legislation. The thought was
23 that to the extent we moved this burden in the
24 direction of an administrative agency rather than
25 the courts that the cost will be lower, so the

1 fiscal note will be smaller. If you look at the way
2 in which our courts operate and the compensation
3 which judges are entitled to, we think that is the
4 Cadillac option.

5 COMMISSIONER SHETTERLY: And I
6 understand. It's not an easy choice. I guess my
7 thinking on that, though, is it still would be
8 easier while the person is in front of the judge,
9 the district attorney is there, probably the victims
10 are there, it seems to me more economical to me to
11 address those at sentencing than to have to start a
12 new proceeding entirely in front of another agency.

13 COMMISSIONER CASSIDY: Understand.

14 COMMISSIONER ANN WALSH BRADLEY
15 (Wisconsin): If I may.

16 CHAIRPERSON AUERBACH: It's on.

17 COMMISSIONER BRADLEY: The thought was
18 to make a time certain for the courts to no longer
19 be involved. I am a firm believer of once the
20 camel's nose is in the tent, the rest is sure to
21 follow and did not want to make the court a
22 quasi-parole board with unending jurisdiction and
23 unending hearings. So those were some of the
24 thoughts that went into the language that is before
25 all of you here today.

1 CHAIRPERSON AUERBACH: Thank you. Let's
2 go over to Microphone 3.

3 COMMISSIONER LYLE W. HILLYARD (Utah):
4 Thank you. Two short friendly suggestions. On Page
5 17, Lines 20 and 21, you say some other substantial
6 reason. I would hope that you would put in the
7 comments, and I couldn't see any, a non-exclusive
8 list of what they were to give the court some
9 guideline of what you were thinking about. And if
10 not, you may want to put it in the act itself.

11 The second is, on top of Page 18 you say
12 if less than five years a person was "sentenced." I
13 would recommend you change that word to "released
14 from parole or probation."

15 I cannot imagine one of our courts
16 entertaining one of these petitions if the person is
17 still on parole or probation. And, secondly, it
18 would be an incentive to the person to complete
19 whatever they need to do and get that done. It says
20 if less than five years. They could file a petition
21 a week after they were released, but I think it
22 would give them an incentive. So I think that word
23 "sentenced" should be changed to "was released from
24 parole or probation."

25 COMMISSIONER RICHARD T. CASSIDY

1 (Vermont): Commissioner, your suggestion about a
2 comment makes good sense to us. We can do that.

3 With respect to the second point, the
4 idea of Section 9 relief is that it is re-entry
5 oriented relief. If you look at what is happening
6 in many jurisdictions such as New York State, there
7 is a great deal of need to provide some assistance
8 and some help, some sort of reentry plan for
9 individuals who are leaving prison. So we did not
10 wish to make it a long waiting period.

11 CHAIRPERSON AUERBACH: Thank you.
12 Microphone 5.

13 COMMISSIONER RYAN LEONARD (Oklahoma): I
14 have heard the committee say several times, and I
15 think I understand it correctly, that the purpose of
16 Section 9 is to really look at the underlying facts.

17 Looking at subsection (b), I thought the
18 commissioner from Wisconsin raised several very good
19 points, the language focusing on the substantial
20 risk and the substantial reason. That seemed to be
21 a fairly high burden. I think the language that
22 troubles me most here is in Line 22 where it says
23 the court shall grant the relief. That standard is
24 almost the same as, if not the same as, denying
25 bail.

1 It seems to me that the language as
2 written actually goes beyond the stated goal of
3 looking at the underlying facts and I think, it
4 seems to me, to impermissibly tie the hands of the
5 discretion of the judge. I don't know whether the
6 committee has considered that language "shall" or
7 "may." I would be curious to hear what the
8 committee's discussions on that point were.

9 COMMISSIONER RICHARD T. CASSIDY
10 (Vermont): One thing you should understand is that
11 when we're talking reviewing the underlying facts,
12 the effect of Section 9 relief if it's granted is
13 that some later decisionmaker is in a position to
14 judge the matter looking at the specific facts.

15 So, one area of distinction, really,
16 from what you're saying and what the committee
17 intends is that in addition to the review by the
18 parole board as to whether the absolute
19 disqualification shall be lifted, then there is a
20 subsequent review by the decisionmaker about what
21 we're going to do with this person.

22 So, given that fact, it was the
23 intention of the committee to make relief from the
24 parole board or court relatively easy to access.

25 COMMISSIONER H. LANE KNEEDLER, III

1 (Virginia): Please keep in mind that just because
2 someone has an order of relief does not mean they're
3 going to get the license, does not mean they're
4 going to get the housing. All it means is the board
5 that normally makes that decision has to look at the
6 underlying facts. That is all it means. They can
7 still say and probably will in many cases "no."

8 COMMISSIONER LEONARD: Would that
9 language not be better stated as "may"? If all
10 we're doing is saying they need to look at the
11 underlying facts, wouldn't it be better to say that
12 the court may grant a petition as opposed to tying
13 their hands and saying "shall"?

14 CHAIRPERSON AUERBACH: Commissioner
15 Kneedler.

16 COMMISSIONER KNEEDLER: In deciding
17 whether there is a substantial risk, they look at
18 the underlying facts, but I think you're confusing
19 the two.

20 Yes, you will look at the circumstances.
21 You can look at lots of things in determining
22 whether there is a substantial risk in deciding
23 whether to grant the order of relief. It's then
24 that the housing board -- for example, Commissioner
25 Ring's housing board -- looks at the facts

1 underlying the offense in deciding whether to issue
2 the license or, in this case, allow the person to
3 live there.

4 I think the answer is, if the standard
5 is met, it "shall," so we get to the point where the
6 housing board can exercise its discretion.

7 COMMISSIONER LEONARD: On a more general
8 point, looking back at the initial comment at the
9 beginning of this act, it states the provisions are
10 largely procedural and designed to rationalize and
11 clarify policies and provisions which are already
12 widely accepted by the states.

13 The language in Section 9, is that
14 consist with that initial comment made at the
15 beginning of this act, that this is something that
16 is already widely accepted by the states?

17 MR. JACK CHIN (Reporter): The answer is
18 that in almost every state there is at least some
19 form of relief for at least some collateral
20 sanctions, and the availability or non-availability
21 of relief for particular collateral sanctions looked
22 at across the various states doesn't necessarily
23 seem to be driven by a consistent policy view.
24 Therefore I think it is consistent with the general
25 idea that most states seem to say that there should

1 be an opportunity to evaluate the appropriateness of
2 particular collateral sanctions. And we're just
3 offering them a mechanism to do that more or less
4 across the board.

5 CHAIRPERSON AUERBACH: Thank you. The
6 commissioner at Microphone 6.

7 COMMISSIONER JAMES BOPP, JR. (Indiana):
8 I frankly, having read ABA Advisor Love's book,
9 disagree with your characterization here. I
10 understand that Section 9 and Section 10 are
11 intended to provide comprehensive relief from
12 collateral sanctions in terms of what they treat.
13 The book says that I only know of one state that
14 provides that, and that is New York. The New York
15 standard is, No. 1, you have to be an eligible
16 offender. An eligible offender is one who has only
17 committed one felony. If this is a second felony,
18 they are not eligible for relief. Now, in your act
19 you can commit 20 felonies and still be eligible to
20 petition the court for relief, or the agency.

21 Secondly, the relief to be granted must
22 be, quote, "consistent with the rehabilitation of
23 the eligible offender," which is a much broader
24 consideration than you're providing for. Well, all
25 you're saying is that the individual has to show

1 that granting the relief from the sanction is likely
2 to assist the individual in living a law-abiding
3 life. That is a piece of cake. In other words, the
4 drug-dealing pharmacist would say, I want to go back
5 to pharmacy. If you give me a license, it will
6 likely assist me in a living a law-abiding life.

7 So it seems to me the relief, the
8 ability of the individual to make his case is
9 extremely easy and almost a given in any petition.

10 The third standard under New York law is
11 that the relief to be granted by the certificate is,
12 quote, "consistent with the public interest," end of
13 quote. Much broader consideration of all of the
14 circumstances and effect of granting the relief,
15 much different than your very burdensome
16 requirement. I mean, how often are people denied
17 bail and what kind of facts and circumstances must
18 be demonstrated to deny bail? That is the standard
19 you are imposing, I gather, by a preponderance of
20 the evidence, and which you have already indicated
21 that you want to clarify that.

22 Secondly, I would understand the burden
23 of proof to be on the agency. What is the agency
24 going to do to meet this standard? Hire a whole
25 bunch of investigators? And do what? I mean, this

1 hypothetical drug dealer just hasn't been caught
2 drug dealing but has no visible means of support, is
3 living a lavish lifestyle and is coming in to say I
4 want my license for pharmacy back. I mean, if you
5 put the burden of proof on the agency, then they
6 haven't proved it.

7 It's hard to understate how truly
8 radical and extreme this provision is in comparison
9 with anything anyone else has ever done, and
10 particularly the law of New York, which is the only
11 comprehensive approach to this that I am aware of.

12 COMMISSIONER H. LANE KNEEDLER, III
13 (Virginia): Mr. Chairman. I will let others speak
14 to the standard. Commissioner Bopp, you're making a
15 link again between the order of relief and the
16 license. That link just isn't there. Just because
17 someone gets the order of relief does not mean the
18 pharmacy board is going to grant them the license or
19 that Commissioner Ring's housing board is going to
20 grant them the housing. All it says to the board at
21 that point is, look at the facts, exercise your
22 discretion. If the answer is "no," it's "no."

23 COMMISSIONER BOPP: Yes. And I have
24 heard that. But there is an effect to granting
25 relief, and that is the considered public policy

1 judgment of the state legislature -- that is our
2 constituency -- is being vitiated and we are then
3 imposing a burden on another governmental agency to
4 make this determination.

5 Now let's think about the Department of
6 Motor Vehicles, and you used to have a collateral
7 sanction that said if an operator of a commercial
8 vehicle commits a felony while operating a
9 commercial vehicle, he's denied his license. All
10 right? That is a sanction.

11 Well, now, after they get -- which I
12 would think would be absolutely a matter of routine
13 the way you have written this -- a matter of routine
14 that that would be relieved. All these people are
15 going to go to the Department of Motor Vehicles and
16 ask for their license back.

17 Now what you're saying is, there has to
18 be an individualized determination of the facts. In
19 other words, the DMV can't look to the conviction.
20 So what do they have to do? They have to hire an
21 investigator, they have to go get the transcript of
22 the thing. I mean, does anybody seriously believe
23 that the Department of Motor Vehicles is going to be
24 doing these things, these individualized
25 determinations and, if they are, to give any meaning

1 to it? How many investigators, how many procedures,
2 how many bureaucrats are going to have to be
3 employed to do what, in my view, is quite reasonable
4 and rational -- that is, somebody has committed a
5 felony while operating a commercial vehicle with a
6 commercial license and you deny it.

7 CHAIRPERSON AUERBACH: Thank you,
8 Commissioner. I am going to ask the chair to
9 respond.

10 COMMISSIONER RICHARD T. CASSIDY
11 (Vermont): Commissioner, you make a narrow point
12 with which I disagree and a broader point which is a
13 very serious point and I want to address.

14 The narrow point I think is incorrect,
15 and that is that under Section 11, motor vehicle
16 license suspension, revocation, limitation, or
17 ineligibility under the state DWI laws is not
18 eligible for relief. That is the narrow point.

19 Let's not talk about the narrow point.
20 Let's talk about the broad point, because you have
21 addressed us many times and I think that you raise
22 really the underlying question about the wisdom of
23 the statute. I would say to you this. First, we
24 are not going to impose anything on any state
25 legislature anywhere. We are only the Uniform Law

1 Commission and all we can do is suggest and
2 recommend that the states should do this.

3 More important, there is an argument on
4 your side, and that is the argument of public safety
5 and public welfare around the effective enforcement
6 of the criminal laws. We understand that, and I
7 think if you look at what Ohio has done and what
8 Minnesota has done and what Maryland has done, the
9 states where this has been studied, the legislatures
10 have been very attentive to that side of the
11 balance.

12 What we are suggesting, and I know you
13 share this concern so I will raise it with you, is
14 that by being so attentive to the public safety side
15 of the balance and imposing so many categorical
16 penalties, that we are creating a huge underclass of
17 people in this nation who are not able to access the
18 ordinary benefits of life in our society. That is
19 the road that we are embarked upon, in my judgment
20 and in the judgment of many people, and we need to
21 step back and take a broader look at what we are
22 doing, which the study will encourage, will
23 encourage state legislatures to see the Ohio type
24 study in their state and to know when they go to
25 consider adding yet another categorical denial

1 whether they want to do that or not. And that is up
2 to them.

3 We are also saying, to the extent you've
4 done that, that there are some ways that people who
5 are trying do better can have a chance to get back
6 in the game.

7 Now, I gather you disagree with our
8 judgment on that. That is fair enough. But I hope
9 the Conference will not.

10 COMMISSIONER BOPP: Sure. Commissioner,
11 I do agree with the proposition that the legislature
12 should examine both retrospectively and in the
13 future as to adding collateral sanctions and the
14 effect that these would have on an individual's
15 ability to re-enter society.

16 I am opposed to internal exile, but I
17 think if you actually look at the sanctions that are
18 imposed in Ohio, there are a lot of them, but
19 they're very targeted. Look at them. I mean, I
20 think you can not come to a fair conclusion that in
21 Ohio because of these sanctions we're creating an
22 underclass of people who cannot re-enter society. I
23 don't think that is a fair characterization. I
24 think it is a much different matter between
25 respecting the public policy choices of the

1 legislature but encouraging them to understand the
2 effects of those choices on an important societal
3 goal, which is re-entry, as opposed to what this
4 bill does, which treats them because of the way you
5 have fashioned the ability to attain relief, that it
6 would be absolutely a matter of routine that they
7 would be waived. I mean, it would be almost
8 impossible to conceive of a situation in which
9 somebody would actually file a petition who would
10 not have need -- that it would be likely to assist
11 them in some way to gain employment, et cetera, and
12 that we could possibly prove that they pose a
13 substantial risk.

14 We have reversed what the legislature
15 has done, in effect, and then imposed a substantial
16 burden on all these agencies who have to disregard
17 the conviction and look at the underlying facts.
18 Who honestly believes that that is going to be
19 actually administered very often? I think you would
20 just see these agencies saying, except in very rare
21 circumstances, they would just say, hey, you know,
22 they're relieved, there is nothing we can do about
23 this and there is no way that we are going to go
24 investigate to find out whether or not this guy is
25 out committing crimes that he hasn't been caught

1 for.

2 COMMISSIONER CASSIDY: Commissioner, I
3 think it's clear to the entire Conference that you
4 and I have a very sharp good faith difference of
5 opinion on what is the best public policy here. I
6 think at some point perhaps a motion is in order,
7 but you're not going to persuade me and I'm not
8 going to persuade you.

9 COMMISSIONER BOPP: I am honestly,
10 again, not trying to persuade you. But I think
11 there is a reason, because I recognize your
12 heartfelt belief that this is necessary, and that is
13 fine. But I think we ought to pause and notice that
14 we only have one state in the United States that has
15 adopted this comprehensive approach, that is New
16 York, and that as Advisor Love said in her book, no
17 other state has taken this on.

18 This is a project, and I think you have
19 said this, you want to develop the law. That is
20 what you want to do. You have a public policy that
21 you're in favor of, that you want to promote through
22 this Conference. But it is one that the states have
23 not shared and we don't have the experience with
24 states dealing with this. There is no credible case
25 that can be made you're trying to create uniformity

1 here. There are no laws to unify.

2 CHAIRPERSON AUERBACH: Let's see if we
3 can move along, Commissioner. I think your point
4 has been well made. I would like to call on the
5 author of the book that you've been referring to to
6 see if she can shed any light on that part of it.

7 MS. MARGARET COLGATE LOVE (ABA Advisor):
8 Thank you very much. Margaret Love, Advisor, ABA.
9 As the author of the offending document here, I had
10 better speak.

11 It is true that there are only a couple
12 of states that have relief regimes that are labeled
13 certificate. Illinois is the other one. New York
14 does offer a comprehensive regime, two kinds of
15 certificates. One is for the first offender and
16 then there is a whole separate certificate scheme
17 for people who have more than one felony conviction.
18 That was one mistake that I think if you look at the
19 New York profile that will be fairly clear. But
20 there are numerous other states that have relief
21 regimes that are in the nature of certificate
22 regimes.

23 Connecticut, for example, has a board,
24 an independent board that administers a pardon
25 system. They label it a pardon. It's from colonial

1 times. That is just what they call it. But in fact
2 what that board does is issue two different kinds of
3 certificates. They issue an early sort of what they
4 call a junior pardon, at least in the back room, and
5 a full and unconditional pardon later. There are
6 many other states, including Indiana, that have a
7 pardon regime where a parole board will consider a
8 case and make a recommendation to the governor.
9 There are so many different kinds of ways that
10 states accomplish this.

11 Let me just say that as our ABA
12 commission has gone around the country and talked to
13 people -- prosecutors, defenders, judges, people who
14 run parole boards -- there is a real longing, a
15 recognition that this is a huge problem, as our
16 chair says, that has not been attended to, that many
17 boards are struggling with this problem. They want
18 guidance. I think that what we are doing here, we
19 are certainly taking the New York model, which has
20 been around a long time, nobody has emulated it
21 exactly except -- well, not exactly, but made any
22 effort except Illinois. But the fact is that many,
23 many states have something like this and they are
24 longing for guidance as to how to do it in a more
25 rational fashion.

1 CHAIRPERSON AUERBACH: Thank you.

2 Commissioner Henderson.

3 COMMISSIONER ROGER C. HENDERSON

4 (Arizona): Just a couple of points quickly. One

5 has already been made but it's worth reemphasizing.

6 We are not undercutting any legislature. Each

7 legislature has to decide whether it wants this act.

8 If they don't like it, don't adopt it. All we are

9 asking them to do is consider it, which would then

10 answer Commissioner Bopp's claim that somehow or

11 another we're doing something contrary to some

12 particular legislature.

13 Secondly, I want to at least give the

14 other side of the coin -- any good advocate always

15 exaggerates the opponent's weakness. And, yes,

16 there are going to be some horrible hypotheticals.

17 But I really doubt that the pharmacist who supplied

18 the drugs to Elvis Presley will ever see his license

19 back again.

20 On the other hand, a pharmacist on a

21 one-time mistake -- maybe the person is an alcoholic

22 and they can get their life back in order -- perhaps

23 that person deserves to get their license back. But

24 they don't get it back automatically. It's done on

25 the merits.

1 Finally, I think you're overlooking that
2 in many of these cases, and let's take Commissioner
3 Ring's situation, you're dealing with a scarce
4 resource, public housing. That is the problem they
5 have in Alexandria. So you have two applicants.
6 One has got, you name it, one to twenty convictions.
7 The other one has lived a law-abiding life. Who do
8 you think is going to get the housing?

9 Another situation. You have a person
10 who is released from prison. This is a spouse. The
11 mother and the children live in public housing.
12 Sorry, sir, you're out. You go live somewhere else.
13 Give me a break. I am sure this is the very type of
14 situation that Commissioner Ring faces quite
15 frequently.

16 All we are saying is, just look at the
17 merits, and if there is a basis -- I do not see any
18 wholesale overturning of these sanctions or
19 disqualifications. It would be done on a
20 case-by-case basis.

21 COMMISSIONER JACK DAVIES (Minnesota):
22 Mr. Chairman.

23 CHAIRPERSON AUERBACH: Jack, I am going
24 to ask if you could hold. I am going to say
25 something that will be unpopular to people next to

1 me. For the most part we need to get the views from
2 the floor, and I want to cut down the amount of time
3 that the committee is spending debating with the
4 floor so we can get that input.

5 The president has made it clear we want
6 to get through this act, and that is going to take
7 an effort by all of us. I hope I don't offend too
8 many people, but having said that, I am going to go
9 to Commissioner Billings, who has been patiently
10 standing almost as long as I have.

11 COMMISSIONER RHODA B. BILLINGS (North
12 Carolina): Thank you. I hope I haven't forgotten
13 now what I got up here for. I wanted to go back to
14 subsection (a) of Section 9.

15 When reading this and particularly with
16 its timing related to imposition of sentencing, it
17 isn't obvious from the reading that this can apply
18 to a person who is convicted in another state. Now,
19 I know that your commentary does say that relief is
20 not restricted to individuals with collateral
21 sanctions based on convictions from the enacting
22 state.

23 My question is, does there have to be
24 some relationship between the petitioner and the
25 state? And where is that expressed.

1 What brought me to this question is in
2 subsection (c), Page 18, Line 9, you give the states
3 alternatives for when we're dealing with the state
4 or a contractor with the state cannot impose a
5 collateral sanction if an order for relief is
6 issued, and then you give them the option of "in
7 this state" or "in any state."

8 There has to be, in order for the entire
9 population of convicted persons in the United States
10 not running to Oregon to get relief, there has to be
11 some restriction. But another option that I think I
12 would support that you might give to the states is
13 limited to an order of relief in this state or the
14 state of conviction.

15 I just want an answer to my first
16 question and then simply making a suggestion in
17 regard to the addition of the third option.

18 COMMISSIONER RICHARD T. CASSIDY
19 (Vermont): The idea is that you can only get relief
20 from a sanction that applies to you, so if you want
21 to work in New York state, you apply for relief in
22 that state.

23 COMMISSIONER BILLINGS: Where does it
24 say that?

25 COMMISSIONER H. LANE KNEEDLER, III

1 (Virginia): Mr. Chairman. I think the answer to
2 your first question is the language we added at
3 Section 8. It says that the person from the other
4 state can seek relief under 9 and 10.

5 I think your question was, what about
6 the person who is involved in Section 8, how do they
7 get to 9 and 10 since we don't mention people from
8 other states in 9 and 10, we mention them in 8.

9 COMMISSIONER BILLINGS: In 8, you're
10 talking about overturning a conviction, but here
11 you're talking about removing a sanction.

12 COMMISSIONER KNEEDLER: In 8, I thought
13 your question was, what happens to someone who is
14 covered by Section 8? We don't refer to those
15 people in 9. Did I misunderstand your point?

16 COMMISSIONER BILLINGS: That is not my
17 point. My question is who has standing to petition
18 under 9 for an order from relief if it isn't just
19 people who have been convicted in the state?

20 COMMISSIONER RICHARD T. CASSIDY
21 (Vermont): It's a person to whom a sanction of that
22 state applies.

23 COMMISSIONER BILLINGS: I am not sure
24 that you can read that into what the wording of this
25 says, because it says "an individual convicted of an

1 offense may petition for an order of relief for one
2 or more collateral sanctions," so they can just go
3 in and petition for relief from all of the
4 sanctions, can't they?

5 COMMISSIONER H. LANE KNEEDLER, III
6 (Virginia): No. Not under 9.

7 COMMISSIONER CASSIDY: There has to be a
8 sanction that applies to you. If you have no
9 relationship with the state of Oregon, then you have
10 no standing to apply there. But if you're trying to
11 become licensed to work in New York and you live in
12 New Jersey, you can apply.

13 COMMISSIONER BILLINGS: I am trying to
14 see where -- and I understand that is what is
15 intended, but I am just trying to see where the
16 language makes that clear so that you don't have
17 people simply coming in asking for an order for
18 relief.

19 CHAIRPERSON AUERBACH: Thank you,
20 Commissioner.

21 The commissioner at Microphone No. 3.

22 COMMISSIONER NORA WINKELMAN
23 (Pennsylvania): I don't really want to beat a dead
24 horse, but considering that Commissioner Bopp is
25 back up at the microphone, I am not sure it's

1 completely dead yet. I thought it was important for
2 someone else from the floor to stand up and talk
3 about some of the issues, the underlying policy
4 issues that the committee has been suggesting, and
5 that is that this is a hugely important issue that
6 state legislators and policymakers in all of the
7 states have to start to address one way or the
8 other.

9 I agree with Commissioner Bopp that we
10 may not get uniformity on this because of how
11 controversial it is in every state, but if we don't
12 start talking about it, we will be where the British
13 were many years ago when they decided the solution
14 was Australia. I mean, these people have to have
15 some way of being reintroduced back into society.
16 How a state does that will be up to them when they
17 start looking at this act.

18 I do think it's probably a pipe dream to
19 think that we will have a uniform act at the end of
20 the day, but we have to start talking about these
21 issues. If there are commissioners here at the
22 conference who don't agree even with that policy,
23 they can vote against the act on final approval. I
24 know that is a big taboo in this Conference to do
25 that, but that is where you would reflect your views

1 on this. You can lobby your legislators when it
2 gets there one way or the other in your states.

3 I don't want to speak for the rest of
4 the people on the floor, but I would rather see
5 specific issues raised on language that the
6 committee can consider or not so we can get to the
7 point where we vote on this act one way or the other
8 on Thursday. And I don't think that debating the
9 policy issues with the committee right now is the
10 answer. I am not trying to suggest everybody's
11 views shouldn't be heard on it. But this is not the
12 time or place for that. We decided last year this
13 would go to a second read. We could have killed the
14 bill last year, I suppose, if we wanted to for
15 policy reasons. But it really needs to be something
16 that gets out to the states one way or the other so
17 that legislators can start talking about it.

18 CHAIRPERSON AUERBACH: I appreciate your
19 comments, Commissioner. Having said that,
20 Commissioner Bopp, the urging is that we stay away
21 from the broad policy and you can vote against the
22 act and move us ahead.

23 COMMISSIONER JAMES BOPP, JR. (Indiana):
24 At risk that we will debate public policy -- Bopp,
25 Indiana. Again, Advisor Love's useful book, and I

1 congratulate you on getting funding from George
2 Soros. I would rather he give you money than spend
3 it to defeat McCain, for instance.

4 [Laughter]

5 CHAIRPERSON AUERBACH: So noted.

6 COMMISSIONER BOPP: But in any event,
7 she points out -- so noted. She points out on Page
8 62 regarding those states which have laws that will
9 relieve collateral sanctions for employment and
10 licensing, she notes that it is very typical for
11 those laws not to allow the waiver of a sanction
12 when it is directly related, substantially related,
13 or rationally related -- that is, the connection
14 between the crime and the employment.

15 Now, that is not in your standard in
16 Section 9. It seems to me, I mean, I share the
17 concern about unrelated crimes being a disability.
18 I share that. But my reading of these Ohio laws is
19 the vast majority are quite related. It seems to me
20 if it can be proven that it is related, if it can be
21 demonstrated, then that sanction would continue, but
22 if it's not related, then it could be relieved.

23 In that regard, it would seem to me
24 appropriate that those elements that the individual
25 must prove would include a number 3, which is that

1 the crime for which you're convicted is not
2 rationally related to the collateral sanction that
3 he is seeking to have waived.

4 Now, has the committee considered that
5 question?

6 COMMISSIONER RICHARD T. CASSIDY
7 (Vermont): Commissioner, we did consider that
8 question. The feeling was -- that is essentially
9 the approach of the ABA standards on collateral
10 sanctions. The feeling was that this should be a
11 more procedurally oriented act and that we should
12 try to tell the states what sanctions they can
13 impose and could not impose. So we did not go in
14 that direction. Thank you, Commissioner.

15 CHAIRPERSON AUERBACH: The commissioner
16 at Microphone 4.

17 COMMISSIONER SANDRA S. STERN (New York):
18 I have a question about subsection (d), and that is
19 whether it should matter whether the decisionmaker
20 had knowledge of the order at the time of the
21 alleged negligence.

22 Suppose you have somebody who has got
23 now the automatic sanction, let's say as a
24 physician's assistant employed in a hospital,
25 lifted. They are secondarily able to convince the

1 licensing board that they are able now to obtain a
2 license, be re-licensed, et cetera. When they
3 present their application to the hospital, all they
4 say is, here I am and I've got a valid license.

5 Shouldn't the hospital be able to admit
6 now in evidence when they find it later the
7 statement or the specific relief granted to that
8 individual?

9 MR. JACK CHIN (Reporter): Well, I think
10 the rationale was that if we're saying that the
11 decision was well founded based on the existence of
12 this certificate, the decisionmaker should have had
13 knowledge of the certificate at that time.

14 COMMISSIONER STERN: But why does it
15 matter? Many of these people, if they can, will
16 simply, of course, present themselves as, here I am
17 and I've got the license.

18 MR. CHIN: Because if the existence of
19 the prior conviction is somehow admissible in the
20 negligence action, which is the premise of Section
21 (d) here, then the existence of the certificate
22 doesn't undermine whatever negligence either exists
23 or doesn't exist based on the fact of that prior
24 conviction. So it doesn't seem to be probative --
25 the thought is, it doesn't seem to be probative of

1 whether the hiring decision, the retention decision
2 was negligent -- might not have been negligent, but
3 the certificate doesn't affect that decision unless
4 the decisionmaker knew about it.

5 COMMISSIONER STERN: Okay.

6 CHAIRPERSON AUERBACH: Microphone 3.

7 COMMISSIONER TERRY L. THURBON (Alaska):

8 I have to briefly react to Commissioner Winkelman's
9 comments. I desperately want us to get through the
10 reading on this because I have a few more things to
11 say and I think we are going to need to have a
12 serious debate about whether this is going to go
13 forward as a model or a uniform act as some point.

14 I agree that we should try to get
15 through the reading, but the idea that we should not
16 debate policy if policy needs to be debated in the
17 Committee of the Whole is a little bit abhorrent to
18 me because we, the Committee of the Whole, did not
19 bring this act forward. That was the leadership's
20 decision, Scope and Program, the Executive
21 Committee. It came on in Hilton Head. We had it in
22 Pasadena last year. I suppose Commissioner
23 Winkelman, for whom I have a lot of respect, is
24 right, we could have found a way to kill it last
25 year if we wanted so, so we tacitly did agree to

1 hear it again this year.

2 I really have a lot of respect for the
3 Drafting Committee's efforts on this because you did
4 address a number of things, a great number of
5 things, and it is much further along the road to
6 something that I could support at least as a model
7 act. But the idea that we should defer debate to
8 the point at which it's up for final approval
9 overlooks the fact that each state only has one
10 vote. This is the opportunity for the commissioners
11 to try to get their voices heard, the individual
12 commissioners, and perhaps when it is up for final
13 approval there may be more debate. But the vote of
14 the states is a one vote and for the commissioners
15 to be heard on policy issues where there are
16 divergent views within the delegations, it is
17 important that we not cut off the policy debate at
18 the Committee of the Whole stage.

19 Thank you.

20 CHAIRPERSON AUERBACH: Thank you. It is
21 not the intent of the chair to cut off any debate if
22 humanly possible. It is the intent of the chair to
23 get through this assignment. We are and are having
24 a good debate covering policy, but what I am trying
25 to do is keep us focused on particular items,

1 because the kind of debate we are having on the need
2 for the act we could have on every section and it is
3 going to be a long, long day if we do that.

4 Having made that little speech, I will
5 go to Microphone 5.

6 COMMISSIONER MARTHA TAYLOR STARKEY
7 (Indiana): I just want to state to the Committee of
8 the Whole that I agree with the previous
9 commissioner. This is the place where we debate
10 policy, and we should not try to stop that debate.

11 I have been with this Conference for
12 almost two decades and our motto has always been
13 diversity of thought, uniformity of law. If we
14 don't debate it here, then we are not going to get
15 the uniformity of law, and that is what we are
16 about.

17 So I think that, yes, we need to get
18 through the act, but this is the place where we need
19 to debate policy.

20 CHAIRPERSON AUERBACH: Okay. Thank you.
21 I don't want to get into an argument on that
22 particular point.

23 Microphone 6.

24 COMMISSIONER RALPH M. FOLEY (Indiana):
25 I had a couple of specific concerns. It seems to me

1 that the sense of the committee has been that the
2 designated board or agency would be most likely to
3 be the state's parole board. I point out that in
4 most states if they're like Indiana we have a parole
5 board that meets four times a year, consisting of
6 lay people, and that would be an extreme burden on
7 that kind of a board.

8 Secondly, when we have a certificate and
9 we're presenting it to a government agency, most
10 likely in our state it would have to comply with the
11 Administrative Code for due process before an
12 administrative agency or before an agency, and that
13 would require the services of a law judge and all of
14 that staff.

15 So I suggest to the committee that in
16 the interest of saving judicial economy that that
17 savings would not be achieved. You would be
18 shifting an even greater burden to these agencies
19 than you would be imposing on the courts that are
20 used to making and weighing evidence and doing these
21 kinds of things.

22 In the parole board we have laws that
23 provide for the prosecuting attorney to be available
24 -- of the conviction. You have the family of the
25 victims that are supposed to appear before the

1 parole board and have notice of any hearing and all
2 of that type of activity.

3 The more I look at this, and I approach
4 the microphone with some caution as a neophyte, but
5 the more I think that this would be appropriate to
6 be a model act rather than a uniform act and ask the
7 chair if it is appropriate to consider a motion to
8 make this a model act rather than a uniform act.

9 CHAIRPERSON AUERBACH: It is my
10 understanding from my discussions with the
11 parliamentarian it is not appropriate in the
12 Committee of the Whole. You'll have every
13 opportunity when it is before the states for action.

14 COMMISSIONER FOLEY: Before what, sir?

15 CHAIRPERSON AUERBACH: If we reach the
16 point of going to a vote by states, it would be
17 appropriate to make that motion, but not in the
18 Committee of the Whole.

19 COMMISSIONER FOLEY: Thank you very
20 much.

21 CHAIRPERSON AUERBACH: Commissioner Ring
22 may argue with me.

23 COMMISSIONER CARLYLE C. RING, JR.
24 (Virginia): I might ask the parliamentarian perhaps
25 to rule on that.

1 I think there are several opportunities.
2 One would be after the committee rises and reports,
3 and the other is before the vote by the states on
4 Thursday. I think there are two opportunities to do
5 so.

6 CHAIRPERSON AUERBACH: Parliamentary.

7 PARLIAMENTARIAN GENE N. LEBRUN (South
8 Dakota): You're correct. The point we're making
9 then is that it's not a proper motion when we are
10 meeting as a Committee of the Whole.

11 COMMISSIONER RING: And I agree with
12 that.

13 CHAIRPERSON AUERBACH: So you could have
14 an opportunity when we report that we're ready to go
15 to the states.

16 Seeing no one up, let's very quickly
17 move to the next section, Section 10. Commissioner
18 Opala.

19 COMMISSIONER MARIAN P. OPALA (Oklahoma):
20 "SECTION 10. CERTIFICATE OF RESTORATION OF RIGHTS.

21 "(a) An individual convicted of an
22 offense may petition the [designated board or
23 agency] for a certificate of restoration of rights.

24 "(b) Unless the [designated board or
25 agency] finds that granting the petition would pose

1 a substantial risk to the safety or welfare of the
2 public or any individual, or that some other
3 substantial reason warrants denial of the petition,
4 the [designated board or agency] shall grant a
5 petition for a certificate of restoration of rights
6 and issue such a certificate, relieving an
7 individual from one or more collateral sanctions
8 including those listed in Section 9(a), or from all
9 collateral sanctions, except those listed in Section
10 11, if it finds that the individual has established
11 by a preponderance of the evidence that:

12 "(1) at least [five] years has elapsed
13 since the date of the individual's most recent
14 conviction of a felony [or misdemeanor] in any
15 jurisdiction;

16 "(2) for the [five] years preceding the
17 issuance of the certificate, the individual:

18 "(A) has not been confined pursuant to a
19 criminal sentence in [prison] [prison, jail, a
20 half-way house, home detention, or other actual
21 confinement] in any jurisdiction;

22 "(B) has been engaged in, or seeking to
23 engage in, a lawful occupation or activity,
24 including employment, training, education, or
25 rehabilitative programs or, if the individual is

1 retired or disabled, that the individual has a
2 lawful source of support; and

3 "(C) has not violated the terms of any
4 criminal sentence, or that any failure to comply is
5 justified, involuntary, or insubstantial; and

6 "(3) no criminal charges are pending
7 against the individual.

8 "(c) The [designated board or agency]
9 may issue a certificate of restoration of rights
10 relieving all collateral sanctions under subsection
11 (b), with specified exceptions in addition to the
12 applicable exceptions listed in Section 11. The
13 text of the certificate shall:

14 "(1) list the particular collateral
15 sanctions from which relief has been granted; or

16 "(2) state that the certificate grants
17 relief from all collateral sanctions except those
18 collateral sanctions listed in Section 11 that are
19 applicable to the individual, and any other
20 collateral sanctions from which relief has not been
21 granted.

22 "(d) the state acting directly or
23 through its departments, agencies, officers, or
24 instrumentalities, including municipalities,
25 political subdivisions, educational institutions,

1 boards, or commissions, or their employees[, and
2 government contractors, including subcontractors,
3 made subject to this section by contract, law other
4 than this [act], or ordinance,] may not impose a
5 collateral sanction that is subject of an unrevoked
6 certificate of restoration of rights issued [in this
7 state] [in any state].

8 "(e) The state acting directly or
9 through its departments, agencies, officers, or
10 instrumentalities, including municipalities,
11 political subdivisions, educational institutions,
12 boards, or commissions, or their employees[, and
13 government contractors, including subcontractors,
14 made subject to this section by contract, law other
15 than this [act], or ordinance,] may not impose a
16 disqualification on an individual to whom an
17 unrevoked certificate of restoration of rights has
18 been issued covering the opportunity at issue unless
19 the decisionmaker determines that granting the
20 opportunity poses an unreasonable risk to the safety
21 or welfare of the public or any individual. The
22 decisionmaker may conduct any investigation it
23 considers necessary, may require that an individual
24 applying for an opportunity furnish copies of court
25 records or other relevant information, and shall

1 consider:

2 "(1) the individual's age when the
3 offense was committed;

4 "(2) the time since commission of the
5 offense and since release from any custody;

6 "(3) the length and consistency of the
7 individual's work history, including whether the
8 individual has a recent record of consistent
9 employment;

10 "(4) the individual's education and
11 training;

12 "(5) the facts underlying the conviction
13 and their relation, if any, to the duties or
14 functions of the opportunity;

15 "(6) the individual's other criminal
16 history, if any, and rehabilitation and conduct
17 since the offense, including the individual's
18 receipt of an order of relief from collateral
19 sanctions, a certificate of restoration of rights, a
20 pardon, or other relief;

21 "(7) whether other individuals who
22 engaged in similar prohibited conduct, whether or
23 not convicted, have been or would be excluded on the
24 ground that they present an unreasonable risk; and

25 "(8) any other relevant factor.

1 "(f) [(1)] If a certificate of
2 restoration of rights is issued and unrevoked at the
3 time of decision, the underlying conviction is
4 inadmissible as evidence that a decisionmaker was
5 negligent or otherwise at fault for hiring,
6 retaining, licensing, leasing to, admitting to a
7 school or program, or otherwise transacting business
8 or engaging in activity with the individual to whom
9 the certificate was issued.

10 "[(2)] A certificate of restoration of
11 rights may be introduced in a judicial or
12 administrative proceeding by a decisionmaker as
13 evidence of the decisionmaker's due care in deciding
14 to hire, retain, license, lease to, admit to a
15 school or program, or otherwise transact business or
16 engage in activity with the individual to whom the
17 certificate was issued, if the decisionmaker had
18 knowledge of the certificate at the time of the
19 alleged negligence or other fault.]"

20 End of Section 10.

21 CHAIRPERSON AUERBACH: Thank you,
22 Commissioner, for getting through that long section.
23 We will start with Microphone 2.

24 COMMISSIONER PATRICK C. GUILLOT (Texas):
25 I was wondering why the educational institutions are

1 listed in this portion of the act. Why is there so
2 much importance and why do you want them included?
3 I was wondering why educational institutions are
4 included in this section and why they're so
5 important to the committee.

6 COMMISSIONER RICHARD T. CASSIDY
7 (Vermont): I think if you look at modern American
8 society, education is the key to economic success
9 and for many people to satisfaction in life. It's
10 just a very important subject.

11 COMMISSIONER GUILLOT: Well, I take it
12 from section (f), Page 23, that if an educational
13 institution does not want to hire someone even if he
14 or she had their record expunged, they can't do
15 that. They have no right to say we will pick and
16 choose who we wish to teach here.

17 COMMISSIONER H. LANE KNEEDLER, III
18 (Virginia): Mr. Chairman. Are you referring to why
19 it is listed on Page 21, Line 21?

20 COMMISSIONER GUILLOT: No. I was more
21 interested in Page 22, Line 4.

22 COMMISSIONER KNEEDLER: Thank you.

23 COMMISSIONER RICHARD T. CASSIDY
24 (Vermont): Commissioner, I think it's quite clear
25 that they have a decision still to make. It doesn't

1 eliminate from the educational institution the right
2 to make a discretionary decision. It gives guidance
3 to that decision.

4 COMMISSIONER GUILLOT: Well, I take it
5 one of the reasons they may base their decision upon
6 cannot be the prior conviction. It was expunged.

7 COMMISSIONER CASSIDY: But they can look
8 at the underlying conduct that was the subject of
9 the conviction.

10 COMMISSIONER KNEEDLER: Mr. Chairman.
11 The analytical framework here in 10 is very similar
12 to what is there in 9. All that it says to begin
13 with is, you can't have a collateral sanction such
14 as nobody with a conviction may be employed or
15 admitted. What you can do here is look at the
16 underlying facts. The difference between the order
17 of relief in 9 and 10 is that we say, even before --
18 it's after five years, there is an investigation,
19 like a presentence report, fairly thorough, showing
20 the person is on their way to good conduct or has
21 certainly not done anything bad.

22 Here we say even before you can look at
23 the facts, you have got to find that there is no
24 unreasonable risk to the safety or welfare, and then
25 we give some instructions of what you ought to look

1 at. But you can look at the underlying facts.

2 CHAIRPERSON AUERBACH: Thank you both.

3 The commissioner at Microphone 3.

4 COMMISSIONER TERRY L. THURBON (Alaska):

5 Just one question on this section. On Page 21,
6 Lines 14 and 15, the board is given the discretion
7 to have specified exceptions in addition to those in
8 Section 11. What is the rationale for allowing that
9 at the restoration stage but not allowing the court
10 or the board to do that under 9 at the order of
11 relief stage?

12 MR. JACK CHIN (Reporter): The Section 9
13 certificate refers to specific collateral sanctions.
14 Because you are talking about a particular thing,
15 such as the right to live in public housing, there
16 is no opportunity for an exception. You either get
17 it or you don't, perhaps on conditions, but you get
18 it or you don't.

19 What the section that you refer in
20 Section 10 addresses is that it's conceivable that
21 the order could lift all collateral sanctions except
22 those listed in Section 11 and the issuing agency
23 could decline to lift a firearms disqualification.
24 So everything but firearms and those things listed
25 in Section 11.

1 That provision allows additional
2 particularized exceptions within a general
3 restoration of rights.

4 COMMISSIONER THURBON: Thank you.

5 CHAIRPERSON AUERBACH: Commissioner Pepe
6 at Microphone 3.

7 COMMISSIONER RAYMOND P. PEPE
8 (Pennsylvania): Will the committee consider
9 amending subsection (c) to allow the designated
10 board or agency to impose conditions upon a
11 certificate of restoration of rights?

12 COMMISSIONER RICHARD T. CASSIDY
13 (Vermont): I think the view of the committee so far
14 has been that it is more appropriate for the actual
15 decisionmaker making a decision about a particular
16 sanction or disqualification, employment or
17 education, to do that, that it's not necessary for
18 the parole board making this larger decision to
19 impose these kinds of conditions.

20 COMMISSIONER PEPE: Well, then, I think
21 I would like to make a motion, for two reasons.
22 One, I think for purposes of judicial economy it
23 would be better if conditions were established up
24 front that would apply across the board to all
25 agencies, which would avoid inconsistent

1 application. Secondly, I do think it's very
2 important to make it very clear in the act that
3 conditions may be imposed, because there is no
4 reference anyplace in 9 or 10 to conditions, and the
5 lack of any specific reference to the imposition of
6 conditions upon relief from sanctions seems to me to
7 be problematic.

8 CHAIRPERSON AUERBACH: Commissioner, I
9 hate to say this, but could you put it in writing.

10 COMMISSIONER PEPE: I would be happy to,
11 although my preference would be, since I think it's
12 very clear what I am asking for, is that if the
13 motion is approved, I would rather see the committee
14 draft it than me attempting to draft it.

15 CHAIRPERSON AUERBACH: The reason for
16 asking from you is to make sure we understand what
17 we're doing, and it would be the understanding that
18 the committee would then do whatever sandpapering
19 was necessary.

20 COMMISSIONER PEPE: That is fine. I
21 will give you a little draft shortly.

22 CHAIRPERSON AUERBACH: Why don't we move
23 ahead while Commissioner Pepe is busy at his
24 drafting board. Microphone 2.

25 COMMISSIONER STEVEN L. WILLBORN

1 (Nebraska): I have a couple of questions about
2 subsection (e). There doesn't seem to be any
3 requirement that the agency know about the
4 certificate. The certificate can't impose a
5 disqualification to someone who has been issued one.

6 Is there any intent to have the agency
7 actually know about the certificate before it . . .

8 COMMISSIONER RICHARD T. CASSIDY

9 (Vermont): One would expect that they would know
10 about it in today's information society. In fact,
11 one of the problems that really calls for the
12 adoption of a statute like this is that there is a
13 lot of information about criminal records, even
14 criminal records that have been expunged all over
15 the Internet.

16 COMMISSIONER WILLBORN: Okay. Maybe in
17 a comment or something indicate, expect people to
18 know. It seems odd to impose an obligation when
19 people might not know.

20 The other question I have has to do with
21 the relationship between the two sentences there on
22 disqualification. The first sentence says that they
23 can't impose a disqualification unless there is an
24 unreasonable risk to safety or welfare and the
25 second sentence has a long list of things.

1 Are those things only to be considered
2 to decide whether there is an unreasonable risk to
3 safety or welfare, or is there a broader category of
4 things I might disqualify someone for?

5 MR. JACK CHIN (Reporter): I think that
6 the word "disqualification" in Line 7 of Page 22
7 should be "collateral sanction."

8 COMMISSIONER H. LANE KNEEDLER, III
9 (Virginia): No.

10 CHAIRPERSON AUERBACH: There is a
11 difference of opinion.

12 COMMISSIONER KNEEDLER: Mr. Chairman.
13 (d) says they may not pose a collateral sanction.
14 (e) is saying we're going to put some burden on
15 imposing a disqualification that is not there under
16 9.

17 CHAIRPERSON AUERBACH: I think the
18 reporter has withdrawn his position.

19 COMMISSIONER RICHARD T. CASSIDY
20 (Vermont): As I understand the question, it is
21 whether the enumerated items are intended to be a
22 specification of the public safety issues that are
23 referred to in principle. Is that the question?

24 COMMISSIONER STEVEN L. WILLBORN
25 (Nebraska): Yes. I can image, for example, I'm the

1 dean of the law school, somebody applies to law
2 school, they present one of these certificates to
3 me. Competitive admissions criteria. I might want
4 to consider it. It Won't have anything to do with
5 unreasonable risk or safety. Right? So if that is
6 the requirement, I can't reject them. I can't
7 consider that in rejecting them.

8 On the other hand, if this list permits
9 me, you know, is opening up the door to a wider
10 array of criteria for rejection, well, then I might
11 be able to reject them if I consider them. I was
12 just wondering which is the case.

13 COMMISSIONER RICHARD T. CASSIDY
14 (Vermont): I think two things happen. One, you get
15 to apply your ordinary standards. The person has to
16 be otherwise qualified. Two, these are, I think, a
17 way of channeling the decisionmaker's look at the
18 public safety problem.

19 COMMISSIONER WILLBORN: So I could
20 reject him for reasons other than public safety as
21 long as I considered all those factors. Okay. It's
22 just that as you clarify them, the language on Line
23 9 and 10 are not the exclusive reasons for
24 disqualifying someone.

25 COMMISSIONER JOHN M. CARY (Washington):

1 Cary from Washington. This is not a total answer to
2 your question. In our earlier draft we had the
3 requirement that the petitioner prove that he would
4 not present an unreasonable risk to society. We
5 realized that that required the petitioner to prove
6 a negative, which is something that is impossible to
7 do. So as a matter of form, we put the general
8 standard up front. I have viewed that as being the
9 basic standard, with the other factors helping
10 channel the discussion and the consideration. But
11 we just have to be careful not to establish a
12 standard that can't be met. We can't require an
13 individual to prove that he is not under any
14 conceivable circumstances a risk to society.

15 COMMISSIONER WILLBORN: I am still not
16 clear. We can reject somebody for the conduct even
17 if it's not a risk to safety or welfare.

18 COMMISSIONER CARY: Yes. Oh, wait a
19 minute. No, no. The answer is, you can reject it
20 if he is a risk to safety.

21 COMMISSIONER WILLBORN: Yes. I want to
22 impose a disqualification on someone who is not a
23 risk to safety or welfare of the public. My law
24 school applicants. They're not a risk to the public
25 safety, but it's a competitive environment. I want

1 to admit somebody else rather than this person
2 because they engaged in this criminal conduct.

3 COMMISSIONER RICHARD T. CASSIDY

4 (Vermont): Commissioner, there are two principles
5 here. One is, you get to apply your ordinary
6 admission standards. So if the person ranks 360th
7 and you have 359 spots, you don't have to admit
8 them. Then the question is, if they otherwise would
9 be admitted, is there a risk to public safety or
10 welfare? This list is intended to guide your
11 discretion on that issue.

12 COMMISSIONER WILLBORN: Can I consider
13 his conviction in deciding whether he ranks 359 or
14 360?

15 COMMISSIONER CASSIDY: I don't think you
16 should be able to consider the conviction in making
17 that decision.

18 COMMISSIONER ROGER C. HENDERSON

19 (Arizona): I think you would be entitled to do what
20 you do today. I know you get applicants who have
21 felony convictions, just as we did at Arizona when I
22 was dean.

23 COMMISSIONER WILLBORN: We get very few
24 of them.

25 COMMISSIONER HENDERSON: We do too,

1 which shows you, I think, good sense of the public
2 that you don't apply to law school if you're a
3 felon.

4 But anyway, I think you under this act
5 would get to do what you do today. It's just
6 another factor.

7 COMMISSIONER WILLBORN: That's not how I
8 read this language, actually, because we will
9 consider that in ranking people. I think it's not
10 good policy to not permit us to do that.

11 COMMISSIONER HENDERSON: When you say
12 you couldn't do it under this act, I thought the
13 chair pointed out you can consider the facts and
14 circumstances. I think that is what you would
15 certainly do today, and that is what I meant. You
16 don't have to let Charles Whitman in law school.

17 COMMISSIONER WILLBORN: Maybe I will go
18 back and think about this. I am just not clear on
19 what the committee is telling me. I hear you
20 telling me, Roger, that I can consider it. I hear,
21 I think, the chair telling me that unless there is a
22 risk to safety or welfare, I cannot.

23 COMMISSIONER HENDERSON: Let's make a
24 distinction between the mere fact that the person
25 has been convicted vis-a-vis the circumstances which

1 gave rise to his conviction. And I think it's the
2 latter that you can consider, which obviously you
3 would do today.

4 COMMISSIONER WILLBORN: It's
5 interesting. I don't have the definition of
6 "disqualification" in front of me right here, but I
7 think it talks about anything relating to the
8 conviction. And certainly the facts and
9 circumstances would relate to the conviction, so I
10 am worried about the language of the act in
11 permitting this distinction to be made between the
12 underlying facts and circumstances.

13 CHAIRPERSON AUERBACH: I hate to do
14 this, Commissioner, but would you like to make a
15 motion?

16 COMMISSIONER WILLBORN: No, I don't
17 right now.

18 CHAIRPERSON AUERBACH: Thank you. I
19 have before me now the work from Commissioner Pepe,
20 which is to add paragraph (3) to subsection (c) to
21 state, "(3) establish any conditions, limitations,
22 or requirements upon the certificate of restoration
23 of rights."

24 Commissioner Pepe, do you want to expand
25 on that? Do you want to give us a line number on

1 that?

2 COMMISSIONER RAYMOND P. PEPE

3 (Pennsylvania): Boris, I didn't hear your question.

4 CHAIRPERSON AUERBACH: They are saying

5 "add paragraph (3) to subsection (c)," and the

6 question is "what line is that?"

7 COMMISSIONER H. LANE KNEEDLER, III

8 (Virginia): It would be Page 21, Line 19, at the

9 end of the sentence. It would be a new paragraph

10 (3).

11 CHAIRPERSON AUERBACH: Thank you.

12 COMMISSIONER PEPE: That would be

13 correct.

14 CHAIRPERSON AUERBACH: Commissioner

15 Pepe, did you want to comment on this before we open

16 it up to the floor?

17 COMMISSIONER PEPE: Very briefly. I do

18 think it's a very important that we make it crystal

19 clear that conditions may be imposed. I understand

20 there has been some other discussion about adding

21 conditional language in the disqualification

22 paragraph, but I also think it's important to have

23 authority to impose conditions up front when a

24 relief from sanctions is granted. This is just

25 simply more efficient and practical to establish

1 overall limitations, restrictions, or conditions
2 upon relief from sanctions.

3 CHAIRPERSON AUERBACH: Thank you. Right
4 now the chair is polling the committee to see what
5 their reaction is and see whether that will be
6 acceptable without having to go to vote. If you
7 will bear with us for 60 seconds.

8 Commissioner Kneedler.

9 COMMISSIONER H. LANE KNEEDLER, III
10 (Virginia): Mr. Chairman. I would like to ask
11 Commissioner Pepe for an example. What do you have
12 in mind? My fear is that the conditions will end up
13 being collateral sanctions by another name. So I am
14 looking for an example.

15 CHAIRPERSON AUERBACH: Commissioner
16 Davies is willing to help you, Commissioner Pepe.

17 COMMISSIONER PEPE: If you're talking
18 occupational stuff, I mean, you can't see certain
19 types of patients. If it's a commercial driver's
20 license, you can't drive during certain hours. It
21 might be a requirement that you take drug testing.
22 I can't think of all of the options here other than
23 that I do know from any number of proceedings that I
24 have be a party to representing clients who have bad
25 histories, attempting to obtain relief from

1 sanctions, that conditions are very appropriate.

2 I do acknowledge that in most cases the
3 individual board or agency that would then be
4 applying a disqualification might be best served to
5 do this, but I do think it would also be worthwhile
6 to give the parole board or the state agency up
7 front in appropriate cases the power to also impose
8 conditions, limitations, and restrictions.

9 CHAIRPERSON AUERBACH: Chair, please.

10 COMMISSIONER RICHARD T. CASSIDY

11 (Vermont): Commissioner, I think the committee is
12 willing to accede to your request if we understand
13 it not to permit one thing, and that is not to
14 permit the imposition of some brand new collateral
15 sanction.

16 If we're talking about -- for example,
17 you used, and I didn't hear all of what you said
18 because I was trying to poll the committee -- but
19 you used the commercial driver's license as an
20 example. So if what you wanted to say was, yes,
21 this person can be eligible for consideration of her
22 commercial driver's license but it can only be used
23 in connection with work during the daytime -- I
24 don't know if that is a sensible example, but it
25 comes to mind -- I think that would be acceptable to

1 the committee. If what you mean is something that
2 is not directly related to driving could be added, I
3 think there would be some unwillingness to accede.

4 CHAIRPERSON AUERBACH: Commissioner
5 Pepe, is that acceptable?

6 COMMISSIONER PEPE: Yes.

7 COMMISSIONER H. LANE KNEEDLER, III
8 (Virginia): Mr. Chairman. I am probably outvoted,
9 but I would not agree to that. It seems to me the
10 commercial driver's license one, I would have no
11 problem if you wanted to put the conditions language
12 in when the licensing board is making those kind of
13 decisions, but why should the parole board, who has
14 no experience in this, be establishing conditions on
15 the driver's license?

16 It seems me the board that issues the
17 driver's license -- I can't remember your other hypo
18 right now -- and it gets to the Commissioner from
19 Alaska's point about, can you kind of divide up the
20 disqualification, give you some and not the other.

21 I think the answer to that is "yes."
22 This is a way to make it clear, but it ought to be
23 the licensing board, not the parole board, that does
24 that.

25 COMMISSIONER PEPE: Well, like I said

1 before, I can't think of all the --

2 CHAIRPERSON AUERBACH: Let me cut
3 through this. Notwithstanding the minority
4 position, with apologies, the committee will accept
5 and we're done with that.

6 Microphone 3.

7 COMMISSIONER LYLE W. HILLYARD (Utah):
8 Three very quick, easy things.

9 Page 20, Line 32 through 33, you have
10 again some other substantial reason. We talked
11 about putting something in the comments.

12 Secondly, on Page 21, Lines 10 and 11,
13 it says "has not violated the terms of any criminal
14 sentence." We have an issue involving criminal
15 sentences, including restitution. I would like to
16 add either probably in brackets "or restitution."
17 You can be on criminal sanctions and then complete
18 probation and be released still owing restitution in
19 Utah, and if you don't pay your restitution, that is
20 an issue. So I think that needs to be clarified.

21 The final thing is on Page 22, Line 16.
22 It says, "has a recent record of consistent
23 employment." I think in the comments you need to
24 mention -- does that mean that if I get a job
25 yesterday that's going to be looking like a

1 permanent job, that is a recent record of consistent
2 employment, where if I have worked for the last
3 three months one morning a week, is that a record of
4 consistent employment? You may want to try to
5 clarify that.

6 The more important issue I have, though,
7 and I want to follow up on what Commissioner
8 Huelsman said, is on paragraph (b) it seems to me,
9 on Line 31, Page 20, there are two burdens of proof.
10 It says that unless the board finds that granting
11 this would pose a substantial risk. It would appear
12 to me that the burden would be then on either the
13 victim or anyone opposing it to show. Because
14 certainly the person applying for the relief would
15 not want to impose that. It seems the burden is on
16 the victim to prove that.

17 Then when you drop down to Line 36, it
18 says if the board finds that the individual. There,
19 the person seeking the relief has the burden of
20 preponderance of the evidence. I think both burdens
21 should be on the person seeking the relief. It
22 seems to me the way you have written it, the burden
23 would be on somebody opposing to come in and show
24 there's a substantial risk of safety or these other
25 reasons, and then it switches back to the person

1 applying to show that he has met or she has met the
2 preponderance of evidence on the issues that you
3 have listed there, 1, 2, 3.

4 I think the burden of proof should be on
5 the person seeking and not the victim. I think that
6 Commissioner Huelsman raised that issue before,
7 about how high that burden is.

8 COMMISSIONER RICHARD T. CASSIDY
9 (Vermont): Commissioner, your comment, request
10 doesn't present any problems.

11 With respect to the restitution issue,
12 we want to be clear that the subsection you point
13 out does include the idea of restitution but it does
14 talk about failure to comply that is justified,
15 involuntary or insubstantial. Because if the
16 restitution requirement is huge, it may be simply
17 impossible.

18 COMMISSIONER HILLYARD: I think you
19 cover that with involuntary. I think compliance is
20 involuntary. If you have a restitution order of
21 five million dollars and you make \$20 an hour,
22 you're not going to be able to pay that. I think
23 the court can look at it. But I think restitution,
24 I know for enactability, restitution is going to
25 have to be there.

1 COMMISSIONER CASSIDY: I think the idea
2 is there, Commissioner.

3 With respect to the burden of proof,
4 this goes back to Commissioner Carey's remarks
5 earlier about not putting the applicant in a
6 position of proving the negative. So, yes, the
7 burden on most of these issues is on the
8 applicant -- that is, to show the time period, that
9 they have been employed, that they have been
10 employed consistently. But with respect to the idea
11 that there is some other substantial reason that
12 warrants denial of the petition or that there is
13 some public safety issue that has not been
14 identified, somebody else has got to come forward
15 with that.

16 COMMISSIONER HILLYARD: I think you're
17 going to have some difficulties with enactability
18 with the victims so strong, where the victim rights
19 groups are right now.

20 CHAIRPERSON AUERBACH: Commissioner
21 Ring, Microphone 6.

22 COMMISSIONER CARLYLE C. RING, JR.
23 (Virginia): The predicate of my comment and request
24 of consideration from the committee is based on the
25 proposition that an agency that is wishing to

1 continue with disqualification really has a higher
2 standard and it imposes a substantial investigative
3 and hearing obligation upon the decisionmaker in
4 subsection (e).

5 I note too as a predicate of my inquiry
6 that in subsection (c), the designated board or
7 agency is to include in the text of the certificate
8 a list of the particular collateral sanctions from
9 which relief has been granted.

10 I will get to my inquiry. In subsection
11 (a) there is no requirement of the individual who is
12 the petitioner to give notice to those that may be
13 affected by the relief that he is requesting. I
14 would inquire of the committee whether they are open
15 to the suggestion that the individual who may
16 petition for a certificate do so with notice to the
17 particular agencies who may be affected by the
18 relief that he requests, he or she requests.

19 COMMISSIONER RICHARD T. CASSIDY
20 (Vermont): Commissioner, the reason we did not do
21 that is because it is a two-step process and the
22 agency gets its own bite at the apple. That was
23 discussed and considered and the decision was not to
24 move in that direction because you, in effect, have
25 two contests, or you put the agency in a position of

1 coming in contesting the right to the certificate on
2 one hand and then making a decision later on about
3 whether to impose a disqualification. It just
4 doesn't seem like good policy to me.

5 COMMISSIONER RING: Well, obviously, as
6 a matter of policy, I have a little different view
7 of that.

8 In Section 9, the agency that is
9 affected has discretion to continue or maintain or
10 impose the sanction, the collateral sanction.

11 In this section, that right is severely
12 limited for the right of the agency to continue.
13 Therefore it seems to me in 10 it is appropriate
14 that there be notice.

15 COMMISSIONER CASSIDY: Pardon me,
16 Commissioner. One other point that you should take
17 into account is that under Section 12 the prosecutor
18 has the right to notice of such a petition.

19 COMMISSIONER RING: It doesn't help me
20 on the housing authority board or any other school
21 board or whatever agency may be affected. I would
22 like to make a motion that subsection (a) be amended
23 so that on Line 30 on Page 20, it says with notice
24 to the appropriate agency that may be affected by
25 the relief requested.

1 COMMISSIONER H. LANE KNEEDLER, III
2 (Virginia): Mr. Chairman. Commissioner Ring, if
3 you are going to do that, could you do it in 12?
4 That contains all the procedures. 12(a) contains
5 the notice but it has to be given by the board that
6 one of these has been filed. If we're going to do
7 it, it probably more properly belongs there.

8 COMMISSIONER RING: I am perfectly
9 willing to make that motion when we get to Section
10 12.

11 CHAIRPERSON AUERBACH: Thank you,
12 Commissioner Ring.

13 The commissioner at Microphone No. 6,
14 from Indiana.

15 COMMISSIONER JAMES BOPP, JR. (Indiana):
16 Thank you. I have a question about the scope and
17 workability of the system that you have set up in
18 10, and the questions are going to be directed at
19 whether there is truly a second bite at the apple
20 that would be available for sanctions that have been
21 relieved through Section 10 and that second bite
22 being, I gather, in subsection (e), right?

23 I understand the scope of this Section
24 10 to include voting rights, for instance. Is that
25 correct?

1 COMMISSIONER RICHARD T. CASSIDY

2 (Vermont): Yes.

3 COMMISSIONER BOPP: If voting rights are
4 restored, what agency -- you wouldn't have to go to
5 an agency. You would just show up at the polls. I
6 don't know what you would do. What is the second
7 bite of the apple there?

8 COMMISSIONER CASSIDY: In that situation
9 you have to file in most states an application to be
10 added to the check list, to become a voter. In my
11 jurisdiction, for example, the Board of Civil
12 Authority acts upon those applications.

13 COMMISSIONER BOPP: So the board of
14 registration in a state, in our county, then if they
15 wanted to deny voting rights would have to go
16 through the requirements of subsection (e) and at
17 that point only, as I understand it, the least
18 principled consideration is safety and welfare of
19 the public, which, of course, could never been met
20 in terms of allowing someone to vote.

21 So that would be how that would work.

22 COMMISSIONER CASSIDY: I should think it
23 would be a very unusual case in which there would be
24 a public safety or welfare issue associated with
25 voting rights.

1 COMMISSIONER BOPP: Secondly, it would
2 also be, as I understand it, laws like Ohio's, which
3 says that any public official is forever
4 disqualified from holding public office if convicted
5 of soliciting or receiving improper compensation.

6 Now, that could be relieved under
7 Section 10, as I understand it. So my question then
8 is, what would be the second bite of the apple?
9 Would that be when he files his candidacy, we would
10 have the election board conduct a, potentially, a
11 subsection (e) proceeding?

12 COMMISSIONER CASSIDY: There are two
13 comments I would make about that, Commissioner.
14 First of all, a parole board or other agency has the
15 initial cut at this and might very well say "no."

16 Secondly, under Section 11, subsection
17 (4), many of these ineligibility provisions in most
18 states are constitutional provisions and would be
19 exempted.

20 COMMISSIONER BOPP: The Ohio law also
21 provides that if a person is previously convicted of
22 a specified sexual offense and commits another
23 within the same group of sexual offenses, the court
24 must impose a mandatory life without the possibility
25 of parole sentence upon the offender.

1 So that could be relieved.

2 COMMISSIONER CASSIDY: No. That is a
3 direct sanction. That is not within the scope of
4 the act.

5 COMMISSIONER BOPP: Okay. So that could
6 not be relieved. Thank you for that.

7 Also, Ohio law requires that the
8 executive director or employee of any school or
9 child care facility shall notify law enforcement of
10 any person adjudicated a habitual sex offender or
11 sexual predator around the school and law
12 enforcement may take any necessary steps to control
13 the situation.

14 I gather that that would be relieved.

15 COMMISSIONER CASSIDY: That depends upon
16 the shape of the Section 11 exception in your
17 particular jurisdiction.

18 COMMISSIONER BOPP: I understand that
19 everything can be excepted under Section 11. I am
20 just assuming that that has not --

21 COMMISSIONER CASSIDY: Section 11(1) is
22 aimed at sex offenders.

23 COMMISSIONER BOPP: Well, sir, but that
24 only applies to Megan's Law, as has been proposed.

25 COMMISSIONER CASSIDY: It's in brackets,

1 Commissioner. The state can fill in what it wishes.

2 COMMISSIONER BOPP: So, we are just back
3 to what I said. I said I understand that any and
4 all exceptions can be placed in subsection (11). I
5 am just assuming they're not and I am just wondering
6 how these things would be administered, that is all.

7 COMMISSIONER H. LANE KNEEDLER, III
8 (Virginia): Mr. Chairman. I think the answer would
9 be, yes, it could be relieved if -- "if" now -- the
10 parole board first decided that the person did not
11 -- I'm trying to find the -- that there wasn't an
12 unreasonable risk to public safety and went through
13 that analysis and said, okay, now, board, you can
14 decide, and they decided there was not an
15 unreasonable risk to the safety or welfare of the
16 public or any individual.

17 Frankly, in the one you posited, I can't
18 imagine that whatever was at stake would be
19 restored. But if they made that decision, the
20 answer is "yes."

21 COMMISSIONER BOPP: I am not going
22 repeat the fact that I do not believe that the
23 initial relief of the sanction really provides a
24 significant defense against these sanctions being
25 relieved. I think we have the same problems in 10

1 as you have in 9.

2 COMMISSIONER KNEEDLER: We just
3 disagree.

4 COMMISSIONER BOPP: Yes. I understand
5 we do. I am just assuming that it's occurred and
6 then what happens next, okay?

7 Now there is also a provision of Ohio
8 law that says that a person who has been convicted
9 of a felony that is an offense of violence who is
10 injured as a consequence of that crime cannot
11 collect any relief against the victim. In other
12 words, even if the victim, I guess might have been
13 negligent in injuring the assailant in the
14 commission of a crime against the victim, that he is
15 barred from relief. And that would be relieved, I
16 gather, by Section 10.

17 COMMISSIONER RICHARD T. CASSIDY
18 (Vermont): Section 3, limitations on scope, would
19 prevent that from occurring.

20 COMMISSIONER BOPP: Okay. Thank you
21 very much.

22 CHAIRPERSON AUERBACH: Thank you. Let's
23 go over to Microphone No. 1.

24 COMMISSIONER JOANNE B. HUELSMAN
25 (Wisconsin): I am going to make a motion the

1 purpose of which is to try to lessen the opposition
2 of victims groups to this bill when it's introduced
3 in the legislature, and that deals with the concern
4 about the burden of proof on the substantial risk to
5 the safety or welfare of the public.

6 The motion is, Section 10, Page 20, Line
7 32, delete the word "substantial." And also Section
8 9, Page 17, Line 20, delete word the "substantial."

9 CHAIRPERSON AUERBACH: Would you bring
10 that up. Write it out or bring it up, whatever form
11 you want. I don't want to mess it up for you.

12 Let me repeat what was said. Turn to
13 Page 17, Line 20, delete the word "substantial." On
14 Page 20, Line 32, delete the word "substantial."

15 Speak on your motion.

16 COMMISSIONER HUELSMAN: Thank you. Some
17 of the victims groups are very concerned about
18 having to prove that there would be a substantial
19 risk to themselves or to others who were in a
20 similar situation. If they only have to prove a
21 risk rather than a substantial risk, I believe that
22 lessens the burden of proof that they would be
23 required to meet.

24 CHAIRPERSON AUERBACH: Peter.

25 COMMISSIONER PETER F. LANGROCK

1 (Vermont): The problem with that is, do we talk
2 about any risk, one in a thousand, one in a million?
3 It seems to me that you need some word in there --
4 that it has to be substantial. That is real risk
5 and not an imagined one, because you could always
6 come up with some possibility.

7 CHAIRPERSON AUERBACH: I will ask the
8 chair if he would like to comment on behalf of the
9 committee.

10 COMMISSIONER RICHARD T. CASSIDY
11 (Vermont): The point is really the same as
12 Commissioner Langrock's. Without the word
13 "substantial" or some other qualifier, deleting this
14 and saying if there is any risk would essentially
15 make these certificates inaccessible.

16 CHAIRPERSON AUERBACH: Commissioner
17 Kneedler.

18 COMMISSIONER H. LANE KNEEDLER, III
19 (Virginia): Would you be willing to accept
20 "unreasonable" rather than "substantial"? I agree
21 that the "any risk" is not workable.

22 COMMISSIONER JOANNE B. HUELSMAN
23 (Wisconsin): Is "unreasonable" a lower burden of
24 proof?

25 COMMISSIONER KNEEDLER: Yes.

1 COMMISSIONER HUELSMAN: I would accept
2 "unreasonable."

3 CHAIRPERSON AUERBACH: The committee has
4 accepted it. That takes care of your motion. You
5 achieved that purpose. Very good.

6 Microphone 2.

7 COMMISSIONER STEVEN L. WILLBORN
8 (Nebraska): I am prepared with a motion now on the
9 issue I raised earlier. The motion is intended to
10 do two things. One, it's intended to incorporate
11 explicitly into the act the assurances that the
12 committee has given that the underlying facts of a
13 conviction could be considered in thinking about a
14 disqualification. And, two, it's intended to expand
15 the scope of the factors that can be considered.

16 So, on Lines 9 and 10, Page 22, and I am
17 going to start up a little further. Basically this
18 begins by saying "decisionmaker may not impose a
19 disqualification on an individual who has received a
20 certificate covering the opportunity at issue unless
21 the decisionmaker determines" -- and my amendment
22 would delete the rest of that sentence and
23 substitute "unless the decisionmaker determines
24 explicitly that the underlying facts of the
25 conviction are relevant and detrimental to the

1 opportunity at issue."

2 CHAIRPERSON AUERBACH: Could you bring
3 that up. Thank you.

4 Madam President, the Committee of the
5 Whole reports that it has had under consideration
6 this interesting act, has considered it. That isn't
7 it. We beg leave to sit again and probably will do
8 so quite shortly. Thank you.

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1 THIRTEENTH SESSION

2 UNIFORM ACT ON COLLATERAL

3 CONSEQUENCES OF CONVICTION ACT

4 THURSDAY MORNING, JULY 24, 2008

5 Boris Auerbach of Ohio, presiding.

6 CHAIRPERSON AUERBACH: Good afternoon.

7 Back again. Things have changed since the last time
8 we came before you, and at this point we are going
9 over for a next year. What we are trying to do and
10 will do during this lunch period is finish reading
11 the act and get comments from the floor. I don't
12 think we are going to be looking for much in the way
13 of motions, since we're not going final and since we
14 want to move along.

15 Just before we adjourned, and it felt a
16 long time ago, we had a motion from a commissioner
17 -- I am going to apologize because I don't remember
18 exactly whose it was -- on Article 10 that was
19 handed up. I would ask the commissioner if he would
20 withdraw the motion at this time. The committee
21 will consider that substance in its deliberations
22 during the next year.

23 Is that acceptable?

24 COMMISSIONER STEVEN L. WILLBORN

25 (Nebraska): Yes. Could I just make a comment on

1 the motion?

2 CHAIRPERSON AUERBACH: Surely.

3 COMMISSIONER WILLBORN: Because I have
4 had a bit of time to think about it now and I have
5 been able to sharpen my own thoughts about it.

6 Really what I am talking about in this
7 subsection (e), Page 22, are competitive situations,
8 not noncompetitive ones. So I'm not talking about
9 licensure, things like that, or applications for
10 guns or anything like that, but competitive ones. I
11 used the law school example.

12 Competitive situations would be common
13 as well. Any job situation, for example, would be a
14 competitive situation. To give you an example of a
15 situation, two people apply for this job, one has a
16 conviction for a relatively serious felony and has
17 one of these certificates with him, another person
18 has a conviction for very minor offense, minor in
19 possession or something like that, and doesn't have
20 this kind of certificate in front of him.

21 As I read this section, this requires me
22 to put the person with the serious conviction ahead
23 in the queue of the person with the minor
24 conviction.

25 I think that is sort of perverse,

1 because the people who would be motivated to get
2 these certificates will be the people with the more
3 serious conviction, so disproportionately we would
4 be putting people with serious convictions above
5 people with less serious convictions.

6 It is also a little bit ironic because
7 it would increase the collateral consequences for
8 people with minor convictions, because now ahead of
9 them are not only people without any convictions at
10 all but people disproportionately with more serious
11 convictions.

12 I would ask you to consider that
13 situation in thinking about this section.

14 CHAIRPERSON AUERBACH: Okay. Let me
15 just cut in here, if I may. Only at this point of
16 the week would this happen. The motion that was
17 made as we were concluding our deliberations was not
18 yours.

19 COMMISSIONER WILLBORN: It was my
20 motion, yes.

21 CHAIRPERSON AUERBACH: Well, I hate to
22 argue with you. It dealt with exclusively providing
23 that the underlying facts of the conviction are
24 relevant and detrimental to the opportunity at
25 issue. Was that your motion?

1 COMMISSIONER WILLBORN: That was it, and
2 it trying to deal with this situation, not very
3 artfully.

4 CHAIRPERSON AUERBACH: Okay. I think
5 what I am saying is that the committee will consider
6 it. I think there is high degree of understanding
7 of what is involved.

8 COMMISSIONER WILLBORN: Thank you.

9 CHAIRPERSON AUERBACH: Thank you.

10 THE STENOGRAPHER: Commissioner
11 Auerbach, this is the court reporter. Before we get
12 too far along, if we might have the individual
13 members of your committee reintroduce themselves.

14 CHAIRPERSON AUERBACH: The chair
15 apologizes for having skipped over that important
16 thing, and I will ask the chair of the committee to
17 reintroduce the surviving members of the committee.

18 [Laughter]

19 COMMISSIONER RICHARD T. CASSIDY
20 (Vermont): I'm Richard Cassidy. I want to make
21 clear that so far as we know, all the rest of the
22 members of the committee are surviving, but some of
23 them are no longer here.

24 Let me just identify the members of the
25 committee who are still present. They are:

1 Margaret Love, our ABA advisor.

2 Lane Kneedler, a member of the
3 committee.

4 Jack Davies, our Division Vice Chair.

5 Marian Opala, a member of the committee.

6 John Cary, a member of the committee.

7 Michele Timmons, a member of the
8 committee.

9 Jessica French, a member of the
10 committee.

11 Brian Flowers, a member of the
12 committee.

13 Jack Chin, our reporter.

14 And the parliamentarian, Dennis Cooper,
15 is also our Style liaison.

16 CHAIRPERSON AUERBACH: Good. Thank you
17 very much. At this point I would ask for any
18 additional comments on Section 10.

19 The commissioner at Microphone 3.

20 COMMISSIONER TERRY L. THURBON (Alaska):
21 On Page 22, about Lines 8 through 10, and this is in
22 the context of disqualifications, whether or not
23 they can impose a disqualification. We have the
24 standard being that they cannot impose a
25 disqualification unless the decisionmaker determines

1 that granting the opportunity poses an unreasonable
2 risk to the safety or welfare.

3 I am just wondering what the committee's
4 view is on whether welfare encompasses risks such as
5 to property. I am mindful of the fact that in our
6 state we have some boards and commissions that would
7 be charged with making this decision who may have
8 safety and welfare issues and also protection of
9 property issues such our combined boards that
10 regulate architects and engineers and land
11 surveyors. An engineer could sure mess up your
12 safety if they engineered the building wrong, but a
13 land surveyor really can't do anything except hurt
14 your property.

15 So, what is your concept of what is
16 within the scope of welfare.

17 COMMISSIONER RICHARD T. CASSIDY
18 (Vermont): Commissioner, you and I talked a bit off
19 the floor about this and we went readily to an
20 example that we're both familiar with, and that is
21 the example of nursing licensing. I think the
22 example that we used, the nurse or licensed nurse
23 assistant who has a history of theft is a good
24 example of an instance in which welfare, not
25 necessarily personal safety, but people's interest

1 in their property being protected is a relevant
2 consideration.

3 COMMISSIONER THURBON: Could I suggest
4 that there be a comment that describes that, because
5 I know certainly in my state they would not look at,
6 at least most of the boards and commissions would
7 not look at safety and welfare as including property
8 necessarily.

9 COMMISSIONER CASSIDY: I think that
10 makes sense.

11 CHAIRPERSON AUERBACH: The committee
12 understands that. Any other comments on Section 10?
13 We will now proceed with the reading of Section 11.
14 Commissioner Timmons will read that.

15 COMMISSIONER MICHELE L. TIMMONS
16 (Minnesota): "SECTION 11. SANCTIONS NOT SUBJECT TO
17 ORDER OF RELIEF FROM COLLATERAL SANCTIONS OR
18 CERTIFICATE OF RESTORATION OF RIGHTS. An order of
19 relief from collateral sanctions or certificate of
20 restoration of rights may not be issued to relieve
21 the following sanctions:

22 "(1) requirements imposed by [insert
23 citation to state's 'Megan's Law' enacted pursuant
24 to 42 U.S.C. §14071 or its associated regulations];

25 "(2) a motor vehicle license suspension,

1 revocation, limitation, or ineligibility pursuant to
2 [insert citation to state DWI laws], or a motor
3 vehicle license suspension, revocation, limitation,
4 or ineligibility pursuant to [insert citation to
5 provision providing for license suspension for
6 traffic offenses], for which restoration or relief
7 is available pursuant to [insert citation to
8 occupational/temporary/restricted licensing
9 provisions] [;or]

10 "(3) ineligibility for employment with
11 a law enforcement agency [as defined in [insert
12 reference to other law defining law enforcement
13 agencies] [including the attorney general,
14 prosecutors' offices, police departments, sheriffs'
15 departments, the [state police,] and the department
16 of corrections.] [or

17 "(4) ineligibility pursuant to [insert
18 references to constitutional provisions removing or
19 suspending officeholders based on criminal charge or
20 conviction].

21 CHAIRPERSON AUERBACH: Any comments on
22 this section? Commissioner at Microphone 2.

23 COMMISSIONER STEVEN L. WILLBORN
24 (Nebraska): One other category that might make
25 sense would be those that involve fiduciary duties,

1 I'm thinking of pension funds, board members or
2 something like that, in appropriate circumstances.
3 So I would ask you to consider that as an additional
4 category.

5 CHAIRPERSON AUERBACH: Any comments from
6 the chair?

7 COMMISSIONER RICHARD T. CASSIDY
8 (Vermont): It is certainly possible for the
9 committee to consider that. I would suggest to you,
10 Commissioner, that there is almost an endless list
11 of everybody's particular concern that they think is
12 of particular importance. It becomes very difficult
13 to figure out exactly where to draw the line.

14 CHAIRPERSON AUERBACH: Thank you. The
15 commissioner at Microphone 3.

16 COMMISSIONER TERRY L. THURBON (Alaska):
17 Well, that is a good segue to the point I wanted to
18 raise. There was some discussion last time we had
19 this that suggested that at least some members of
20 the body are under the impression that Section 11
21 gives states a lot of latitude to make exceptions.
22 We have had some debate about whether the Section 1
23 provision with the brackets as defined there would
24 be broad enough to allow to state to add additional
25 sex offenses.

1 I look at (4) and see that office
2 holders may not be the only additional category
3 beyond the sex offense, motor vehicle, and law
4 enforcement exceptions. I am wondering whether the
5 committee would entertain the idea of adding sort of
6 a catch-all bracketed provision, and I have language
7 that I will provide in a second, but the idea being
8 that even if this goes forward as a model act but
9 especially if it goes forward as a uniform act, the
10 states are going to need in order to enact it, in my
11 opinion, they are going to need the flexibility to
12 add more than just these four categories.

13 What I would propose is at Page 25, Line
14 21, to add a subparagraph (5) that essentially says
15 something to the effect, ineligibility pursuant to,
16 bracket, references to other specific provisions of
17 law that give rise to collateral sanctions the
18 enacting state wishes to exclude.

19 I will bring that up.

20 CHAIRPERSON AUERBACH: That is a
21 suggestion to the committee, which the committee
22 will consider. I will point out the obvious, that a
23 state can do whatever it wants, although we don't
24 always like it.

25 COMMISSIONER H. LANE KNEEDLER, III

1 (Virginia): Mr. Chairman. I've got to say, in
2 fairness to the person proposing that, that we have
3 had a long debate about what issues, if any, ought
4 to be in Section 11, and it goes all the way from
5 none to everybody has their favorite that should be
6 added.

7 I think I will say personally, I would
8 be opposed to adding a catch-all phrase like that,
9 but recognizing at the same time when this act,
10 either model or uniform, gets to the states, there
11 will be an inevitable push to add to this list.

12 Our effort, however, is not to invite
13 states to do that. If they do it, they do it.

14 CHAIRPERSON AUERBACH: Thank you. The
15 commissioner at Microphone 3.

16 COMMISSIONER LYLE W. HILLYARD (Utah):
17 My suggestion is along the same lines, a little bit
18 different. One of the real strengths I found in
19 trying to keep the act together is the fact that
20 it's uniform. And so as proposed amendments come, I
21 resist those as strongly as I can, but sometimes you
22 end up, you just have to make some adjustments to
23 get it passed.

24 I generally call Chicago and say, these
25 are the proposed amendments. Do I lose my

1 uniformity with those amendments? Generally the
2 comment back is, no, they're minor enough, they
3 don't really impact it.

4 I think the committee needs to give your
5 drafting chairman at least some direction on this
6 because I am sure you're going to hear a lot of
7 different proposals. I know as the proposals come
8 and as I try to resist them if this bill is
9 introduced in Utah, either a model or uniform act,
10 the question is going to come if we add others to
11 it, what is the impact going to be on uniformity?
12 And it's something the committee can live with or
13 you can't. I think you've issued there very
14 correctly.

15 The other issue that I know I'm going to
16 get in this is there may be conviction of someone,
17 for example, a sex offense in another state, that
18 somehow can get that reduced, or when our laws are
19 so tough and they register now in Utah and they have
20 to register whether we're going to recognize that as
21 part of these things that you cannot get a relief
22 from sanctions.

23 So, not only the state of Utah I am sure
24 we're going to have the question, I am going to have
25 the question presented -- if they get the relief of

1 the collateral sanctions in the state where they
2 were convicted and their state's penalties and
3 sanctions are different than ours and people then
4 want to put them on the list, how do I address that?

5 So don't come with a list of what it's
6 going to be, because I don't know and I think many
7 legislators don't know, but I think Mr. Cassidy
8 needs to be prepared when these calls start coming
9 that he at least has some feel to speak for the
10 committee because, quite frankly, again, I find the
11 greatest strength to avoiding amendments is simply
12 say, this is uniform, we're trying to have the same
13 in every state, and as soon as you tinker with it,
14 we lose, really, one of the goals we want,
15 uniformity.

16 CHAIRPERSON AUERBACH: Thank you,
17 Commissioner. Microphone No. 6.

18 COMMISSIONER JOHN L. KELLAM (Indiana):
19 Looking at Section 11, subsection (2) brought up the
20 thought that there are certain collateral
21 consequences attached under federal law to state
22 convictions, and particularly here in the area of
23 commercial driver's license.

24 Do we need to think about making mention
25 of those collateral consequences that exist under

1 federal law?

2 CHAIRPERSON AUERBACH: Chair.

3 COMMISSIONER RICHARD T. CASSIDY

4 (Vermont): Commissioner, I think the feeling has
5 been that those are beyond the power of state law to
6 effect and that therefore there is no reason to
7 mention them.

8 COMMISSIONER KELLAM: Okay.

9 CHAIRPERSON AUERBACH: Thank you.
10 Commissioner at Microphone 2.

11 COMMISSIONER STEVEN L. WILLBORN

12 (Nebraska): Another thought came to mind with
13 respect to pension funds that might apply to other
14 areas as well. There is often a specific provision
15 in the pension statutes that prohibit people who
16 have been convicted of embezzlement or similar kinds
17 of offenses from serving in an executive or
18 fiduciary role. Do you have a view on how this
19 would interrelate with that?

20 CHAIRPERSON AUERBACH: Chair.

21 COMMISSIONER CASSIDY: Commissioner, I
22 think it depends upon exactly what sort of
23 collateral sanction statute you're talking about. I
24 am familiar with some federal statutes that I think
25 wouldn't be affected by this.

1 With respect to state statutes that
2 might have this sort of provision or federal
3 statutes -- and I don't know if there are any in
4 exactly the context that you mention, but I can
5 think of one that applies in the insurance context
6 which is dependent upon state law.

7 Then the idea, at least at present, is
8 that they would be subject to this scheme and that
9 there would be an opportunity for those folks to get
10 relief from them if, A, the parole board type agency
11 says "yes," and, B, the licensing board looks at the
12 relationship between the crime and what it is the
13 person wants to do and all the other relevant
14 considerations and says, yes, we will take a chance
15 on you.

16 COMMISSIONER H. LANE KNEEDLER, III
17 (Virginia): Mr. Chairman.

18 CHAIRPERSON AUERBACH: Commissioner
19 Kneedler.

20 I want to remind Commissioner Willborn
21 and the floor of two things. One, there is no way
22 to avoid the fact that 11 is a way for collateral
23 sanctions to come back in through the back door.
24 So, again, everybody's favorite is a possibility for
25 the list.

1 More importantly, remember that this
2 does not mean that the underlying facts of whatever
3 it was, like in the fiduciary one, even though it's
4 not on this list, they're not relieved from that.
5 All this act does, unlike some earlier version,
6 doesn't do away with collateral sanctions or
7 disqualifications. It simply says, when something
8 essentially that is a collateral sanction gets
9 converted to a disqualification and something that
10 was a disqualification before remains a
11 disqualification.

12 So the individual board or agency or
13 educational institution can continue to consider the
14 facts underlying the conviction. It's just that the
15 conviction itself is not an automatic, used now,
16 disqualification, not in a technical sense.

17 COMMISSIONER WILLBORN: That is true
18 with disqualification as well as sanction?

19 COMMISSIONER KNEEDLER: Yes, because the
20 disqualification is by definition permission to look
21 at the underlying facts of the case.

22 CHAIRPERSON AUERBACH: Thank you.
23 Commissioner at Microphone 6.

24 COMMISSIONER JAMES BOPP, JR. (Indiana):
25 Thank you. How is the agency that you're referring

1 to to determine what the underlying facts are if
2 they cannot consider the conviction itself? In
3 other words, you have Indiana University considering
4 the employment of someone who has been convicted of
5 a crime that seems very logical to disqualify them,
6 like they want to work in the treasurer's office to
7 handle funds, been convicted of embezzlement in
8 Florida, and that would disqualify them. You cannot
9 consider the offense, the conviction itself, so what
10 is Indiana University to do?

11 CHAIRPERSON AUERBACH: I will ask the
12 chair to respond to that.

13 COMMISSIONER RICHARD T. CASSIDY
14 (Vermont): The idea, Commissioner Bopp, is that the
15 stigma of the conviction itself is removed but
16 nobody is going to deny that the events that
17 underlie the conviction occurred, and Section 10, in
18 sub (e), explicitly indicates that the decisionmaker
19 may conduct any investigation it considers necessary
20 and may require the individual applying for an
21 opportunity to furnish copies of records or other
22 relevant information.

23 What we intend to say is, you can't
24 disqualify this person because, for example, the
25 person has a conviction of burglary. You can

1 require the individual to tell you how it was that
2 they were convicted of burglary, what they did, and
3 to produce the court records that reflect that fact.
4 But you just wouldn't treat the convicted burglar
5 differently than you would treat the burglar who you
6 happen to know committed the same events.

7 COMMISSIONER BOPP: Does Section 10
8 allow you to require the applicant to explain what
9 their conduct was that resulted in the offense?
10 And, honestly, are we really supposed to believe
11 this? And shouldn't a prudent agency go beyond
12 simply the self-serving statements of an already
13 convicted felon for a crime of dishonesty, like
14 embezzlement? Should a prudent agency then have to
15 do more than that, like -- and that is where my
16 question is. Do they either ask the applicant or
17 contact the court in Florida and get a transcript of
18 the trial and read it and do what the jury did,
19 beyond a reasonable doubt -- that is, try to figure
20 out what actually happened here? I mean, how do you
21 examine the facts that underlie the conviction
22 without doing that?

23 COMMISSIONER CASSIDY: I think it would
24 be different in different cases. If I were the
25 agency head and I had been in that role in some

1 functions in my state, I think I would, first of
2 all, take a look at what we are talking about to
3 determine how closely I wanted to look, then make
4 some inquiry, probably of the individual, about what
5 sorts of records were in existence and make a
6 reasonable judgment about what sort of records to
7 require that the individual produce and make a
8 judgment about whether I am willing to take that
9 individual's word for the fact that these are the
10 records. And possibly you would contact the court
11 of conviction and say, is there a transcript? Send
12 it over to me, or send me at least the record of
13 conviction.

14 COMMISSIONER BOPP: My understanding is
15 that if this agency determines that they're not
16 going to hire, and the question focuses on the facts
17 underlying the conviction, then this is subject to
18 APA review. What I keep asking you for is not your
19 assurances that there is no problem, but what is the
20 legal standard that the agency is going to be
21 expected to meet under your statute to meet their
22 obligation of justifying their failure to hire based
23 on reviewing the underlying facts of the conviction?
24 What is the legal standard that the agency under
25 your statute must demonstrate in order to meet that

1 standard?

2 CHAIRPERSON AUERBACH: Chair.

3 COMMISSIONER CASSIDY: First I would
4 take issue with the proposition that the agency must
5 demonstrate anything. If there is an APA review of
6 an agency refusal to afford a benefit, the person
7 coming forward with that review would carry the
8 burden, at least in every state APA scheme that I am
9 familiar with. Once that burden is carried by the
10 applicant, we would be looking at the underlying
11 burdens in Section 10 or Section 9, as appropriate.
12 And in Section 9 the question is whether granting
13 the petition would pose a substantial risk to the
14 safety or welfare of the public or any individual or
15 that some other substantial reason warrants the
16 denial of the petition. On top of that, there are a
17 number of specific factors listed in subsection
18 (b)(1), (2), and (3) that the agency could rely
19 upon.

20 So I do not think the burden for the
21 agencies would be extraordinarily heavy.

22 CHAIRPERSON AUERBACH: Thank you.
23 Commissioner McKay at Microphone 2.

24 COMMISSIONER JAMES C. MCKAY, JR.
25 (District of Columbia): Wouldn't in every case the

1 agency have access to the indictment or criminal
2 information? It seems to me that if somebody is
3 convicted, looking at the charges would give you the
4 best picture of what the underlying conduct was.
5 Wouldn't that be enough, really?

6 COMMISSIONER CASSIDY: Commissioner, I
7 think it would depend upon the particular
8 circumstances. Sometimes the charges are not the
9 best record of what actually happened. In fact,
10 those who do criminal law tell me that the custom of
11 overcharging by prosecutors is not unusual because
12 they know they're going to get into a bargaining
13 situation. But in any event, there is a record from
14 that underlying proceeding, and nothing about the
15 statute would say that that record could not be
16 examined.

17 COMMISSIONER McKAY: But the charges,
18 the indictment would set forth the facts. The
19 charge is, maybe the defendant is convicted of a
20 lesser included charge. But I think the indictment
21 would set forth the facts. It would seem to me that
22 that would be an absolute requirement, that the
23 agency have access to the information or indictment.

24 CHAIRPERSON AUERBACH: Thank you,
25 Commissioner. I think there is language in 10 that

1 we will look at. We will go back to Microphone 6,
2 Indiana.

3 COMMISSIONER DONALD K. DENSBORN
4 (Indiana): Last reading, I believe, that on motion
5 to try to lessen, or try to increase the standard
6 from substantial to something else, the word
7 "unreasonable" was substituted for "substantial" on
8 the basis of a comment from the committee that that
9 was indeed a lower standard.

10 I think definitionally "substantial"
11 means large, but "unreasonable" includes a
12 definition as being absurd. So I just question if
13 we went in the right direction on that in response
14 to the question from the floor.

15 CHAIRPERSON AUERBACH: Chair.

16 COMMISSIONER RICHARD T. CASSIDY
17 (Vermont): As I recall the exchange, the person who
18 was the proponent of the motion, they wanted us to
19 delete any adjective at all and suggested
20 "unreasonable" as a substitute for "substantial."
21 The committee was willing to accept "unreasonable."
22 As I think about it, I think "unreasonable" is a
23 very sensible adjective to use. It is quite
24 reasonable.

25 COMMISSIONER DENSBORN: My recollection

1 is that the committee suggested "unreasonable" as
2 being a better standard to meet the comment. I
3 think maybe it's worse, to meet the comment anyway.

4 CHAIRPERSON AUERBACH: Commissioner
5 Kneedler.

6 COMMISSIONER H. LANE KNEEDLER, III
7 (Virginia): On the "unreasonable" point, we will
8 look at that. We don't want to increase the burden.

9 I want us to keep in mind, all we're
10 trying to do here, using Commissioner Bopp's example
11 of the burglary, we want the board to look and say,
12 wait a minute, this case wasn't breaking into a home
13 that was occupied by a family at night. He broke
14 into a vacation home when nobody was home in the
15 middle of the winter. Does that make any difference
16 to you?

17 Look at the facts. That is all we are
18 asking. My guess is that when one had burglary and
19 that is all you had to look at, a conviction for
20 burglary, one might get a very different view if it
21 was burglary of a home at nighttime versus burglary
22 of a vacation home in the daytime in the middle of
23 the winter with nobody around. That is all we are
24 asking, take a look at the facts of the case.

25 CHAIRPERSON AUERBACH: Thank you.

1 Continuing with the Indiana motif, Microphone 6.

2 COMMISSIONER JOHN J. STIEFF (Indiana):

3 While we are on that point, if you do stay with
4 "unreasonable," on Page 20, Line 33, I would suggest
5 changing "substantial reason" to "reasonable
6 factor." Otherwise it will read "an unreasonable
7 reason."

8 CHAIRPERSON AUERBACH: Okay. I see an
9 affirmative nod over here.

10 COMMISSIONER CASSIDY: We're willing to
11 look at that --

12 CHAIRPERSON AUERBACH: I think that is
13 true of almost everything, that we could look at it.
14 We've got time to do it now, thanks to what we
15 decided this week.

16 Any other comments on Section 11? If
17 not, I believe we are going to have the chairman of
18 the committee read us No. 12.

19 COMMISSIONER CASSIDY: "SECTION 12.
20 PROCEDURES APPLICABLE TO ISSUANCE, REVOCATION, AND
21 MODIFICATION OF ORDERS OF RELIEF FROM COLLATERAL
22 SANCTIONS AND CERTIFICATES OF RESTORATION OF RIGHTS;
23 VICTIMS' RIGHTS.

24 "(a) The [designated board or agency]
25 shall give notice of the filing of a petition for an

1 order of relief from collateral sanctions under
2 Section 9, or for a certificate of restoration of
3 rights under Section 10, to the office that
4 prosecuted the offense for which the order or
5 certificate is sought, and, if the conviction was
6 not obtained in this state, to [the Office of the
7 Attorney General of this state or an appropriate
8 prosecuting office in this state]. If a petition
9 for an order of relief from collateral sanctions is
10 filed with the sentencing court, such notice shall
11 be governed by the applicable rules of court. Any
12 prosecutor so notified, and any prosecuting agency
13 in this state, may participate in the process by
14 which the court or the [designated board or agency]
15 considers the petition.

16 "(b) The court or the [designated board
17 or agency] may order any test, report,
18 investigation, or disclosure by the individual it
19 believes necessary to its decision. Before issuing
20 a certificate of restoration of rights, the
21 [designated board or agency] shall order preparation
22 of a report of the type required before sentencing
23 an individual convicted of a felony. If there are
24 disputed issues of fact or law material to the
25 decision, the [designated board or agency] shall

1 give the individual and the prosecutor the
2 opportunity to submit evidence and argument on those
3 issues before decision.

4 "(c) The court or the [designated board
5 or agency] may grant any relief to which the
6 individual is entitled, even if the individual does
7 not request that relief in the petition for an order
8 or a certificate. The [designated board or agency]
9 may enlarge the relief granted under an order of
10 relief from collateral sanctions issued previously
11 by a court or by the [designated board or agency],
12 or under a certificate of restoration of rights
13 issued previously by the [designated board or
14 agency], if the individual petitions for enlargement
15 and satisfies the requirements for the additional
16 requested relief under the applicable provisions of
17 section 9(b) or Section 10(b).

18 "(d) The [designated board or agency]
19 may revoke an order for relief from collateral
20 sanctions issued under Section 9, or a certificate
21 of restoration of rights issued under Section 10, in
22 whole or in part, if it finds by a preponderance of
23 the evidence that just cause exists for revocation.
24 Subsequent conviction of the holder for a crime that
25 is or would be a felony in this jurisdiction

1 constitutes just cause. An order of revocation may
2 be entered:

3 "(1) sua sponte or by motion of a
4 prosecutor in this state;

5 "(2) after notice to the individual to
6 whom the order or certificate was issued and any
7 other prosecutor who has appeared in the matter; and

8 "(3) after a hearing pursuant to rules
9 adopted under the [insert reference to the state
10 administrative procedure act] if requested by the
11 individual or the prosecutor who made the motion or
12 any prosecutor that has appeared in the matter.

13 "(e) The [designated board or agency]
14 may adopt rules for application, determination,
15 modification, and revocation of orders for relief
16 from collateral sanctions under Section 9 and
17 certificates of restoration of rights under Section
18 10, in accordance with the provisions of [insert
19 reference to state administrative procedure [act]].
20 The [designated board or agency] is not bound by the
21 rules of evidence except those on privileges. The
22 [designated board or agency] shall maintain a public
23 record of the application, determination,
24 modification, and revocation of orders of relief
25 from collateral sanctions and certificates of

1 restoration of rights. The [state criminal justice
2 record agency] shall include issuance, modification,
3 and revocation of orders of relief from collateral
4 sanctions and certificates of restoration of rights
5 in its system of records.

6 "(f) A victim of the offense that led
7 to the collateral sanction for which the petitioner
8 is seeking relief has the right to receive notice of
9 and participate in proceedings for issuance,
10 modification, or revocation of an order for relief
11 from collateral sanctions or a certificate of
12 restoration of rights pursuant to [insert citation
13 to crime victim's act].

14 "(g) With respect to an individual to
15 whom an order of relief from collateral sanctions or
16 certificate of restoration of rights has been
17 issued, this [act] does not eliminate any legal
18 right or remedy, or give rise to a cause of action
19 other than a declaration that a policy imposing a
20 collateral sanction on an individual to whom such an
21 order or certificate has been issued is invalid or,
22 if an individual has shown that an opportunity was
23 denied in violation of this section, for an order
24 that the individual's application be reconsidered in
25 accordance with this section."

1 CHAIRPERSON AUERBACH: We will go to
2 Microphone 3.

3 COMMISSIONER TERRY L. THURBON (Alaska):
4 I have two questions on this section, both relating
5 to subsection (d). In the first sentence there we
6 have designated board or agency revoking an order of
7 relief. As I recall from Section 9, sometimes that
8 is the same agency that issued the order of relief,
9 or maybe the order of relief was issued by a court.

10 Was it the committee's intention that if
11 the judicial branch issues an order of relief, the
12 super board and the executive branch that we have
13 been talking about all along could go ahead and
14 revoke that?

15 CHAIRPERSON AUERBACH: Chair.

16 COMMISSIONER CASSIDY: Yes.

17 COMMISSIONER THURBON: Okay. Second
18 question relates to the just cause in Lines 11, 12,
19 and 13. It goes on, starting at Line 12, to say
20 "Subsequent conviction of the holder for a crime,"
21 et cetera, et cetera, "in this jurisdiction
22 constitutes just cause."

23 Is it your intent that that is the only
24 thing that would constitute just cause or did you
25 just intend to give an example?

1 CHAIRPERSON AUERBACH: Committee chair.

2 COMMISSIONER CASSIDY: No, it's not our
3 intention that it would be only just cause.

4 COMMISSIONER THURBON: Might I suggest
5 that to avoid people reading that as the definition
6 and only definition of just cause that that sentence
7 be limited to a comment, and if just cause is not
8 going to be defined, that we not have an example of
9 just cause in the text.

10 COMMISSIONER CASSIDY: Wouldn't you
11 think it would be better to leave the black letter
12 rule that a conviction would constitute just cause
13 in the statute and to have a comment to make clear
14 that there may be other just causes?

15 COMMISSIONER THURBON: Well, or even,
16 since the comments are not always picked up and
17 carried forward, it might even be better just to
18 tinker with that sentence to make it clear that this
19 is one example of just cause but not the only just
20 cause.

21 COMMISSIONER CASSIDY: We will take it
22 into account.

23 CHAIRPERSON AUERBACH: Microphone 6.

24 COMMISSIONER DONALD K. DENSBORN

25 (Indiana): I see that there is to be maintained a

1 public record of the application, determination,
2 modification, revocation of orders.

3 What about the entire transcript of the
4 proceedings? One of the concerns I have heard
5 raised over and over again is the burden it places
6 on the ultimate decision-maker to conduct an
7 investigation, and it looks like a substantial
8 investigation may be carried on at this level and
9 could be made available to the decision-maker.

10 CHAIRPERSON AUERBACH: Chair.

11 COMMISSIONER CASSIDY: I don't think the
12 committee would want to require that a transcript be
13 prepared in every case, because the cost of doing so
14 would be very significant. That is not to say that
15 if a transcript were made that it ought not be part
16 of the record.

17 COMMISSIONER DENSBORN: What about an
18 informal transcript, if you will, of documents or
19 other evidence that was submitted, whatever form it
20 might be in. Would that be available to the
21 decision-maker?

22 COMMISSIONER CASSIDY: My recollection,
23 and as I just read this statute, I didn't notice it,
24 but my recollection is that one of the things the
25 statute intends to do is to authorize the parole

1 board, for want of a better term, to adopt some
2 rules to regulate those kinds of details so each
3 state could find its own way to handle those
4 problems.

5 COMMISSIONER DENSBOURN: I know you'll be
6 looking for a lot of solutions, and I just think
7 maybe there could be something found in that to save
8 a duplicate investigation, if you will.

9 CHAIRPERSON AUERBACH: Thank you,
10 Commissioner. Microphone 1.

11 COMMISSIONER SUSAN KELLY NICHOLS (North
12 Carolina): Two thoughts, and I am not exactly sure
13 if Section 12 is the best place to raise it. But
14 one is, North Carolina has in its constitution a
15 provision that says if you're convicted of a felony,
16 you lose your right to vote and hold office unless
17 your citizenship or those rights are restored in the
18 manner prescribed by law.

19 I question whether once it's been
20 restored it could then be revoked by the
21 administrative agency absent conviction of a new
22 felony. I suspect other states have similar
23 provisions. So I would just look at that question
24 about the statutory authority to revoke it once it's
25 been restored.

1 And then the second thing is somewhat
2 related. I know this is all tied into adoption of
3 this act and Sections 9 and 10. But it might be
4 worth looking at how this statute as ultimately
5 drafted interacts with other state laws,
6 constitutional or statutory, that deal with this
7 issue that might not be supplanted by the adoption
8 of this.

9 CHAIRPERSON AUERBACH: Thank you.
10 Chair.

11 COMMISSIONER CASSIDY: We thank you for
12 your comments. Obviously I am not familiar with the
13 details of the way in which the North Carolina
14 constitution is set up, but certainly is something
15 we should think about.

16 CHAIRPERSON AUERBACH: Continuing with
17 Microphone No. 1.

18 COMMISSIONER JOANNE B. HUELSMAN
19 (Wisconsin): Thank you. My comments relate to
20 section (f) on Page 28. On Line 9 you say "insert
21 citation to crime victim's act." I am not sure if
22 every state has a crime victim's act. If not, you
23 might want to consider who is responsible for giving
24 notice to the victim.

25 CHAIRPERSON AUERBACH: Chair.

1 COMMISSIONER CASSIDY: The reporter
2 advises me that some 40 states have crime victim's
3 acts, but that doesn't mean that we don't need to
4 deal with your concern about the remaining states.

5 CHAIRPERSON AUERBACH: Something else
6 for the reporter to do. Microphone 2. McKay.

7 COMMISSIONER JAMES C. MCKAY, JR.
8 (District of Columbia): I suggest during the next
9 year you rethink the idea of a single unitary board
10 or commission. Instead I think it would be much
11 more acceptable to the states, if you had the board
12 or commission vary depending upon what right is
13 sought. For example, if you were a doctor and your
14 license to practice medicine was revoked, the
15 designated board or agency should be the board of
16 medicine. If you want to practice as a barber, it
17 ought to be the board of cosmetology. If you want
18 it housing, it ought to be the department of
19 housing.

20 I think if you did it that way, you
21 would find the states would be much more willing to
22 accept this. The problem with a unitary sort of
23 super board of agencies is two-fold. No. 1 is a
24 fiscal expense in creating a total new bureaucracy.
25 And the idea of parole is going out. There are not

1 very many parole boards any more. So you're not
2 going to be able to just say the board of paroles
3 does that.

4 I think you really should think about
5 the idea of a variable board or commission. I guess
6 you could put in governor and then the governor
7 could do this by executive order. But I think you
8 ought to really think of that as a way to gain a
9 little more confidence on the part of the states.

10 I just want to know what your reaction
11 to that idea is.

12 CHAIRPERSON AUERBACH: Commissioner
13 Davies.

14 COMMISSIONER JACK DAVIES (Minnesota):
15 The idea of this is really in the world of the
16 criminal law, and once this has been done, a
17 certificate of relief, restoration of rights, then
18 the role of the board of medical examiners comes
19 into play, is they make their individualized inquiry
20 about what the criminal law system has done, which
21 now frees them to look at and make the
22 individualized inquiry, justifies in this particular
23 instance the return of the license.

24 COMMISSIONER MCKAY: All right. But the
25 biggest problem you are going to have is with money.

1 Fiscal impact. You want to create a new agency.
2 That alone could kill the bill in half the states.
3 If you just use existing boards, commissions and
4 agencies and just say, relevant or pertinent board,
5 commission, or agency shall make the determination,
6 depending upon what rights are being sought. Then
7 you won't have the fiscal impact, and that is really
8 going to make a difference. I would like you to
9 think about that.

10 CHAIRPERSON AUERBACH: Do you want to
11 comment on that, Chair?

12 COMMISSIONER CASSIDY: Commissioner
13 McKay, we certainly will think about what you've
14 said, but let me suggest to you, though, that
15 virtually every state still does have a parole
16 board, although many of them, their responsibilities
17 have been greatly narrowed.

18 The other concern I have with what you
19 are suggesting comes from my own experience and the
20 experience of folks I know who served on one or
21 another boards, and that is that it is very natural
22 for the board to take a rather parochial view of its
23 own jurisdiction, and it's easy to say if you're the
24 chairman of the board of bar examiners, as I was for
25 11 years, we don't want any felons in our

1 profession. So by having a two-step process, what
2 you do is, you have this initial step where a
3 criminal justice oriented organization takes a look
4 at it and says, yes, this person is eligible for
5 reconsideration. And then the ordinary licensing
6 board or housing board or other governmental agency
7 that would have to make an individualized judgment
8 goes ahead and makes that judgment with a little
9 help from the criminal justice world saying this
10 person is worthy of your thinking. So, we will
11 certainly think about it, but I am not predisposed
12 to moving in the direction you mention. We do know
13 that there will be a fiscal issue with respect to
14 parole boards.

15 CHAIRPERSON AUERBACH: Thank you. We
16 will go to Microphone 3.

17 COMMISSIONER LYLE W. HILLYARD (Utah): I
18 am concerned a little bit with the first sentence in
19 paragraph (c), which is on Page 27, where it seems
20 to indicate that the court could grant relief beyond
21 what you have asked for. I am used to a practice
22 when I go before a court or a board, our petition or
23 application becomes the parameter of the issues
24 before the court, and the court will only go beyond
25 those issues if the attorneys all agree they can.

1 Usually if new issues come up, the court continues
2 the matter to give us a chance to prepare for that.

3 As I read that, may grant relief to
4 which the individual is entitled even if they
5 haven't asked for it gives me some concern that it
6 may give leeway to a court or a board even though
7 you may have agreed to the specific issues you're
8 working on, then suddenly have them say, well, we
9 don't care, we are going to something new that you
10 haven't had a chance to address. I am concerned
11 about how that is worded.

12 CHAIRPERSON AUERBACH: Comment.

13 COMMISSIONER CASSIDY: We will certainly
14 think about that, Commissioner. Let me just share
15 with you the countervailing thinking, which was that
16 most of these applications will be made to a parole
17 board and that that board will be thinking in terms
18 of what it is the person needs in order to be
19 successful. And if the ex-offender hasn't been wise
20 in terms of making the request that they have made
21 and they need something other than what they have
22 asked for, we want to give the board the authority
23 to be helpful in terms of making the re-entry to
24 society likely to succeed.

25 COMMISSIONER HILLYARD: I think there

1 are people who may be opposing it if suddenly they
2 were faced with a new issue they hadn't thought
3 about before. There may be some ramifications of
4 that decision that maybe should be brought to the
5 panel.

6 COMMISSIONER CASSIDY: How would you
7 feel about it if we had some sort of additional
8 notice provision so that if the scope of the process
9 opens up, the victim, for example, and the
10 prosecutors have some right to know that before it
11 happens.

12 COMMISSIONER HILLYARD: I would feel
13 more comfortable with that.

14 CHAIRPERSON AUERBACH: Commissioner
15 Miller at Microphone 5.

16 COMMISSIONER FRED H. MILLER (Oklahoma):
17 I hesitate to raise this because I don't practice
18 criminal law and, as a result, I am not sure that I
19 have any greater wisdom. And I realize it's a
20 policy question that is one of balance.

21 In sub (f), my assumption would be that
22 at the time the prosecution for the offense
23 occurred, the focus almost by definition under this
24 act did not really include a consideration of
25 possible collateral sanctions or disqualification.

1 To the extent that that might be the case, then
2 essentially the victim of the offense is going to
3 come forward perhaps and tell a sob story, and as a
4 result I think you could have a balance between
5 revenge on the one side and harm to the society in
6 preventing a person being restored to a productive
7 life. I am not sure you have come down on the right
8 side here, unless these crime victim's acts already
9 provide for this sort of relief or participation.

10 CHAIRPERSON AUERBACH: Chair.

11 COMMISSIONER CASSIDY: My understanding
12 is that the familiar pattern is that at sentencing a
13 crime victim is given the opportunity to be aware
14 that the sentencing is occurring and to get up and
15 to say their piece. The thinking here is that a
16 similar right ought to attach in this situation.

17 COMMISSIONER MILLER: But I don't think
18 the crime victim or -- the premise of this act, the
19 prosecution really focused on the collateral stuff.
20 So therefore allowing the participation at this
21 point is likely to be on a motive of further revenge
22 versus the rehabilitation, in a sense, of the person
23 who committed the offense. I am not sure the
24 balance here then is correct.

25 COMMISSIONER CASSIDY: Commissioner, I

1 understand what you are saying. Let me offer a
2 slightly different thought. In many of these cases
3 it may be exactly as you suggest, and we may be
4 relying upon the board to be wise about that and to
5 say, well, we understand the victim's concerns, but
6 they're outweighed by the rehabilitative needs at
7 present. On the other hand, some victim may come
8 forward with some very good point, you know, this is
9 going to allow this victim to be working three
10 blocks from my office, and it may be relevant that
11 this be known, and we certainly want every
12 opportunity to be there for there to be fairness to
13 the victim in such a situation.

14 COMMISSIONER MILLER: I agree, Rich,
15 that there probably are circumstances, but if it's a
16 pretty horrendous crime or something like that, I
17 think the board is going to be aware of that, and I
18 think in too many instances it may be simply the
19 person comes forward for revenge rather than
20 anything else. So I think you ought to think about
21 that.

22 COMMISSIONER CASSIDY: We will think
23 about it.

24 CHAIRPERSON AUERBACH: Thank you,
25 Commissioner. We will go to Microphone 3.

1 COMMISSIONER ELIZABETH KENT (Hawaii): I
2 want to thank the committee for putting that
3 provision in, because I think it strikes the right
4 balance. So much of the focus of the criminal
5 justice system is now is on the offender and not on
6 the victim, and there has been a lot of discussion,
7 at least in my field, about putting more focus on
8 the victim.

9 So I think this offers the victim an
10 opportunity to talk and to let the decision-maker
11 know what the victim is thinking, and then it is up
12 to the decision-maker. I think that decision-makers
13 are very good at weighing the evidence and deciding
14 if it's coming from a retribution point of view or a
15 concern.

16 Also, recently we were burglarized, and
17 one of the things that I've been happy about with
18 the criminal justice system is how much notice we
19 get of what is going on with the defendants as it
20 proceeds through and all the notification that we
21 get concerning how they may be close to us and how
22 they may be involved in our lives.

23 I know that at least in our state,
24 victims have that same notice when somebody is sent
25 to prison and when they're going to be getting out

1 of prison. So I think that this continue to keep
2 the victim involved in the process, and I think a
3 lot of victims won't want to take the time to make
4 any comments. But for those who do, I think it
5 offers a good opportunity. Thank you to the
6 committee for considering it.

7 CHAIRPERSON AUERBACH: Thank you.
8 Seeing no one else at the microphones, Section 13 to
9 me is standard boilerplate and I assume is not
10 required to be read.

11 Sorry, Commissioner. I wasn't quick
12 enough.

13 COMMISSIONER TERRY L. THURBON (Alaska):
14 Regarding 13, I know we don't normally read the
15 boilerplate and I am not going to ask to read the
16 boilerplate, but I did want to beg the indulgence of
17 the committee for a short remark on uniformity
18 versus model act.

19 I have absolute respect for the
20 president and the committee's request that we not
21 make motions, and I don't intend to make a motion,
22 and that we should talk to the Executive Committee
23 in the interim, and I may be able to do that. But
24 in case I get hit by one of those buses when I leave
25 here today and don't have a chance to talk to the

1 Executive Committee in the meantime or to attend in
2 Sante Fe next year, I know I've got at least a
3 couple of the Executive Committee members hostage
4 right now. I am not going to quote chapter and
5 verse from the yellow book, which many of us have
6 been studying the last couple of days with regard to
7 uniform versus model act, but I do want to encourage
8 the membership and the committee and the Executive
9 Committee to think about this, not just in terms of
10 the enactability of this act.

11 From my state's perspective, if this
12 goes forward as a uniform act and our delegation
13 decides it won't fly in Alaska, we'll deem it
14 inappropriate for enactment in Alaska. We won't
15 pursue it. No problem.

16 What I am worried about intensely is
17 that vote by the states next year in Sante Fe when
18 every state has to go on the line if this goes
19 forward as a uniform rather than a model act and
20 represent whether it agrees that this is a situation
21 in which uniformity is required.

22 You might pass the pink face test for
23 that for the first six articles. For the how and
24 whether a person gets relief from collateral
25 consequences, I don't think there is a chance that

1 that is really going to pass the pink face test in
2 anybody's mind now. We can differ on that, I
3 suppose. But where the criminal laws, the
4 sentencing laws, the scope of the sanctions that
5 your state actually does impose where there doesn't
6 need to be uniformity on those, it's going to be
7 very hard, I think, for me at least, to go to any
8 legislator and make the case for why we need
9 uniformity on how you get relief from those
10 consequences.

11 I am looking at the bigger picture. I
12 won't bore you with the details of some of the
13 discussion I have had with legislators and high
14 placed executive branch officials that have the ear
15 of the governor in my state about what they think of
16 this Conference. But if we're worried about the
17 reputation, the integrity of this Conference, we
18 need to make sure that when we pass that vote next
19 year, if it's not for a model act, that every state
20 that votes "yea" is going to be comfortable saying
21 uniformity is required and that we won't be calling
22 into question the credibility of this Conference
23 because, arguably at least from my parsing, this
24 doesn't meet the test in our constitution, bylaws,
25 and policies for uniformity.

1 Thank you.

2 CHAIRPERSON AUERBACH: Thank you. I
3 think it is clear to all of us that during the year
4 and at the meeting next year in Sante Fe the issue
5 of model versus uniform will be fully explored.

6 I will now ask Commissioner Davies to
7 read Section 14.

8 COMMISSIONER JACK DAVIES (Minnesota):
9 "SECTION 14. SAVINGS AND TRANSITIONAL PROVISIONS.

10 "(a) This [act] applies to collateral
11 consequences whenever enacted or imposed, unless the
12 law creating the collateral consequence expressly
13 states that this [act] does not apply.

14 "(b) This [act] does not invalidate the
15 imposition of a collateral sanction on an individual
16 before the [effective date of this [act]], but
17 collateral sanctions validly imposed before [the
18 effective date of this [act]] may be the subject of
19 relief under this [act]."

20 CHAIRPERSON AUERBACH: Okay. Any
21 comments on this section? That concludes our going
22 through the act. Because we are not going final, we
23 are not going back to the prior sections, where we
24 have been working on making changes and reflecting
25 the views of the floor.

1 Are any other comments anyone wishes to
2 make without getting us into a morass?

3 [Laughter]

4 CHAIRPERSON AUERBACH: There is a
5 challenge. Commissioner at Microphone 5.

6 COMMISSIONER DAVID A. GIBSON (Vermont):
7 I will take that challenge and hope I don't get us
8 into a morass. But I just want to raise again the
9 question about this restoration of voting rights. I
10 know that the committee at one time had a section in
11 there that it had toyed with and then decided not to
12 offer it, recognizing some state constitutions have
13 a role to play on that restoration. Obviously, the
14 uniform act can't touch those.

15 I would just urge the committee once
16 again to revisit the question of restoration of
17 voting rights. There are a couple of ways it could
18 be approached. I will be glad to work with the
19 committee on that if it so desires.

20 COMMISSIONER JACK DAVIES (Minnesota):
21 That provision was taken out for a very interesting
22 reason. We thought that the progress that was being
23 made on voting rights was so substantial that we did
24 not want to distract from the straightforward effort
25 to continue that progress.

1 Now, I think over the next year we can
2 continue to watch and see if that progress
3 continues, and I think the political situation now
4 surrounding that particular issue might be
5 substantially different a year from now and the
6 committee might have a quite different view of it.
7 It was a close question in not the votes of the
8 committee but in the minds of the committee. Some
9 of us were sort of on the tipping edge.

10 COMMISSIONER GIBSON: If I might add.
11 It just seems to me when you're talking about
12 whether it's a model act or a uniform act, to
13 restore certain rights, remove certain disabilities,
14 for the Uniform Law Commission not to recognize that
15 the right to vote is one of those important ones
16 that would kind of be a black mark on us.

17 CHAIRPERSON AUERBACH: The chair has a
18 comment he would like to make.

19 COMMISSIONER RICHARD T. CASSIDY
20 (Vermont): Commissioner Gibson, at one time during
21 this meeting you submitted in writing an addition to
22 Section 8(e), a new subsection (e). I haven't
23 distributed that to the members of the committee
24 because somebody told me that you had a later
25 proposal. If you have something else you would like

1 to suggest, please let me know.

2 COMMISSIONER GIBSON: It would be along
3 the lines of what the committee had previously been
4 considering. I would think there are two
5 alternatives. The preferable one is probably the
6 one that you don't yet have. I do happen to have it
7 written out. I will be glad to give you a copy.

8 COMMISSIONER CASSIDY: Thank you.

9 CHAIRPERSON AUERBACH: The commissioner
10 at Microphone 6.

11 COMMISSIONER JAMES BOPP, JR. (Indiana):
12 As to that point, it was my understanding that
13 Section 10 encompasses voting rights, so that you
14 could petition under Section 10 to have your voting
15 rights restored or if you obtain the general
16 restoration, that would include your voting rights,
17 and that that would have extraterritorial effect --
18 that is, not only would it restore voting rights in
19 the state where you petition, but it would restore
20 them throughout the United States if the person
21 moved. Isn't that correct?

22 CHAIRPERSON AUERBACH: Chair.

23 COMMISSIONER CASSIDY: It's correct that
24 under Section 10 one of the rights that might be
25 restored is the right to vote and it is possible

1 that that might have extraterritorial effect.

2 COMMISSIONER BOPP: I am sorry, but I
3 just don't understand the equivocal statements you
4 make sometimes. First it is clearly encompassed
5 within the general certificate of restoration of
6 rights, as I understand it, and specifically you
7 could ask for it as well. So there is no
8 equivocation there.

9 The second thing is, I have been told,
10 the committee, one of the committee members said,
11 and I think it was the reporter, that there is
12 extraterritorial effect of certificates under
13 Section 10.

14 Now, when would that not occur if it
15 would not?

16 COMMISSIONER CASSIDY: If you look at
17 Section 10(d), you will see that the state acting
18 directly -- and I won't go through all of the
19 subsidiaries that are mentioned -- may not impose a
20 collateral sanction that is the subject of an
21 unrevoked certificate of restoration of rights
22 issued, bracket, in this state, or, bracket, in any
23 state.

24 So the answer to whether or not it would
25 have extraterritorial effect depends upon the

1 bracketed choice that the enacting state would make.

2 COMMISSIONER BOPP: Okay. Thank you.

3 CHAIRPERSON AUERBACH: Anyone else? If
4 not, the parliamentarian is going to help me get out
5 of these little technical quandaries.

6 Mr. Secretary, the Committee of the
7 Whole rises and reports that it has had under
8 consideration the Drafting Committee on Uniform Act
9 on Collateral Consequences of Conviction, has made
10 progress and asks leave to sit again.

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1	I N D E X
2	UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION
3	Saturday, July 19, 2008
4	Fourth Session.1
5	Sunday, July 20, 2008
6	Fifth Session103
7	Tuesday, July 22, 2008
8	Ninth Session162
9	Thursday, July 24, 2008
10	Thirteenth Session.320

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PROCEEDINGS IN COMMITTEE OF THE WHOLE

UNIFORM ACT ON COLLATERAL
CONSEQUENCES OF CONVICTION
of the
UNIFORM LAW COMMISSION

July 18 - July 24, 2008

Big Sky Resort
Big Sky, Montana

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