



September 2017

NONVIOLENT DRUG CONVICTIONS

Stakeholders' Views on Potential Actions to Address Collateral Consequences

Why GAO Did This Study

In 2015, certain federal, state, and other law enforcement agencies made about 11 million arrests, according to the Department of Justice's Federal Bureau of Investigation. Individuals ultimately convicted of a crime may face federal or state collateral consequences. According to the ABA's NICCC, roughly 46,000 collateral consequences existed in federal and state laws and regulations, as of December 31, 2016. According to the ABA, collateral consequences have been a feature of the justice system since colonial times, but have become more pervasive in the past 20 years.

The Comprehensive Addiction and Recovery Act of 2016 included a provision for GAO to review collateral consequences for individuals with NVDC. This report identifies (1) collateral consequences in federal laws and regulations that can be imposed upon individuals with NVDC, (2) mechanisms that exist to relieve individuals from these collateral consequences, and (3) selected stakeholders' views on actions the federal government could consider to mitigate these collateral consequences.

GAO analyzed NICCC data as of December 31, 2016; reviewed relevant laws, regulations, and federal agency documents; and conducted interviews with ABA staff, selected federal officials, and 14 stakeholders. GAO selected stakeholders with relevant experience, among other factors. Selected stakeholders included leaders of organizations representing judges, victims of crime, and states, among others.

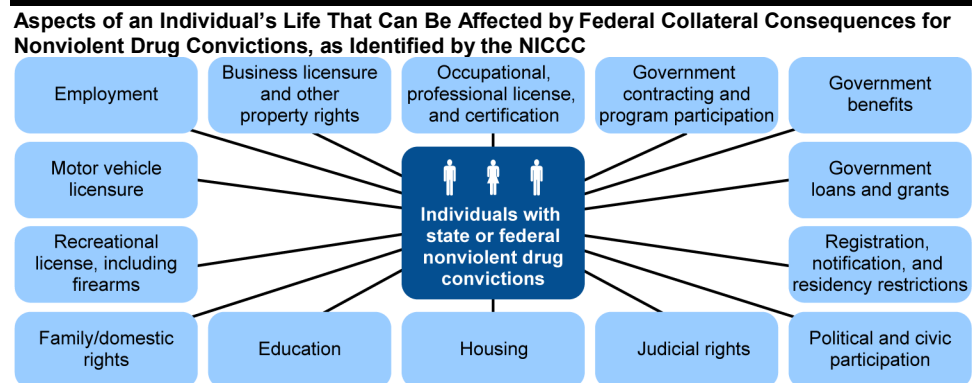
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NONVIOLENT DRUG CONVICTIONS

Stakeholders' Views on Potential Actions to Address Collateral Consequences

What GAO Found

Collateral consequences are the penalties and disadvantages that can be imposed upon an individual with a criminal conviction, in addition to those directly associated with a sentence (such as a fine, prison, or community service). GAO's review of the American Bar Association's (ABA) National Inventory of the Collateral Consequences of Conviction (NICCC) found that, in federal laws and regulations, there are 641 collateral consequences that can be triggered by nonviolent drug convictions (NVDC). For example, individuals with NVDC may be ineligible for certain professional licenses and federal housing assistance. The NICCC data that GAO reviewed indicate that these 641 collateral consequences can limit many aspects of an individual's life, such as employment, business licenses, education, and government benefits. In addition, GAO also found that the NICCC identified that 497 (78 percent) of the 641 collateral consequences can potentially last a lifetime.



Source: GAO analysis of the American Bar Association's National Inventory of the Collateral Consequences of Conviction (NICCC). | GAO-17-691

Of the 641 federal collateral consequences for NVDC, GAO found that the NICCC identified 131 (20 percent) as having a relief mechanism in a related law or regulation that prescribed how an individual could potentially obtain relief from the consequence. For example, individuals may be relieved if they successfully complete a drug rehabilitation program or receive a pardon.

Thirteen of the 14 stakeholders GAO interviewed said the federal government should consider taking action to reduce the severity of (i.e., mitigate) federal collateral consequences for NVDC, such as conducting a comprehensive review of these collateral consequences and implementing a new relief mechanism. Additional mitigation could, according to some stakeholders, help individuals with NVDC obtain employment, housing, or education; and almost all the stakeholders said mitigation could potentially reduce the likelihood of reoffending. At the same time, federal collateral consequences can serve public safety functions and protect government interests. Some stakeholders cautioned that federal action should strike the appropriate balance between preserving collateral consequences that provide a public safety benefit, and addressing consequences that can cause unnecessary burdens and potentially increase the likelihood that individuals with NVDC reoffend.

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Abbreviations

ABA	American Bar Association
DOJ	Department of Justice
NICCC	National Inventory of the Collateral Consequences of Conviction
NIJ	National Institute of Justice
NVDC	nonviolent drug convictions
Reentry Council	Federal Interagency Reentry Council

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September 7, 2017

The Honorable Charles E. Grassley
Chairman
The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Robert W. Goodlatte
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

In 2015, U.S. law enforcement agencies made approximately 11 million arrests, according to the Department of Justice’s (DOJ) Federal Bureau of Investigation.¹ Individuals ultimately convicted of a crime generally face a sentence, which can include fines, probation, and incarceration in jail or prison. In addition to the sentence (i.e., the direct consequences), individuals may also face collateral consequences. Collateral consequences are penalties and disadvantages, other than those associated with a sentence, which can be imposed upon an individual as a result of a conviction.² Collateral consequences can be contained in federal and state laws and regulations. For example, based on federal laws and regulations, individuals that receive a state or federal drug

¹This information was reported by tribal, city, county, state, and federal law enforcement agencies that participate in the Federal Bureau of Investigation’s Uniform Crime Reporting Program.

²The Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, § 401, 130 Stat. 695, 723-24, defines a “collateral consequence” as “a penalty, disability, or disadvantage imposed upon an individual as a result of a criminal conviction for a drug-related offense automatically by operation of law; or by authorized action of an administrative agency or court on a case-by-case basis; and does not include a direct consequence imposed as part of the judgment of a court at sentencing, including a term of imprisonment or community supervision, or a fine.” This is the definition we have used for the purposes of our report.

conviction may be ineligible for certain professional licenses, federal education loans, or federal food assistance.³

According to the American Bar Association (ABA), collateral consequences have been a familiar feature of the American justice system since colonial times, but have become more pervasive in the past 20 years.⁴ In 2012, the ABA began compiling the first nationwide inventory of collateral consequences, known as the National Inventory of the Collateral Consequences of Conviction (NICCC), after receiving a grant from DOJ's National Institute of Justice (NIJ). As of December 31, 2016, the NICCC contained roughly 46,000 collateral consequences established through federal and state laws and regulations.⁵ According to the NIJ's NICCC project description, the NICCC can be used by people with convictions, policymakers, lawyers, judges, and others to understand the breadth and severity of collateral consequences. Individuals can also use the NICCC to learn if opportunities exist for them to be relieved of a collateral consequence. Specifically, the NICCC describes whether relief mechanisms (e.g., presidential pardon) are available for certain collateral consequences.

The Comprehensive Addiction and Recovery Act of 2016 includes a provision for GAO to review collateral consequences that can be imposed on people with federal and state nonviolent drug convictions (NVDC).⁶ Our objectives were to identify (1) collateral consequences contained in federal laws and regulations (i.e., federal collateral consequences) that can be imposed upon individuals with NVDC; (2) mechanisms that exist to relieve individuals from federal collateral consequences for NVDC; and (3) actions stakeholders identified that the federal government could consider to mitigate federal collateral consequences for NVDC.

³See 14 C.F.R. § 63.12, 14 C.F.R. § 61.15, 20 U.S.C. § 1091, and 7 C.F.R. § 273.16.

⁴American Bar Association, Criminal Justice Section, *The National Inventory of the Collateral Consequences of Conviction Coding Manual*, 4th ed. (January 2015).

⁵The ABA's NICCC also included collateral consequences established through the laws and regulations of the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

⁶Pub. L. No. 114-198, § 401, 130 Stat. 695. 723-724 (2016). For the purposes of our report, we defined NVDC as violations of laws prohibiting or regulating the possession, use, distribution, or manufacture of illegal drugs which do not include (a) offenses that have as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

To address our first objective, we obtained data on federal collateral consequences from the ABA's NICCC, as of December 31, 2016.⁷ We used the data from the ABA's NICCC to determine the number of federal collateral consequences that can be imposed on individuals with NVDC, and to identify selected characteristics, such as duration (e.g., permanent or specific term) of these collateral consequences. According to ABA officials, the NICCC does not identify whether a federal collateral consequence is triggered by NVDC; however, an estimate could be calculated using NICCC data. According to ABA officials, the NICCC was intended to provide a comprehensive inventory of collateral consequences contained in all federal and state laws and regulations. For example, if a collateral consequence was established in a federal law and also included in a federal regulation, the NICCC would include the occurrence in federal law and regulation as two separate collateral consequences.⁸ In addition, in instances that federal law requires the imposition of a collateral consequence by state law or regulation to receive certain federal funding, the NICCC would include the federal law and each state law or regulation as a separate collateral consequence.⁹

To address our second objective, we reviewed relevant laws, regulations, and federal agency directives and guidance; and interviewed ABA staff and selected federal officials. Specifically, we interviewed officials from four federal agencies—the DOJ, Department of Housing and Urban Development, Department of Health and Human Services, and Department of Labor. We selected these agencies because they participated on the Federal Interagency Reentry Council (Reentry Council) and reviewed at least some regulations or policies in an effort to

⁷We obtained data from the NICCC as of December 31, 2016. According to ABA officials, jurisdictions in the NICCC were not updated on a real-time basis for changes in laws and regulations. Each jurisdiction was updated periodically based on a schedule developed by NICCC project management, and based on the schedule, some changes to laws and regulations may have taken a year or longer to be reflected in the NICCC. Consequently, according to ABA officials, the data we obtained did not reflect the laws and regulations of all U.S. jurisdictions as of December 31, 2016.

⁸See 26 U.S.C. § 25A and 26 C.F.R. § 1.25A-3 (relating to the denial of Hope Scholarship Credit for a student convicted of a federal or state felony offense consisting of the possession or distribution of a controlled substance).

⁹For example, under 23 U.S.C. § 159, generally a percentage of apportioned federal funds may be withheld from a state, if the state fails to enact and enforce a state law that requires the revocation or suspension of a driver's license of any individual who is convicted of any violation of the Controlled Substances Act, or any drug offense. The NICCC includes this federal law as a collateral consequence, as well as the individual state laws.

mitigate federal collateral consequences, among other criteria.¹⁰ In addition, we analyzed NICCC data on each federal collateral consequence for NVDC to determine whether relief was available. For our first and second objectives, we examined the NICCC data and related controls and interviewed ABA officials, and we concluded that these data were sufficiently reliable to describe federal collateral consequences for NVDC and their characteristics.

To address our third objective, we interviewed selected stakeholders to gather perspectives on mitigating federal collateral consequences for NVDC. To identify stakeholders, we conducted a literature search for studies and other materials related to federal collateral consequences, identified relevant work groups and conferences, and asked potential stakeholders to recommend other stakeholders to participate in our study. From the list of potential stakeholders, we selected individuals with relevant experience, among other factors. We selected 14 stakeholders and conducted semi-structured interviews with them to learn what, if any, actions the federal government could consider taking to mitigate federal collateral consequences for NVDC. The information obtained from these stakeholders cannot be generalized across all stakeholders; however, these stakeholders provided examples of potential actions the federal government could consider taking to mitigate collateral consequences for NVDC. To describe the types of actions taken by states to mitigate federal collateral consequences, we identified and reviewed two studies that examined actions taken by states to mitigate collateral consequences, and summarized the types of actions. See Appendix I for further discussion of our scope and methodology and for a list of the 14 stakeholders we interviewed.

We conducted this performance audit from September 2016 to September 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

¹⁰The Reentry Council is a group of about 20 federal entities whose mission is to make communities safer, assist those who return from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.

Background

Collateral Consequences

The definition of collateral consequences can vary. For example, definitions may include the penalties and disadvantages contained in laws and regulations of the federal and state governments; ordinances established by local governments; and policies maintained by non-government organizations, such as private employers, schools, and churches. Some researchers consider additional effects of convictions to be collateral consequences, such as the social stigma associated with a conviction. For the purposes of this report, we focus on collateral consequences contained in federal laws and regulations, which we will refer to as federal collateral consequences.

Federal collateral consequences can serve various functions, such as enhancing public safety or protecting government interests. For example, collateral consequences may prohibit people who committed crimes involving a sex offense or offense involving a child victim from working in a child care facility.¹¹ Importantly, federal collateral consequences can be triggered by federal as well as state convictions. Thus, if an individual is convicted in state court, then the individual can be subject to federal collateral consequences. For example, according to federal law, in general, individuals may be denied a merchant seamen license if within 10 years before applying for the license they were convicted of violating a dangerous drug law of the United States or of a state.¹²

National Inventory of the Collateral Consequences of Conviction

The Court Security Improvement Act of 2007 required the director of NIJ to conduct a study to determine and compile the collateral consequences of convictions for criminal offenses in the United States, each of the 50 states, each territory of the United States, and the District of Columbia.¹³ In 2009, NIJ awarded a grant to the ABA to catalogue and publicize this information on a publically searchable website, which eventually became the NICCC. According to NIJ officials, by June 2014, the ABA had compiled collateral consequence information for the federal and state

¹¹See 42 U.S.C. § 13041. For more information related to this collateral consequence, see table 1.

¹²46 U.S.C. § 7503.

¹³Pub. L. No. 110-177, § 510, 121 Stat. 2534, 2543-2544 (2008).

governments and publicized the information in the NICCC. In addition, recognizing that laws and regulations can change, the ABA developed a schedule to continuously update the NICCC. As of December 31, 2016, the NICCC included roughly 46,000 collateral consequences from laws and regulations at the federal and state level, which included the 50 U.S. states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. See Appendix II for information on the number of collateral consequences in each jurisdiction.

As discussed in greater detail later in this report, the NICCC provides certain characteristics of collateral consequences, such as the type of triggering offense (e.g., controlled substance offenses, sex offenses, and public corruption offenses); the duration; and the type of collateral consequence (i.e., mandatory vs. discretionary). According to DOJ officials, in January 2017, NIJ transferred control of the NICCC from the ABA to the Council of State Governments.¹⁴

Nonviolent Drug Convictions

There is no standard definition of NVDC in federal laws and regulations. Further, according to DOJ officials, DOJ does not use a standardized definition of the term. For the purposes of our report, we defined NVDC as violations of laws prohibiting or regulating the possession, use, distribution, or manufacture of illegal drugs, which do not include:

- offenses that have as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
- any other offense that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

¹⁴The National Inventory of the Collateral Consequences of Conviction, accessed May 23, 2017, <https://niccc.csgjusticecenter.org>.

Federal Collateral Consequences for Nonviolent Drug Convictions Can Limit Many Aspects of an Individual's Life, and a Majority Can Last a Lifetime

There Are Hundreds of Federal Collateral Consequences for Nonviolent Drug Convictions, Which Can Affect Many Aspects of an Individual's Life

The NICCC identified 1,171 federal collateral consequences that existed as of December 31, 2016. The NICCC also identified which types of criminal offense(s) can trigger these 1,171 collateral consequences, and based on our review of these data, 641 (55 percent) may be imposed on individuals with NVDC.¹⁵ In addition, the NICCC data that we reviewed identified that these 641 collateral consequences can limit numerous aspects of an individual's life. For example, as a result of NVDC, individuals may be terminated from their current jobs, no longer qualify for certain jobs, and lose eligibility for some professional licenses.¹⁶ In addition, individuals may no longer qualify for federal housing or food assistance, lose gun ownership rights, and no longer be eligible for certain federal healthcare programs, among many other consequences.¹⁷ The text boxes included in this section identify some of the statements

¹⁵The majority of these 641 collateral consequences can be triggered by numerous types of convictions, not just NVDC. We determined that federal collateral consequences included in the following NICCC triggering offense categories may be imposed for NVDC: (1) Any offense, (2) Any felony, (3) Any misdemeanor, and (4) Controlled substances. We excluded collateral consequences in the Controlled substances triggering offense category if they only were related to alcohol or tobacco. See Appendix 1 for additional information on ABA's methodology and how we calculated the number of federal collateral consequences for NVDC.

¹⁶42 U.S.C. § 13041 and 14 C.F.R. § 63.12. For more information related to these collateral consequences, see table 1.

¹⁷See 24 C.F.R. § 982.553, 7 C.F.R. § 273.16, 18 U.S.C. § 922, and 42 U.S.C. § 1320a-7. For more information related to these collateral consequences, see table 1.

made by stakeholders during our interviews regarding federal collateral consequences for NVDC.

Stakeholder Perspectives on Federal Collateral Consequences for Nonviolent Drug Convictions

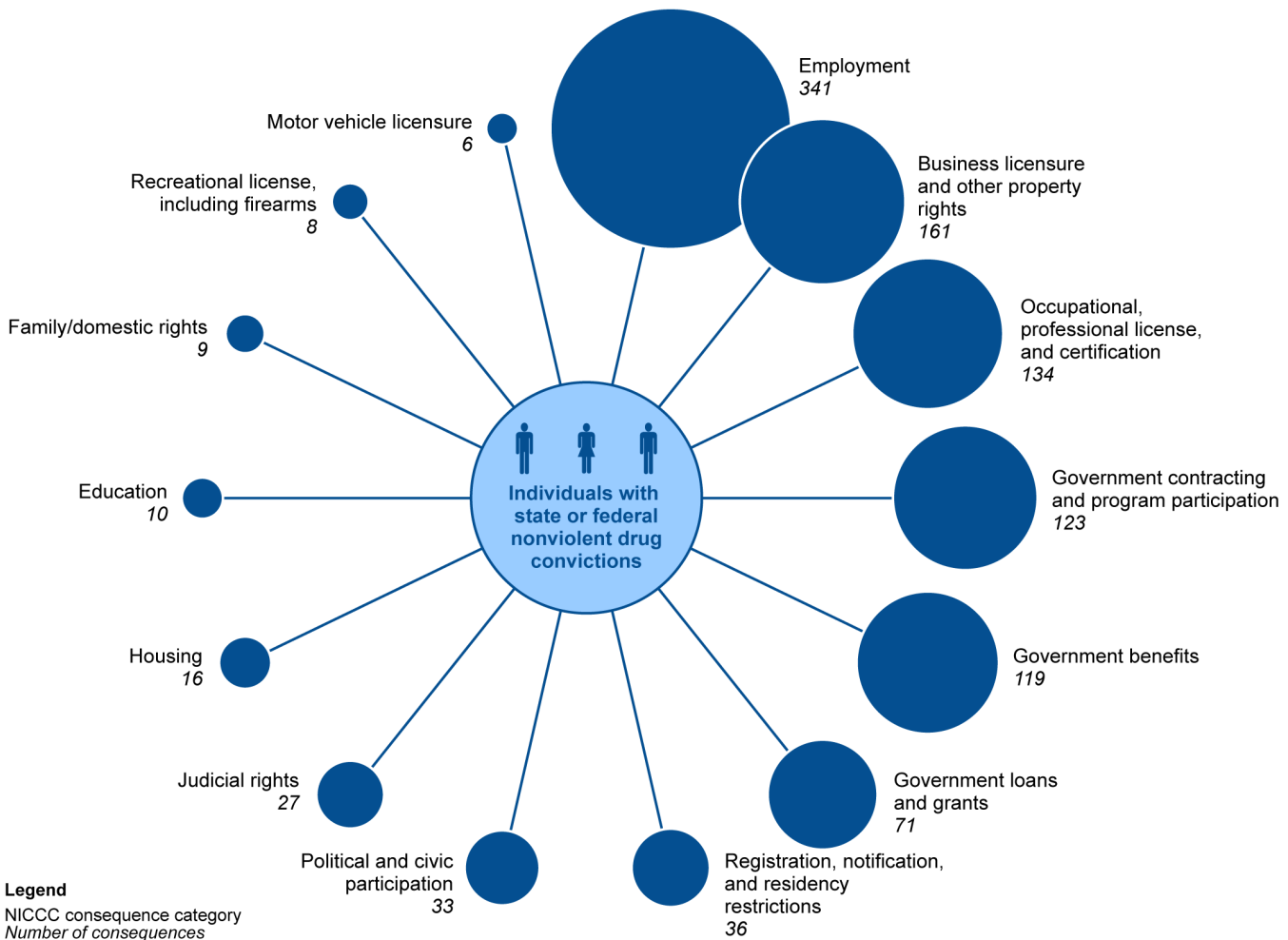
- “The breadth of federal collateral consequences for nonviolent drug convictions is so massive and affects so many aspects of a person’s life, such as family life, immigration, jury service, housing, employment, and voting, that they contribute to an underclass of people.”
- “Many instances wherein the federal collateral consequences for nonviolent drug convictions end up making it hard for people to live a law abiding life. For example, they may not be able to live in public housing or may be barred from getting an occupational license or doing a particular job. This may push them to turn back to committing crimes to make some money.”
- “...some federal collateral consequences for nonviolent drug convictions are sensible and appropriate. If we abolish [all that] exist you could imperil public safety...”
- “We can’t just say we’re going to err on the side of public safety and implement a wide range of collateral consequences strictly across the board. The problem is that public safety is undermined by making it impossible for individuals to move on from the criminal offense.”
- “It is important not to assume that nonviolent means that there is no victim.”

Source: Selected stakeholders interviewed by GAO. | GAO-17-691

The NICCC uses consequence categories to categorize the aspects of an individual’s life that a collateral consequence can affect.¹⁸ Figure 1 below shows the number of federal collateral consequences for NVDC, by NICCC consequence category. Our review found the NICCC identified most of the 641 federal collateral consequences for NVDC as relating to employment. For example, the figure shows that the largest category was Employment (341), and Business licensure and other property rights was the second largest category (161). See Appendix III for the ABA’s descriptions of the NICCC consequence categories.

¹⁸In some instances, the NICCC includes a single collateral consequence in one or more of its consequence categories. For example, if an individual with a flight engineer certification is convicted of a drug possession offense, then the certification may be suspended or revoked (see 14 C.F.R. § 63.12). The NICCC includes this collateral consequence both in the Occupational, professional license, and certification category and the Employment category.

Figure 1: Number of Federal Collateral Consequences for Nonviolent Drug Convictions, by Consequence Category, as Identified in the NICCC



Source: GAO analysis of the American Bar Association's National Inventory of the Collateral Consequences of Conviction (NICCC). | GAO-17-691

Note: This figure provides NICCC data for 641 federal collateral consequences that can be triggered by nonviolent drug offenses, as of December 31, 2016. In some instances, the NICCC includes a single collateral consequence in one or more of its consequence categories, and thus, the total number of collateral consequences in the figure will not add up to 641. For example, a single collateral consequence may be included in both the Government benefits category and the Housing category.

Importantly, although there are 641 federal collateral consequences for NVDC, a number of factors will determine which of these collateral consequences apply to any one individual. For example, some of these collateral consequences are triggered by felony convictions but not misdemeanor convictions, and some are triggered by convictions for the

sale of drugs but not possession of drugs. Table 1 below includes examples of federal collateral consequences that can be imposed on individuals with NVDC, including the NICCC consequence category and the specific type of NVDC that can trigger the collateral consequences.

Table 1: Examples of Federal Collateral Consequences for Nonviolent Drug Convictions, as Identified by the NICCC

Consequence Category(s)	Description	Triggering Offense	Federal Law or Regulation
Employment	Ineligible for employment in federal child care facility: Any conviction for a drug felony may be grounds for denying employment or for dismissal of an employee of each agency of the federal government and every facility operated by the federal government that hires individuals involved with the provision of child care services.	Felony drug conviction	42 U.S.C. § 13041
Employment; Occupational, professional license, and certification	Denial of flight engineer certification: A conviction for the violation of any federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marijuana, or depressant or stimulant drugs or substances is grounds for denial of an application for a flight engineer or navigator certificate or rating for a period of up to 1 year after the date of final conviction or the suspension or revocation of any certificate or rating.	Any crime related to the manufacture, sale, possession, or transportation of narcotic drugs	14 C.F.R. § 63.12
Business license and other property rights; Recreational license, including firearms	Ineligible to possess or transport firearms: If an individual is an unlawful user of or addicted to any controlled substance, then the individual is prohibited from shipping, transporting, receiving, or possessing firearms/ammunition which has been shipped or transported in interstate or foreign commerce.	Any felony conviction; unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))	18 U.S.C. § 922
Government contracting and program participation	Ineligible to participate in certain healthcare programs: The Secretary of Health and Human Services must exclude any individual or entity that has been convicted of a criminal offense which occurred after August 21, 1996, under federal or state law, consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance from participation in any federal health care program.	Felony conviction for a controlled substance	42 U.S.C. § 1320a-7
Government benefits	Ineligible to participate in food assistance program: If an individual is found by a federal, state, or local court to have used or received Supplemental Nutrition and Assistance Program benefits in a transaction involving the sale of a controlled substance, then the individual is ineligible to receive program benefits for 2 years upon the first offense and permanently for the second offense.	Sale of a controlled substance	7 C.F.R. § 273.16

Consequence Category(s)	Description	Triggering Offense	Federal Law or Regulation
Government benefits	Forfeit certain veteran-related benefits: If a veteran is convicted of any type of felony, then the veteran may forfeit the receipt of certain veteran-related benefits, such as disability compensation.	Any felony conviction	38 C.F.R. § 3.665
Housing; Government Benefits	Ineligible to receive Section 8 (i.e., housing) voucher: If any household member is involved in drug criminal activity, then a Public Housing Agency may deny admission of the household to the Section 8 program or terminate any existing public assistance for the household.	Involved in drug criminal activity	24 C.F.R. § 982.553
Education; Government loans and grants	Ineligible for federal education grant or loan: If a student receives a conviction for the possession or sale of a controlled substance while receiving a federal education loan, then eligibility for federal education loans is suspended for a specified period of time. Regarding the possession of a controlled substance, eligibility is suspended for 1 year upon the first offense, 2 years for the second offense, and indefinitely for the third offense. Regarding the sale of a controlled substance, eligibility is suspended for 2 years upon the first offense and indefinitely for the second offense.	Conviction for the possession or sale of a controlled substance	20 U.S.C. § 1091

Source: GAO analysis of the American Bar Association's National Inventory of the Collateral Consequences of Conviction (NICCC). | GAO-17-691

Most Federal Collateral Consequences for Nonviolent Drug Convictions Can Last a Lifetime, and About Half are Mandatory

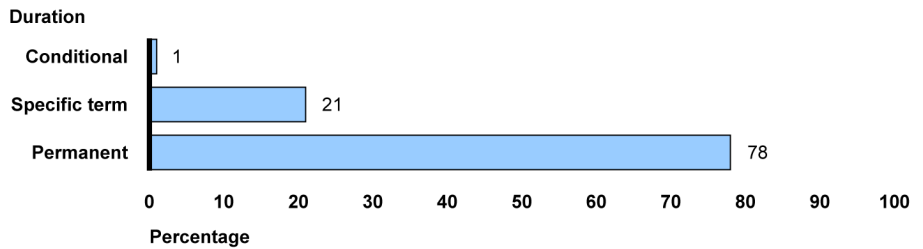
According to our review of the 641 federal collateral consequences for NVDC that the NICCC identified, 497 (78 percent) were classified as permanent, meaning that they could potentially last a lifetime. The NICCC classifies the duration of collateral consequences as follows:¹⁹

- **Permanent:** Laws or regulations express that the collateral consequence is permanent, or do not express when the collateral consequence would expire, and thus, the collateral consequence could last indefinitely;
- **Specific term:** Laws or regulations express a specific time frame when the collateral consequence could expire; and
- **Conditional:** Laws or regulations express that the collateral consequence could expire after a specified event “under the affected individual’s control.” For example, a collateral consequence may expire after an individual completes a drug rehabilitation program.

¹⁹The NICCC has four categories for duration, including permanent/unspecified, specific term, conditional, and N/A; however, we did not include the N/A category, as none of the 641 federal collateral consequences for NVDC were identified by the NICCC as N/A. In addition, in this report we refer to the permanent/unspecified category as permanent.

Figure 2 shows the percentage of federal collateral consequences for NVDC, by NICCC duration category, of which 78 percent were classified as permanent in the NICCC.

Figure 2: Percentage of Federal Collateral Consequences for Nonviolent Drug Convictions, by Duration Category, as Identified in the NICCC



Source: GAO analysis of the American Bar Association's National Inventory of the Collateral Consequences of Conviction (NICCC). | GAO-17-691

Note: The figure includes NICCC duration data related to 641 federal collateral consequences that can be triggered by nonviolent drug convictions, as of December 31, 2016. According to NICCC guidance, permanent means that laws or regulations express that the collateral consequence is permanent, or do not express the time frame when the collateral consequence would expire; specific term means that a specific time frame is provided; and conditional means that a collateral consequence could expire after an event "under the affected individual's control" (e.g., completion of a drug rehabilitation program).

Stakeholder Perspectives on Duration of Federal Collateral Consequences for Nonviolent Drug Convictions

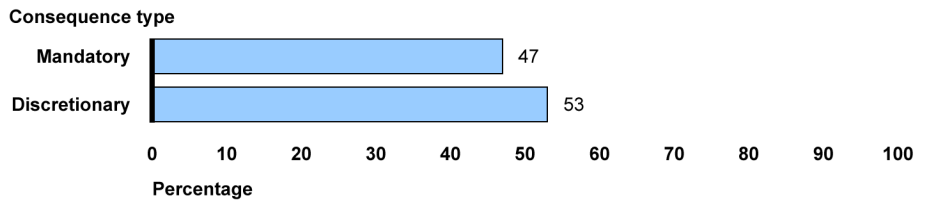
- “The actions that someone engages in at 23 years of age are not necessarily related to actions the same person would engage in when they turn 35, 40, or 50 years old.”
- “Research shows that recidivism rates drop starkly after a certain time period, so time limiting collateral consequences makes sense.”
- “When we reduce restrictions someone will do something we wish they had not done, but the risks are relatively low.”

Source: Selected stakeholders interviewed by GAO. | GAO-17-691

In addition, the NICCC classifies collateral consequences as discretionary or mandatory.²⁰ Discretionary means that a federal entity, such as a federal agency or court, is authorized but not required to impose the collateral consequence. For example, a collateral consequence would be considered discretionary if the federal entity can decide whether imposing the collateral consequence on an individual is necessary to protect public safety. In contrast, mandatory means that a federal entity has no discretion and must impose the collateral consequence. For example, a law may require that a collateral consequence be imposed on all individuals with drug possession convictions, and thus, the federal entity must impose the collateral consequence on these individuals. According to our review of the 641 collateral consequences, nearly half were classified as mandatory in the NICCC. Figure 3 shows the percentage of federal collateral consequences for NVDC, by consequence type.

²⁰The NICCC has five categories for consequence type, including mandatory/automatic, discretionary, discretionary (waiver), background check, and N/A. We did not include the background check and N/A categories, as none of the 641 federal collateral consequences for NVDC were identified by the NICCC as background check or N/A. In addition, we excluded the discretionary (waiver) category, as collateral consequences identified by the NICCC as discretionary (waiver) were also identified as discretionary. Further, we refer to the mandatory/automatic category as mandatory.

Figure 3: Percentage of Federal Collateral Consequences for Nonviolent Drug Convictions, by Consequence Type, as Identified in the NICCC



Source: GAO analysis of the American Bar Association’s National Inventory of the Collateral Consequences of Conviction (NICCC). | GAO-17-691

Note: The figure includes NICCC consequence type data related to 641 federal collateral consequences that can be triggered by nonviolent drug convictions, as of December 31, 2016. According to NICCC guidance, mandatory means that a federal entity, such as a federal agency or court, has no discretion and must impose the collateral consequence; and discretionary means that a federal entity is authorized but not required to impose the collateral consequence.

Stakeholder Perspectives on Discretion to Impose Federal Collateral Consequences for Nonviolent Drug Convictions

- “Collateral consequences should be decided on a case-by-case basis, allowing [the federal government] to maintain those that are deemed to be desirable without applying them inappropriately across the board to everyone with a particular conviction.”
- “All federal collateral consequences should be discretionary; there are very few reasons why a collateral consequence should be mandatory...”
- “By allowing someone to do something, you may give them an opportunity that they would not have had to offend.”

Source: Selected stakeholders interviewed by GAO. | GAO-17-691

Some Mechanisms Exist to Relieve or Mitigate Federal Collateral Consequences for Nonviolent Drug Convictions

One in Five Federal Collateral Consequences for Nonviolent Drug Convictions Have Relief Specified in Laws or Regulations

Of the 641 federal collateral consequences for NVDC, we found that the NICCC identified 131 (20 percent) as having a relief mechanism, as of December 31, 2016. Thus, the NICCC showed these collateral consequences as having a related law or regulation that prescribed how a person could potentially obtain relief from the collateral consequence. For example, by law, generally individuals convicted of a state or federal drug possession offense, while receiving federal education loans, lose eligibility for federal education loans for a specified period of time.²¹ However, the law also includes a relief mechanism for this collateral consequence, stating that individuals may resume eligibility for federal education loans if they successfully complete a drug rehabilitation program.²² Examples of other types of relief mechanisms include:

- presidential or gubernatorial pardon;
- expungement or sealing of conviction;
- appeal or review; and
- certificate of recovery.²³

²¹20 U.S.C. § 1091(r)(1).

²²20 U.S.C. § 1091(r)(2). According to 34 C.F.R. § 668.40, the drug rehabilitation program must meet certain criteria, including that the program must include at least two unannounced drug tests.

²³According to the Vera Institute of Justice, "...some states issue certificates of recovery to people who have met certain rehabilitative standards. These certificates are meant to help third parties, such as employers and landlords, make better-informed decisions about individuals with criminal records."

Although we found that the NICCC identified these 131 collateral consequences as having a mechanism to obtain relief, individuals wanting relief may not actually be relieved of the collateral consequences for a variety of reasons. Below are some of these reasons, based on our review of the NICCC:

Years since Conviction: Individuals may not be able to obtain relief until a certain amount of time has passed since their conviction. For example, a federal collateral consequence may require that individuals wait 10 years after their conviction to be eligible for relief. Thus, if it has only been five years since an individual's conviction, then the individual would have to wait an additional five years to be eligible for relief.

Type of Offense: Individuals may not be eligible for a relief mechanism due to the type of drug offense for which they were convicted. For example, a relief mechanism may be available to individuals convicted of a drug possession offense but not a drug trafficking offense, or may be available to individuals after their first offense but not their second offense. Thus, in this example, individuals with drug trafficking offenses or individuals who received second convictions would not be eligible for relief.

Denied Request: Some requests for relief can be denied. For example, one relief condition is that individuals request an appeal or review. However, the appeal or review may result in an unfavorable outcome, and thus, the collateral consequence may continue to be imposed on individuals seeking relief.

Of the 641 federal collateral consequences for NVDC, we found that the NICCC identified 510 (80 percent) that did not have a related law or regulation that prescribed how a person could potentially obtain relief from the collateral consequence, as of December 31, 2016. However, there may be circumstances whereby a person could still obtain relief. For example, from January 1993 through January 2017, presidents granted, on average, 33 pardons per year.²⁴ According to officials from DOJ's Office of the Pardon Attorney, a presidential pardon may relieve an individual of a collateral consequence even if related federal laws or regulations do not specifically prescribe that the consequence can be relieved by a pardon. In addition, the officials said that federal collateral consequences would have to be reviewed on a case-by-case basis to

²⁴The year 1993 only includes pardon data from the Clinton administration, and 2017 only includes pardon data from the Obama administration.

determine what effect, if any, a presidential pardon may have on the collateral consequences. Specifically, an individual would have to review related case law and agency policies to determine the potential effect of a pardon, according to Office of the Pardon Attorney officials.

Federal Interagency Reentry Council Agencies Have Issued Guidance or Directives Intended to Mitigate Federal Collateral Consequences

In January 2011, the U.S. Attorney General convened the Reentry Council, a group of about 20 federal entities whose mission is to make communities safer, assist those who return from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration. According to a 2016 Reentry Council report, some Reentry Council agencies have issued guidance or directives on federal collateral consequences.²⁵ A primary focus of the Reentry Council is to reduce “the policy barriers to successful reentry, so that motivated individuals—who have served their time and paid their dues—are able to compete for jobs, attain stable housing, support their children and their families, and contribute to their communities.” In 2012, the Attorney General requested that federal agencies participating in the Reentry Council review their regulations and consider eliminating those collateral consequences that lessen the likelihood of successful reentry without improving public safety. In addition, the Attorney General requested that these agencies determine whether unnecessary collateral consequences exist that could be amended without new legislation. The review requested by the Attorney General did not target federal collateral consequences triggered by specific types of convictions, such as NVDC.

According to Reentry Council leadership, a takeaway from the review was that many federal collateral consequences are written into law, and thus, Reentry Council agencies were limited in their ability to modify the related regulations. Another takeaway was that some federal collateral consequences included in the review are appropriately tailored and should not be changed. Further, according to the 2016 Reentry Council report, some Reentry Council agencies issued guidance or directives intended to mitigate federal collateral consequences. The following are examples of actions taken by Reentry Council agencies, according to the 2016 Reentry Council report:

- The Office of Personnel Management issued a proposed rule (sometimes referred to as the ban the box rule) regarding the federal

²⁵DOJ and The White House, *The Federal Interagency Reentry Council: A Record of Progress and a Roadmap for the Future* (August 2016).

government's hiring practices. Specifically, for certain jobs, federal agencies must withhold questions about an applicant's criminal background until the agency has made a conditional offer of employment. In December 2016, subsequent to the release of the 2016 Reentry Council report, the Office of Personnel Management finalized the rule.²⁶

- Reentry Council agencies developed Reentry Myth Busters, which are fact sheets that seek to clarify certain federal collateral consequences, such as those related to housing, employment, and parental rights. For example, according to a Reentry Myth Buster, a common myth is that veterans with a criminal record or a history of incarceration are not eligible for health care from the Department of Veterans Affairs. The Reentry Myth Buster clarifies that "an eligible Veteran, who is not currently incarcerated, can use [Department of Veterans Affairs] care regardless of any criminal history, including incarceration."
- The Department of Housing and Urban Development issued guidance to housing providers intended to clarify when the use of criminal history records may constitute discrimination, and thus, violate the Fair Housing Act.
- In 2013, the Attorney General issued a memorandum to DOJ components and U.S. Attorneys directing them to take collateral consequences into consideration when proposing new or revising existing regulations or policy guidance.

²⁶Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 86,555 (Dec. 1, 2016) (to be codified at 5 C.F.R. pts. 330 and 731).

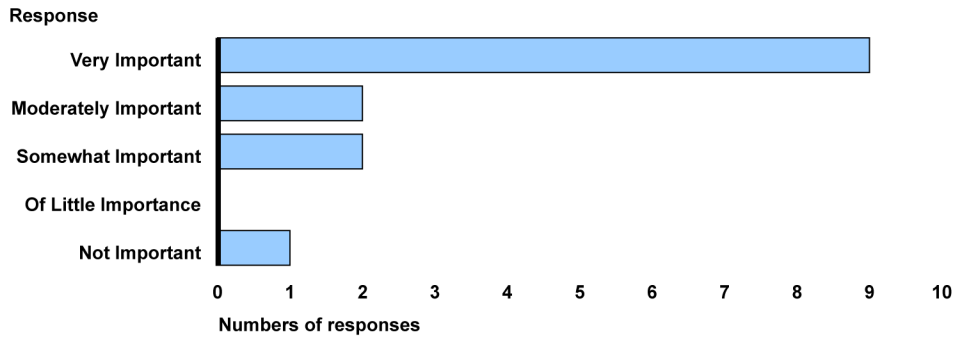
**Selected
Stakeholders
Highlighted Actions
the Federal
Government Could
Consider to
Potentially Mitigate
Federal Collateral
Consequences for
Nonviolent Drug
Convictions**

**Stakeholders Underscored
the Importance of Federal
Action to Mitigate Federal
Collateral Consequences
for Nonviolent Drug
Convictions**

Most of the stakeholders that we interviewed said it was important for the federal government to take action to mitigate federal collateral consequences for NVDC.²⁷ Specifically, 11 of the 14 stakeholders we interviewed said that it was either “very important” or “moderately important” for the federal government to take action to mitigate federal collateral consequences for NVDC. In addition, 1 of the 2 stakeholders who responded “somewhat important” said that it is only somewhat important to reduce the severity specifically for individuals with NVDC, whereas it would be very important to reduce the severity for individuals with all types of convictions. Only 1 stakeholder we interviewed said that federal action was “not important” and, moreover, that these collateral consequences are, at times, inadequate. Figure 4 below shows the stakeholder responses to our question on the degree of importance, if any, of federal action to mitigate federal collateral consequences for NVDC.

²⁷We interviewed 14 stakeholders, including leaders of organizations focused on collateral consequences, victim’s rights, and states; and organizations representing judges and federal prosecutors.

Figure 4: Stakeholder Views on the Importance of Federal Action to Mitigate Federal Collateral Consequences for Nonviolent Drug Convictions



Source: GAO analysis of interviews with selected stakeholders. | GAO-17-691

Thirteen stakeholders highlighted benefits of mitigating federal collateral consequences for NVDC.²⁸ Benefits identified by stakeholders included greater workforce participation (7 stakeholders), more individuals with housing (7 stakeholders), and the removal of barriers to education (4 stakeholders). For example, 1 stakeholder highlighted that individuals may lose their driver’s license as a result of a drug conviction, which can create a barrier to attending school and work. The stakeholder further highlighted that if mitigation removes this barrier, then a person is more likely to obtain a job and attend school. In addition, 8 stakeholders said that mitigating federal collateral consequences can have a positive effect on families, including children, of individuals with NVDC. For example, 1 stakeholder highlighted that mitigation may allow individuals to maintain their jobs, and thus support themselves and their families, and contribute as taxpayers. One stakeholder said that mitigation was not important and did not offer any potential benefit of mitigation.

Thirteen stakeholders said that mitigating federal collateral consequences could potentially reduce the likelihood that individuals with NVDC reoffend.²⁹ For example, 1 stakeholder said that federal collateral consequences for NVDC create barriers for individuals that are willing and able to reform and could potentially lead these individuals back into

²⁸During interviews with stakeholders, we asked open-ended questions about the potential benefits of mitigating federal collateral consequences for NVDC.

²⁹During interviews with stakeholders, we asked what effect mitigation could potentially have on the likelihood that individuals with NVDC would reoffend, and the effect on the individuals’ ability to successfully reenter the community after jail or prison.

criminal activity. Another stakeholder said “we can’t just say we’re going to err on the side of public safety and implement a wide range of collateral consequences strictly across the board. The problem is that public safety is undermined by making it impossible for individuals to move on from the criminal offense.” In addition, 11 stakeholders said that mitigation could potentially increase the likelihood that individuals with NVDC successfully reenter the community after jail or prison. For example, 1 stakeholder said “minimizing collateral consequences for someone who has paid their debt to society for committing a particular crime only brings good benefits [such as] employment and education, and all of this is for the benefit of public safety by rebuilding families, communities, and the tax base.”

Stakeholders also identified risks of taking federal action to mitigate federal collateral consequences for NVDC.³⁰ Specifically, 13 stakeholders we spoke to highlighted at least 1 risk. Nine stakeholders said that mitigating collateral consequences could create conditions for individuals to commit crimes that they otherwise might not have had the opportunity to commit. For example, 1 stakeholder said that mitigation may allow individuals to get a job (e.g., air traffic controller, or operator of heavy machinery) they otherwise could not have obtained, and that if the individuals are under the influence of drugs, then their actions may injure or kill other people. However, some of the 9 stakeholders said this risk could be mitigated. For example, 1 stakeholder said the federal government could provide discretion to officials responsible for determining whether to impose a collateral consequence, allowing these decision makers an opportunity to determine whether the individual poses a threat to public safety. One stakeholder said that the amount of time that has passed without a re-offense is a potential consideration when determining whether to relieve an individual of a collateral consequence.

Nevertheless, 3 stakeholders were concerned that there is a risk that mitigation will remove federal collateral consequences that serve an important function for the federal government. For example, 1 stakeholder said that “...some federal collateral consequences for NVDC are sensible and appropriate. If we abolish [all that] exist you could imperil public safety...” One stakeholder noted that this risk could be mitigated by reviewing federal collateral consequences—for example, understanding whether they serve a valuable purpose. In addition, 1 stakeholder

³⁰During interviews with stakeholders, we asked open-ended questions about the potential risks of mitigating federal collateral consequences for NVDC.

highlighted that determining whether an individual committed a violent or non-violent crime is difficult—for example, not everyone has the same definition of NVDC—and therefore, the federal government may inadvertently mitigate collateral consequences for an individual that committed a violent crime. According to the stakeholder, allowing violent behavior to continue means that the harm to victims could continue.

Stakeholders Highlighted a Need for a Review of all Federal Collateral Consequences for Nonviolent Drug Convictions and an Additional Relief Mechanism

Stakeholders recommended a range of actions the federal government could consider taking to help mitigate federal collateral consequences for NVDC.³¹ Specifically, 13 of the 14 stakeholders we interviewed recommended at least 1 action. Some stakeholders cautioned that federal action should strike the appropriate balance between preserving collateral consequences that provide a public safety benefit, and addressing consequences that can cause unnecessary burdens and potentially increase the likelihood that individuals with NVDC reoffend. Each of the following actions was recommended by several stakeholders, as we note below:

Comprehensive Review: Eight stakeholders recommended that the federal government conduct a review of federal collateral consequences for NVDC to identify opportunities for mitigation. Stakeholders offered some potential goals of the review, including the following:

- *Reduce the types of offenses that can trigger a collateral consequence.* For example, 1 stakeholder said that some collateral consequences are imposed after an individual violates any type of controlled substance offense. However, it may be appropriate to limit the collateral consequence to a smaller group of controlled substance offenses.
- *Change the nature of a collateral consequence from mandatory to discretionary.* For example, 1 stakeholder said that giving decision makers more discretion will allow them to impose collateral consequences when beneficial instead of across-the-board for everyone with a particular conviction.
- *Change the duration of a collateral consequence from permanent to time limited.* For example, 1 stakeholder said it is important to

³¹During interviews with stakeholders, we asked what actions, if any, the federal government should consider taking to mitigate federal collateral consequences for individuals with NVDC.

impose a collateral consequence when an individual poses a risk, but it is hard to justify imposing a collateral consequence after an individual has had a long period of stability.

- *Eliminate certain collateral consequences.* For example, 1 stakeholder recommended that a review examine each consequence to determine whether it continues to be essential to government policy and primarily focuses on public safety, and if not, to eliminate the collateral consequence.

Stakeholders identified benefits of a comprehensive review, such as:

- A review can result in the elimination of collateral consequences that do not provide a public safety-related benefit.
- A review can lead to a reduction in the number of affected individuals, and a decrease to the length of time that the collateral consequences can be imposed on individuals, if such actions are determined beneficial.

Stakeholders also identified risks and disadvantages of a comprehensive review, such as:

- A review would require considerable time to conduct.
- A review could result in the removal or modification of a collateral consequence that could create conditions for a person to potentially commit crimes that they otherwise might not have had the opportunity to commit.

Broad Relief Mechanism: Seven stakeholders recommended a new federal relief mechanism that allows individuals to petition federal entities or officials to obtain relief from federal collateral consequences for NVDC that have been imposed on them. Some stakeholders highlighted that, currently, an individual can petition a federal entity or official for relief from some federal collateral consequences for NVDC; however, they recommended that this relief mechanism be available for all federal collateral consequences for NVDC. In addition, some stakeholders said that models for this type of mechanism can be found in the Model Penal Code by the American Law Institute and the Uniform Collateral Consequences of Conviction

Act by the Uniform Law Commission, and that some states have implemented such a mechanism.³²

Stakeholders identified benefits of a broad relief mechanism, such as:

- Expands opportunities for relief for people with state and federal convictions, if deemed beneficial by the reviewing federal entity or official.
- Gives people with a conviction hope that they can overcome problems associated with a collateral consequence. For example, they can be relieved of a collateral consequence that serves as a barrier to obtaining employment or education.
- Judge or agency official can review the facts and circumstances of the petitioner to determine whether there is a need for relief and whether relief would create a risk to public safety.
- Can potentially promote reentry, reintegration, and law abiding behavior.

Stakeholders also identified risks and disadvantages of a broad relief mechanism, such as:

- A person may be relieved of a collateral consequence and potentially commit crimes that they otherwise might not have had the opportunity to commit.
- The mechanism would allow federal officials to use discretion, which is less efficient than automatically imposing a collateral consequence.
- Individuals may not have resources to obtain legal assistance when petitioning a federal entity or official.

Avoidance Mechanism: Six stakeholders recommended a new mechanism that allows individuals to petition a federal court before or during sentencing to avoid a federal collateral consequence for NVDC. Some stakeholders said that models for this type of mechanism can be found in the Model Penal Code and the Uniform Collateral Consequences of Conviction Act.

³²According to a May 2017 American Law Institute press release, the Proposed Final Draft of the *Model Penal Code: Sentencing* was approved by its members in 2017. In addition, according to the American Law Institute's website, the Proposed Final Draft "may be cited as representing the Institute's position until the official text is published." National Conference of Commissioners on Uniform State Laws, *Uniform Collateral Consequences of Conviction Act* (March 2011).

Stakeholders identified benefits of an avoidance mechanism, such as:

- Expands opportunities for people to avoid collateral consequences, if deemed beneficial by a federal court.
- Judges or prosecutors can review the facts and circumstances of the petitioner to determine whether there is a need to approve the petitioner's request and whether granting approval would create a risk to public safety.
- Can potentially promote reentry, reintegration, and law abiding behavior.

Stakeholders also identified risks and disadvantages of an avoidance mechanism, such as:

- A person may avoid a collateral consequence and potentially commit crimes that they otherwise might not have had the opportunity to commit.
- The mechanism would allow federal officials to use discretion, which is less efficient than automatically imposing a collateral consequence.

Eliminate certain federal collateral consequences for NVDC:

Three stakeholders recommended that the federal government eliminate the requirements that states deny the Supplemental Nutrition Assistance Program and the Temporary Assistance for Needy Families for individuals with certain drug convictions. All 3 stakeholders acknowledged that states can currently opt out of these requirements; however, they recommended that the federal government eliminate the requirements altogether.

Stakeholders identified benefits of eliminating these federal collateral consequences for NVDC, including those listed below. Stakeholders did not mention any risks or disadvantages of this action.

- Expand the number of people eligible for the Supplemental Nutrition Assistance Program and the Temporary Assistance for Needy Families program.
- Family members, including children, of individuals with a NVDC could potentially benefit from expanded program participation.

As discussed earlier, 13 stakeholders recommended at least 1 action to mitigate federal collateral consequences for NVDC. During our interviews, we asked these 13 stakeholders whether their recommended action(s) could also be applied to convictions other than NVDC (e.g., convictions related to theft). Eleven of the 13 stakeholders said yes, their

recommended actions could be applied to other types of convictions. For example, 1 stakeholder said that actions to expand relief and to evaluate whether collateral consequences should be mandatory or discretionary could be applied to all convictions. In addition, 1 stakeholder said that, “if we solve the problem of collateral consequences [only] for people with nonviolent drug convictions, we would have left a much larger problem untouched.”

Stakeholders Offered Perspectives on Mitigating Federal Collateral Consequences for Individuals that Participate in a Drug Rehabilitation Program

Stakeholders also recommended actions for individuals with NVDC who participate in a drug rehabilitation program.³³ Specifically, 11 of the 14 stakeholders said that they did not recommend any actions beyond what they recommended for all individuals with NVDC. Two stakeholders offered specific actions the federal government could take. For example, 1 stakeholder recommended that the federal government review federal collateral consequences for NVDC to identify opportunities to mitigate employment-related consequences for individuals that participate in a drug rehabilitation program. One stakeholder did not believe that mitigation was necessary, and did not offer any recommended actions.

In addition, 4 stakeholders highlighted that completion of, or participation in, a drug rehabilitation program could be considered by federal officials or agencies when determining whether to grant relief from federal collateral consequences for NVDC. For example, 1 stakeholder said that participating in a drug rehabilitation program could be the “price of admission” for relief. However, some stakeholders highlighted risks of requiring the completion of a drug rehabilitation program. One stakeholder said that not all people with NVDC have access to a drug rehabilitation program. Another stakeholder said that this requirement should not be imposed for housing-related collateral consequences, as a lack of housing could make it less likely that an individual stop using drugs.

³³During interviews with stakeholders, we asked what, if any, actions the federal government should consider taking to mitigate federal collateral consequences for individuals with NVDC that participate in a drug rehabilitation program.

States Have Taken a Range of Actions to Mitigate Collateral Consequences

We identified two studies that described actions states took to mitigate collateral consequences from 2009 through 2016.³⁴ Specifically, these two studies examined legislative or policy changes in all 50 states to mitigate collateral consequences, and found that most states took at least one action. The two studies did not target collateral consequences triggered by specific types of convictions, such as NVDC. According to the studies, the mitigation actions taken by states generally fell into the following categories. For each category below, an example of an action is provided:

- Created or expanded expungement or sealing opportunities—some states granted more individuals the opportunity to expunge or seal their criminal records.
- Issued, or expanded effects of, certificates of recovery—some states started to issue certificates of recovery that, according to one study we reviewed, can assist third parties (e.g., prospective employers) in making more informed decisions about applicants with a conviction.
- Expanded opportunities for offense downgrades—some states expanded opportunities for individuals with a felony conviction to downgrade the conviction to a misdemeanor after meeting certain requirements, such as the successful completion of probation.
- Expanded opportunities for people to avoid collateral consequences—some states expanded opportunities for individuals to participate in deferred adjudication.³⁵
- Addressed employment-related collateral consequences—some states enacted laws or policies that may prohibit employers from asking about criminal histories during the early stages of the hiring

³⁴Collateral Consequences Resource Center, *Four Years of Second Chance Reforms, 2013 – 2016: Restoration of Rights & Relief from Collateral Consequences* (2017); and Ram Subramanian, Rebecka Moreno, and Sophia Gebreselassie, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009 – 2014*, (New York, NY: Vera Institute of Justice, December 2014).

³⁵For example, according to the Vera Institute of Justice report, "...states created or expanded deferred adjudication programs in which a defendant is charged, prosecuted, and found guilty, but a conviction (sometimes called an order of judgment) is never entered. Similar to deferred prosecution, eligible defendants are given an opportunity to complete a treatment or other program, and stay out of trouble for a specified probationary period. If successful, the guilty verdict is vacated and the case dismissed; upon failure, the order of judgment is entered and the individual proceeds to formal sentencing."

process. These are sometimes referred to as ban the box laws and policies.

- Improved access to collateral consequence information—some states took steps to provide convicted individuals with information on collateral consequences that could potentially be imposed on them or potential ways to obtain relief.
- Mitigated certain state collateral consequences—some states mitigated collateral consequences, such as those related to housing, education, public assistance, and driving privileges.
- Expanded effects of pardons—some states expanded the number of collateral consequences that can be relieved by a gubernatorial pardon.

Agency Comments and Third-Party Views

We provided a draft of this report to the DOJ, Department of Housing and Urban Development, Department of Health and Human Services, Department of Labor, and ABA, for their review and comment. In emails, officials from the DOJ, Department of Housing and Urban Development, Department of Health and Human Services, and Department of Labor, stated that these agencies did not have any comments on our draft report. The ABA provided technical comments, which we incorporated as appropriate.

We are sending copies of this report to the appropriate congressional committees, the Attorney General, the Secretary of the Department of Housing and Urban Development, the Secretary of Labor, and the Secretary of the Department of Health and Human Services. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-8777 or maurerd@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in Appendix IV.

A handwritten signature in cursive script that reads "Diana Maurer".

Diana Maurer
Director, Homeland Security and Justice Issues

Appendix I: Objectives, Scope, and Methodology

This report addresses the following objectives: (1) What federal collateral consequences can be imposed upon individuals with nonviolent drug convictions (NVDC), (2) What mechanisms exist to relieve individuals from federal collateral consequences for nonviolent drug convictions, and (3) According to selected stakeholders, what actions, if any, could the federal government consider to mitigate federal collateral consequences for nonviolent drug convictions.

To address our first objective, we obtained data on state and federal collateral consequences from the American Bar Association's (ABA) National Inventory of the Collateral Consequences of Conviction (NICCC). The data included variables, such as a description of the collateral consequence and the duration (e.g., permanent or specific term). We obtained the data from the NICCC as of December 31, 2016; however, according to ABA officials, the data may not have been current as of that date. According to ABA officials, collateral consequences in the NICCC were not updated on a real-time basis for changes in jurisdictions' laws and regulations. Collateral consequences for each jurisdiction were updated periodically based on a schedule developed by NICCC project management, and based on the schedule, some changes to laws or regulations may have taken a year or longer to be reflected in the NICCC. Therefore, even though the NICCC data were obtained as of December 31, 2016, the data may include some laws and regulations that were removed or modified by a jurisdiction on or before December 31, 2016. In addition, the NICCC data may not include some laws or regulations that were added on or before December 31, 2016.

According to the ABA, the NICCC was developed using the definition of collateral consequences in the Court Security Improvement Act of 2007. According to the act: "The term 'collateral consequence' means a collateral sanction or a disqualification....The term 'collateral sanction' means a penalty, disability, or disadvantage, however denominated, that is imposed by law as a result of an individual's conviction for a felony, misdemeanor, or other offense, but not as part of the judgment of the court; and does not include a term of imprisonment, probation, parole, supervised release, fine, assessment, forfeiture, restitution, or the costs of prosecution....The term 'disqualification' means a penalty, disability, or disadvantage, however denominated, that an administrative agency, official, or a court in a civil proceeding is authorized, but not required, to impose on an individual convicted of a felony, misdemeanor, or other offense on grounds relating to the conviction." Although some differences exist between the definition of collateral consequences in the Comprehensive Addiction and Recovery Act of 2016 and the definition

used by the NICCC, we determined that the definition used by the ABA's NICCC was appropriate for the purposes of describing federal collateral consequences for NVDC and their characteristics.

According to ABA officials, the NICCC was designed to provide a comprehensive inventory of collateral consequences contained in federal and state laws or regulations. For example, if a collateral consequence was established in a federal law and also included in a federal regulation, the NICCC would count this occurrence as two separate collateral consequences. In addition, in instances that federal law requires the imposition of a collateral consequence by state law or regulation to receive certain federal funding, the NICCC would include the federal law and each state law or regulation as a separate collateral consequence.

To determine the number of federal collateral consequences that can be imposed on individuals with NVDC, we analyzed NICCC data. According to ABA officials, the NICCC does not identify whether a federal collateral consequence is triggered by NVDC; however, an estimate could be calculated using the NICCC's 16 triggering offense categories, among other available data. Specifically, we determined that federal collateral consequences included in the following triggering offense categories may be imposed for NVDC: (1) Any offense, (2) Any felony, (3) Any misdemeanor, and (4) Controlled substances. For example, if a federal collateral consequence was included in the Any offense category, then it could be triggered by any offense, including nonviolent drug offenses. Similarly, if a federal collateral consequence was included in the Any felony category, then it could be triggered by a felony nonviolent drug offense. According to ABA officials, the following 11 triggering offense categories generally do not contain drug offenses: Crime of moral turpitude; Crimes involving fraud, dishonesty, misrepresentation or money-laundering; Crimes of violence, including "person offenses"; Weapons offenses; Sex offenses; Public corruption offenses; Election-related offenses; Recreational license offenses; Motor vehicle offenses; Child Support offenses; and Other. As such, we excluded these 11 categories from our analysis. In addition, N/A, the final triggering offense category, includes general background checks that are not triggered by a specific offense or a type of offense, and may be conducted whether an applicant or employee does or does not have a conviction. In addition, the N/A category includes laws and regulations that provide relief from collateral consequences. As such, we excluded the N/A triggering offense category from our analysis.

Based on our analysis, we found that the Controlled substances triggering offense category included some collateral consequences that did not relate to drugs. As such, we reviewed each collateral consequence in the Controlled substances category that included specific words, such as alcohol and tobacco. If a federal collateral consequence only related to alcohol or tobacco, we excluded it from our population of federal collateral consequences for NVDC. Once we identified the population of federal collateral consequences for NVDC, we analyzed the data by selected characteristics, such as consequence type (i.e., mandatory, or discretionary) and duration (i.e., permanent, specific term, or conditional).

Of the roughly 46,000 federal and state collateral consequences identified in the NICCC, our review found that some of the consequences (less than one percent of the total number of collateral consequences) had duplicate legal citations and collateral consequence titles. We did not further examine these collateral consequences. In addition, we did not remove these potential duplicates from the data presented in Appendix II, as there are reasons why these collateral consequences may be unique and not duplicative. However, we examined the potentially duplicative federal collateral consequences that could be triggered by NVDC, and determined that two were duplicates. We removed these two collateral consequences from our count of federal collateral consequences for NVDC. We assessed the reliability of the NICCC data by obtaining information from ABA officials responsible for managing the database on how the data are collected and used, and what internal controls the data are subject to. We examined the data and related controls and interviewed ABA officials, and we concluded that these data were sufficiently reliable for the purposes of describing federal collateral consequences for NVDC and their characteristics.

To address our second objective, we analyzed NICCC data; reviewed relevant laws, regulations, and federal agency directives and guidance; and interviewed selected federal officials and ABA staff. To determine the number of federal collateral consequences for NVDC that had a related law or regulation that prescribed how a person could potentially obtain relief from the collateral consequence, we analyzed NICCC data as of December 31, 2016. Specifically, we analyzed each federal collateral consequence for NVDC to determine whether the NICCC identified it as having relief available. Our analysis was limited to the NICCC's Relief variable, which only includes relief mechanisms in laws and regulations related to a specific collateral consequence. Therefore, our review did not include federal relief mechanisms that may be available in laws or regulations that were not specific to a federal collateral consequence for

NVDC, and mechanisms in sources other than laws or regulations, such as federal agency policies. To identify examples of relief mechanisms, we analyzed the NICCC description of the relief and the related laws and regulations. As discussed above, we determined that the NICCC data were sufficiently reliable for the purposes of describing federal collateral consequences for NVDC and their characteristics.

To identify actions the Federal Interagency Reentry Council (Reentry Council) and its participating federal agencies took to mitigate federal collateral consequences, we analyzed Reentry Council reports and interviewed Reentry Council leadership. In addition, we selected four federal agencies—the Department of Justice, Department of Housing and Urban Development, Department of Health and Human Services, and Department of Labor. We selected these agencies because they participated on the Reentry Council, and reviewed at least some regulations or policies in an effort to mitigate federal collateral consequences. We also asked Reentry Council leadership for recommended agencies to include in our selections. Further, we sought to select a group of agencies that oversee policy areas that often affect individuals with NVDC, including employment and government assistance (e.g., housing and education assistance). For selected agencies, we reviewed relevant agency directives and guidance and interviewed agency officials to better understand their actions to mitigate federal collateral consequences. The information obtained from selected federal agencies cannot be generalized across all federal agencies; however, the information provided examples of recent actions the federal government took to mitigate federal collateral consequences.

To address our third objective, we interviewed selected stakeholders to gather perspectives on mitigating federal collateral consequences for NVDC. We asked these stakeholders to provide their opinions and perspectives, and not those of the organization to which they were affiliated. To identify potential stakeholders, we conducted a literature search for studies, government reports, conference papers, and other materials, that related to federal collateral consequences. To identify existing literature, we conducted searches of various databases, such as ProQuest and Scopus. We performed these searches to identify potential stakeholders that authored relevant literature, presented at conferences, or held leadership positions in a workgroup from January 2006 to January 2017. In addition, we asked potential stakeholders to recommend other stakeholders to participate in our study (i.e., snowball sampling). From our list of potential stakeholders we selected 14 stakeholders, aiming to select stakeholders with a range of perspectives and experiences

regarding federal collateral consequences. Table 2 below includes the list of stakeholders we selected for interviews.

Table 2: Stakeholders GAO Interviewed to Gather Perspectives on Federal Collateral Consequences for Nonviolent Drug Convictions

Name	Title, Organization, Location
Richard Cassidy	President Uniform Law Commission Burlington, Vermont
Gabriel J. Chin	Edward L. Barrett Jr. Chair and Martin Luther King, Jr. Professor of Law University of California, Davis School of Law Davis, California
Steve Cook	President National Association of Assistant U.S. Attorneys Woodbridge, Virginia
Meg Garvin	Executive Director National Crime Victim Law Institute Portland, Oregon
Cecelia Klingele	Associate Reporter "Model Penal Code: Sentencing," a project of the American Law Institute Madison, Wisconsin
Paul J. Larkin, Jr.	Senior Legal Research Fellow Heritage Foundation Washington, District of Columbia
Marc Levin	Policy Director "Right on Crime," a project of the Texas Public Policy Foundation in cooperation with Prison Fellowship and the American Conservative Union Austin, Texas
Margaret Colgate Love	Executive Director Collateral Consequences Resource Center Washington, District of Columbia
Judge Eugene A. Lucci	Member, Board of Governors American Judges Association Painesville, Ohio
Marc Mauer	Executive Director The Sentencing Project Washington, District of Columbia
Roberta Meyers	Director of National Helping Individuals with Criminal Records Re-enter Through Employment (H.I.R.E.) Network Legal Action Center New York, New York

Appendix I: Objectives, Scope, and Methodology

Name	Title, Organization, Location
Madeline Neighly	Senior Policy Advisor The Council of State Governments Justice Center New York, New York
Michael Pinard	Harriet and Francis Iglehart Professor of Law and Co-Director, Clinical Law Program University of Maryland Francis Carey School of Law Baltimore, Maryland
Norman Reimer	Executive Director National Association of Criminal Defense Lawyers Washington, District of Columbia

Source: Information provided by stakeholders whom GAO interviewed. | GAO-17-691

Note: Information regarding title, organization, and location, was obtained from stakeholders in May 2017. Stakeholders may have held positions with multiple organizations; however, we have only presented one title and organization per stakeholder.

Next, we conducted semi-structured interviews with the 14 selected stakeholders and asked questions regarding federal collateral consequences for NVDC—for example, we asked what, if any, actions the federal government should take to mitigate these collateral consequences. In addition, we asked about potential benefits and risks of taking actions to mitigate these collateral consequences. The information obtained from stakeholders cannot be generalized across all stakeholders; however, these stakeholders provided insights into potential actions the federal government could consider taking to mitigate federal collateral consequences for NVDC.

To identify types of actions that have been taken by states that could inform the types of actions the federal government could consider to mitigate federal collateral consequences for NVDC, we identified two studies that examined actions taken by states to mitigate collateral consequences, and summarized the types of actions. Specifically, we identified and reviewed two studies that examined legislative or policy changes in all 50 states to mitigate collateral consequences. The studies did not focus on collateral consequences triggered by a specific type of conviction, such as NVDC. One study examined actions taken during the years 2009 through 2014, and the other study examined the years 2013 through 2016.

We conducted this performance audit from September 2016 to September 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We

believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Number of Collateral Consequences by Jurisdiction, as Included in the National Inventory of the Collateral Consequences of Conviction

Table 3: Number of Collateral Consequences by Jurisdiction, as Included in the NICCC, as of December 31, 2016

Jurisdiction	Number of Collateral Consequences
Alabama	812
Alaska	599
Arizona	850
Arkansas	952
California	1,748
Colorado	688
Connecticut	599
Delaware	765
District of Columbia	609
Federal Government	1,171
Florida	1,126
Georgia	846
Hawaii	414
Idaho	657
Illinois	1,401
Indiana	770
Iowa	623
Kansas	612
Kentucky	886
Louisiana	1,458
Maine	669
Maryland	1,003
Massachusetts	784
Michigan	764
Minnesota	555
Mississippi	861
Missouri	883
Montana	562
Nebraska	745
Nevada	756
New Hampshire	1,101
New Jersey	1,054
New Mexico	656
New York	1,276

Appendix II: Number of Collateral Consequences by Jurisdiction, as Included in the National Inventory of the Collateral Consequences of Conviction

Jurisdiction	Number of Collateral Consequences
North Carolina	995
North Dakota	521
Ohio	1,650
Oklahoma	1,203
Oregon	1,112
Pennsylvania	837
Puerto Rico	398
Rhode Island	715
South Carolina	694
South Dakota	453
Tennessee	952
Texas	1,617
Utah	711
Vermont	324
Virgin Islands	226
Virginia	876
Washington	976
West Virginia	841
Wisconsin	691
Wyoming	501

Source: GAO analysis of data from the American Bar Association's National Inventory of the Collateral Consequences of Conviction (NICCC). | GAO-17-691

Note: Our review found that some federal and state collateral consequences (less than one percent of the roughly 46,000 total collateral consequences) had duplicate legal citations and collateral consequence titles. We did not further examine these collateral consequences. In addition, we did not remove these potential duplicates as there are reasons why these collateral consequences may be unique and not duplicative.

Appendix III: Descriptions of Consequence Categories in the National Inventory of the Collateral Consequences of Conviction

Table 4: ABA Descriptions of Consequence Categories in the National Inventory of the Collateral Consequences of Conviction, as of December 31, 2016

Consequence Category	Description
Employment	This category includes public employment, appointive office (not elective office), military service, volunteering, publicly regulated private employment, employment by licensed business entities, and employment as a manager or officer of a business. Volunteering and eligibility for appointive office are also included in the Political and civic participation category.
Business licensure and other property rights	This category includes liquor licenses; livestock, agriculture, and wildlife licenses; lottery and gambling licenses; licenses to operate care-giving or educational facilities; and, licenses to engage in specific industries. It also includes consequences affecting property rights, such as fines and administrative forfeitures, and corporate ownership interests.
Occupational, professional license, and certification	This category includes commercial drivers' licenses, pilots' and mariners' licenses, commercial hunting and fishing licenses, and most professional licensure requirements. Endorsements to operate school buses, multiple-person vehicles, and any other commercial vehicles on an ordinary driver's license are also included in this category.
Government contracting and program participation	This category includes Medicaid and Medicare program participation and general government contracting.
Government benefits	This category includes benefits in the form of welfare, health (e.g., Medicaid and Medicare), retirement, workers compensation, veterans, employee benefits, etc. It also includes immigration and travel restrictions.
Government loans and grants	This category includes business loans and educational financial aid.
Registration, notification, and residency restrictions	This category includes two primary types of mandatory disclosure requirements: Registration and mandatory supervision requirements usually applicable to sex offenders, and public notification requirements that involve disclosing criminal history information to the general public or to particular third parties, including victims and employers and schools. It also includes restrictions on residency in licensed community care facilities.
Political and civic participation	This category includes voting rights, eligibility for jury service, public office (both elective and appointive office, but not public employment generally), and volunteer activities.
Judicial rights	This category includes guardianships, executorships, and trusteeships; eligibility to inherit from crime victims; and limitations in subsequent civil proceedings (e.g., collateral estoppels and res judicata). Jury service is coded in the Political and civic participation category only.
Housing	This includes occupancy in any form of housing, vouchers, housing subsidies, and subsidized housing, which are also included in the Government benefits category. Restrictions on residency in licensed facilities are coded in this category, and the Registration, notification, and residency restrictions category.
Education	This category includes educational program eligibility and financial aid, which are also included in the Government benefits category.

**Appendix III: Descriptions of Consequence
Categories in the National Inventory of the
Collateral Consequences of Conviction**

Consequence Category	Description
Family/domestic rights	This category includes parental rights (e.g., custody or visitation), foster care, adoption, and name changes.
Recreational license, including firearms	This category includes all non-commercial hunting and fishing licenses, firearms licenses, and recreational motor vehicle licenses.
Motor vehicle licensure	This category includes all classes of drivers' licenses not issued for commercial purposes. Recreational vehicle licenses and commercial drivers' licenses are not coded in this category.

Source: American Bar Association (ABA). | GAO-17-691

Note: The ABA also included General relief in its list of consequence categories. We excluded the general relief category because it includes laws and regulations that provide relief from a variety of collateral consequences.

Appendix IV: GAO Contact and Staff Acknowledgments

GAO Contact

Diana Maurer, (202) 512-8777 or maurerd@gao.gov

Staff Acknowledgments

In addition to the contact named above, Brett Fallavollita (Assistant Director) and Jeffrey Fiore (Analyst in Charge) managed the work. Also, Enyinnaya David Aja, Kathryn Bassion, Willie Commons III, Dominick Dale, Leia Dickerson, Elizabeth Dretsch, Lorraine Ettaro, Eric Hauswirth, Jeffrey Daniel Paulk, Janay Sam, and Nina Thomas-Diggs, made significant contributions to this report.

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