

**Senator Chuck Grassley, Ranking Member**  
**Questions for the Record**  
**Judge John Gleeson (ret.)**

**Nominee to be a Commissioner on the United States Sentencing Commission**

1. **On May 11, 2020, you wrote an op-ed in the *Washington Post* urging Judge Emmet Sullivan to “assess the credibility of the [Justice] [D]epartment’s stated reasons for abruptly reversing course” in its prosecution of Michael Flynn. Shortly after your op-ed was published, Judge Sullivan appointed you as amicus to argue against the positions of both the Department and the defense.**

- a. **Did you discuss your *Washington Post* op-ed or any aspects of the Flynn case with Judge Sullivan prior to your appointment as amicus?**

Response: No.

- b. **In your view, if a prosecutor decides there is insufficient evidence to sustain a conviction, is it appropriate for a judge to overrule that determination?**

Response: A federal prosecutor’s authority not to prosecute is plenary and unqualified; it is unreviewable in any court of law. A federal prosecutor’s authority to *dismiss* a prosecution after it is brought is very broad but not unqualified; Rule 48 of the Federal Rules of Criminal Procedure expressly requires leave of court. In the vast majority of cases, and certainly in cases where a judge reaches the conclusion that the basis for prosecutor’s decision to seek dismissal of an indicted case is insufficiency of the evidence, in my view it would not be appropriate for the judge to deny leave to dismiss.

2. **In written testimony to the Judicial Conference of the United States in 2016, you wrote that America’s criminal justice system is “arguably the most punitive one in the world,” and suggested that America is “wildly out of proportion when compared to nations that are otherwise similar to ours.”**

- a. **To which comparable nations were you referring when you suggested that the American justice system is “wildly out of proportion”?**

Response: At that time the incarceration rate in the United States was dwarfed by the rates in many countries, including Canada, the United Kingdom, France, Germany, Norway, the Netherlands, and Japan.

- b. **Do you still believe the American justice system is among the “most punitive” in the world?**

Response: Yes, but substantial strides have been made to change that, including the 2018 enactment of the First Step Act. Since 2016, the federal prison population has been substantially reduced. If I am fortunate enough to be confirmed, any action in

this regard in my capacity as a member of the Commission would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders. I note that under 28 U.S.C. § 994(g), the Commission has been directed to “take into account the nature and capacity of the penal, correctional, and other facilities and services available,” and to “make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated.” In addition, that provision requires that the Guidelines “be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.”

3. **What is the correct comparator for sentencing disparities and why do you think so:**
- a. **sentencing disparities among similarly situated defendants before a single judge;**
  - b. **sentencing disparities among similarly situated defendants within a single district;**
  - c. **sentencing disparities among similarly situated defendants within a single circuit;**
  - d. **sentencing disparities among all similarly situated defendants;**
  - e. **any other comparator.**

Response: (d) is the correct answer.

4. **Are there any crimes for which mandatory minimum sentences are appropriate? If so, which crimes?**

Response: As a judge, I regularly heard cases involving mandatory minimums, and I applied them as required. For example, I presided over several cases arising out of terrorist efforts to bomb the New York City subway system. I imposed mandatory sentences in those and other terrorism cases.

5. **In a 2018 presentation, you said that the United States has an “overincarceration problem.” To solve this problem, you suggested that policymakers ask “[a]re there people who are being sentenced to prison who should not be imprisoned at all?”**

- a. **How would you answer that question?**

Response: Though any answer to that question in my capacity as a member of the Commission (should I be confirmed) would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders, I currently believe there is a segment of the federal defendant population that is currently subjected to imprisonment that might be better dealt with through alternatives to incarceration. For example, nonviolent defendants suffering from addiction problems might be

more effectively dealt with through judge-involved drug courts. Defendants who are veterans might benefit from (and avoid prison as a result of) Veterans' courts.

**b. For which crimes do you support “re-entry” programs in lieu of prison sentences?**

Response: Though I believe there are certain categories of offenders who ought not be eligible for alternative to incarceration programs, including but not limited to violent offenders, in general I think re-entry programs ought to focus more on the offender than on the crime with which he or she is charged. For example, some offenders charged with minor offenses may present criminal histories that render them ineligible for alternative to incarceration programs.

**6. Some have argued that 18 U.S.C. § 3553(a)(6) permits a district judge to consider racial disparities in crafting a sentence. Do you agree? Please explain with citations to case law.**

Response: In my view, § 3553(a)(6) permits district judges to consider the sentences imposed on others in the same case and on others around the country who have similar records and have been found guilty of similar offenses. Though certain racial disparities might be noted and acted upon by sentencing judges, in my view it would not be pursuant to § 3553(a)(6).

**7. What role should empathy play in sentencing defendants?**

Response: Within the ranges advised by the Commission's Guidelines, sentencing judges have broad discretion, but Congress has made clear that they should apply the factors set forth in 18 U.S.C. § 3553(a).

**8. Should sentences take into consideration principles of social “equity”?**

Response: I believe that remediating social inequities is not a proper goal of sentencing.

**9. What, if anything, do you think is the relationship between morality and the law when it comes to punishing criminals?**

Response: As long as our system vests discretion in sentencing judges to arrive at sentences based at least in part on individualized circumstances, morality will play a role in sentences. Among the many accomplishments of the Congress in this context is the requirement that judges state their reasons for sentences, and the provision for appellate review of sentences. Those features of our system help ensure that all of the bases of a sentence are transparent and subject to review.

- 10. In 1983, I supported the Protection of Children Against Sexual Exploitation Act. In 2012, I sent a letter to the Sentencing Commission urging the Commission not to recommend lower sentences for the possession of child pornography. I wrote that “it would be a disservice to the American people to have the Commission issue a report that advocates for the reduction in sentencing for a class of criminals who cause profound and lasting damage to their victims.” But some have argued that the sentencing enhancements for child pornography offenses are too severe. Do you believe the sentencing enhancement based on the number of images is flawed?**

Response: Though any answer to this question in my capacity as a member of the Commission (should I be confirmed) would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders, I believe the number of images involved in a child pornography offense is a relevant consideration in sentencing. All other things being equal, a defendant who downloaded 10,000 images can properly be considered more culpable than one who downloaded only 10.

- 11. For non-production child pornography offenses, an application note in the guidelines defines each video as the equivalent to 75 images. *See* USSG §2G2.2, comment. (n.6 (B)(ii)). Do you believe this note is flawed or have a policy objection to it?**

Response: Though any answer to this question in my capacity as a member of the Commission (should I be confirmed) would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders, I do not regard that note as flawed and have no policy disagreement with it.

- 12. Do you believe mandatory minimums are inappropriate for offenses involving non-production of child pornography?**

Response: It is the purview of Congress to determine whether to pass mandatory sentences for specific offense, and if confirmed I would want to make sure Congress had the relevant data it needed to evaluate such a question.

- 13. Do you believe mandatory minimums are inappropriate for offenses involving production of child pornography?**

Response: It is the purview of Congress to determine whether to pass mandatory sentences for specific offense, and if confirmed I would want to make sure Congress had the relevant data it needed to evaluate such a question.

- 14. Please describe the selection process that led to your nomination to be a Commissioner on the United States Sentencing Commission from beginning to end**

**(including the circumstances that led to your nomination and the interviews in which you participated).**

Response: My work as a prosecutor, judge, defense lawyer, and law professor resulted in various outreaches to me, including by Senate staff members, asking if I might be interested in serving. I answered those in the affirmative. I was asked to participate in a single interview--with lawyers in the office of White House Counsel--and some time later I was informed that President Biden was considering my nomination.

- 15. During your selection process, did you talk with anyone from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary? If so, what was the nature of those discussions?**

Response: No.

- 16. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

- 17. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

- 18. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

- 19. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundation, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

- 20. Demand Justice is a progressive organization dedicated to “restor[ing] ideological balance and legitimacy to our nation’s courts.”**

- a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
- b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, and/or Jen Dansereau?**
- c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, and/or Jen Dansereau?**

Response: The answer to all of these questions is “no.”

**21. The Alliance for Justice is a “national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society.”**

- a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
- b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**
- c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: The answer to all of these questions is “no.”

**22. Arabella Advisors is a progressive organization founded “to provide strategic guidance for effective philanthropy” that has evolved into a “mission-driven, Certified B Corporation” to “increase their philanthropic impact.”**

- a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella’s known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**
- b. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella’s known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**
- c. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella’s known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: The answer to all of these questions is “no.”

**23. The Open Society Foundations is a progressive organization that “work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens.”**

- a. Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
- b. Are you currently in contact with anyone associated with the Open Society Foundations?**
- c. Have you ever been in contact with anyone associated with the Open Society Foundations?**

Response: The answer to all of these questions is “no.”

**24. Fix the Court is a “non-partisan, 501(C)(3) organization that advocates for non-ideological ‘fixes’ that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people.”**

- a. Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
- b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**
- c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: The answer to all of these questions is “no.”

**25. The Raben Group is “a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors.” It manages the Committee for a Fair Judiciary.**

- a. Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
- b. Are you currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**
- c. Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

Response: The answer to all of these questions is “no.”

**26. Please explain, with particularity, the process whereby you answered these questions.**

Response: I wrote answers to the questions based on my own knowledge and experience, including teaching Sentencing in law schools for 28 years. I then received comments from a lawyer in the Justice Department’s Office of Legal Policy before finalizing my answers.



**Nomination of the Honorable John Gleeson  
to be a Member of the United States Sentencing Commission  
Questions for the Record  
Submitted June 15, 2022**

**QUESTIONS FROM SENATOR COTTON**

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

Response:

No

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

Response:

No

3. **What are the purposes of criminal sentencing? Of those purposes, which do you believe is the most important and why?**

Response:

The purpose of sentencing, set forth in 18 USC § 3553(a)(2) are retribution (just deserts), incapacitation, general deterrence, and rehabilitation. As a general matter, I believe the first is most important because, as a general rule, similarly situated defendants who commit similar crimes ought to receive similar sentences. That said, there are some cases in which the need to incapacitate the defendant is so strong it can dominate the sentence, and there are also some types of cases in which general deterrence (though difficult to measure) can be a factor in sentencing.

4. **Is deterrence a product of the severity of a sentence, a product of the likelihood of punishment, or a combination of the two? If you believe that deterrence is a combination of the two, please explain which of the two is a stronger factor in deterrence.**

Response:

Deterrence is a product of both sentence severity and the perceived likelihood of being caught and punished. I am familiar with some social science that suggests that the latter factor plays a more dominant role, but I have not reached a view of my own on that topic; I would need to study it further.

5. **Please describe what you believe to be “success” in the context of your work if you**

**are confirmed as a member of the Sentencing Commission.**

Response:

“Success” as a Sentencing Commission member would be achieved if I worked collaboratively with my six colleagues and, after gathering data and listening to all the appropriate stakeholders, we promulgated (or recommended to Congress, or both) sound sentencing policy changes as needed and ensuring Congress has the information needed to pass legislation regarding sentencing.

- 6. Do you believe that it is the purpose of the Sentencing Commission to reduce the number of criminals in prison?**

Response:

No

- 7. As a general matter, should criminals who commit crimes that tend to involve violence face stronger sentences, weaker sentences, or approximately the same sentences as criminals who commit crimes that do not tend to involve violence?**

Response:

As a general matter, defendants who commit violent crimes deserve harsher punishment than those who do not.

- 8. Does the Sentencing Commission have the authority to undermine mandatory minimum or maximum sentences passed by Congress?**

Response:

No

- 9. Please describe what you believe to be the Supreme Court’s holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).**

Response:

*Apprendi* held that any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury (if not admitted in a guilty plea), and proven beyond a reasonable doubt.

- 10. Please describe what you believe to be the Supreme Court’s holding in *Blakely v. Washington*, 542 U.S. 296 (2004).**

Response:

Applying *Apprendi*, *Blakely* held that the “maximum sentence” is the highest sentence the judge can impose based solely on the facts found by the jury.

- 11. Please describe what you believe to be the Supreme Court’s holding in *United States v. Booker*, 543 U.S. 220 (2005).**

Response:

Applying *Apprendi* and *Blakely* to the Guidelines, the Court held that mandatory Guidelines violated the Sixth Amendment right to trial by jury; in a second opinion in the same case, it excised 18 USC § 3553(b)(1) and declared the Guidelines advisory only.

- 12. Please describe what you believe to be the correct application of 18 U.S.C. § 3553.**

Response:

The correct application of § 3553 includes a careful consideration of the specified factors and a sentence that serves the goals set forth in § 3553(a)(2).

- 13. Do you believe that the Sentencing Commission has inherent authority to apply sentencing guidelines amendments retroactively? Please explain in your answer what you believe to be the limits on the Sentencing Commission’s authority to make retroactive changes.**

Response:

The Commission’s authority to apply amendments retroactively is statutory, conferred by 28 U.S.C. § 994(u). Generally, amendments reducing Guidelines ranges are prospective only. I believe the limits on the authority to make retroactive are, for the most part, practical and administrative in nature. Retroactive reductions produce burdens on the criminal justice system in the form of inmate applications for relief. For example, a small reduction in sentence that would apply to a large number of cases could easily result in administrative costs that outweigh the interest in according the benefit to previously-sentenced inmates.

- 14. The Sentencing Commission recently released a report on the recidivism rates for offenders who participated in vocational training programs in federal prison, and found that participation in such job training programs had no meaningful effect on the recidivism rates of those offenders. Please explain what factors, if any, you believe to have the greatest effect on reducing recidivism rates.**

Response:

I believe various facts affect recidivism rates. To a degree, sentence lengths play a role. Although not all prison programming is successful in reducing recidivism rates, some have been proven effective in state systems. Other factors, include the

offender's current age, age at the time of the offense, and marital status also play a role in recidivism rates.

- 15. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

Response:

I wrote answers to the questions based on my own knowledge and experience, including teaching Sentencing in law schools for 28 years. I then received comments from a lawyer in the Justice Department's Office of Legal Policy before finalizing my answers.

- 16. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please identify the department or agency with which those officials are employed.**

Response:

No. I wrote my answers.

**SENATOR TED CRUZ**  
**U.S. Senate Committee on the Judiciary**

**Questions for the Record for Hon. John Gleeson, Nominee to be a Member of the United States Sentencing Commission**

**I. Directions**

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Commission, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

## **II. Questions**

### **1. Is racial discrimination wrong?**

Response:

Yes, racial discrimination is wrong.

### **2. If confirmed, what will your top priorities be for the U.S. Sentencing Commission?**

Response:

If I am confirmed, my top priorities for the Commission will be to implement the Congressional directives that have accumulated while it lacked a quorum. In light of the First Step Act, there is also a need to conform the compassionate release policy statement (§ 1B1.13) to the statute. Before deciding on further priorities I will first hear from my colleagues, the Commission's staff, and the various stakeholders that regularly provide input to the Commission.

### **3. What do you believe is the essential function of the U.S. Sentencing Commission?**

Response:

I believe the essential function of the Commission, which is embodied in 28 USC § 991, is to establish sentencing policies and practices that assure the meeting of the purposes of sentencing as set forth in 18 U.S.C. § 3553; provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.

### **4. How does the Separation of Powers inform your view of the Commission and your role as a potential Commissioner?**

Response:

Sentencing Commissioners, in my view, must understand that the Commission was created by Congress, given instructions by Congress, and acts pursuant to a process that requires Congressional approval (in the form of inaction) of all of the Commission's amendments. In addition, only Congress can enact or repeal mandatory sentencing provisions. Whereas the Commission may properly advise the Congress with respect to such matters, it would

violate separation of powers principles for the Commission to assert authority over such provisions.

**5. Is the criminal justice system systemically racist?**

Response:

No. Our criminal justice system is affected by documented racial inequities that we should all work to eliminate, but in my experience the system writ large is not systemically racist.

**6. What do you believe is the role of incapacitation in sentencing?**

Response:

Congress has set forth the following purposes of sentencing in 18 U.S.C. § 3553(a)(2): (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; (c) to protect the public from further crimes of the defendant; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. In some cases (particularly violent crimes), the interest in protecting the community from further crimes by the defendant through incapacitation outweighs the other factors. Quite a few of the defendants I prosecuted in the late 80s and early 90s are still in prison, where they belong.

**7. What do you believe is the role of general deterrence in sentencing?**

Response:

Congress has set forth the following purposes of sentencing in 18 U.S.C. § 3553(a)(2): (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; (c) to protect the public from further crimes of the defendant; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. I believe general deterrence, though difficult to measure, plays a role in sentencing. Certain individuals are sufficiently informed about sentencing outcomes that their behavior can be modified by the sentences imposed on others.

**8. Do you believe in specific deterrence?**

Response:

Yes. Congress has set forth the following purposes of sentencing in 18 U.S.C. § 3553(a)(2): (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; (c) to protect the public from further crimes of the defendant; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. As discussed above, I believe specific deterrence (which in my view is substantially equivalent to incapacitation) is necessary in some cases.

9. **Should a sentencing judge consider retributive concerns when fashioning a sentence?**

Response:

Yes, a sentencing judge should consider retributive concerns when fashioning a sentence.

10. **How will your views of the Eighth Amendment's prohibition on "cruel and unusual" punishment inform your work as a Sentencing Commissioner?**

Response:

I do not think the Eighth Amendment will play a major role in my work as a Commissioner if I am confirmed. In my view, the work of the Commission virtually never implicates the constitutional limits on permissible sentences as those limits have been articulated by the Supreme Court.

11. **What sentences do you understand the U.S. Supreme Court's current Eighth Amendment jurisprudence as prohibiting?**

Response:

As relevant to the work of the Commission (which is not involved in capital cases), the Eighth Amendment prohibits, for example, sentences of life without parole imposed on juveniles. However, as suggested by my previous answer, such cases are exceedingly rare in the federal system.

12. **Do you believe that the U.S. Supreme Court's current Eighth Amendment jurisprudence is consistent with the original public meaning of that provision?**

Response:

As I understand it, the Supreme Court's resort to evolving standards of decency in its Eighth Amendment precedents (*see, e.g., Trop v. Dulles*, 356 U.S. 86 (1958)) has allowed for and resulted in some differences between its current jurisprudence and the original public meaning of the amendment. The Supreme Court has also looked to the original public meaning of the Eighth Amendment in some cases (*see, e.g., Bucklew v. Precythe*, 139 S. Ct. 112 (2019)).

13. **Do you believe that capital punishment is constitutional?**

Response:

Yes, the Supreme Court of the United States has repeatedly so held.



14. **In light of the leak of the draft of the U.S. Supreme Court opinion in *Dobbs v. Jackson Women’s Health Organization*, will you commit to maintaining the confidentiality of non-public Commission documents and instruct all staff and individuals with access to such documents to do the same?**

Response:

Yes.

15. **Do you believe that prosecutorial discretion does more good than harm in our criminal justice system?**

Response:

Yes, in my experience as a federal prosecutor and federal district court judge, for the most part federal prosecutors exercise their considerable discretion prudently.

16. **In *United States v. Kupa*, 976 F. Supp. 2d 417, 419 (E.D.N.Y. 2013), you claimed that prosecutors abused their authority to file prior felony informations (“851 Enhancements”) in drug trafficking cases.**

- a. **Do you believe that it is ever appropriate for a prosecutor to file an 851 Enhancement in a drug trafficking case?**

Response:

Yes.

- b. **How do you plan to use your position on the Sentencing Commission to help rectify some of these prosecutorial “abuses”?**

Response:

Prosecutorial practices are of course the province of the Department of Justice. When, on occasion, in my role as a sentencing judge, I observed what I believed to be unfair results of prosecutorial choices, I pointed them out, as in *Kupa*. However, I do not believe efforts to influence DOJ practices are among the proper functions of the Commission.

17. **At Debevoise & Plimpton, you started The Holloway Project to advocate for the reduction of prison sentences that you and your firm colleagues believe to be unjust. Would you continue to be involved in The Holloway Project while a member of the Sentencing Commission?**

Response:

Except to the extent it will result in a conflict, *see* below, I will continue my work on the Holloway Project.

**a. Do you foresee any conflicts of interest between your work on The Holloway Project and your potential service on the Sentencing Commission?**

Response:

It is possible that my work on the Commission (assuming I am confirmed) may limit my activities on behalf of clients of the Holloway Project. For example, if there is future litigation over the Commission's intent with respect to a revised policy statement that guides decisions on motions for compassionate release, it would be inappropriate in my view for me, as a sitting Commissioner, to make such an argument on behalf of a client. I commit to the Committee that if I am fortunate enough to be confirmed, I will be attentive to such concerns and deal appropriately with them as they arise.

**18. Since resigning from the federal bench, you have maintained a fairly large media profile—drafting an editorial in the Washington Post and giving multiple interviews to the Wall Street Journal. Do you believe that this high level of media exposure is appropriate for a potential member of the Sentencing Commission?**

Response:

I agree with the suggestion that a public official – especially a member of a multi-member body like the Commission – needs to be mindful of the heightened importance of public statements. I respectfully disagree with the assertion that I have “maintained a fairly large media profile” during the past six-plus years.

**19. You joined an amicus brief in support of Boston Marathon bomber, Dzhokhar Tsarnaev, in his appeal before the U.S. Supreme Court this past term. Do you intend to continue joining amicus briefs and making public statements about pending cases before courts, should you be confirmed to the U.S. Sentencing Commission?**

Response:

I do not intend to continue joining amicus briefs if I am confirmed. As for public statements about pending cases before courts, I will of course not make such statements on any cases related to sentencing. There may be occasions when public statements by me are appropriate in cases I am litigating.

**20. In a 2018 presentation at the University of Virginia Law School, you publicly stated your belief that the United States has an “overincarceration problem.” Do you continue to hold this belief today?**

Response:

Yes, although I believe subsequent developments, including The First Step Act, have reduced the magnitude of the problem.

**a. Do you believe there is an optimal number of people the United States should**

**incarcerate?**

Response:

No.

**b. If yes, please state that figure and your reasoning for it.**

**Senator Josh Hawley**  
**Questions for the Record**

**John Gleeson**  
**Nominee, U.S. Sentencing Commission**

- 1. Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

- a. Do you agree that the penalties should be aligned?**

Response: Though any answer to this question in my capacity as a member of the Commission (should I be fortunate enough to be confirmed) would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders, I generally believe the penalties for receipt and possession should be aligned.

- b. If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

Response: Any answer to this question in my capacity as a member of the Commission (should I be confirmed) would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders. In this particular context, I would want to carefully study the issue because of the distinctive seriousness of child pornography offenses.

- 2. In *Terry v. United States*, decided last year, the Supreme Court acknowledged the argument that *underenforcement* of the law can have a negative disparate impact based on race. Given that racial minorities are more likely to be victims of crimes, do you agree that underenforcing criminal laws—including by issuing sentences that are too low—disproportionately harms victims who are racial minorities?**

Response: The question is difficult to answer in the abstract (that is, without identifying the specific underenforced laws), but I agree as a general matter that the interests of crime victims play an integral role in law enforcement. When

underenforcement results in adverse effects on crime victims and their families and communities, that produces negative effects irrespective of the race of those victims.

- 3. Current law requires judges to impose sentences on firearms offenders “consecutively,” not “concurrently.” That means that if a person was convicted of three counts of 18 U.S.C. §924(c), he would have to serve time for each count. The Commission previously advocated making these sentences run “concurrently” in certain circumstances. This would mean that a person with three sentences of 5 years would serve them all at the same time. In effect, this would be identical to 5 years in jail. Do you agree with the Commission’s recommendation?**

Response: I respectfully disagree with the premise of the question. The mere fact that the sentences would not be *required* by statute to run consecutively does not “mean that a person with three sentences of five years *would* serve all of them at the same time.” As a prosecutor, I successfully argued in many cases that sentences on multiple counts ought to be imposed consecutively (even though that was not mandated by law), and through my advocacy judges on multiple occasions did just that.

- 4. Please rank these four aims of criminal law in order of general importance, recognizing that they may change from case to case: retribution, deterrence, incapacitation, and rehabilitation.**

Response: As a general matter, I believe the first aim (retribution) is most important because, as a general rule, similarly situated defendants who commit similar crimes ought to receive similar sentences. That said, there are some cases in which the need to incapacitate the defendant is so strong it can dominate the sentence, and there are also some types of cases in which general deterrence (though difficult to measure) can be a factor in sentencing. When it comes to sentence length, rehabilitation, in my view, is generally least important.

- 5. During the Antifa riots of 2020, Montez Lee killed a man. He burned down a building with the man still inside. Rather than press for a tough sentence, the Biden administration argued that Lee deserved leniency because he had a political motive to commit the crime. The Department of Justice tried to excuse this horrific crime on the theory that “a riot is the language of the unheard” and that Lee—by burning down a building and killing a man—was just trying to give voice to his anger and frustration after the death of George Floyd. If a person commits a crime at a protest, do you believe that the person’s motivation to further the political aim of that protest can ever serve as a reason for a lower sentence?**

Response: I am not aware of all the facts of this particular case, and as a former federal judge I am well aware that an individualized inquiry is involved in every federal sentence. Though motive is rarely an element of an offense, it is often a relevant factor at sentencing. Whether a political motive for a crime amounts to an aggravating or mitigating factor would depend on all the circumstances in the case.

**Questions for the Record for John Gleeson  
From Senator Mazie K. Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

- a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

Response:

No

- b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

Response:

No

## **Questions for the Record**

**Judge John Gleeson**

**Senator John Kennedy**

- 1. You previously claimed the American justice system is the most “punitive” in the world. If you maintain this viewpoint, please describe how do you plan to reduce the punitive nature of sentencing guidelines if you are confirmed as a commissioner.**

Response:

If I am fortunate enough to be confirmed, I plan, as promised at the confirmation hearing, to faithfully implement The First Step Act, which was explicitly intended to increase the use and transparency of sentence reductions. As for any other measures, I would first listen to and learn from my fellow Commissioners (if in fact I am confirmed) and other stakeholders in the federal criminal justice system. Sentencing Commissioners, in my view, must understand that the Commission was created by Congress, given instructions by Congress, and acts pursuant to a process that requires Congressional approval (in the form of inaction) of all of the Commission’s amendments. In addition, only Congress can enact or repeal mandatory sentencing provisions. Whereas the Commission may properly advise the Congress with respect to such matters, it would violate separation of powers principles for the Commission to assert authority over such provisions.

- 1. Do you believe prosecutors who decline to prosecute entire classes of crime improve the criminal justice system or public safety?**

Response:

This question is difficult to answer in the abstract, but as a general matter the answer is no. I was a federal prosecutor and Chief of the Criminal Division in the Eastern District of New York, and my experience has imbued in me a belief that prosecutorial “declinations” should be case-specific, not categorical.



**2. Have you ever been accused of or disciplined for maintaining an inappropriate workplace relationship?**

Response:

No.

**Senator Mike Lee**  
**Questions for the Record**  
**John Gleeson, Nominee to the United States Sentencing Commission**

- 1. What factors or information will you consider before making sentencing recommendations?**

Response: I would consider all of the factors set forth in Section 3553(a) of Title 18, United States Code, and the purposes of sentencing in subsection (a)(2) thereof. I would also consider the relevant data and the views of the Staff of the Commission, the views of the other Commissioners (assuming I am confirmed), and the views of all the stakeholders who provide input to the Commission.

- 2. Please define the term “mens rea” and explain why it is important in criminal law.**

Response: Mens rea is the state of mind required by a penal statute.

- 3. Would the severity of a statute’s mens rea standard factor into your sentencing recommendations?**

Response: Perhaps. All other things being equal, a defendant convicted of a crime requiring only a mens rea of negligence might be less culpable than one convicted of a crime requiring an intentional violation of the law.

- 4. Do you think it is important for criminal law statutes to have an explicit mens rea requirement? Should statutes without a mens rea standard be treated differently than those with an explicit standard in terms of sentencing?**

Response: In fairness, and in furtherance of providing the notice required by the Due Process Clause, penal statutes should explicitly set forth the mens rea requirement. For the reason set forth in the answer to question 3 above, a failure to specify the requisite mens rea could result in a relevant sentencing consideration.

- 5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?**

- a. Does the “plain meaning” of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

Response: The construction of a statute always begins with its text, which is given its plain meaning.

6. **The Biden Administration has defined “equity” as: “the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.” Do you agree with that definition? If not, how would you define equity?**

Response: I agree that equity is the consistent and systematic fair, just, and impartial treatment of all individuals.

7. **Is there a difference between “equity” and “equality?” If so, what is it?**

Response: I believe both equity and equality involve the consistent and systematic fair, just, and impartial treatment of all individuals.

8. **Does 18 U.S.C. § 3553(a) allow for the consideration of “equity” as defined by the Biden Administration (listed above in question 6)?**

Response: 18 U.S.C. § 3553(a) allow for the consideration of the nature and circumstances of the offense and the history and characteristics of the defendant, the need for the sentence imposed to serve the purposes of sentencing, the kinds of sentences available, the applicable sentencing range, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to any victims of the offense.

9. **Should 18 U.S.C. § 3553(a)(6) – the need to avoid unwarranted sentence disparities – be weighed more strongly than other § 3553 factors?**

Response: No.

10. **Should the desire to reduce the prison population across the United States be considered at any stage of sentencing, either by the Sentencing Commission or by federal judges?**

Response: In some circumstances, yes. For example, Congress made clear that that First Step Act's amendment to the compassionate release statute was intended to "increase the use and transparency" of sentence reductions. That explicit statement by Congress may properly be considered as one of many factors by the Commission when it amends the pertinent policy statement (U.S.S.G. § 1B1.13). When I sentenced individuals as a federal judge, I was motivated by the factors set forth in the relevant statutes, particularly 18 U.S.C. § 3553.

11. **In the opinion you authored in *United States v. Diaz*, you stated that you “w[ould] not ignore the Guidelines range” when sentencing the defendant, but that you would “place almost no weight on it because of [your] fundamental policy disagreement with the offense guideline that produces it.” What gives judges the authority to ignore the sentencing guidelines based on policy disagreements?**

Response: District judges never have the authority to ignore the Guidelines, and I never did so when I was a judge. However, the Supreme Court has held that they may act on policy disagreements with offense guidelines. *See U.S. v. Kimbrough*, 552 U.S. 85, 109-10; *Spears v. U.S.*, 555 U.S. 261, 263-67 (2010).

12. **In your *United States v. Diaz* opinion you also stated that you “w[ould] carefully consider all of the factors set forth in 18 U.S.C. § 3553(a) except one – the length of imprisonment recommended by the United States Sentencing Commission’s Guidelines Manual.” You have expressed a similar disregard for the work of the Sentencing Commission multiple times throughout your career. Why should you be confirmed as a commissioner when you repeatedly disregarded the sentencing guidelines as a judge?**

Response: Respectfully, I did not “repeatedly disregard[ ] the sentencing guidelines as a judge.” As required by *Booker*, I began every sentence by computing the proper range, and as required by statute I considered that range in every case, except in those where mandatory sentencing provisions dictated the sentence. My decision in *Diaz* to act upon a policy disagreement with the guideline in that case was expressly authorized by the cases cited in the preceding answer, was carefully explained in a lengthy statement of reasons, and was not appealed by the government.

13. **What role, if any, should an offender’s group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the consideration of an appropriate sentence?**

Response: None.

**14. How much deference should judges give to the sentencing guidelines promulgated by the Sentencing Commission?**

Response: As dictated by statute, judges must in every case consider the relevant guidelines and policy statements and the advisory range produced by a proper application of the Guidelines Manual. They must also consider the applicability of the various departure grounds set forth in the Manual.

**15. Is it ever appropriate for a judge to deviate from or disregard the sentencing guidelines? If so, under what circumstances is it appropriate?**

Response: Judges are never free to disregard the Guidelines. Sentences above or below the advisory range are authorized in many cases by the Guidelines Manual itself, and they may also be the result of the judge's consideration of the factors set forth in 18 U.S.C. § 3553(a).

**16. Is it appropriate for judges to depart from the sentencing guidelines simply because they disagree with the underlying policy?**

Response: As discussed above in my answers to questions 11 and 12, sentencing judges are permitted in appropriate circumstances to sentence outside the applicable range based on policy disagreements with the offense guideline.

**17. According to data from the Sentencing Commission, less than one-third of non-production child pornography offenders receive a sentence within the Commission's guideline range. What do you think accounts for this trend? Are you concerned that the majority of judges appear to have disregarded the Sentencing Commission's work in this area?**

Response: I think concerns like those expressed by the Second Circuit in *U.S. v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), may account for that trend. I am not persuaded that judges who sentence below the range have "disregarded" the Sentencing Commission's work, but I agree that a trend of sentences outside the applicable range provided by a specific guideline deserves the attention of the Commission.

**18. What will you do to encourage judges to follow the guidelines more closely in child pornography cases?**

Response: To the degree that judges are not imposing Guidelines sentences in a particular category of cases, the Commission's role in the first instance is to determine why that is the case. Judges, like the Department of Justice,

defenders, and other stakeholders, are important sources of information that can influence sentencing policy.

- 19. In offenses involving controlled substances what role, if any, should the quantity of a drug in the possession of an offender play in determining the appropriate sentence?**

Response: All other things being equal, a defendant who traffics in five kilograms of heroin is more culpable than one who traffics in one kilogram. Other factors, such as role on the offense, may be better indicators of culpability, but drug quantity properly plays a role in sentencing.

- 20. Criminal law is generally understood to have four main purposes: deterrence, reformation, retribution and prevention. Are mandatory minimums an effective way to accomplish these purposes? Why or why not?**

Response: Mandatory minimums, in appropriate circumstances, can effectively serve the purposes of retribution, incapacitation, and general deterrence. When they are proportionate to the offense of conviction, they can reflect the just deserts for the offense conduct. They can also incapacitate the offender and provide a deterrent effect on others contemplating similar crimes.

- 21. Are there areas of law in which you think mandatory minimums are inappropriate?**

Response: It is the purview of Congress to determine whether to pass mandatory sentences for specific offense, and if confirmed I would want to make sure Congress had the relevant data it needed to evaluate such a question.

### **Questions for the Honorable John Gleeson from Sen. Ossoff:**

The United States Sentencing Commission issued a series of reports that study demographics in sentencings. In the most recent report, from 2017, the Commission found that “sentences of Black male offenders were 19.1 percent longer than those of White male offenders.”<sup>1</sup> The Commission has documented that racial disparity is pervasive in federal sentencing. It has also recognized that some strategies, like changes to the crack/powder disparity, helped to reduce that racial disparity.<sup>2</sup>

**(a) What responsibility does the Commission have to identify strategies to ameliorate the racial disparity in federal sentencing?**

Response:

The Commission’s responsibilities include gathering data regarding sentencing practices, and, where appropriate, making recommendations to Congress based on that data. A good example is its 2011 Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, which, among other things, identified racial disparities and made recommendations to Congress to help ameliorate them.

**(b) Beyond conducting studies and publishing reports, how would you – as a member of a collaborative commission - work to avoid racially disparate outcomes in federal sentencings across the country?**

Response:

I would work with my colleagues to ensure that documented racial disparities are never ignored, to determine the origins of those disparities, and to identify ways to help eradicate them.

**(c) Will you commit to prioritizing the elimination of racial disparities in federal sentencing?**

Response:

Absolutely.

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<sup>1</sup> Demographic Differences in Sentencing: An Update to the 2012 Booker Report (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf) at 2.

<sup>2</sup> *Id.* at 4.

**Questions from Senator Thom Tillis**  
**for Judge John Gleeson**  
**Nominee to be Commissioner of the U.S. Sentencing Commission**

**1. Do you believe the crack and powder cocaine disparity should be addressed?**

Response:

Congress has addressed the crack/powder ratio through legislation, such as the Fair Sentencing Act of 2010, and there are several pending legislative proposals that recommend additional changes. Any answer to this question in my capacity as a member of the Commission (should I be confirmed) would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders.

**2. How does the crack and powder cocaine disparity impact sentencing? Do you believe that the disparity leads to excessive incarceration?**

Response:

The disparity between crack and powder cocaine produces sentences (pursuant to both mandatory sentencing provisions and Guidelines ranges) that are more severe for crack offenders than they are for offenders involved with equal quantities of powder cocaine.

**3. Do you agree with the 1-to-1 ratio suggested in the EQUAL Act? Or, do you recommend another ratio?**

Response:

Any answer to this question in my capacity as a member of the Commission (should I be confirmed) would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders.

**4. What challenges would the sentencing commission face when trying to implement the EQUAL Act?**

Response:

Retroactive reductions of sentencing ranges always present an administrative challenge for the federal courts, the federal defenders, and the Department of Justice. However, were Congress to pass the Equal Act, the Sentencing Commission has repeatedly proven its ability to work with those and other stakeholders to efficiently implement such reductions.



- 5. Do you believe that individuals that share Child Sexual Abuse Material (CSAM) should receive lenient or enhanced penalties?**

Response:

I believe that individuals that share Child Sexual Abuse Material deserve serious punishment.

- 6. What factors would you look at when articulating sentencing guidelines for CSAM cases?**

Response:

In addition to the general factors set forth in 28 U.S.C. § 991, I would consider the uniquely severe harm to the victims of such material, and the recidivism rates of such offenders.

- 7. What is your view on the Protect Act of 2022? Do you believe individuals who possess child pornography should receive the same mandatory minimum for receiving?**

Response:

Though any answer to this question in my capacity as a member of the Commission (should I be confirmed) would necessarily be subject to data review and listening to the views of the staff and my colleagues on the Commission, and getting the input from all relevant stakeholders, I generally believe that unless the defendant has produced the child pornography, there is no meaningful difference between his or her receipt of it and his or her possession of it. The sentencing regime applicable to receipt and possession should be the same.