

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Luis Felipe Restrepo

Nominee to be a Commissioner and Vice-Chair of the U.S. Sentencing Commission

1. **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: All of the above are proper comparators for evaluating sentencing disparities. The goal of the U.S. Sentencing Guidelines is to eliminate disparities among similarly situated defendants regardless of where and by whom they are sentenced.

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

Response: Empathy is not among the factors Congress has directed judges to consider in Title 18 U.S.C. Section 3553(a).

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

Response: Social equity is not among the factors Congress has directed judges to consider in Title 18 U.S.C. Section 3553(a).

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

Response: Moral judgement should not be factored into fashioning the appropriate sentence. Judges must consider congressional statutory mandates, the U.S. Sentencing Guidelines along with the individual facts of the case before imposing sentence.

5. **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: This statute allows judges to take into account as one factor “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” District judges must apply the 3553(a) factors based on

the facts of the specific case before them and legal precedents. I would hope that among the most important roles of the U.S. Sentencing Commission is to identify strategies to ameliorate disparities in federal sentencing.

6. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?**

Response: Ensuring the safety of the community is of paramount importance and central to our criminal justice system. Congress has set forth by statute the factors that must be considered in making any individual determination regarding whether an individual should be released and public safety is among those factors.

7. **When, if ever, is it appropriate for a prosecutor to charge multiple counts of 18 U.S.C. § 924(c)?**

Response: As a federal judge I have had cases or appeals regarding 924(c) and I have evaluated those cases based on the applicable legal standards and the evidence in the record. I cannot further comment without having litigants believe I may have prejudged appeals that will come before me.

8. **Should the fact that a defendant threatened to brandish a firearm during a bank robbery alter the sentencing range for the defendant?**

Response: The current U.S. Guidelines provide for adjustments when a firearm is brandished during a bank robbery. Consistent with the Code of Conduct for United States Judges it would be inappropriate for me to opine further on this question because it may cause litigants to believe I have prejudged appeals that will come before me.

9. **Is threatening Supreme Court Justices right or wrong? Please explain your answer.**

Response: I believe this conduct would be governed by Title 18 U.S.C. 111(a)(2) and Title 18 U.S.C. 1114.

10. **What weight should a judge give to a criminal defendant's economic background during sentencing?**

Response: An individual's economic background is not among the factors Congress has directed judges to consider in Title 18 U.S.C. Section 3553(a).

11. **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: The current U.S. Guidelines provide for enhancements in child pornography offenses. As a district judge I applied enhancements where necessary and as an appellate judge I have applied these enhancements based on the appropriate standard of review. Child pornography offenses are incredibly serious crimes. Before opining further I would want to review data provided by the staff at the United States Sentencing Commission and receive input from experts and stakeholders in the criminal justice system and discuss this issue with other Commissioners in a constructive manner.

- 12. 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: Before opining on this application note I would want to review data provided by the staff at the United States Sentencing Commission and receive input from experts and stakeholders in the criminal justice system and discuss this issue with other Commissioners in a constructive manner.

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

Response: I understand that it is within Congress’ prerogative to mandate mandatory sentences in appropriate cases. Consistent with the Code of Conduct for United States Judges it would be inappropriate for me to opine further on this public policy question.

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

Response: I understand that it is within Congress’ prerogative to mandate mandatory sentences in appropriate cases. Consistent with the Code of Conduct for United States Judges it would be inappropriate for me to opine further on this public policy question.

- 15. 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: To the best of my knowledge, I have not talked to any officials from or anyone directly associated with the organization Demand Justice during the selection process nor has anyone done so on my behalf.

- 16. 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: I have spoken with members of the American Constitution Society during the pendency of my selection process but not about my nomination to serve on the United States Sentencing Commission other than to note that I had been nominated to serve in this capacity. These conversations were with various law school chapters of the American Constitution Society where I discussed my career path and offered clerkship advice. All conversations with the American Constitution Society are noted in my Senate Questionnaire.

- 17. 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: To the best of my knowledge, I have not spoken to any officials, or anybody directly associated with any of the groups identified in Question 17 above nor has anyone done so on my behalf.

- 18. 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: To the best of my knowledge, I have not talked with any officials from, or anyone directly associated with the Open Society Foundation nor has anyone done so on my behalf.

- 19. 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?**

Response: No.

- 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, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: I have on very limited occasions exchanged emails with Christopher Kang on issues not related to my nomination to the U.S. Sentencing Commission.

- 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, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: I have on very limited occasions exchanged emails with Christopher Kang on issues not related to my nomination to the U.S. Sentencing Commission.

20. **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?**

Response: No

- 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?**

Response: No.

- 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: During the nomination process as a district judge and as a circuit judge I did have some conversations with junior members of the Alliance for Justice. I have no recollection of their names and have not been in contact with anybody associated with the Alliance for Justice in many years.

21. **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?**

Response: No.

- b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**

Response: To the best of my knowledge, I have had no contact with any of the groups identified above.

- c. **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, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

- d. **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, or any other such Arabella dark-money fund that is still shrouded.**

Response: To the best of my knowledge, I have never had any contact with any of the groups listed above.

22. 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?**

Response: No.

- b. **Are you currently in contact with anyone associated with the Open Society Foundations?**

Response: No.

- c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

Response: To the best of my knowledge, I have never had any contact with the Open Society Foundations.

23. 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?**

Response: No.

- 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?**

Response: No.

- 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: To the best of my knowledge, I have never been in contact with Fix the Court or any of the individuals listed above.

24. 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?**

Response: No.

- 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?**

Response: No.

- 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: In years gone by I have had some conversations with Robert Raben but have not had any recent contact with him or any member of the Raben Group.

25. 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: I was initially approached by members of Senator Schumer's staff about my interest in being vetted as a potential Commissioner on the U.S. Sentencing Commission in 2017. I then met with members of President Trump's administration (White House Counsel's Office) in person to discuss my interest in serving as a commissioner. I do not remember the names of the attorneys I met with. After President Trump formally nominated me I had several conversations with members of the Department of Justice and White House Counsel's Office related to my nomination. Throughout this process I updated both Senator Casey's and Senator Toomey's staff about the status of my nomination. I did not speak with the Senators. After the first group of potential nominees were not successful President Trump included me in a group of nominees "with the intent to nominate." I again had several conversations with members of White House Counsel's Office and members of the Department of Justice in support of this process.

More recently I interviewed with President Biden's White House Counsel's Office and was subsequently nominated by President Biden to serve as a Vice-Chairman of the U.S. Sentencing Commission. I have had several conversations with members of White House Counsel's Office and members of the Department of Justice in support of my pending nomination.

Other than when I appeared before the Senate Judiciary Committee on June 8, 2022, I have not spoken with any member of the Senate about my nomination.

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

Response: I received the questions from the Department of Justice and answered them as promptly as possible. I then received input from the Department of Justice and finalized my answers for submission.

**Nomination of the Honorable Luis Felipe Restrepo
to be a Member and Vice Chair 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: Since becoming a legal adult I have never been arrested for or accused of committing a hate crime against any person.

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

Response: Since becoming a legal adult I have never been arrested for or accused of committing a violent crime against any person.

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

Response: Sentencing must be done in an individualized manner consistent with the Congressional mandate found in Title 18 U.S.C. Section 3553(a). Consistent with that mandate judges must impose sentences that are “sufficient, but not greater than necessary” to promote the purpose of the sentence, including, providing just punishment, deterrence, incapacitation, and rehabilitation. In my view all 4 factors are equally important.

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 the product of both the severity of the sentence and the likelihood of punishment. In my estimation the certainty of punishment is the stronger of the two because the severity of the sentence assumes the individual being sentenced engaged in a cost benefit analysis before committing the crime and was aware of the specific sentence he/she would be exposed to.

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 in the context of my work as a member of the Sentencing Commission, if confirmed, I would do my best to ensure that federal sentencing is transparent and consistent without consideration of race, gender or national origin. I

would also work to ensure that the Commission continues to provide support and current data to Congress, judges, probation officers and practitioners relevant to sentencing.

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

Response: I do not believe it is among the statutory responsibilities of the Sentencing Commission to reduce the number of individuals in prison.

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: It is difficult to answer sentencing questions in the abstract. Sentencing should be approached from an individualized perspective. However, all things being equal those who commit violent crimes should face more significant sentences.

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

Response: It is my understanding the Sentencing Commission does not have the authority to undermine mandatory minimum or maximum sentences authorized by Congress.

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

Response: The Court in *Apprendi* held that the Due Process Clause requires that any fact that increases the penalty for a crime beyond the statutory maximum – other than a previous conviction – must be submitted to the jury 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: The Court in *Blakely* held that the exceptional sentence increase based solely on the judge's determination that Blakely acted with "deliberate cruelty" increasing the sentence beyond the proscribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

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

Response: The Court held in *Booker* that the United States Sentencing Guidelines would be advisory invalidating provisions that made the Guidelines mandatory.

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

Response: I believe that the correct application of 18 U.S.C. Section 3553 is that judges must consider all the factors enumerated in the statute before imposing sentence.

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: Congress gave the Commission authority to make its amendments retroactive in 28 U.S.C. Section 994(u). The statute provides, "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoner serving terms of imprisonment may be reduced." The limits of the Commission's authority are detailed in the statute. Rules of Practice and Procedure 4.1A *Retroactive Application of Amendments* instructs that: "Generally, promulgated amendments will be given prospective application only." Rule 4.1A (1-4) also details the procedures the Commission must follow when considering an amendment for retroactive application.

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: Having helped coordinate a "Reentry Program" in the Eastern District of Pennsylvania for the better part of 15 years it has been my experience that among the factors that have the greatest effect on reducing recidivism rates are: affordable/accessible housing, a supportive positive social network, a sense of purpose and hope that comes with being able to provide for oneself and a family, financial literacy, vocational training and job placement and cognitive behavioral therapy (CBT).

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 received the questions from the Department of Justice and answered them as promptly as possible. I then received input from the Department of Justice and finalized my answers for submission.

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: I answered the questions myself and received input from the Department of Justice.

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

Questions for the Record for Hon. Luis Felipe Restrepo, Nominee to be a Member and Vice Chair 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 confirmed my top priorities for the U.S. Sentencing Commission would be to promote guidelines consistent with the statutory duties identified in the Sentencing Reform Act provisions of the Comprehensive Criminal Control Act of 1984. I would also strive to ensure that the Commission continues to provide support and current data to Congress, judges, probation officers and practitioners relevant to sentencing.

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

Response: As noted above I believe the essential function of the U.S. Sentencing Commission is to promote guidelines that consistent with the statutory duties identified in the Sentencing Reform Act provisions of the Comprehensive Criminal Control Act of 1984 and ensure that federal sentencing is transparent, consistent and free of unwarranted sentencing disparities.

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

Response: Should I be fortunate enough to be confirmed as a Commissioner I would perform my duties consistent with the duties and responsibilities given the Commission by Congress. I would remain cognizant at all times as I am as a federal judge that the responsibility of passing federal criminal law regarding sentencing lies with Congress.

5. Is the criminal justice system systemically racist?

Response: While I do not believe the criminal justice system is systemically racist, I do believe there are aspects of the system that have and continue to have a disparate impact on some communities and that both Congress and the U.S. Sentencing Commission have over the years made efforts to remedy some of these disparities.

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

Response: The role of incapacitation in sentencing is that, in the appropriate case(s), the focus of sentencing should be to ensure that the offender not be in a position to commit any further criminal activity.

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

Response: The role of general deterrence in sentencing is to deter criminal conduct by those that may be considering such activity.

8. Do you believe in specific deterrence?

Response: While I believe in the theory of specific deterrence, this assumes that an individual conducts a “cost – benefit” analysis of the anticipated criminal activity with an understanding of the potential consequences if convicted. I am not convinced that individuals engaged in criminal activity typically conduct such an analysis. That said I am aware that some individuals are specifically deterred from reoffending having suffered the consequences of an initial or prior offense.

9. How will your views of the Eighth Amendment’s prohibition on “cruel and unusual” punishment inform your work as a Sentencing Commissioner?

Response: My views of the Eighth Amendment’s prohibition on “cruel and unusual” punishment would be governed by the Supreme Court’s interpretation of the Eighth Amendment.

10. What sentences do you understand the U.S. Supreme Court’s current Eighth Amendment jurisprudence as prohibiting?

Response: My views of the Eighth Amendment are governed by Supreme Court precedent. See generally, *Coker v. Georgia*, 433 U.S. 584 (1977), *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and *McCleskey v. Kemp*, 481 U.S. 279 (1987).

11. 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: Consistent with the Code of Conduct for United States Judges it would be inappropriate for me as a sitting federal judge to opine on this question because it may be the subject of ongoing litigation. My views of the Eighth Amendment are governed by Supreme Court precedent.

12. Do you believe that capital punishment is constitutional?

Response: As a sitting federal judge I am bound by the opinions of the United States Supreme Court which has held that capital punishment is constitutional in appropriate circumstances. See generally, *McCleskey v. Kemp*, 481 U.S. 279 (1987).

13. 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: I do commit to maintain the confidentiality of non-public documents and to

instruct all staff and individuals with access to such documents to do the same.

14. **In the 1992 Criminal Defense Manual for the Federal Community Defender Office of the Eastern District of Pennsylvania, which you authored, you characterized drug sentencing guidelines as “draconian.” There have been over 800 amendments to the Guidelines since they went into effect in 1987. What specific changes would you propose making to the drug sentencing guidelines today?**

Response: Should I be fortunate enough to be confirmed as a commissioner to the U.S. Sentencing Commission I would not bring any specific agenda with me. I would work with my colleagues in a collaborative way reviewing the data and recommendations of the Commission staff consistent with Congressional mandates and any relevant holdings of the United States Supreme Court before proposing changes to the guidelines.

15. **On at least two occasions, *Griffin-El v. Beard*, 411 Fed. App’x 517 (3d Cir. 2011) and *Wilson v. City of Philadelphia*, 415 Fed App’x 434 (3d Cir. 2011), the Third Circuit reversed your prior determinations in qualified immunity cases. Given this record, do you believe you can fairly take into account the concerns of prosecutors and law enforcement when formulating the Sentencing Guidelines?**

Response: Over my 15 years on the bench, as both a trial and appellate judge, I have handled many cases involving qualified immunity. To the best of my recollection I have only been reversed or remanded on this issue in the two cases cited above. I have no doubt that I can fairly take into account the concerns of prosecutors and law enforcement when formulating the Sentencing Guidelines.

16. **In 2021, your home city of Philadelphia experienced record-breaking gun violence: 562 people were killed and almost 2,000 were injured. Will you factor in the massive increases in gun violence in cities (almost exclusively Democrat-run) across the country since 2020 in evaluating new sentencing guidelines for gun-related crimes?**

Response: Tragically gun violence has impacted all parts of the United States. Should I be fortunate enough to be confirmed as a commissioner of the United States Sentencing Commission I would work collaboratively in a bipartisan manner with the other Commissioners and all the stake holders in the criminal justice system when evaluating new guidelines for gun related crimes.

Senator Josh Hawley
Questions for the Record

Luis Restrepo
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: I am not familiar with the Commission's recommendation on this specific issue or with your proposed bill. Before making any such recommendation I would want to review data provided by the staff at the United States Sentencing Commission and receive input from experts and stakeholders in the criminal justice system and discuss this issue with other Commissioners in a constructive manner.

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

Response: Please see my response to subpart a. above.

- 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: I believe that even handed neutral enforcement of criminal laws free of bias of any kind should be the goal of our criminal justice system. Should I be fortunate enough to be confirmed as a Commissioner on the U.S. Sentencing Commission I would make every effort to ensure that sentencing is neutral when it comes to race, gender, and national origin.

- 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: Before making any such recommendation I would want to review data provided by the staff at the United States Sentencing Commission and receive input from experts and stakeholders in the criminal justice system and discuss this issue with other Commissioners in a constructive manner.

- 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: Sentencing must be done in an individualized manner consistent with the congressional mandate found in Title 18 U.S.C. Section 3553(a). Consistent with that mandate judges must impose sentences that are “sufficient, but not greater than necessary” to promote the purpose of the sentence, including, providing just punishment, deterrence, incapacitation, and rehabilitation. In my view all 4 factors are equally 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 familiar with the circumstances of this case. As a former district judge I understand that every sentencing decision must be made on a case-by-case basis after consideration of the factors identified in Title 18 U.S.C. Section 3553(a). I do not recall a time I have sentenced an individual related to a crime committed at a protest based on a person’s motivation at the protest.

**Questions for the Record for Luis Felipe “Phil” Restrepo
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: Since I became a legal adult I have never made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature.

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

Response: I have never faced discipline, or entered into a settlement related to this kind of conduct.

Questions for the Record

Judge Restrepo

Senator John Kennedy

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

Response: I am aware that there is a big public debate over prosecutors' discretion and decisions that may be made with respect to the declination to prosecute entire classes of crime. I am sensitive to the fact that, as a judge, my role in the criminal justice system is to consider the cases that come before me and evaluate the facts and evidence presented in specific cases. I do believe prosecutors have wide discretion as to charging but as a federal judge for 15 years I have not experienced prosecutors who have declined to prosecute entire classes of crime in federal court.

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

Response: I have never been accused of or disciplined for maintain an inappropriate workplace relationship.

Senator Mike Lee
Questions for the Record
Luis Restrepo, Nominee to the United States Sentencing Commission

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

Response: Among the factors I would consider before making sentencing recommendations would be: the factors identified in Title 28 U.S.C. Chapter 58 “United States Sentencing Commission”, the Sentencing Reform Act provisions identified in the Comprehensive Crime Control Act of 1984, statutes passed by Congress, the language of 18 U.S.C. Section 3553(a) as well as research and data provided by the staff at the United States Sentencing Commission, the views of experts and stakeholders expressed at hearings before the Sentencing Committee and the views of my colleagues should I be fortunate enough to be confirmed.

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

Response: *Mens rea* is defined in the *Oxford Language Dictionary* on-line edition as: “The intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused.” *Mens rea* is important in criminal law because it distinguishes offenses committed with specific intent or purpose from offenses committed without specific intent or purpose.

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

Response: The severity of a statute’s *mens rea* is a factor that may influence my sentencing recommendations.

- 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: Generally, I do think it is important for criminal law statutes to have an explicit *mens rea* requirement. I do believe that offenses committed with specific intent or purpose should generally be treated differently than offenses committed without specific intent.

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

Response: My approach to reading statutes is to defer 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 “plain meaning” of a statute or constitutional provision refers to the public understanding of the relevant language at the time of enactment.

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 am not familiar with this definition of equity. The *Oxford Language Dictionary* on-line edition defines “equity” as the quality of being fair and impartial.

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

Response: The *Oxford Language Dictionary* on-line edition defines equity as the quality of being fair and impartial and equality as the state of being equal, especially in status, rights and opportunities.

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: The word equity does not appear in Title 18 U.S.C. Section 3553(a).

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: 18 U.S.C. § 3553(a) does not distinguish among the factors Congress has mandated judges consider when imposing sentence.

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: As a sitting federal judge it would not be appropriate for me to comment or opine on general policy questions. If fortunate enough to be confirmed to the

United States Sentencing Commission my primary concern would be fairness and transparency in federal sentencing.

- 11. 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: An offender's group identity(ies) should not play a role in consideration of an appropriate sentence.

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

Response: Judges must consider the guidelines promulgated by the Sentencing Commission consist with United States Supreme Court opinions and Circuit opinions of their respective Circuit.

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

Response: In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Sentencing Guidelines are advisory and although district courts are not bound by the Guidelines they must consult and take the guidelines into consideration when sentencing. In appropriate circumstances judges may deviate from the guidelines after considering the guidelines and the factors identified in Title 18 U.S.C. Section 3553(a).

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

Response: The Supreme Court has authorized judges to depart for the guidelines bases on policy disagreements. See generally, *Kimbrough v. United States*, 552 U.S. 85 (2007).

- 15. 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 am not in a position to speculate as to why judges have imposed sentences beneath the guideline range or what accounts for this trend. I am concerned whenever a majority of judges appear to have discarded the Sentencing Commission's work in any area.

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

Response: If fortunate enough to be confirmed I would work closely with my colleagues and with the staff at the United States Sentencing Commission to reach out to judges, prosecutors, probation officers and defense counsel in an effort to understand the issue better and consider what may be driving judicial decision making in this area and promote guidelines that judges would follow more closely in all cases.

- 17. 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: The quantity of a controlled substance in the possession of an offender should play a role in determining the appropriate sentence along with other factors identified in the guidelines, any relevant mandatory sentence and the considerations identified in 18 U.S.C. Section 3533(a).

- 18. 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: I understand that mandatory minimum sentences are within the prerogative of the executive and legislative branches of government and understand the argument in support of mandatory minimums but as a sitting federal judge it would be inappropriate for me to comment or opine further.

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

Response: I respect the prerogative of the legislative branch to create mandatory minimum sentences. As a sitting federal judge it would not be appropriate for me to comment on or opine further on general policy questions.

Questions for the Honorable Luis Felipe Restrepo 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.”¹ 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.²

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

Response: Among the most important responsibilities the Commission has is to identify strategies to ameliorate racial disparities in federal sentencing.

(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: Should I be fortunate enough to be confirmed as a commissioner I would work collaboratively with my colleagues and the staff at the Commission to identify causes of racial disparities and make every effort to correct them.

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

Response: Yes, I will commit to prioritizing the elimination of racial disparities in federal sentencing.

¹ 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 at 2.

² *Id.* at 4.

Questions from Senator Thom Tillis
for Judge Luis Felipe Restrepo
Nominee to be Commissioner and Vice Chair of the U.S. Sentencing Commission

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

Response: I believe it was important for Congress to address the crack and powder cocaine disparity through the Fair Sentencing Act of 2010. Whether Congress chooses to further address this disparity is something for Congress to consider.

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

Response: The crack and powder cocaine disparity impacts sentencing because similarly situated individuals are typically sentenced to longer periods of incarceration for crack offenses as opposed to cocaine powder offenses. As recognized by Congress in the Fair Sentencing Act of 2010 the disparity has led to excessive incarceration.

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

Response: Before making any such recommendation I would want to review data provided by the staff at the United States Sentencing Commission and receive input from experts and stakeholders in the criminal justice system and discuss this issue with other Commissioners in a constructive manner.

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

Response: Among the challenges the Sentencing Commission would face trying to implement the EQUAL Act would be updating the Guidelines to implement the ration as set for by Congress in the Act and providing guidance on retroactive implementation as set forth in the statute.

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

Response: Offences involving the production, distribution, and possession of CSAM are serious crimes. It is difficult to answer sentencing questions in the abstract; judges should approach sentencing in an individualized manner carefully considering the guidelines, statutory minimums (if applicable) and the factors set forth in 18 U.S.C. Section 3553(a) to arrive at the appropriate sentence.

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

Response: Among the factors I would look at when articulating sentencing guidelines for CSAM are the factors currently identified in the guidelines as well as the language of 18 U.S.C. Section 3553(a) and other factors deemed appropriate after consultation with the other commissioners and data and research presented to us by the staff of the Commission.

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: Before making any such recommendation I would want to review data provided by the staff at the United States Sentencing Commission and receive input from experts and stakeholders in the criminal justice system and discuss this issue with other Commissioners in a constructive manner.