

**Senator Chuck Grassley, Ranking Member
Questions for the Record**

Ms. Claire McCusker Murray

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: (D). The Commission is charged with a broader mission than merely reducing sentencing disparities among defendants before a single judge or within a single district or circuit; its statutory mission is to “establish sentencing policies and practices for the Federal criminal justice system” that “avoid[] unwarranted sentencing disparities among *defendants with similar records who have been found guilty of similar criminal conduct.* . . .” 28 U.S.C. § 991(b)(1)(B) (emphasis added).

- 2. As a matter of legal ethics do you agree with the proposition that some civil clients don’t deserve representation on account of their identity?**

Response: No.

**Nomination of Claire McCusker Murray
United States Sentencing Commission
Questions for the Record
June 15, 2022**

QUESTIONS FROM SENATOR BOOKER

- 1. In October 2020, you spoke at a webinar on “Religious Freedom in the Age of COVID-19 and Beyond,” where you promoted the Attorney General’s efforts to challenge pandemic-related public health orders on religious grounds. You have also called for legislative carveouts from statutes that would exempt religious individuals from laws that prohibit certain behaviors.**

- a. How do you believe a defendant’s religious belief and the presence of a religious motivation in the commission of a crime should affect his or her sentence?**

Response: As a general matter, a defendant’s religious beliefs and/or the presence of a religious motivation in the commission of a crime should not affect his or her sentence. Indeed, by statute, “[t]he Commission shall assure that the guidelines and policy statements are entirely neutral as to the . . . creed . . . of offenders.” 28 U.S.C. § 994(d). However, in exceptional cases, religious beliefs/motivations could affect a defendant’s sentence. For example, if a defendant committed a murder because he believed that God was telling him to do so, he might have an insanity defense that would bar his conviction (and thus his sentencing).

- b. Do you believe the legislature should be more proactive in creating exemptions from crimes for those motivated by religious beliefs?**

Response: No.

- c. How will you ensure that your own strong views about religious liberties and your body of work promoting legislative carveouts for religious individuals do not unduly influence the guidelines and recommendations you support on the Commission?**

Response: I am not aware that I have a “body of work” promoting legislative carveouts for religious individuals.

In the webinar you reference, I described the Attorney General’s COVID civil liberties initiative as seeking to ensure that religious organizations were on “equal footing” with secular organizations. I said that the initiative was animated by the principle that “the Free Exercise Clause doesn’t allow religion to be singled out for disfavored treatment” by COVID restrictions. I elaborated that the initiative was motivated by the idea that “[i]f government is going to enact restrictions, they

have to be neutral with respect to, you know, similarly situated secular and religious activities and organizations.”

My understanding is that issues related to religious liberty come before the Commission extremely infrequently. To the extent that such an issue did ever come before me, I would apply the applicable law and rely on any relevant research.

- 2. During your time at the Department of Justice, you were the co-chair of the Religious Liberty Task Force, which implemented Attorney General Jeff Sessions’s memorandum on “Federal Law Protections for Religious Liberty.” The memo was criticized for reinterpreting existing laws to give greater protections to religious groups, even when they conflict with anti-discrimination laws and other policies.**

- a. Do you agree with the way that this memo reinterpreted existing laws?**

Response: Attorney General Sessions’ 2017 Religious Liberty Memo long predated my 2019 arrival at the Department of Justice. The Attorney General is the chair of the Religious Liberty Task Force. By virtue of my position as the head of the Office of the Associate Attorney General, I served as co-vice chair of the Task Force from 2019-2021. However, none of my work with the Task Force involved a close analysis of that (very lengthy) memo.

- b. Do you commit to promulgating guidelines and policy statements at the Commission that incorporate interpretations of anti-discrimination laws as they have been previously interpreted and not new interpretations like the ones expressed in that memo?**

Response: If I am fortunate enough to be confirmed, I commit to faithfully interpreting all applicable law to the best of my ability in all matters that come before me on the Commission.

- 3. The Sentencing Commission has conducted analyses that have found racial disparities in sentence lengths. For example, Black male offenders received sentences on average nearly 20 percent longer than similarly situated White male offenders, and Black male offenders were 21.2 percent less likely to receive a non-governmental sponsored downward departure or variance. These trends reflect racial disparities that data show exist at all levels of the criminal justice system.**

- a. Do you believe that there is systemic racism in the criminal justice system that leads to such outcomes?**

Response: I am familiar with – and troubled by – the study you cite. Racism has no place in our criminal justice system. The term “systemic racism” means different things to different people, but I certainly believe that some people – including people involved in the criminal justice system – have racial biases that

can impact their work. I am committed to doing everything I can to ensure that my own work does not perpetuate unwarranted racial disparities.

- b. Do you believe that the disproportionate impact of sentencing policy on certain demographic groups such as Black men should be a consideration when developing fair and effective sentencing guidelines and recommendations?**

Response: Yes.

**Nomination of Claire McCusker Murray
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: 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 statutory purposes of sentencing are deterrence, incapacitation, rehabilitation, retribution (or just punishment), and restitution. *See* 28 U.S.C. § 3553(a). While all of these factors are important, it is just punishment that undergirds the criminal justice system at its most basic level; only because punishment is due in justice to offenders does the state have legitimate authority to punish them.

- 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: A combination of the two. Neither of the factors is an effective deterrent without the other: the certainty of a slap on the wrist does little to deter wrongdoing, and neither does a severe penalty that is all but certain not to be imposed.

- 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: I don't come to the Commission with an agenda. However, if confirmed, I would look back at my time on the Commission as a success if the Commission was able to play a role in increasing public safety, reducing recidivism, increasing the rate of successful reentry, reducing unwarranted disparities, and providing Congress with the research and data it needs to pass informed sentencing legislation.

- 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: Stronger sentences.

- 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: In *Apprendi*, the Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

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

Response: In *Blakely*, the Supreme Court held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

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

Response: *Booker* has both a constitutional holding and a remedial holding. Its constitutional holding is that “the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines,” *United States v. Booker*, 543 U.S. 220, 227 (2005), and thus that “the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant,” *id.* at 245. *Booker*’s remedial holding is that, in light of its constitutional holding, “two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent.” *Id.* at 227.

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

Response: Section 3553 is correctly applied when all six factors are considered and the court “impose[s] a sentence sufficient, but not greater than necessary to comply with the purposes” of sentencing. 18 U.S.C. § 3553(a).

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 Sentencing Reform Act provides that, “[i]f 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 prisoners serving terms of imprisonment for the offense may be reduced.” 28 U.S.C. § 994(u). Of course, that general recognition of authority may be limited by other statutory provisions evincing a contrary congressional intent in particular cases. In practice, the Commission’s rules provide that, “[g]enerally, promulgated amendments will be given prospective application only.” U.S.S.C. R. Prac. & Proc. 4.1A.

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: Reducing recidivism is one of the most important goals of the criminal justice system. The Commission has concluded, based on a series of studies of recidivism, that a number of factors influence recidivism. These factors include age, criminal history, and the nature of the offense. The Commission also concluded in its 2020 *Length of Incarceration and Recidivism* Report that incarceration lengths of more than 120 months had approximately a 30% deterrent effect with respect to recidivism, and that incarceration lengths of 60 or more months had approximately a 17% deterrent effect.

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 researched, drafted, and wrote all responses myself. I solicited feedback on some draft answers from my husband and a few friends. Before I submitted my answers, I sent them to both the Department of Justice’s Office of Legal Policy and Senator McConnell’s office.

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.

Senator Josh Hawley
Questions for the Record

Claire Murray
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: Since issuing its *Child Pornography Report* in 2012, the Commission has consistently recommended that Congress align the statutory penalty schemes for receipt of child pornography and possession of child pornography. If confirmed, I plan to consult with my colleagues and delve into the Commission's research and data on this issue. However, my preliminary view is that receipt and possession merit similar treatment.

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

Response: Both possession and receipt of child pornography are serious crimes that warrant serious penalties. If confirmed, I commit to doing everything I can to leverage the Commission's tools to combat the scourge of child pornography. I do not currently have a fixed view on the correct sentencing range for those two crimes. If confirmed, I plan to consult with my colleagues and to delve into the Commission's data to more fully understand what factors, if any, support the current sentencing ranges.

- 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: Underenforcing criminal laws puts victims and vulnerable communities at risk. According to the Department of Justice's most recent National Crime Victimization Survey, racial minorities are disproportionately victims of a number of crimes, including firearm homicide and personal financial fraud. See Bureau of Justice Statistics, *Trends and Patterns in Firearm Violence, 1993-2018*, Table 6; Bureau of Justice Statistics, *Financial Fraud in the United States, 2017*, App. Table

10. Accordingly, underenforcement of those crimes disproportionately puts victims who are racial minorities at risk.

- 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: Firearms offenses are among the most serious problems our country faces. Firearms offenders recidivate at a higher rate than any other offenders, and their actions destroy communities. If confirmed, I am committed to doing everything I can to leverage the Commission’s tools to combat firearms offenses. I do not currently have a fixed view on when and under what circumstances sentences imposed for violations of § 924(c) should be imposed consecutively or concurrently. If confirmed, I plan to consult with my colleagues and to delve into the Commission’s data to more fully understand what factors support the current system and what factors support the Commission’s recommendation. As a default, however, sentences imposed at different times generally run consecutively in the federal system. *See* 18 U.S.C. § 3584(a).

- 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: While all four factors are important, it is just punishment (retribution) that undergirds the criminal justice system at its most basic level; only because punishment is due in justice to offenders does the state have legitimate authority to punish them.

- 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: No.

**Questions for the Record for Claire McCusker Murray
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

Ms. Claire Murray

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: Not as a general matter. However, there are certain exceptions. For example, many states continue to have statutes on the books that have been found by the courts to be unconstitutional. Declining to prosecute those classes of crime improves the criminal justice system insofar as it brings it into conformity with the Constitution.

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

Response: No.

Senator Mike Lee
Questions for the Record
Claire Murray, Nominee to the United States Sentencing Commission

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

Response: Before developing or amending the Guidelines, Commissioners should consider – *inter alia* – the applicable statutory framework and any other direction from Congress, any relevant research or data, the testimony of knowledgeable witnesses, relevant public comments, and the views of their fellow Commissioners.

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

Response: “Mens rea” (Latin for “guilty mind”) refers to criminal intent. Mens rea is the state of mind statutorily required to convict a particular defendant of a particular crime. In criminal law, mens rea is an important measure of culpability; a greater level of mens rea is commonly associated with greater culpability for a given crime.

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

Response: Yes. The degree to which a defendant has criminal intent is relevant to § 3553(a)(1), which requires that sentencing be predicated in part on “the nature and circumstances of the offense,” and to § 3553(a)(2)(A), which requires that sentencing be predicated in part on the “need for the sentence imposed to reflect the seriousness of the offense . . . and to provide just punishment for the offense.”

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: Clarity in criminal statutes is critically important, especially with respect to essential elements like the level of criminal intent a statute requires. I have not had occasion to think carefully about whether criminal statutes with no mens rea standard or that are silent as to the applicable mens rea standard should be treated differently from other statutes for purposes of sentencing, but would be interested in exploring the question further if I am fortunate enough to be confirmed.

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: I am a textualist. If the meaning of a given text is plain and unambiguous, there is no reason to seek further to resolve a question of statutory interpretation.

- 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 original public understanding of the relevant language.

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 was not previously aware of the above definition. In a legal context, Black’s Law Dictionary defines “[e]quity” as “[f]airness; impartiality; evenhanded dealing,” and “[t]he body of principles constituting what is fair and right; natural law.” *Black’s Law Dictionary* 560 (7th ed. 1999).

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

Response: Black’s Law Dictionary defines “[e]quality” as “[t]he state of being equal; esp. likeness in power or political status.” *Black’s Law Dictionary* 556 (7th ed. 1999). Equality before the law is a bedrock principle of the American system of government and, in particular, of our criminal justice system. Likewise, all persons who come before the criminal justice system as defendants are entitled to be treated with fairness and impartiality.

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 § 3553(a) factors are designed to ensure fair, just, and impartial treatment of all individuals.

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: Under the Sentencing Reform Act, the Commission is statutorily directed to formulate the guidelines in such a way as to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” 28 U.S.C. § 994(g). However, neither the Sentencing Commission nor federal judges should be swayed by personal policy “desires” on this or any other matter.

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: The Commission is statutorily required to ensure that its Guidelines and policy statements are “entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.” 28 U.S.C. § 994(d).

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

Response: A significant amount. The Guidelines are the “lodestar of sentencing,” *Peugh v. United States*, 569 U.S. 530, 544 (2013), and the guidelines ranges “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives,” *Rita v. United States*, 551 U.S. 338, 350 (2007). For that reason, courts are required to correctly calculate the guidelines range for each defendant and, when explaining the reasons for the sentence they impose, must give “more significant justification[s]” for significant departures from the guidelines range. *Gall v. United States*, 552 U.S. 38, 50 (2007). Similarly, a number of circuits consider a within-Guidelines sentence to be presumptively reasonable. *See Rita*, 551 U.S. at 354-55.

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: Yes. A sentencing judge should deviate from the Guidelines where it is necessary to do so in order to “impose a sentence sufficient, but not greater than necessary” to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a). The sentencing judge has “greater familiarity with[] the individual case and the individual defendant before him than the Commission,” *Rita*, 551 U.S. at 357-58, and is therefore “in a superior position to find facts and judge their import under § 3553(a)” in each particular case, *Gall*, 552 U.S. at 51 (internal quotation marks omitted).

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 held that a sentencing judge may deviate from the Guidelines where “a within-Guidelines sentence is ‘greater than necessary’ to serve the objectives of sentencing.” *Kimbrough v. United States*, 552 U.S. 85, 91 (2007), quoting 18 U.S.C. § 3553(a). In making that determination, the Court has held that

the judge may in some cases consider policy disagreements with the Guidelines. *Id.* (“In making that determination, the judge may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses.”). However, when a sentencing judge deviates from the Guidelines “based solely on the judge’s view that the Guidelines range fails properly to reflect § 3553(a) considerations even in the mine-run case,” “closer review may be in order” *id.* at 109, unless the Guidelines at issue “do not exemplify the Commission’s exercise of its characteristic institutional role.” *Id.*

- 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: A number of factors likely account for that trend, among them policy disagreements among judges with the Guidelines/PROTECT Act and the dramatic increase in the quantity of child pornography on the Internet since Congress passed the Act. The stark disparities between similarly situated offenders in this area are certainly a matter of concern.

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

Response: The Commission has an important outreach/education function through which it can make the case to judges that unwarranted sentencing disparities are harmful to the criminal justice system.

- 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: As the Controlled Substances Act and U.S.S.G. § 2D1.1 reflect, offenses involving controlled substances are more serious – and thus warrant more serious sentences – when they involve larger drug quantities.

- 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 the primary aim of mandatory minimums to be greater deterrence/prevention. In appropriate circumstances, mandatory minimums can advance those two aims by incapacitating the offender and serving as a warning for others considering similar crimes. With respect to retribution (or just punishment), they also effectively reflect Congress’s view that certain crimes are sufficiently heinous to warrant at least a certain level of punishment.

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

Response: Yes. For example, mandatory minimums are inappropriate for strict liability crimes because judicial discretion is required to deal with the nuances of cases in which defendants without any criminal intent are convicted of a crime.

Questions for Claire McCusker Murray 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: Foremost among the Commission’s statutory duties is “establish[ing] sentencing policies and practices for the Federal criminal justice system that . . . avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . .” 28 U.S.C. § 991(b)(1)(B). Racial disparities in sentencing among similarly situated defendants are the paradigmatic example of the sort of unwarranted disparities the Commission is charged with helping judges to avoid.

(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: Equal justice under law is the foundation of our legal system. Disparate treatment for people of disparate races strikes at the very heart of that foundation. While I would of course want to consult with my colleagues about this issue if I were fortunate enough to be confirmed, three avenues I would be interested in pursuing are: (1) scrutinizing guidelines/enhancements that result in racially disparate sentencing to determine whether they are evidence-based; (2) using the Commission’s outreach/education function to educate litigants and judges with respect to racial disparities; and (3) discussing whether the Commission’s data-gathering function can be improved to allow for more sophisticated demographic research.

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.

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

Response: Yes. I see ameliorating unwarranted disparities as at the heart of the Commission's mission.

Questions from Senator Thom Tillis
for Claire McCusker Murray
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: Yes. I think the crack and powder cocaine disparity merits careful analysis and study by both Congress and the Commission.

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

Response: The disparity has led to lengthier sentences for those convicted of crack offenses than those convicted of powder cocaine offenses. Because sentenced crack offenders are disproportionately African-American and sentenced powder cocaine offenders are disproportionately white, it has also led to racial disparities in sentencing. Whether any particular defendant is subject to excessive incarceration is a question best answered at the individual level.

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

Response: I do not have a fixed view on the correct ratio. If confirmed, I plan to consult with my colleagues and to delve into the Commission's data to more fully understand what factors – *e.g.*, recidivism rates, level of violence associated with trafficking offenses – if any, support the continued existence of any disparity.

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

Response: In implementing the EQUAL Act, the Commission would be required to draft amendments to the Guidelines; it would need to determine whether or not to include the elimination of the crack-powder disparity on the list of retroactive amendments in U.S.S.G. § 1B1.10(d); it would need to draft new training materials so that judges and attorneys could become acclimatized to the amendments to the Guidelines and (if the changes were made retroactive) be prepared for the large number of motions for a reduction in term of imprisonment that would be filed under 18 U.S.C. § 3582(c)(2); it would have to begin new lines of research into the effects of the EQUAL Act; and it would have to disentangle those effects from the effects of other statutes and sentencing practices.

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

Response: Enhanced penalties. Sharing CSAM is a serious crime that warrants serious penalties.

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

Response: If confirmed, I would look first to relevant statutory authorities, most notably the PROTECT Act of 2003. I would also – as part of a multi-member collegial body – consult with my colleagues. Presumably, the Commission would hold hearings at which it would hear from judges, prosecutors, probation officers, defense attorneys, victims, and offenders. In addition, I would review the voluminous body of data and research that exists in this area. Through each of those means, I would seek to better understand recidivism rates, sentencing outcomes and disparities, and the most relevant aggravating and mitigating factors in the commission of the offense.

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: Both possession and receipt of child pornography are serious crimes that warrant serious penalties. If confirmed, I commit to doing everything I can to leverage the Commission's tools to combat the scourge of child pornography. Since issuing its *Child Pornography Report* in 2012, the Commission has consistently recommended that Congress align the statutory penalty schemes for receipt of child pornography and possession of child pornography. If confirmed, I plan to discuss that issue with my colleagues and to review the Commission's relevant data and research. However, my preliminary view is that receipt and possession of CASM merit similar treatment. I do not currently have a fixed view on the correct sentencing range(s) for those two crimes. If confirmed, I plan to consult with my colleagues and to delve into the Commission's data to more fully understand what factors, if any, support the two crimes' current sentencing ranges.

Senate Judiciary Committee Hearing
“Nominations”
Questions for the Record
for Claire McCusker Murray
Submitted June 15, 2022

QUESTIONS FROM SENATOR WHITEHOUSE

1. From 2019-2021, during the Trump administration, you worked in the Department of Justice. During your tenure, you co-chaired the Religious Liberty Task Force, which implemented Attorney General Jeff Sessions’s Religious Liberty Memo.¹
 - a. The Sessions memo states that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex and national origin, “does not apply in the same way to religious employers, who have certain constitutional and statutory protections for religious hiring decisions. . . . Religious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations’ religious precepts.”² Under this policy, religious employers were permitted to discriminate against employees who did not agree with or comport with the employers’ beliefs, including LGBTQ individuals and people of a different faith.
 - i. Do you agree that religious employers should be able to discriminate against LGBTQ individuals? If so, in what circumstances?

Response: I abhor invidious discrimination in all its forms and reject it in all circumstances. Under *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), Title VII’s prohibitions on discrimination on the basis of sex also prohibit discrimination on the basis of sexual orientation and gender identity. The legality of individual hiring decisions by religious employers is controlled by *Bostock*; Title VII’s exemptions for religious organizations as set forth in 42 U.S.C. § 2000e-1(a); the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*; the First Amendment; and relevant Supreme Court case law interpreting the First Amendment (*e.g.*, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012)).

- ii. Do you agree that religious employers should be able to discriminate against people who do not practice their faith? If so, in what circumstances?

Response: I abhor invidious discrimination in all its forms and reject it in all circumstances. Title VII provides that, where religion “is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise,” employers may hire and employ individuals based on their religion.

¹ Mem. to All Executive Departments and Agencies from Attorney General Jeff Sessions on Federal Law Protections for Religious Liberty (Oct. 6, 2017), *available at* <https://www.justice.gov/opa/press-release/file/1001891/download>.

² *Id.* at 5-6.

42 U.S.C. § 2000e-2(e)(1). Moreover, under Title VII, “a religious corporation, association, educational institution, or society” may employ “individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” *Id.* § 2000e-1(a). Finally, the First Amendment’s “ministerial exception” protects a religious institution’s “autonomy with respect to internal management decisions that are essential to the institution’s central mission,” including “the selection of the individuals who play certain key roles.” *Our Lady of Guadalupe School*, 140 S. Ct. at 2060.

b. As co-chair of the Religious Liberties Task Force, what work did you do to advance and promote the goals of the Sessions memo?

Response: Attorney General Sessions’ 2017 Religious Liberty Memo long predated my 2019 arrival at the Department of Justice. The Attorney General chairs the Department’s Religious Liberty Task Force. By virtue of my position as the head of the Office of the Associate Attorney General, however, I served as a co-vice chair of the Task Force from 2019-2021. During my tenure, components involved in the Task Force undertook a number of initiatives to protect Free Exercise, including holding a summit on combating anti-Semitism, holding numerous “Protecting Places of Worship” forums to inform local communities about resources available to combat hate crimes and vandalism, and participating in – and, in some cases, initiating – numerous suits under the Religious Land Use and Institutionalized Persons Act to combat discrimination in zoning against, *e.g.*, an Islamic cemetery, a Buddhist meditation center, and Orthodox Jewish religious schools and home synagogues.