

Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Candice C. Wong
Nominee to be a Commissioner 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: I view (d) – sentencing disparities among all similarly situated defendants – as the ultimate comparator that best approximates the language in the Sentencing Commission’s enabling statute, which speaks of avoiding “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). I view (a), (b), and (c) as illuminating and probative data points in the assessment of (d). Evidence that two individuals with similar records who have been found guilty of similar criminal conduct have received markedly different sentences would be concerning, irrespective of whether the defendants are in different cases before one judge, before different judges within one district, or before different districts within one Circuit.

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 Candice Chiu Wong
United States Sentencing Commission
Questions for the Record
Submitted June 15, 2022**

QUESTIONS FROM SENATOR BOOKER

At your hearing, I asked you about the potential conflict of interests, or the appearance of a conflict of interests, that may arise should you be confirmed to the Sentencing Commission while you remain in your current position as Chief of the Violent Reduction and Trafficking Offenses Section of the U.S. Attorney’s Office for the District of Columbia. In this role, you oversee criminal cases that are directly affected by the policies of the Sentencing Commission.

- 1. Would you continue to represent the United States in cases against individual defendants while serving as a Commissioner?**

Response: In my current role at the U.S. Attorney’s Office, I only infrequently handle sentencing in cases against individual defendants; the lion’s share of my day-to-day responsibilities relate to staffing, case assignment, coordination with law enforcement, investigations, and grand jury. As I noted at the hearing, the interaction of government attorneys with the Guidelines in connection with sentencing is in the ordinary case fairly mechanical. Government attorneys offer corrections to the Presentence Report’s computation of a Guidelines range, with the “district court [bearing] the ultimate responsibility to ensure that the Guidelines range it considers is correct,” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903–04 (2018), lest it commit procedural error. If confirmed, my hope is to continue serving the public in my current role concurrently with my part-time service as a member of the Commission if I am so able. If my continued service were on occasion to entail handling of a sentencing, I would undertake it only if consistent with ethics guidance to avoid any actual or apparent conflict of interest stemming from Commission work. Relevant considerations might include, for instance, any legal challenges or litigation in the case involving a Guideline and the context of any role I played, confidential knowledge I gained, or position I took on the promulgation of that Guideline as a Commissioner. I would also consult with colleagues on the Commission who continue practicing before the courts, and past Commissioners who continued practicing before the courts. I would recuse myself from any matter in which it is required, consistent with all applicable statutes, regulations, and policies. Further, should I have the opportunity to be confirmed and serve concurrently as a Commissioner, I would not seek any additional compensation for service on the Commission on top of my present federal salary.

- 2. Would you use resources from the Department of Justice (DOJ) to carry out your work as a Commissioner, including administrative, personnel, or research?**

Response: No.

- 3. Would you be able to take positions on the Commission that contradict DOJ's positions, or would you consider yourself bound to follow DOJ's positions?**

Response: If confirmed, my service on the Commission would be in my individual capacity. I would not be speaking as the Department of Justice's official representative nor bound to follow Department positions.

- 4. What steps will you take, if confirmed, to ensure that your work at DOJ does not present any conflicts of interest with your role on the Commission?**

Response: Please see my response to Question 1.

- 5. In what situations would you foresee yourself having to recuse yourself from a case you are prosecuting at DOJ or abstain from voting on a matter before the Sentencing Commission?**

Response: Please see my response to Question 1.

**Nomination of Candice C. Wong
to be a Member of the United States Sentencing Commission
Questions for the Record
Submitted June 15, 2022**

QUESTIONS FROM SENATOR COTTON

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

Response: No.

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

Response: No.

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

Response: Deterrence, retribution, incapacitation, and rehabilitation are the purposes of sentencing. I rank all of these aims as very important; Congress has enshrined all four by statute in 18 U.S.C. § 3553(a)(2). Deterrence – both specific deterrence to the defendant and general deterrence to others who might commit a similar offense – would in my view be of greatest importance because the promotion of public safety is the foremost goal of the criminal justice system.

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: Both the length and certainty of punishment may contribute to deterrence. Which of the two has greater deterrent effect is difficult to answer categorically; it could turn, for instance, on individualized facts including the sentence at issue and the offender's criminal history, including any history of reoffending.

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 would define “success” as improving federal sentencing policy through strong, evidence-based Sentencing Guidelines that carry anchoring weight across the judiciary and thereby minimize unwarranted sentencing disparities while promoting public safety.

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

Response: The “purposes” of the Commission are expressly defined in its enabling statute at 28 U.S.C. § 991(b). Those purposes are two-fold: first, to establish federal sentencing policies and practices that effectuate “the purposes of sentencing as set forth in” 18 U.S.C. § 3553(a)(2), that “provide certainty and fairness ... avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted,” and that “reflect, to the extent practicable, advancement in knowledge of human behavior”; and second, to “develop means of measuring the degree to which [our] sentencing, penal, and correctional practices are effective” in meeting the purposes of sentencing in § 3553(a)(2).

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

Response: As a general matter, violence is aggravating. For similarly situated offenders, I would thus ordinarily expect criminal conduct involving violence to receive a more significant sentence than similar criminal conduct not involving violence.

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

Response: No. The elected branches of government establish our sentencing laws.

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 Supreme Court held that, under the Sixth Amendment, any fact other than a prior conviction that exposes a defendant to a sentence in excess of the prescribed statutory maximum must be submitted to a jury, not a judge, and proved 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: In *Blakely*, the Supreme Court held 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. Accordingly, Washington State’s determinate sentencing regime violated the Sixth Amendment insofar as it allowed judge-found facts found by a preponderance of evidence standard to increase a sentence in excess of the statutory maximum of the standard range for the offense.

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

Response: In *Booker*, the Supreme Court applied *Blakely* to the then-mandatory and

binding Federal Sentencing Guidelines. The Court held that the Guidelines violated the Sixth Amendment insofar as they allowed a judge to find facts that increased a defendant's maximum mandatory Guidelines sentence – that is, where the penalty was increased beyond the maximum authorized by facts found by a jury beyond a reasonable doubt or admitted by the defendant. The Court additionally ruled in a remedial opinion that the Guidelines would not implicate the Sixth Amendment if they were made advisory rather than mandatory.

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

Response: The Supreme Court has instructed that a sentencing judge “should begin ... by correctly calculating the applicable Guidelines range” as his or her “starting point and ... initial benchmark.” *Gall v. United States*, 552 U.S. 38, 50 (2007). After giving the parties the opportunity to present argument for whatever sentence they view as appropriate, the judge then considers the seven factors set forth in 18 U.S.C. § 3553(a). These include “the nature and circumstances of the offense and the history and characteristics of the defendant,” a factor that typically entails consideration of the Presentence Report and any victim impact statements. They further include the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant,” and “the need to avoid unwarranted sentence disparities among” similarly-situated defendants. Of note, the statute also requires consideration of the Guidelines and any Commission policy statements, underscoring that the judge should “remain cognizant of [the Guidelines] throughout the sentencing process,” including throughout his or her analysis of the § 3553(a) factors. *Gall*, 552 U.S. at 50 n.6.

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

Response: The Commission's enabling statute, 28 U.S.C. § 994(u), contemplates some capacity for retroactive application of amendments, providing 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.” However, the Commission's Rules of Practice and Procedure make clear that “[g]enerally, promulgated amendments will be given prospective application only.” U.S.S.C. Rule 4.1A. That default rule appears grounded in the recognition of weighty societal interests in ensuring the finality of convictions and sentences, such that consequential decisions on retroactivity should ordinarily be made by Congress. In any event, Rule 4.1A sets forth numerous limitations on the Commission's ability to make retroactive changes, noting, for instance, the need to hold a public hearing on, and request public comment on, whether retroactive application should be considered, the requirement that a retroactivity impact analysis be prepared by the Commission, and the prerequisite of a vote on retroactive application at a public meeting held at least 60 calendar days before any change's effective

date.

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

Response: I am not familiar with the study described, but I understand that the Commission does critically important work studying the recidivism of federal offenders. I am also generally familiar with the Commission's 2017 report, *The Effects of Aging on Recidivism Among Federal Offenders*, which found that age and criminal history exert a strong influence on recidivism. If confirmed, I would look forward to studying and learning more about the Commission's data and analysis on recidivism to date, including in connection with various types of training programs.

- 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 reviewed the groups of questions submitted by each Senator, considered each question carefully, and personally drafted and formatted my responses, conducting research where necessary to refresh my recollection. I provided my answers to the Department of Justice's Office of Legal Policy and Senator McConnell's office for feedback before I 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: No. I wrote and drafted my responses; all answers to these questions are my own.

Senator Josh Hawley
Questions for the Record

Candice Wong
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 generally familiar with the Sentencing Commission's reported finding in 2012 that similarly-situated offenders engaged in similar underlying criminal conduct faced significant sentencing disparities based on whether they were charged with receipt or possession. I thus think alignment of penalties warrants serious consideration, and if confirmed, would welcome the opportunity to leverage the tools and data of the Commission to inform and assist your office in this important area.

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

Response: Given the statutory penalties in this area, I believe the elected branches of government rather than the Commission are best positioned to make adjustments to the penalties in place, including determining in which direction adjustments should be made to address any unwarranted sentencing disparities between receipt and possession cases. I also understand that there was a spectrum of views on the Commission in 2012 as to what the appropriate penalties should be, and if confirmed, would want to receive expert testimony, be well-versed in the Commission's latest data and analysis, and consult with my fellow Commissioners to make an informed recommendation.

- 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 agree that failures to enforce criminal laws negatively affect communities victimized by crime. I also agree that minority communities are impacted by crime.

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: 18 U.S.C. § 924(c)(1)(D) currently prescribes by statute the manner in which sentences for 18 U.S.C. § 924(c) convictions are run. Requiring that sentences be run concurrently rather than consecutively would, if enacted, likely have significant impact on the length of a large number of sentences. In my experience, it is not uncommon for defendants to be charged in a single case with multiple armed offenses, such as in robbery cases. In such situations, the 18 U.S.C. § 924(c) penalties are not only required to be imposed consecutively, but they also carry mandatory terms of imprisonment ranging from 5 to 10 years, depending on how the firearm was used by the offender. Accordingly, any changes to the statute should be carefully evaluated and their projected effects studied, including in connection with the recidivism of firearms offenders.

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: I rank all of these aims as very important; Congress has enshrined all four by statute in 18 U.S.C. § 3553(a)(2). If internal ranking were needed because, for instance, the aims were in irreconcilable conflict, deterrence – both specific deterrence to the defendant and general deterrence to others who might commit a similar offense – would in my view be of greatest importance, because the promotion of public safety is the foremost goal of the criminal justice system.

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 this particular case or the government’s arguments in the sentencing proceeding. I do not believe political motives could ever excuse homicide, nor are political motives a sentencing factor accounted for in 18 U.S.C.

§ 3553(a). Consistent with the Supreme Court's instruction, sentencing courts should use the Sentencing Guidelines as a starting point and conduct an individualized assessment of the specific factors described in 18 U.S.C. § 3553(a) to reach a sentence that best effectuates the purposes of sentencing.

**Questions for the Record for Candice Chiu Wong
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. Candice Wong

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: No.

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

Response: No.

Senator Mike Lee
Questions for the Record
Candice Wong, Nominee to the United States Sentencing Commission

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

Response: As an Assistant United States Attorney, I carefully consider the individual facts, circumstances, and evidence in every case. I conduct a thorough review of the Presentence Report, and most importantly, its computation of a Guidelines range based on the offender’s criminal history score and base offense level, which will serve as the benchmark or anchor for the sentencing court. I review any applicable enhancements or departures under the Guidelines Manual. In developing a final sentencing recommendation, I also consider any datapoints of similarly-situated defendants who engaged in similar criminal conduct and ultimately, whether the recommended sentence will effectuate the purposes of sentencing and considerations set forth in 18 U.S.C. § 3553(a). As a Sentencing Commissioner, if confirmed, I would want to be well-versed in all statutory directives to the Commission in the particular area of law, work collaboratively with Congress to identify issues of shared interest, receive expert testimony, consider the Commission’s latest data and analysis, and consult with fellow Commissioners to make informed recommendations.

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

Response: “Mens rea” refers to the mental state necessary to separate wrongful conduct from otherwise innocent conduct, and is sometimes referred to as *scienter*. “Mens rea” is significant in criminal law because the “general rule” is that a guilty mind is “a necessary element in the indictment and proof of every crime.” *United States v. Balint*, 258 U.S. 250, 251 (1922). Offenses that require no *mens rea* generally are disfavored.

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

Response: The mental state exhibited by the individual offender in committing the offense – the degree to which the offense was knowingly or willfully committed, for instance – is frequently relevant in considering what a reasonable sentence will be.

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: The Supreme Court has said that “offenses that require no *mens rea* generally are disfavored.” *Staples v. United States*, 511 U.S. 600, 606 (1994). I have

not studied the issue of whether statutes without a *mens rea* standard should be treated differently for sentencing purposes, but please see my answer to question 3.

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: As the Supreme Court has said, “we start where we always do: with the text of the statute.” *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021). It is important to adhere to the law as written, including the text of any statute passed by Congress and signed by the President.

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: As the Supreme Court has said, “we turn to the ... plain meaning at the time of enactment.” *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020). So too, I heed the original public meaning of the Constitution.

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 the definition quoted or its context. I do not have a definition of “equity” personal to me, but am aware that multiple definitions of the term appear in dictionaries. For instance, Black’s Law Dictionary defines “equity” as “[f]airness; impartiality; evenhanded dealing.” Equity, Black’s Law Dictionary (11th ed. 2019).

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

Response: Please see my answer to Question 6. I understand “equality” to have the meaning it does under the 14th Amendment guarantee of “equal protection” of the laws.

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: To the extent the definition quoted stands for “fair ... and impartial treatment of all individuals,” courts are required to be fair and impartial in imposing sentences.

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: I rank all the factors in 18 U.S.C. § 3553(a) as important, and do not believe § 3553(a)(6) is to be weighed more strongly than any other statutory factor.

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: Such a “desire” should not drive either sentencing judges, who are duty-bound to undertake individualized assessments of each defendant, or the Sentencing Commission, which has statutorily defined objectives set forth by Congress and whose work should be evidence-based.

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: None. Equal treatment under the law is the bedrock of our justice system. The Commission’s enabling statute specifically codifies that the Commission “shall assure that the 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: The Supreme Court has instructed that a sentencing judge “should begin ... by correctly calculating the applicable Guidelines range” as his or her “starting point and ... initial benchmark.” *Gall v. United States*, 552 U.S. 38, 50 (2007). After giving the parties the opportunity to present argument for whatever sentence they view as appropriate, the judge then considers the seven factors set forth in 18 U.S.C. § 3553(a). These include “the nature and circumstances of the offense and the history and characteristics of the defendant,” a factor that typically entails consideration of the Presentence Report and any victim impact statements. They further include the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant,” and “the need to avoid unwarranted sentence disparities among” similarly-situated defendants. Of note, the statute also requires consideration of the Guidelines and any Commission policy statements, underscoring that the judge should “remain cognizant of [the Guidelines]

throughout the sentencing process,” including throughout his or her analysis of the § 3553(a) factors. *Gall*, 552 U.S. at 50 n.6.

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: Judges may not disregard the Guidelines. Judges are, however, permitted to vary from the Guidelines range if the district court determines that “the [18 U.S.C.] § 3553(a) factors, on a whole, justify the extent of the variance” and offers appropriate justification under the statutory factors. *Gall*, 552 U.S. at 51.

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

Response: In *Kimbrough v. United States*, 552 U.S. 85 (2007), the Supreme Court indicated that a district court may vary from the Guidelines based on its disagreement with a categorical policy judgment reflected in the Guidelines.

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 concerned whenever there are high rates of variances insofar as such statistics indicate that the Sentencing Guidelines are not carrying anchoring weight across the judiciary and are thereby not minimizing unwarranted sentencing disparities. I am aware that some judges have espoused the concern that the existing Guidelines in the child pornography context have been outpaced by technological developments. If confirmed, I would welcome the opportunity to further study U.S.S.G. § 2G2.2, review the Commission’s latest data and analysis, consult with my fellow Commissioners, and receive expert testimony on all sides of the issues.

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

Response: A former Commissioner, Judge Danny Reeves, encouraged the Commission to address areas where there are large numbers of departures or variances from the Guidelines with judges themselves. Whether through publications, meetings, or judicial conferences, Commissioners are uniquely equipped to convey to judges the information, evidence, and data that has been considered in explaining decisions of the Commission.

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: There is a rational basis for pegging penalties to drug quantities. An offense involving a larger quantity of a controlled substance is typically more serious than an offense involving a smaller quantity of the same controlled substance.

- 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: Mandatory minimum terms of incarceration in my experience can have deterrent effect on certain types of criminal activity. Deterrence – both specific deterrence to the defendant and general deterrence to others who might commit a similar offense – is important because the promotion of public safety is the foremost goal of the criminal justice system.

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

Response: Please see my answer to Question 18. I believe it falls to Congress as the elected branch to set statutory penalties and it is likewise Congress's prerogative to revisit them. If confirmed, I would welcome the opportunity for the Sentencing Commission to arm Congress with the best possible information, impact analysis, and projections, including in its evaluation of any particular mandatory minimums of interest.

Questions for Candice C. Wong 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: Equal treatment under the law is the bedrock of our justice system. The Sentencing Commission’s enabling statute specifically codifies that the Commission “shall assure that the guidelines and policy statements are entirely neutral as to the race ... of offenders,” 28 U.S.C. § 994(d), and defines one of the purposes of the Commission as establishing sentencing policies and practices that “avoid... unwarranted sentencing disparities,” *id.* § 991(b)(1)(B). If confirmed, I would do my utmost to uphold these solemn responsibilities. I would also hope to see the Commission continue its important work, as in the 2017 report cited, of using multivariate regression analyses to explore the relationship between demographic factors and sentencing outcomes to assist and inform policymakers in Congress and the Executive Branch.

(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: First and foremost, the Commission should stand ready to arm Congress with the best possible data, information, impact analysis, and projections in connection with any pending bills or measures Congress is considering or drafting, including those that consider changes to the crack/powder ratio. The Commission might also wish to hold hearings or make presentations at judicial conferences or Executive Branch meetings about its reports exploring the relationship between demographic factors and sentencing outcomes. The Commission may also wish to work proactively with the Administrative Office of Courts to expand its datasets to include information such as an offender’s employment history that it does not currently collect. The Commission’s past analyses of demographics and sentencing have specifically noted the inability to control for certain absent datasets, and their inclusion going forward has the potential to enhance the Commission’s future reports and the public’s understanding.

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: Please see my answer to Question (a).

Questions from Senator Thom Tillis
for Candice C. Wong
Nominee to be Commissioner of the U.S. Sentencing Commission

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

Response: I understand that Congress has several pending bills that address the trigger quantities for crack and powder cocaine in the drug trafficking statute. While I have not reviewed those bills, I feel the issue has appropriately drawn close attention and debate as policymakers have wrestled since 1986 with what differences in crack and powder cocaine penalties, if any, are justified and necessary to protect public safety, and the appropriate severity of the penalties at issue. If confirmed, I would welcome the opportunity to further study the issues and for the Sentencing Commission to arm Congress with the best possible data, information, impact analysis, and projections in its consideration of these bills.

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

Response: The drug trafficking statute, 21 U.S.C. § 841, keys mandatory minimum sentences to specific quantities of drugs distributed. Distribution of 28 grams of crack cocaine or 500 grams of powder cocaine will trigger a 5-year mandatory minimum sentence. Likewise, distribution of 280 grams of crack cocaine or 5 kilograms of powder cocaine will trigger a 10-year mandatory minimum sentence. Thus, crack traffickers receive longer sentences than powder traffickers who distribute the same weight in powder cocaine form. Whether longer sentences in the crack trafficking context are “excessive” is a difficult question to answer categorically, and would necessarily turn on the individualized facts and circumstances of each offense and offender.

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

Response: I believe it is the role of Congress as an elected branch to set the statutory penalties and triggers. If confirmed, I would welcome the opportunity for the Sentencing Commission to arm Congress with the best possible data, information, impact analysis, and projections in its consideration of any and all ratios being proposed.

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

Response: As experience with the First Step Act has shown, one challenge the Commission has encountered in implementing legislation is doing so in a sufficiently expeditious manner that ensures that all affected portions of the nearly 600-page Guidelines Manual are updated in time to get uniform guidance to the judiciary and thereby minimize sentencing disparities. The Commission must balance that need for expedition against its obligation to ensure diligent deliberations over the contours of any

implementing policy statements or commentary. In addition, the Commission is tasked by statute with the responsibility of recommending any “change or expansion in the nature or capacity” of “penal, correctional, and other facilities and services available ... that might become necessary as a result of the guidelines promulgated.” 28 U.S.C. § 994(g).

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

Response: The trade of sexually abusive images of children inflicts unique harms upon its victims and warrants serious criminal consequences. Whether those penalties should be more lenient or enhanced will necessarily turn on the individualized facts and circumstances of each offense and offender and the specific penalty already imposed.

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

Response: I would, first and foremost, familiarize myself with the limitations on Commission action prescribed by Congress in the PROTECT Act. I would also study the Commission’s data and analyses to date on child pornography offenses, and consider all information relevant to potential revisions of the Guidelines, not just information that favors reducing the enhancements. If empirical evidence supports the elimination of certain enhancements, the Commission should consider that. The Commission might also consider new enhancements that account for technological changes and differentiate among levels of culpability, to include potentially aggravating considerations of an offender’s involvement in sexually abusive or exploitative conduct, or involvement in internet communities devoted to child sexual exploitation. Ultimately, the Commission’s responsibility is to ensure that it has considered information on all sides of the issues and to develop Guidelines that effectuate the purposes of sentencing and factors in 18 U.S.C. § 3553(a).

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: I am generally familiar with the Sentencing Commission’s reported finding in 2012 that similarly-situated offenders engaged in similar underlying criminal conduct faced significant sentencing disparities based on whether they were charged with receipt or possession. I thus think alignment of penalties warrants serious consideration, and if confirmed, would welcome the opportunity to leverage the tools and data of the Commission to inform and assist your office in this important area.

**Senate Judiciary Committee Hearing
“Nominations”
Questions for the Record
for Candice Wong
Submitted June 15, 2022**

QUESTIONS FROM SENATOR WHITEHOUSE

- 1. From 2017 to 2021, you were detailed to DOJ’s Criminal Division, where you were Acting Deputy Assistant Attorney General and Acting Chief of Staff. During your tenure, then-Attorney General Sessions rescinded guidance that directed federal prosecutors not to file charges carrying a mandatory minimum against low-level drug offenders whose conduct did not involve violence, weapons, or minors, and who had little or no criminal history.¹ The Sessions memo also rescinded guidance that directed federal prosecutors to limit the use of sentencing enhancements under 21 U.S.C. §851, which significantly increases the mandatory minimum and potential maximum sentences for drug offenders with a prior felony drug conviction.**
 - a. Do you agree with these sentencing policies?**

Response: The “Sessions memo” cited was issued in May 2017, at which time I was serving in the D.C. Superior Court Division of the U.S. Attorney’s Office investigating domestic violence felonies and sex offenses under the D.C. Code. I was detailed to the Criminal Division as Senior Counsel in November 2017. At the Criminal Division, my portfolio focused on transnational organized crime, violent crime, and human rights violations, and to the best of my knowledge, I had no role in implementing the memo or any new approach to charging and sentencing in drug cases as described. As a general matter, I believe charging and sentencing decisions in drug cases, as in all cases, should be based on individualized assessment of the facts, circumstances, and the state, strength, and scope of the evidence in each case.

- b. What role did you have in implementing these policies?**

Response: Please see my answer to Question 1a.

¹ Mem. to All Federal Prosecutors from Attorney General Jeff Sessions on Department Charging and Sentencing Policy (May 10, 2017), *available at* <https://www.justice.gov/archives/opa/press-release/file/965896/download>.