**Nomination of Thomas Kleeh to the United States District Court for the Northern District of West Virginia**
**Questions for the Record May 2, 2018**

## QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

   **a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

   A district court is always bound by Supreme Court precedent and the precedent of the relevant circuit court. If I were fortunate enough to be confirmed, I would not depart from Supreme Court or Circuit Court of Appeals for the Fourth Circuit precedent.

   **b. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

   As a nominee for the district court, I have not had opportunity or occasion to study and do not have an opinion as to whether it would ever be proper for a circuit court judge to question Supreme Court precedent in either a concurring or dissenting opinion.

   **c. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?**

   As a nominee to an inferior federal court bound by Supreme Court precedent, I do not believe it would be appropriate for me to comment on when and under what circumstances the Supreme Court would consider overturning its own precedent. The Supreme Court – and the Supreme Court alone - has "the prerogative of overruling its own decisions." *Rodriquez de Quijas v. Shearson/American Express, Inc.* 490 U.S. 477, 484 (1989).

   **d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?**

   Please see the response to Question 1.c.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on

similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

**a. Do you agree that *Roe v. Wade* is "super-stare decisis"? Do you agree it is "superprecedent"?**

I have not had the opportunity to read Justice Gorsuch's text book nor to study the basis for these designations. No matter how Supreme Court decisions may be characterized, *Roe v. Wade* and all other precedent of the Supreme Court is binding on district courts. If I were fortunate enough to be confirmed, I will faithfully adhere to such precedent.

**b. Is it settled law?**

Yes.

**3.** In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

**a. Do you agree with Justice Stevens? Why or why not?**

I do not believe it would be appropriate, under the applicable Judicial Canons, for me to offer an opinion as to a matter that may come before me if I were fortunate enough to be confirmed. If I were to be confirmed, I will faithfully adhere to *Heller* and all precedent established by the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit.

**b. Did *Heller* leave room for common-sense gun regulation?**

I do not believe it would be appropriate, under the applicable Judicial Canons, for me to offer an opinion as to the contours of *Heller* and its implications other than to note that the Court's decision states "[n]othing in our opinion should be taken to case doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*,

554 U.S. 570, 626-27 (2008).

**c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?**

As a nominee to an inferior federal court, it would be inappropriate, under the applicable Judicial Canons, for me to comment or express my personal views on this issue. *Heller* is binding precedent upon all lower courts, and if I were fortunate enough to be confirmed, I would apply that decision, like all binding Supreme Court precedent, fully and faithfully.

5. In 2009, while in private practice, you delivered a presentation entitled "Change: What the New Administration, Congress & Legislature Envision for Employers, Employees and Unions." In the presentation, you commented on federal legislation called the Employee Free Choice Act, sometimes referred to as "Card Check." Slides from your presentation note "major threats" posed by Card Check.

**a. What was the context for this presentation?**

I delivered this presentation in April 2009 to the Society of Human Resources Management, Charleston, West Virginia Chapter. On occasion during my career, I have spoken to that same group on legislative developments at both the federal and state level that may affect human resources professionals.

**b. To whom or what did the Employee Free Choice Act pose "major threats"?**

The presentation materials outline the proposed changes encapsulated in the Employee Free Choice Act. Those changes would have been a significant change to long-standing labor law principles in the United States including an employee's right to cast a secret ballot and an employer's opportunity to fully participate in a campaign or election as had historically been afforded.

**6.** In December 2007, while in private practice, you wrote a piece entitled "By Leaps and Bounds . . . The List of Protected Classes Continues to Grow," which addressed a new municipal ordinance in Charleston, West Virginia, barring discrimination on the basis of sexual orientation or transgender status. **How did you determine the title of your article?**

As this article is over ten years old, I do not have a specific recollection as to the drafting process involved including the title of the piece. This article was drafted for publication in a newsletter my law firm authors (with contributions by various lawyers) but is published by an outside entity. Traditionally, the editing process involves multiple steps with possible changes at each stage.

7. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial

piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

**a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

No.

**b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

No.

**c. What are your "views on administrative law"?**

As a judicial nominee, under the applicable Judicial Canons, it would be inappropriate for me to comment on my personal "views on administrative law." Like all other areas of the law, I would be bound by the applicable precedent of the Circuit Court of Appeals for the Fourth Circuit and the Supreme Court as it relates to administrative law issues and questions. I would fairly and faithfully apply that precedent.

8. When is it appropriate for judges to consider legislative history in construing a statute?

Like all other questions or issues, I would be bound by the applicable Circuit Court of Appeals for the Fourth Circuit and Supreme Court precedent on matters involving statutory construction. On this issue, the Fourth Circuit has stated "[s]tatutory construction must begin with the language of the statute and the court should not look beyond that language unless there is ambiguity or unless the statute as literally read would contravene the unambiguously expressed legislative intent gleaned from the statute's legislative history." *United States v. Sheek*, 990 F.2d 150, 152–53 (4th Cir. 1993).

9. At any point during the process that led to your nomination, did you have any discussions with anyone — including but not limited to individuals at the White House, at the Justice Department, or at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

10. Please describe with particularity the process by which you answered these questions.

I received the questions from the Department of Justice in the evening of Wednesday, May 2, 2018. I reviewed the questions, conducted limited research, personally drafted answers to all of the questions, solicited comments from the Department of Justice attorneys working on my nomination, and revised my draft answers as I deemed appropriate in light of those comments.

**Nomination of Thomas S. Kleeh to the**
**United States District Court**
**For the Northern District of West Virginia**
**Questions for the Record**
**Submitted May 2, 2018**

## QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."
    a. Do you agree with Justice Roberts' metaphor? Why or why not?

    I agree with the Chief Justice's metaphor. Judges are to interpret and apply the law to the facts before them. They are not to act as advocates of any cause or for any party and, therefore, are not to rule based on their own personal beliefs or policy preferences.

    b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

    None unless the applicable law, whether statutory or precedent, requires it. For example, when determining if a motion for an injunction should be granted or denied, the court is required to consider, among other established factors, whether the movant would suffer irreparable harm if the injunction were not granted. *See Scotts Co. v. United Industries Corp.*, 315 F.3d 264, 271 (4th Cir. 2002) (citations omitted). On the other hand, a judge considering a motion for summary judgment should not consider the practical consequences of the decision as the applicable law and rules do not provide for it.

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."
    a. What role, if any, should empathy play in a judge's decision-making process?

    Generally, empathy should not factor in a judge's decision-making process as a judge is bound by oath to be impartial and "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. In each case, a judge must apply the law to the facts without allowing personal opinions, emotions or policy preferences to affect decisions. That said, certain sentencing statutes may require consideration of empathetic factors. For example, under 18 U.S.C. § 3553(a)(1) a judge must consider the "history and characteristics of the defendant." This factor could impact sentencing if the defendant's crime is out of character from an otherwise crime-free existence. Empathy should play a role in a judge's conduct on the bench particularly in delivery of decisions and rulings and overall treatment of litigants. However, empathy should not be a basis for deciding cases.

    b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

A judge should strive to ensure that his or her life experiences do not play a role in the decision-making process. A judge should fairly and impartially apply the law to the matter before the court without any preconceived biases or preferences.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

   No.

4. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

   As indicated in the response to Question 2 above, I am very mindful of the oath I would take as a judge to "administer justice without respect to persons, and do equal right to the poor and to the rich, and … [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge]." 28 U.S.C. § 453. The oath requires judges to treat all litigants and parties equally and fairly and to resolve issues and cases based on the merits and the law, not the parties' identity or status. I believe my professional experience and community activities provide assurance for the Committee and the American people that I would fulfill the oath required of a federal judge. Throughout my career, I have been fortunate enough to represent a diverse group of clients including numerous non-profit and community organizations. Likewise, during my legal career, I have been involved in activities aimed at assisting the less fortunate in securing legal and non-legal services.

   a. In civil litigation, well-resourced parties commonly employ "paper blizzard" tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

      The Federal Rules of Civil Procedure and well-established precedent make litigation tactics aimed at coercing parties apart from the merits of a particular case inappropriate. That would include so-called "paper blizzard" tactics. A judge should apply and employ the applicable rules of procedure including the proportionality standard set forth in the rules and standards for discovery and pretrial motions. If fortunate enough to be confirmed, I would actively manage cases to ensure the litigation is conducted appropriately within the Federal Rules of Civil Procedure and any other applicable law or rule. This would include working closely with the Magistrate Judge assigned to the case to ensure efficient and effective case management.

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## QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

    a. Do you believe there is implicit racial bias in our criminal justice system?

    I do believe that, unfortunately, racial bias still exists in our country and that there are actors within the criminal justice system that may harbor racially biased views. I am very mindful of the oath that I would take if I were fortunate enough to be confirmed and I pledge, as a district court judge, to "administer justice faithfully and impartially without respect to persons," which includes not just "equal right to the poor and to the rich," but equal right to persons irrespective of race. 28 U.S.C. § 453.

    b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

    Yes.

    c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

    I had not specifically studied this issue prior to my nomination.

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.
[4] *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

    a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

    I have not previously reviewed these studies and statistics. Regardless, I believe it would be inappropriate, as a judicial nominee under the applicable Judicial Canons, to offer an opinion on this topic.

    b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

    Please see the response to Question 2.a. above.

3. Since Shelby County, Alabama v. Holder, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.[7] One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.[8] Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

    a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

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[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[6] *Id.*

[7] JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), *available at* http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf.

[8] Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, *available at* https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca.

As a judicial nominee, it would be inappropriate for me, under the applicable Judicial Canons, to comment on this issue given pending litigation and the policy and political nature of the matter.

b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

Please see the response to Question 3.a above.

c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

Please see the response to Question 3.a above.

4. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

**Questions for the Record from Senator Kamala D. Harris**
**Submitted May 2, 2018**
**For the Nominations of**

**Thomas S. Kleeh, to be United States District Judge for the Northern District of West Virginia**

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

   **a. What is the process you would follow before you sentenced a defendant?**

   If I were fortunate enough to be confirmed as a United States District Court Judge, I would undertake the sentencing process with a great deal of preparation, thought and consideration. I would work to ensure every sentence imposed is "sufficient, but not greater than necessary" to achieve the sentencing purposes established by Congress. 18 U.S.C. § 3553(a)(2). I would fairly and faithfully apply all controlling laws, rules, guidelines and procedures, as construed and set forth by the United States Circuit Court for the Fourth Circuit and the Supreme Court, to determine a fair and just sentence. This process would include thorough review of the Presentence Investigation Report and the Advisory Sentencing Guidelines as well as any arguments from the litigants and victims relevant to the same.

   **b. As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?**

   Please see the response to Question 1.a. The applicable and controlling statutes, rules and guidelines have been established by Congress and construed by the Supreme Court and the United States Circuit Court for the Fourth Circuit to guide a federal district court in determining what may be a fair and proportional sentence in a particular case.

   **c. When is it appropriate to depart from the Sentencing Guidelines?**

   Although the Sentencing Guidelines are advisory, the Guidelines use the term "departure" as a term of art and both the Guidelines and applicable precedent outline the circumstances under which a variance from the advisory Guidelines range can be justified. Part K of Section 5 of the Guidelines proscribes the various circumstances where a "departure" is appropriate and a sentencing judge may impose a sentence above or below the sentencing range set forth by the Guidelines. I would carefully review the guidelines and the applicable precedent, provide advance notice required by Federal Rule of Criminal Procedure 32(h), if applicable, and consider the arguments and positions of the parties before departing from the guidelines. Regardless of the Guideline range, a judge is

charged with imposing a sentence that is "sufficient, but not greater than necessary" to achieve the sentencing purposes established by Congress. 18 U.S.C. § 3553(a)(2).

**d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]**

**i. Do you agree with Judge Reeves?**

I believe this question to be one of legislative policy properly reserved to Congress under the Constitution. Therefore, it would be inappropriate for me under the Judicial Canons to express an opinion on this matter. If I were fortunate enough to be confirmed as a United States District Court Judge, I would fairly and faithfully apply all controlling laws, rules, guidelines and procedures as construed by the United States Circuit Court for the Fourth Circuit and the Supreme Court to arrive at a fair and just sentence.

**ii. Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see the response to Question 1.d.i above.

**iii. Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

A mandatory minimum sentence is a legislative policy question best reserved to the province of Congress. Likewise, the decision to charge a defendant under a certain statute that carries a mandatory minimum sentence is vested to the authority and discretion of the executive branch. If I were fortunate enough to be confirmed as a United States District Court Judge, my role would be to fairly and faithfully apply all controlling laws and precedents including those statutes when Congress has provided for the imposition of a mandatory minimum sentence.

**iv. Former-Judge John Gleeson has previously criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2] If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking**

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf
[2] *See, e.g.*, "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

**proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

   The decisions to include mandatory minimum sentences in criminal statutes rest with Congress under Article I of the Constitution. Although some judges have commented on statutes that may lead to unjust results in extreme cases, a judge must be always mindful of his or her role in our Constitutional framework and be careful to avoid treading into the province of the other branches of government. Regardless, if I were fortunate enough to be confirmed, I would consider commenting in a particular case where I was required to impose what I believed to be a manifestly unjust sentence.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

   Decisions with respect to charges are vested to the discretion of the United States Attorney under Article II of the Constitution. Similar to the response to Question 1.d.iv.1, a judge must avoid impinging upon the authority of the United States Attorney to make such decisions provided for under the Constitution. However, in an extreme case, I could envision discussing with all counsel the particulars of a charging decision.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

   Please see the response to Question 1.d.iv.2. The Supreme Court has established "pardon and commutation decisions have not traditionally been the business of courts …" *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998). However, in an extreme case, I could envision discussing with a representative of the United State Attorney's Office possible consideration of clemency for a sentenced defendant recognizing that the final decision on clemency matters rests within the Executive Branch's authority and discretion.

**e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

Yes, if permitted under the applicable law.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

   **a. Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

   Yes. The oath required of judges mandates that the judge administer justice faithfully and impartially. This commitment should be taken seriously and, if I were fortunate enough to be confirmed, I pledge to do so.

   **b. Do you believe that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

   Yes, based on materials I have studied. As noted in the response to Question 2.a., judges play a role in making sure the criminal justice system is fair and equitable. If I were fortunate enough to be confirmed, I will "administer justice faithfully and impartially without respect to persons," which includes not just "equal right to the poor and to the rich," but equal right to persons irrespective of race. 28 U.S.C. § 453.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

   **a. Do you believe that it is important to have a diverse staff and law clerks?**

   Yes.

   **b. Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

   Yes.