Responses of Christina Reiss
Nominee to the U.S. District Court for the District of Vermont
to the Written Questions of Senator Jeff Sessions

1. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit.

a. Are you committed to following the precedents of higher courts, to faithfully give them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

b. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision?

Response: I would follow controlling precedent even if I personally felt it was in error.

2. In an article in the *Arizona Law Review*, you concluded that the Supreme Court's opinion in *Colorado v. Spring*, 479 U.S. 564 (1987), undermined the Court's intention in *Miranda v. Arizona*, 384 U.S. 436 (1966), to "indulge every presumption against waiver" and signaled "approval of interrogation techniques that straddle the border between acceptable police investigative tactics and constitutionally impermissible deception and trickery." At your confirmation hearing, you recognized that, if confirmed, you will have to deal with cases involving issues related to *Miranda*. If confirmed, how will you reconcile your personal beliefs, as reflected in your law review article, and current precedent governing confessions and waivers?

Response: As a member of the law review, I was encouraged to select a recent United States Supreme Court decision and analyze what I believed were the strengths and weaknesses of the decision. My law review article focused on what I felt was a departure from prior United States Supreme Court precedent governing waivers.

In my five years as a state court judge, I have had numerous occasions to address *Miranda* issues and I have followed controlling precedent governing confessions and waivers in doing so. If confirmed as a United States District Court Judge, I would continue to follow controlling precedent.

3. In *State of Vermont v. Michele Bottiggilonge*, 917 A.2d 500 (Vt. 2007), the Vermont Supreme Court overruled your holding, in an unpublished opinion, that tapping on a car windshield by a police officer amounts to a seizure under the Fourth Amendment.

a. Please explain the underlying facts and circumstance of the case and your reasoning that led to your decision that a seizure occurred.

Response:

In *State of Vermont v. Bottiggilonge,* a police officer noticed a woman operating a motor vehicle slowly and weaving within her lane. He further observed that she was talking on her cell phone (Vermont does not prohibit cell phone use while driving) and suspected she was lost. He ran her plates and determined that she lived in an adjoining county. He had no intention to stop her for a motor vehicle violation. He followed her vehicle in his police cruiser until the woman parked her vehicle in a diagonal parking spot. The law enforcement officer then parked his cruiser next to the woman's vehicle. The officer stepped out of his cruiser and approached the woman's vehicle. When the woman continued to talk on her cell phone, the officer tapped on her vehicle window until she lowered it. He then smelled the odor of intoxicants and began processing her for driving under the influence.

In determining whether a seizure had occurred, I followed Vermont Supreme Court precedent. Under Vermont law, "[a] 'stop' is a shorthand way of referring to a seizure that is more limited in scope and duration than an arrest," and thus "police need not force or signal a vehicle to the side of the road to effect a stop of persons in the vehicle." *State v. Jestice,* 2004 VT 65, ¶ 5 (mem.) (quoting *State v. Burgess,* 163 Vt. 259, 261 (1995)). The "mere approaching and questioning of a person seated in a parked vehicle does not constitute a seizure…." *Burgess,* 163 Vt. at 261 (citation omitted). However, "'activity which inhibits a person's freedom of movement does.'" *Jestice,* 2004 VT 65, ¶ 5 (quoting *Burgess,* 163 Vt. at 261).

The Vermont Supreme Court has observed that, "[c]ourts have long held that a show of authority tending to inhibit a suspect's departure from the scene is sufficient to constitute a stop, even though the vehicle is already stopped at the time of an approach by police." *Burgess,* 163 Vt. at 261. "Normally a seizure occurs when, under the totality of the circumstances, a reasonable person would not believe he was at liberty to leave or to decline to answer the officer's questions." *State v. Pierce,* 173 Vt. 151, 153 (2001).

In *Burgess,* the Vermont Supreme Court cited with approval *Adams v. Williams,* 407 U.S. 143, 145-48 (1971) as "treating officer's approach of voluntarily parked vehicle and tap on window as forcible stop" and cited *Wibben v. North Dakota State Highway Comm'r,* 413 N.W.2d 329, 330, 331 (N.D. 1987) for the proposition that "approaching parked car and tapping on window with flashlight was seizure under Fourth Amendment." *Burgess,* 163 Vt. at 261.

Applying Vermont Supreme Court's precedent to the totality of the facts and circumstances in the case before me, I concluded "that a reasonable person would not feel that he or she could simply drive away with a police officer knocking on the car window, but instead would feel compelled to, at least, remain parked and roll down

the car window in response." *State v. Bottiggilonge,* Addison District Court, Docket Nos. 319-6-05 & 43-6-05 Ancr at 3.

b. How does your holding comport with the standard set by the U.S. Supreme Court in *Florida v. Bostick*, 501 U.S. 429 (1991), which is whether or not a reasonable "person would feel free to disregard police and go about his business?"

Response: Vermont's standard that a "seizure" occurs when, "under the totality of the circumstances, a reasonable person would not believe he was at liberty to leave or to decline to answer the officer's questions," *State v. Pierce,* 173 Vt. 151, 153 (2001), is analogous to the standard set forth in *Florida v. Bostick,* 501 U.S. 429 (1991). I believe my decision in *Bottiggilonge* comports with the standard in *Florida v. Bostick*, however, I acknowledge that the *Bottiggilonge* facts present a close question and that my conclusion was found to be in error.

4. What in your view is the role of a judge?

Response: A judge is an adjudicator of legal and, if such jurisdiction is conferred upon the judge, equitable disputes. A judge has a sworn obligation to uphold the Constitution and the laws of the jurisdiction. He or she must preside fairly, impartially, and diligently in all matters that come before the judge. As a public servant, a judge must be a role model both inside and outside the courtroom and faithfully adhere to the rule of law and applicable ethical codes.

5. How would you define "judicial activism?"

Response: I do not believe the term "judicial activism" has a generally accepted definition. When it is used to criticize a judge's decision-making process, I believe it refers to judges who render advisory opinions regarding issues and facts not before the court in an effort to create policy or to disseminate the judge's personal views. I believe this form of "judicial activism" is improper.

6. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: I have never referred to the Constitution as a "living" document. I believe its terms are fixed unless amended.

7. As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:

> **"We need somebody who's got the heart, the empathy, 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. And that's the criteria by which I'm going to be selecting my judges."

a. Without commenting on what President Obama may or may not have meant by this statement, what is your opinion with respect to President Obama's criteria for federal judges, as described in his quote?

Response: A judge must never forget that it is not cases, pleadings, papers, and matters that come before the judge but real people with real rights and interests at stake. The standard of "empathy" whereby a judge understands that he or she is making rulings that impact the lives of real people is one that I share as it ensures that a judge will be prompt, thorough, and careful in his or her decision-making. In making those rulings, however, the rule of law and not the judge's personal feelings towards the litigants and their backgrounds determines the outcome.

b. In your opinion, do you fit President Obama's criteria for federal judges, as described in the quote?

Response: I take my role as a judge very seriously. I strive to treat the individuals before me and their claims with all the fairness, impartiality and thoughtfulness that I would desire and expect with regard to my own rights and interests. I believe I show "empathy" as described by President Obama by recognizing that the cases that come before me are not a series of intellectual questions but are individuals and entities seeking an adjudication of their disputes.

c. During her confirmation hearings, Justice Sotomayor rejected President Obama's so-called "empathy standard" stating, "We apply the law to facts. We don't apply feelings to facts." Do you agree with Justice Sotomayor?

Response: Yes.

d. What role do you believe that empathy should play in a judge's consideration of a case?

Response: Judicial decisions must be devoid of the judge's personal feelings, biases, and opinions.

e. Do you think that it's ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?

Response: A judge should never make a judicial decision based upon his or her personal feelings regarding a litigant, an issue, a law, or a fact pattern.

i. If so, under what circumstances?

Response: See above.

ii. Please identify any cases in which you've done so.

Response: I do not believe I have ever done this.

iii. If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.

Response: In presiding over juvenile protection cases, I have been called upon to remove children from parents who genuinely love their children but who are unable to adequately care for them at even a minimal standard of care, or to protect them from physical, sexual, or emotional abuse from a third party. I understand that my rulings in these very difficult cases are likely to cause both parent and child real suffering and grief. I have nonetheless followed Vermont's juvenile code in making these determinations.

8. Please describe with particularity the process by which these questions were answered.

Response: On November 12, 2009, I received these questions from the Justice Department and drafted my answers. I then briefly discussed the questions with the Justice Department and finalized my responses. On November 16, 2009, I forwarded my final responses to the Justice Department for transmission to the Committee.

9. Do these answers reflect your true and personal views?

Response: Yes