

Responses of Louis B. Butler, Jr.
Nominee to the U.S. District Court for the Western District of Wisconsin
to the Written Questions of Senator Tom Coburn, M.D.

- 1. In your questionnaire, you stated that you stated that you were asked questions by “each Senator that asked about my personal views concerning a number of issues, but it was understood by me and by them that as a District Court Judge, any personal views that I might have would not control my decisions on the bench.” What specifically were you asked? Please explain the questions you were asked and the answers you provided to the best of your recollection.**

Response: I believe it would be inappropriate for me to describe in any further detail my private conversations with United States Senators. As I have indicated throughout this process, any personal views that I might have would not control my decisions on the bench. My decisions would be based on governing law. No one involved in the process of selecting me as a judicial nominee discussed with me any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue or question.

- a. Were you asked about your opinion on abortion?**

Response: Please see above response.

- b. What about the Second Amendment and gun rights?**

Response: Please see above response.

- c. National security issues?**

Response: Please see above response.

- d. The Patriot Act?**

Response: Please see above response.

- 2. At a 2008 Obama campaign event you stated: “[W]hile all judges have a desire to interpret and apply the law, the cases that get to the Supreme Court are the ones that have no easy answer. Thus, the background, personal beliefs and policy decisions of the justices selected will influence how they vote on the difficult cases before them. . . . And that is the main reason that I support Senator Obama.” Based on that statement it appears you endorse President Obama’s empathy standard, a standard that even Justice Sotomayor rejected.**

How do a judge's "personal beliefs and policy decisions" influence how they will vote in a particular case?

Response: I do not believe a judge's personal beliefs and personal policy decisions should influence how a judge should vote in a particular case. I have not, and will not make decisions based on my personal beliefs. I have publicly made statements referencing my approach to judicial decision-making and impartiality in the past. For example, at a speech in June 2007, I stated as follows:

Judicial decision-making should be based on the evidence and the law, however we interpret that to be, and not outside influence and improper consideration.

Every judge is duty bound to make decisions with the following framework in mind: In applying the law to the facts in any given case, we look first to the Constitution of the United States, the Supreme Law of the land. Then we look to the state constitution, our state statutes, our common law, and our precedents. It is within that framework that we make our decisions.

At another speech in July 2007, I stated as follows:

The goal of any judge is to not side with one party or another. We do not dance to the tune of special interest groups. We do not reach a result, and then figure out how to get there. We do what we can to make sure that our legal system is fair, neutral, detached and impartial. We base our decisions on the facts and the law. Our judges put on their so-called striped shirts, you call them robes, and play the role of referee every single day in order to make sure that our rules are employed in an appropriate manner.

If I am confirmed as a United States District Court Judge, I will decide cases within the above framework, basing my decisions on the United States Constitution, federal legislation, and controlling precedent from the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit.

- a. How is that consistent with a judge's duty to merely apply the law to the facts?**

Response: If confirmed as a United States District Court Judge, I will base my decisions on the evidence and the law, using the framework for judicial decision-making provided above.

3. **You provided notes of a speech that you gave to the Wisconsin Department of Workforce Development entitled “Experience as a Black Man in the Legal Field” on February 21, 2007 and of a speech to the National Black Law Students Association on February 4, 2006. Under the heading, “How else can others help the community?,” Your notes state: “4. Judges, and now justices. A) Making sure that justice is accomplished; B) ‘Do the right thing’; C. Being visible.”**

- a. **What did you mean by “Making sure that justice is accomplished”?**

Response: I do not have prepared remarks for that event, so my answer is to the best of my recollection, consistent with how I view “justice.” The justice system is involved in dispute resolution. Parties come to court to get an answer to issues they have been unable to resolve on their own. The parties need to be heard, judges need to listen to them, and decisions need to be rendered in a fair, impartial, neutral and detached manner based on the evidence presented and controlling law. Parties may not agree with a court’s decision, but justice is accomplished when the process has been equally and fairly applied to each party, and the law followed.

- b. **What did you mean by “Do the right thing”?**

Response: I do not have prepared remarks for that event, so my answer is to the best of my recollection. By “do the right thing,” I believe that means following the law, wherever that takes you.

4. **As you know, the Second Amendment right to bear arms is one that is very important to all Americans, but particularly to those in my home state of Oklahoma. Do you believe the right to bear arms is a fundamental right?**

Response: *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) recognized an individual right to keep and bear arms under the Second Amendment, but the Court has not yet ruled that the right is fundamental.

- a. **What constitutional analysis would you employ to determine whether it is a fundamental right?**

Response: I would follow controlling precedent of the United States Supreme Court and the Seventh Circuit Court of Appeals.

- b. **Do you believe the right to self defense is a fundamental right?**

Response: *Heller* recognized an individual right to keep and bear arms in self defense. I understand the Supreme Court has another case before it that may determine whether that right is incorporated as against the states. I would follow the decision issued by the Court.

5. **Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. In an interview with the *Lawrence Journal*, you said that “in applying the Constitution, you need to look at where things have evolved and adapt accordingly.” Is it fair to say that you agree with that concept of a “living Constitution”?**

Response: I believe the term “living Constitution” comes from a speech given by former Chief Justice Warren Burger, and I am not sure what he meant by that term exactly. My approach is consistent with the recent United States Supreme Court decision in *Kyllo v. United States*, where Justice Scalia for the court stated that it “would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.” Situations exist now that did not exist when the Constitution was drafted. Nevertheless, the principles enshrined in the Constitution are enduring. Situations change, the Constitution does not.

6. **In *Ferdon v. Wisconsin Patients Compensation Fund*, you voted with the majority in another 4-3 decision to strike down the punitive damages cap (\$350,000) enacted by the Wisconsin state legislature, finding that it violated the state equal protection clause because it lacked a rational basis, even though the evidence showed that the caps were successful in reducing the cost of malpractice insurance. Under your version of the rational basis test, virtually any statute is subject to being struck down. Please explain why you decided to strike down a punitive damages cap that the legislature had determined was successful in reducing the cost of medical malpractice insurance?**

Response: I did not write the opinion in *Ferdon*, so my answer will be based on the opinion written for the court by the Chief Justice. Our court applied the Wisconsin Constitution to a comprehensive Wisconsin Scheme governing medical malpractice. Our court accepted the fact that the legislation in question was presumed constitutional, and that the plaintiff must establish that the statute was unconstitutional beyond a reasonable doubt. *Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, par. 68. The court then applied the rational basis test under the Wisconsin Constitution for the equal protection claim that was pursued by the plaintiff by “focusing on means without second-guessing legislative ends.” *Id.*, par. 79. The court ultimately concluded, for reasons stated in the majority opinion, that the malpractice cap adopted by the legislature was unreasonable and arbitrary because it was not rationally related to legislative objectives. *Id.*, pars. 113, 129, 175-76, 187. The opinion states several reasons why Wisconsin did not have a medical malpractice crisis, and those reasons were not related to the cap imposed. The Court noted that “[c]ourts across the

country are divided about whether caps on noneconomic damages are constitutional.” *Id.*, par. 17, and our court’s decision was based on the Wisconsin Constitution. If confirmed as a United States District Court Judge, my decisions will be controlled by the decisions of the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit.

- a. **Further, in this case, the majority of the court (of which you were a member) engaged in an aggressive reassessment of legislative choices. Please explain why you believe it is the role of the court to second guess the decisions of the legislature.**

Response: I respectfully disagree that the majority engaged in an aggressive reassessment of legislative choices. The court applied the Wisconsin Constitution to a comprehensive Wisconsin scheme governing medical malpractice. If confirmed as a United States District Court Judge, my decisions will be controlled by the decisions of the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit.

7. **In *State v. Fisher*, you voted with the majority in a 4-3 decision to uphold a conviction of a tavern owner, who kept a gun for business purposes, under a concealed carry statute that banned carrying in all instances. The Wisconsin constitution provides for the right to bear arms for a “lawful purpose,” among others. In this case, the court read the specified examples of a “lawful purpose” for which there are constitutional rights to bear arms as *limitations* on its exercise and applied those restrictions in a fairly aggressive way. The majority’s opinion, which you joined, resolved the conflict between the concealed carry statute and the state constitutional right by engaging in its own detailed analysis of the facts and policy judgments involved on a case-by-case basis. Please explain your analysis in this case and why you believed the words “lawful purpose” were a restriction on Second Amendment rights?**

Response: I did not write an opinion in *State v. Fisher*, 2006 WI 44, 290 Wis.2d 121, 714 N.W.2d 495, so my answer will be based on the opinion written for the court by Justice Ann Walsh Bradley. Our decision was based on earlier precedent decided before I joined the court (*State v. Cole*, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328, and *State v. Hamdan*, 2003 WI 113, 264 Wis.2d 433, 665 N.W.2d 785), interpreting the constitutional provision in conjunction with the carrying concealed weapon statute. In those cases, the court recognized that the right to bear arms under the Wisconsin Constitution is not absolute and that the test for the constitutionality of a regulation of that right depends on whether the regulation is a reasonable exercise of the state's inherent police power. 264 Wis.2d 520, par. 24. Although both cases occurred in high crime areas, the court drew a distinction between carrying a concealed weapon in a person’s home or place of business, and carrying a concealed weapon in a vehicle. *Id.*, par. 49, and 264 Wis.2d 433, par. 67. In *Fisher*, at the time of the defendant’s arrest for carrying a loaded and concealed gun in his vehicle, “he was on his way to McDonald’s and was running personal errands.” *Id.*, pars. 1,

39. He first stopped at the Department of Natural Resources to contest a citation he received a week-and-a-half earlier for transporting loaded firearms that were stolen along with his vehicle after he left his vehicle running unattended. *Id.*, par. 38. “[H]e kept the gun in his vehicle even at times when he was not transporting cash.” *Id.*, par. 36. He was not in his home or place of business. It was in the context of these facts and our earlier precedent that the court held that Wisconsin’s Carrying Concealed Weapon statute, sec. 941.23, established by the legislature, was constitutional as applied to the defendant. *Id.*, par. 5. In reaching this decision, the court followed our earlier precedent consistent with stare decisis. The Second Amendment was not before the court.

8. **In *State v. Dubose*, you joined a four-vote majority of the Court that found that the show-up procedure of eyewitness-identification was impermissibly suggestive and generally should not be admitted as evidence, departing from its longstanding tradition of following the U.S. Supreme Court’s interpretation of parallel constitutional provisions. You wrote a concurring opinion specifically defending the majority’s extensive use of social science studies to conclude that show-ups were unreliable. In dissent, Justice Wilcox stated that such studies are “not a valid basis to determine the meaning of our constitution. The majority fails to adequately explain how the meaning of the text of the constitution can change every time a new series of social science studies is present to the court.” Justice Wilcox also made a separation of powers argument: “It is not the function of this court to create what it considers to be good social policy based on data from social science studies. That is the province of the legislature.” That’s a fairly strong criticism.**

- a. **Please explain why you believe social science studies are relevant to constitutional interpretation.**

Response: Under the Wisconsin Constitution, factors taken into account by the court in determining whether to adhere to precedent include whether there is a need to reach a decision that corresponds to newly ascertained facts, and whether prior decisions have become unsound, because they are based on principles that are no longer valid. The Court in *Dubose* was presented with significant and overwhelming evidence concerning wrongful convictions based on eyewitness misidentification. Our decision adopting earlier precedent from the United States Supreme Court regarding showups in *Dubose* was based on the Wisconsin Constitution as applied to the evidence received and considered by the court. Our decision in *Dubose* takes into account the fact that when an innocent person is convicted, the guilty party is free to prey upon society.

- b. **Does this type of analysis not lead to an evolving constitution?**

Response: I do not understand the concept of an evolving constitution. If what you mean by “evolving constitution” is the concept of “living

constitution” referred to earlier, then as I indicated earlier, situations exist now that did not exist when the Constitution was drafted. Nevertheless, the principles enshrined in the Constitution are enduring. Situations change, the Constitution does not.