

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 Charles E. Grassley

1. In your opinion, what is the proper role of a judge?

Response: Courts are involved in dispute resolution. The role of a judge is to decide cases in a fair, impartial, neutral and detached manner, applying the law to the facts of a given case. 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.

2. Do you believe that it is ever proper for judges to indulge their own values in determining what the law means?

Response: No.

- a. **If so, under what circumstances?**

Response: See above response.

- b. **Please identify any cases in which you have done so.**

Response: None.

- c. **If not, please discuss an example of a case where you had to set aside your own values and rule based solely on the law.**

Response: Please see my concurring opinion in *Industrial Roofing v. Marquardt*, 2007 WI 19, 299 Wis.2d 81, 726 N.W.2d 898. While my personal views were consistent with the majority and dissenting views that a party should not be responsible for the mistakes of the lawyer where the client is blameless, our precedent was to the contrary, and in the absence of any change implemented as part of the court's rule-making procedure, I could not join the majority opinion.

3. **Do you believe that it is ever proper for judges to indulge their own policy preferences in determining what the law means?**

Response: No.

- a. **If so, under what circumstances?**

Response: See above response.

- b. **Please identify any cases in which you have done so.**

Response: None.

- c. **If not, please discuss an example of a case where you had to set aside your own policy preferences and rule solely on the law.**

Response: Please see both the majority opinion, which I coauthored, and my concurring opinion in *Clean Wisconsin, Inc. v. PSC*, 2005 WI 93, 282 Wis.2d 250, 700 N.W.2d 768. I had serious questions about the environmental impact statement in that case, but it was not the court's function to determine this state's energy policy or to decide whether the construction of coal-fired power plants was in the public interest. These were legislative determinations assigned to the Public Service Commission. Our court could not substitute our judgment for that of an administrative agency determining a legislative matter within its province.

4. **How do you define "judicial activism?"**

Response: I have previously stated that “judicial activism” is a term I suspect is often used by those who disagree with a particular result. I am aware that others use that term without defining it to criticize opinions of various courts. To me it suggests coming up with a result, and then figuring out how to get there, or deciding issues not presented by the parties in a given case, but that is not necessarily how the term is used by others. It is also not how I decided cases. If confirmed as a District Court Judge, I would apply settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals.

5. U.S. Supreme Court precedents are binding on all lower federal courts, and Circuit Court precedents are binding on the district courts within their particular circuit.

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

Response: Yes.

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

Response: I would follow controlling precedent from the Seventh Circuit Court of Appeals.

- c. How would you rule if you believed that the U.S. Supreme Court had seriously erred in rendering a decision?**

Response: I would follow controlling precedent from the United States Supreme Court.

6. In remarks to a campaign event entitled “Young and Powerful for Obama” dated September 25, 2008, 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.*” (emphasis added). You obviously endorsed President Obama’s candidacy based on what he said about the type of judges he would choose, which you interpreted to mean those who would be influenced by their “backgrounds, personal beliefs and policy decisions” in judging.

- a. What role do an individual’s background, personal beliefs and policy decisions have on a judge’s decisionmaking?**

Response: Personal beliefs and personal policy decisions have no role in a judge’s decision-making. Judges on an appellate court often disagree on how a

case should be decided. As to backgrounds, it has been my experience that it is beneficial when a court has members on it that have civil experience as well as criminal experience, former prosecutors and defense lawyers, former plaintiff's counsel as well as defense, liberals, moderates and conservatives, and judges from an urban setting as well as rural. Different perspectives will help the judges to assess facts presented, as well as the scope of the decisions to be rendered and how those decisions will affect the public in general.

b. How do these relate to applying the law to the facts in a given case?

Response: See above answer.

7. **During your confirmation hearing, you stated that, in your experience, you look to the law and “then you have to make a decision that will resolve the dispute in a fair and impartial manner. And so the backgrounds of the different experiences that one can bring to the table – whether its practice experience or other types – I think it helps to expand the discussion in the conference room” Please explain what you meant by this statement.**

Response: As I noted above, it has been my experience that it is beneficial when a court has members on it that have civil experience as well as criminal experience, former prosecutors and defense lawyers, former plaintiff's counsel as well as defense, liberals, moderates and conservatives, and judges from an urban setting as well as rural. Different perspectives will help the judges to assess facts presented, as well as the scope of the decisions to be rendered and how those decisions will affect the public in general.

8. **In response to a question at your confirmation hearing regarding the role of the court, you stated: “For me it’s always been taking the facts of the case and applying the applicable law.” Please explain what you meant by this statement.**

Response: In applying the law to the facts in any given case, I first determined what the facts were. Sometimes the factfinder is a jury, sometimes it is the judge. I then determined whether the Constitution of the United States applied. I then looked at any applicable legislation, the common law, and prior precedent. I applied the law to the facts in a fair, impartial, neutral and detached manner to resolve the matter pending before the court.

9. **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.” At her confirmation hearing, Justice Sotomayor rejected this “empathy standard” stating, “We apply the law to the facts. We don’t apply feelings to the facts.” At your confirmation hearing, you testified that you agreed with her statement.**

- a. **Do you agree with President Obama's quote? Please explain your answer.**

Response: The President has set forth some of the considerations he takes into account when selecting a Justice on the Supreme Court. If confirmed as a nominee, my role as a District Court Judge would be to apply the law to the facts in a fair, impartial, neutral and detached manner to resolve the matter pending before the court.

- b. **Based on your understanding of President Obama's quote, and your statements before the "Young and Powerful for Obama" event, do you believe that you fit President Obama's standard for federal judges?**

Response: Yes.

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

Response: Empathy should play no role in deciding the law. However, following a criminal conviction, at the time of sentencing, a judge must take into account several factors in fashioning an appropriate sentence. Among those factors are the sentencing guidelines, the seriousness of the offense, the character and background of the defendant, and the need to protect society. The judge must also assess the impact the crime had on individual victims and their rights. It is important to understand what a victim has suffered in fashioning an appropriate sentence.

- d. **Do you think that it is ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No.

- i) **If so, under what circumstances?**

Response: See above response.

- ii) **Please identify any cases in which you have done so.**

Response: None.

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

Response: Once, as a Municipal Court judge, a tavern owner appeared before the court for an underage person on the premises violation. When the owner hired the manager and the bartender on duty, the owner

provided each of them with training that required them to check the identification of each individual entering the premises, and each individual purchasing alcohol. While the owner was out of the country, the bartender served an underage patron with alcohol, resulting in a violation of the law. The bartender was cited, as well as the manager on the premises. The owner was also cited, and chose to try the case. While I agreed with the dissent in a binding Wisconsin Supreme Court decision, controlling precedent dictated that the owner was also responsible. Therefore, I found the owner guilty.