

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 Orrin G. Hatch

1. **Justice Butler, you were part of the majority in *State v. Fisher* which upheld a conviction for carrying a concealed weapon. The Wisconsin Constitution contains a robust right to keep and bear arms which covers security and any other lawful purpose. The court said this did not protect a tavern owner who carried a gun in his car even though he transported large amounts of cash related to his business. It appears that the court looked at what it considered a low crime rate in the community and concluded that this constitutional right did not apply to this business owner. That seems like a differential approach to constitutional rights where some people have them and others do not depending on their circumstances, where they live, or what they do for a living. Would the case have been decided differently if the same tavern owner keeping the same gun in the same car for the same purpose done business in a different neighborhood?**

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. As to any fact situation not decided by the court, it would be inappropriate for me to comment how any such case should be decided.

2. **In a 2005 speech, you said that who judges are and everything they have experienced is valuable when they decide cases. In remarks just about a year ago, you talked about interpreting and applying law as a desire, but you did not say it is an obligation. Instead, you said that "personal beliefs and policy decisions" will influence how judges decide cases. Do you believe that judges from different backgrounds would decide the same case differently and, if so, do you believe this is acceptable? When judges take an oath to be impartial, do they have a duty to set aside factors such as their personal views or the influences of their personal background?**

a. **Do you believe that judges from different backgrounds would decide the same case differently and, if so, do you believe this is acceptable?**

Response: As a former member of the Wisconsin Supreme Court, I have been involved with many unanimous decisions, as well as with many split decisions, so I am aware that different judges can, and do, decide the same case differently. Similar patterns (unanimous as well as split decisions) exist at the United States Supreme Court, the United States Court of Appeals, and other state appellate courts. If different judicial opinions were not acceptable, there would be no need for multi-judge courts.

b. **When judges take an oath to be impartial, do they have a duty to set aside factors such as their personal views or the influences of their personal background?**

Response: I have not, and will not make decisions based on my personal views. 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.

3. **Justice Butler, courts have an important role to play, but they play that role as part of a system of government. That system includes the legislature. They are not free simply to second-guess legislators. It appears to me that in the *Ferdon* medical malpractice case, the Wisconsin Supreme Court stepped out of those bounds. You were in the majority in that case, and the court struck down the cap on noneconomic damages that the legislature had passed. Just a year earlier, the court had upheld the damages in wrongful death cases but in *Ferdon* the court struck it down in a personal injury case. The court said there was not even a rational basis for the damages cap. Ordinarily, that is a very deferential standard, which gives room for the legislature to make policy decisions and solve problems. But here it seems the court turned that standard into something else. It looks like your court created a standard that, while you still called it rational basis, actually set a higher bar for the legislature. Especially since the American Medical Association later found that Wisconsin was one of only a few states that did not have a medical malpractice crisis, it nonetheless appears that the damages cap accomplished precisely what the legislature intended. Why did the court substitute its policy judgment for the legislature's judgment?**

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. I respectfully disagree that the court substituted its policy judgment for the legislature's judgment. 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.