

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 Jeff Sessions

1. In a 2008 debate during your campaign for the Wisconsin Supreme Court, you identified William J. Brennan and Thurgood Marshall as the Supreme Court justices whom you most admire and align yourself with. You included them when asked the same question during your 2000 campaign. In 2004, the *Milwaukee Journal Sentinel* reported that your “judicial philosophy was influenced by [your] legal idols,” Justices Brennan and Marshall. You reiterated this conviction in your application to Governor Doyle for a seat on the Wisconsin Supreme Court. You also told the *Lawrence Journal*, “If I could mold myself as a justice, I’d want to be a cross between” Justices Brennan and Marshall. Given your consistent record of praise for Justices Brennan and Marshall, I am concerned that you may adopt their activist attitudes if confirmed to the federal bench. Both Justices were viewed as having judicial philosophies far out of the mainstream and far to the left of the Court.
 - a. In his dissent in *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), Justice Brennan said that he believed that the government is constitutionally barred from prohibiting any obscenity not involving minors. Justice Marshall joined this dissent. In so doing, they departed from the mainstream of the Court and its precedents in this area.
 - i. Do you agree with the dissent in *Paris Adult Theatre*? Please explain why or why not.

Response: If confirmed as a District Court Judge, I would apply settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals.
 - ii. Do you agree with Justices Brennan and Marshall that all obscenity is beyond the reach of government regulation? Please explain why or why not.

Response: The Supreme Court has recognized that all obscenity is not beyond the reach of government regulation. If confirmed as a District Court Judge, I would apply settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals.
 - b. In their concurrence in *Furman v. Georgia*, 408 U.S. 238 (1972), Justices Brennan and Marshall wrote that they would have held that any use of the death penalty is *per se* a violation of the Eighth Amendment.

- i. **Do you agree that the death penalty is *per se* unconstitutional? If not, do you agree that it is settled law that the death penalty is constitutional?**

Response: The Supreme Court has held that the death penalty is not *per se* unconstitutional. If confirmed as a District Court Judge, I would apply settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals.

- ii. **Do you agree that Justices Brennan and Marshall were engaged in judicial activism when they ignored the text of the Constitution and centuries of Supreme Court precedent to try to outlaw capital punishment?**

Response: To me, “judicial activism” 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. I understand that this is not necessarily how the term is used by others. It is also not how I decided cases. Whether I agree or disagree with a particular result or opinion is irrelevant. If confirmed as a District Court Judge, I would apply settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals.

- c. **Justice Brennan, joined only by Justice Marshall, dissented in *Marsh v. Chambers*, 463 U.S. 783 (1983), where a majority of the Court held that legislative chaplains were constitutional.**

- i. **Do you agree with the dissent in *Marsh*? Please explain your answer.**

Response: If confirmed as a District Court Judge, I would apply settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals.

- ii. **Do you agree that America’s history and heritage as a Judeo-Christian nation should inform interpretation of the First Amendment?**

Response: If confirmed as a District Court Judge, I would apply settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals.

- d. **In *Plyler v. Doe*, 457 U.S. 202 (1982), Justice Brennan held that taxpayers were constitutionally obligated to provide free public education for illegal aliens. In dissent, Chief Justice Burger wrote, “[t]he Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem.”**

- i. **Do you believe that illegal aliens have a constitutional right to taxpayer-funded benefits? Please explain your answer.**

Response: The Supreme Court has held that illegal aliens do not have a constitutional right to free public education. If confirmed as a District Court Judge, I would apply all settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals.

- ii. **Do you agree with Chief Justice Burger that it is not the role of judges to try to remedy every social problem when cases present opportunities to do so? Please explain your answer.**

Response: Yes. Congress is generally best suited to explore solutions to every social problem.

- e. **Both Justice Brennan and Justice Marshall were often characterized as sympathetic to particular social groups perceived as disadvantaged or disempowered.**

- i. **Do you agree with this characterization?**

Response: No. I would characterize them as sympathetic to equal justice under the law for all.

- ii. **Do you believe, as they did, that judges have a special responsibility to be empathetic to the needs and concerns of “disadvantaged” social groups?**

Response: I do not agree with that characterization. I believe that judges have a responsibility to be fair, impartial, neutral and detached in rendering decisions based on the facts and the law.

2. **In a 2005 speech at the University of Wisconsin Law School, you discussed the deliberations of the Wisconsin Supreme Court, stating:**

“Each of us brings our own experiences with us everyday Who we are, everything we have learned, everything we have experienced is valuable when it comes to . . . deciding cases as a judge or justice. I know that I have experiences that no one else has had when it comes time for us to render our decisions. I recognize that my fellow justices may not necessarily see things as I do when we have our spirited discussions, but I am comforted by the fact that my perspective is at least being shared with the other justices, just as they share their experiences and outlooks with me. That can only be good. The more perspectives that we have in our conference room, the more likely it is that we achieve justice for all.”

a. Do these statements accurately reflect your judicial philosophy? If not, please describe your judicial philosophy.

Response: These statements reflect my belief in diversity in a collegial decision-making process. As far as my judicial philosophy is concerned, I have publicly made statements referencing my approach to judicial decision-making and impartiality. 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.

b. How does the presence of a number of perspectives make it more likely to “achieve justice for all”?

Response: Judges on an appellate court often disagree on how a case should be decided. 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.

3. In a 2005 interview in *Lawrence Today*, you stated that, as a judge, you “always try to think in terms of what’s right, what’s just.”

a. Please explain your view of “what’s right” and/or “what’s just.”

Response: Justice is ultimately the goal to be achieved within the justice system. Process is important, and judges should make decisions in all cases in a fair, impartial, neutral and detached manner and provide equal justice to all appearing before the court.

b. Please provide an example of a case where the outcome comported with your view of “what’s right” and/or “what’s just.”

Response: Any case where the decisions were made in a fair, impartial, neutral and detached manner, providing equal justice to all persons appearing before the court, comports with my view of what’s right and what’s just.

c. Please provide an example of a case where the outcome did not comport with your view of “what’s right” and/or “what’s just.”

Response: *Ableman v. Booth*, 62 U.S. 506 (1858). I disagree with the court’s decision to uphold and enforce the Fugitive Slave Act.

4. In a 1994 op-ed you argued that President Clinton should appoint an African-American to a vacancy on the Seventh Circuit. You stated that he

“should strongly consider the needs of the court and the people the court serves. Anyone who has practiced law knows that the best courts are balanced, both in terms of backgrounds and philosophies. . . . The court’s judicial philosophy is well to the right. And most importantly, the court is in need of someone who has special experience in representing indigent clients and understanding the needs of poor people and the impacts that the court’s decisions will have on the poor.”

In addition, in a 1992 interview, you stated: “We’ve got to work harder in the judicial system to reflect the population levels of the various ethnic groups.”

a. Do you believe that a judge’s race or ethnic background affects the quality of his or her decisionmaking? Please explain your answer.

Response: No. While I believe in diversity and balance, the quality of a judge’s decision-making will depend on the amount of attention given to the facts presented, and the research and scholarship done by the judge with respect to the

law to be applied. On a multi-judge court, the quality will also depend on the discussions among the judges that take place during the decision-making process.

- b. Please provide an example of a case in which your race or ethnic background informed your decisionmaking as a judge.**

Response: None.

- c. How can litigants know that they are being treated fairly if a judge's perspectives or background, rather than the application of the law to the facts, affect legal decisions?**

Response: Judicial decision-making should be based on the facts and the law as applied to those facts. Litigants will hopefully believe they have been treated fairly if their case has been decided in a fair, neutral, detached and impartial manner, based on the facts and based on the law, and if they believe they have been listened to.

- 5. According to notes you provided to the Committee, in multiple speeches in 2005, you said of the members of the Wisconsin Supreme Court, "we each try to accomplish justice in our own way by applying the law to a particular fact situation based on our legal interpretation."**

- a. Please explain what you meant by this statement.**

Response: Judges decide cases based on the facts presented and law that applies. 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 in court.

- b. Please provide an example of a case in which you "accomplish[ed] justice in [your] own way."**

Response: Every case I participated in accomplished justice, because of the process applied by the court by listening to the parties, in treating everyone in a fair and impartial manner, and in resolving their disputes.

- 6. In a 2008 article, you were asked about your judicial philosophy. You stated: "I strongly believe that the role of the judiciary is to interpret and apply the law to a given set of facts, not make law. . . . I also consider myself to be a textualist." However, in several cases during your tenure on the Wisconsin Supreme Court, you often departed from precedent, cited to non-legal authorities not in the record, and reexamined legislative factfinding and policies to invalidate legislative enactments.**

How do you reconcile the foregoing with the notion that you are a “textualist” and that the role of a judge is to “apply the law to a given set of facts, not make law”?

Response: While I respect your interpretation of the Wisconsin Supreme Court’s rulings during the years I served on the court, I do not agree with your characterizations. When I indicate that I am a textualist, “I interpret and apply the law as drafted by the legislature, as opposed to what it might mean based on our construction of what the legislature may have intended to do.” *Bartholomew v. Wisconsin Patients Compensation Fund and Compcare Health Services Ins. Corp.*, 2006 WI 91, 293 Wis.2d 38, 717 N.W.2d 216, at par. 155 and fn8. I look at the language of the statute as expressing the legislature’s intent. “Generally, language is given its common, ordinary, and accepted meaning. . . . If the meaning is plain, we [I] ordinarily stop the inquiry.” *State v. Reed*, 2005 WI 53, ¶ 13, 280 Wis.2d 68, 695 N.W.2d 315. As to applying the law to a given set of facts, I served during my last four years on the court of last resort in Wisconsin. Our court was faced with many cases of first impression, whether interpreting the Constitution, state statutes, or the common law. While our court based its decisions on the facts and the law, I accept that not everyone will agree with our decisions, just as not everyone will agree with the dissents written in those cases.

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

Response: The questions were forwarded to me by the Department of Justice (DOJ). I undertook some research, reviewed some of the Wisconsin Supreme Court’s opinions, and reviewed some of my speeches. I drafted answers to these questions then discussed them with representatives of the DOJ. I then finalized my responses.

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

Response: Yes.