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.

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.

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.

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 John Cornyn

1. **You state in your Committee questionnaire that, during the appointment process, you were "asked about [your] personal views concerning a number of issues." Were you asked, and did you answer, questions regarding your views on any of the following: the use of foreign law in American courts; the death penalty; abortion; the scope of Congress's commerce power; affirmative action; the protections of the First Amendment; the meaning of the Second Amendment; the protections of the Fourth and Fifth Amendments; the application of the Eight Amendment; the scope of the Tenth Amendment; federal courts' limited review of state *habeas corpus* petitions; the proper enforcement of immigration laws; the effect of arbitration provisions; or the permissible application of punitive damages? If yes, please provide the answer you gave at that time.**

   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.

2. **In *State v. DuBose*, 699 N.W.2d 582, 600 (2005), you wrote that one "cannot seriously argue that . . . eyewitness identifications are inherently reliable." You noted: "What we have here is a legal fiction that is simply not borne out by the facts. Unless, and until, we improve eyewitness identification procedures so that the likelihood of irreparable misidentifications is significantly reduced, we can no longer proceed as though all is good in the Land of Oz." *Id.* You also opined in *State v. Shomberg*, 709 N.W.2d 370, 394 n.2 (2006), that "[i]n general, people overestimate eyewitness accuracy and fail to understand the factors that affect it."**

   a. **Do you agree with the United States Supreme Court's ruling that eyewitness identifications are admissible unless "there is a very substantial likelihood of irreparable misidentification"? *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (internal quotations omitted).**

      Response: If confirmed as a District Court Judge, I would have no difficulty following this Supreme Court precedent.

   b. **Likewise, do you endorse the Court's opinion that "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature"? *Id.***

Response: If confirmed as a District Court Judge, I would have no difficulty following Supreme Court precedent.

c. Under what circumstances would you, if confirmed as a federal judge, likely exclude eyewitness identifications as unreliable?

Response: It would be inappropriate for a nominee to predict how future cases should be decided. I would follow controlling precedent of the United States Supreme Court and the Seventh Circuit Court of Appeals.

d. Do you agree with Justice Stevens's view that "rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony" are designed "more effectively by the legislative process than by a somewhat clumsy judicial fiat"? *Id.* at 117-18 (Stevens, J. concurring).

Response: I do agree that legislative action in this area would be welcome. As a then Wisconsin Supreme Court Justice, my job was to resolve issues presented to the court in a given dispute. Under Wisconsin law, 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* and *Shomberg* was presented with 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. I might add that Forrest Shomberg's conviction was recently vacated because DNA evidence excluded him as the source of the evidence at the scene of the crime. 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.

3. In *State v. Knapp*, 666 N.W.2d 881 (2003) (*Knapp I*), the Supreme Court of Wisconsin concluded that a sweatshirt covered in a murder victim's blood that a suspect voluntarily pointed out to police was inadmissible on account of a *Miranda* violation. The United States Supreme Court vacated and remanded, concluding "that the fruit of the poisonous tree doctrine does not extend to derivative evidence discovered as a result of a defendant's voluntary statements obtained without *Miranda* warnings." *State v. Knapp*, 700 N.W.2d 899, 901 (2005) (*Knapp II*); *see also Wisconsin v. Knapp*, 542 U.S. 952 (2004). Writing for a majority of the Supreme Court of Wisconsin on remand, *see Knapp II*, 700 N.W.2d at 901-21, you reinstated the holding of *Knapp I*, interpreting *sua sponte* a provision of the Wisconsin Constitution to provide more protections against searches and seizures than the identical provision of the federal Constitution on which the Supreme Court based its ruling. In doing so, you addressed an argument that was not presented in *Knapp I*, and you broke with the Supreme Court of Wisconsin's longstanding tradition of

interpreting provisions of its constitution in concert with the federal Constitution. Your opinion has been criticized as "pure unvarnished result-orientation," and Wisconsin law enforcement officials have emphasized that it "could potentially impact many areas of police decision-making in the future, increas[ing] confusion among officers." Lt. Victor Wahl, *Legal Update*, Madison Police Dep't (2005).

Do you acknowledge that, if you are confirmed as a federal district judge, it will not be within your power to go beyond the rulings of the United States Supreme Court?

Response: Yes.

Do you agree with Justice Wilcox of the Supreme Court of Wisconsin that departing from, or evading, precedent "seriously undermines the prestige, influence, and function of the judicial branch"? *Knapp II*, 700 N.W.2d at 926.

Response: In *Knapp II*, the Wisconsin Supreme Court did not depart from or evade precedent. With respect to *Knapp II*, there was no controlling precedent from the United States Supreme Court. Two decisions by the United States Supreme Court issued the same day, *United States v. Patane* and *Missouri v. Seibert*, were both plurality decisions with different voting blocks that led to different results with respect to the fruit of the poisonous tree doctrine. Justice Kennedy was the deciding vote in each matter. He concluded in *Patane* that derivative physical evidence should not be suppressed for a non-deliberate *Miranda* violation, but concluded in *Seibert* that derivative testimonial evidence should be suppressed if there was a deliberate *Miranda* violation. *Knapp I* and *II* involved a deliberate *Miranda* violation and derivative physical evidence, a situation not presented in either *Patane* or *Seibert*. Regardless, as a District Court Judge, if confirmed, I would have no such authority for departing from or evading precedent.

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.

Responses of Louis B. Butler, Jr.
Nominee to the U.S. District Court for the Western District of Wisconsin
to the Written Follow-up Questions of Senator Jeff Sessions

1. **In response to Questions 1(a)(i), (c)(i), and (c)(ii), you stated "if confirmed as a District Court Judge, I would apply settled precedent of the United States Supreme Court and Seventh Circuit Court of Appeals." While I appreciate your commitment to follow precedent if confirmed to the district court, this statement does not answer any of the above-listed questions. Please provide a response to those questions.**

   a. **Do you agree with the dissent in *Paris Adult Theatre*? Please explain why or why not.**

      Response: As a judge, I read opinions of the United States Supreme Court to determine how to apply those opinions to cases that come before the court. The Court in *Paris Adult Theatre* held, among other things, that obscenity may be banned in public places even if confined to consenting adults. I fully accept that as precedent to be followed, and will do so if confirmed. Beyond that, having not reviewed the briefs filed by the parties, having not read all of the decisions cited within the majority and dissenting opinions, and having not heard the oral arguments in the action, I am not in a position to agree or disagree with any viewpoint taken by a dissenting justice.

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

      Response: The Supreme Court held that the Nebraska practice of opening legislative sessions with a prayer did not violate the establishment clause. I fully accept that as precedent to be followed, and will do so if confirmed. Beyond that, having not reviewed the briefs filed by the parties, having not read all of the decisions cited within the majority and dissenting opinions, and having not heard the oral arguments in the action, I am not in a position to agree or disagree with any viewpoint taken by a dissenting justice.

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

      Response: In response to the claim in *Marsh* that prayers at the beginning of the legislative session are in the Judeo-Christian tradition, the Court stated: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." I fully accept that as precedent to be followed, and will do so if confirmed. Beyond that, having not reviewed the briefs filed by the parties, having not read all of the

decisions cited within the majority and dissenting opinions, and having not heard the oral arguments in the action, I am not in a position to agree or disagree with any viewpoint taken by a dissenting justice.

2. **In response to Question 1(a)(ii), you stated: "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." While I appreciate your commitment to follow precedent if confirmed to the district court, your statements do not answer this question. Please provide a response to this question.**

    a. **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 Court held to the contrary in *Paris Adult Theatre*. I fully accept that as precedent to be followed, and will do so if confirmed. Beyond that, having not reviewed the briefs filed by the parties, having not read all of the decisions cited within the majority and dissenting opinions, and having not heard the oral arguments in the action, I am not in a position to agree or disagree with any viewpoint taken by a dissenting justice.

3. **In response to Question 1(b)(i), you stated: "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." While I appreciate your commitment to follow precedent if confirmed to the district court, your statements do not answer my question. Please provide a response to this question.**

    a. **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 Court has held that the death penalty is not *per se* unconstitutional. Beyond that, having not reviewed the briefs filed by the parties, having not read all of the decisions cited within the majority and dissenting opinions, and having not heard the oral arguments in the action, I am not in a position to agree or disagree with any viewpoint taken by a dissenting justice. As to whether it is settled law that the death penalty is constitutional, for a United States District Court Judge, any decisions by the United States Supreme Court are settled law, and would be binding precedent.

4. **In response to Question 1(d)(i), you stated: "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." While I appreciate your**

commitment to follow precedent if confirmed to the district court, your statements do not answer my question. Please provide a response to this question.

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

Response: I believe your question asks for a response not decided in *Plyler v. Doe*. The Court decided, among other things, that "public education is not a 'right' granted to individuals by the Constitution," but any further discussion calls for me to give an answer on a question that may come before the district court that I believe has not been squarely decided by the United States Supreme Court. That is why I responded that I would follow established precedent if confirmed. Of course, if either the United States Supreme Court or the Seventh Circuit Court of Appeals has decided the question of taxpayer-funded benefits, I would be bound by those decisions, and would follow that precedent.

5. Question 3(c) asked you to "provide an example of a case where the outcome did not comport with your view of 'what's right' and/or 'what's just.'" You answered: "*Ableman v. Booth*, 62 U.S. 506 (1858). I disagree with the court's decision to uphold and enforce the Fugitive Slave Act." To clarify, please give an example of a case *in which you participated as a judge* where the outcome did not comport with your view of "what's right" and/or "what's just."

Response: I have no such examples. The goal is to provide each litigant with a fair, neutral, detached and impartial decision in each case. Whether I agreed with the result of an individual case or not, each individual litigant was provided with due process and a fair and impartial decision. Thus, each case comported with my view of what is right and just.

Responses of Louis B. Butler, Jr.
Nominee to the U.S. District Court for the Western District of Wisconsin
to the Written Follow-up Questions of Senator Charles E. Grassley

1. **In questions 6(a) and 7, you concluded your response by stating: "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." I am concerned about judges looking to opinion polls or issuing a ruling based on their view of how it might "affect the public in general." Please explain the rationale behind a judge considering public impact, rather than simply applying the law to the facts.**

   Response: My answer to question 6(a) stated: "Personal beliefs and personal policy decisions have no role in a judge's decision-making. Judges on an *appellate court* (emphasis added) 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." My answer specifically referenced appellate courts with multiple judges. This is very different than being a United States District Court Judge. At the Wisconsin Supreme Court, one of the criteria for granting review is whether "the petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority." Wis. Stats. (Rule) 809.62(1r)(b). Another criterion for granting review is whether "a decision by the supreme court will help develop, clarify or harmonize the law," and the "question presented is a novel one, the resolution of which will have statewide impact." Wis. Stats. (Rule) 809.62(1r)(c)2. Another criterion for granting review at that court is whether "due the passage of time or changing circumstances, such (supreme court or court of appeals) opinions are ripe for reexamination." Wis. Stats. (Rule) 809.62(1r)(e). It is within this context as a former justice on the Wisconsin Supreme Court that I answered questions 6(a) and 7. I have said many times that judges should not make decisions based on popularity or opinion polls, and that judges should make decisions based on the facts and the law. For example, please see June 1, 2007 speech I gave at the State's Mock Trial Championship. If I am confirmed as a United States District Court Judge, I will decide cases based on the facts and the law, following established precedent from the United States Supreme Court and the Seventh Circuit Court of Appeals.

2. **In question 9(a), I quoted President Obama and asked whether you agreed or disagreed with the President's empathy standard. Please respond with a simple yes or no, followed by an explanation.**

   Response: No. As I testified at my confirmation hearing, I agree with Justice Sotomayor's statement that "We apply the law to the facts. We don't apply feelings to the facts." As I also stated in my response to your question 9(c), "Empathy should play no role in deciding the law."

3. **I want to make sure I understand your answer to question 9(b). By answering yes, are you indicating that you meet President Obama's empathy standard, or did you not read the question to include empathy as part of the standard?**

   Response: Given the fact that I was nominated by President Obama, I can only assume that I indeed met all of the standards the President has established for appointment to the federal bench. That is what I was indicating when I answered question 9(b). Having said that, once again, let me reiterate that I agree with Justice Sotomayor that judges apply the law to the facts; judges do not apply feelings to the facts.

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 John Cornyn

1. **I write to request that you provide a sufficient answer to one of the written questions submitted after your Senate Judiciary Committee hearing.**

   Rule 4.1(13) of the 2007 ABA Model Code of Judicial Conduct requires that a judicial candidate not "make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." In particular, the comments to this section emphasize that a candidate should not make such pledges and promises to "an appointing or confirming authority." Similarly, Canon 30 of the American Bar Association's 1924 Canons of Judicial Ethics, as cited by the ABA, states that a candidate for judicial position "should not announce in advance his conclusions of law on disputed issues to secure" the support of the class of people who will determine whether the candidate attains the judicial position. And Canon 3A(6) of the U.S. Judicial Code of Conduct provides that a "judge should not make public comment on the merits of a matter pending or impending in any court."

   Any conversations that may have violated these Canons are relevant to the Senate's exercise of its advice and consent power. In exercising this power, the Senate is entitled to judge for itself whether any views you expressed on legal issues raise concerns under the applicable ethical rules.

   My previous question did not call for any private details of your conversations, or for you to reveal which Senator asked about any particular issue. The question merely asks that any views on the specific legal issues listed in the question that you may have expressed to one Senator be made available to all Senators. Please answer the question, which is reproduced below.

   > **You state in your Committee questionnaire that, during the appointment process, you were "asked about [your] personal views concerning a number of issues." Were you asked, and did you answer, questions regarding your views on any of the following: the use of foreign law in American courts; the death penalty; abortion; the scope of Congress's commerce power; affirmative action; the protections of the First Amendment; the meaning of the Second Amendment; the protections of the Fourth and Fifth Amendments; the application of the Eight Amendment; the scope of the Tenth Amendment; federal courts' limited review of state *habeas corpus* petitions; the proper enforcement of immigration laws; the effect of arbitration provisions; or the permissible application of punitive damages? If yes, please provide the answer you gave at that time.**

Response: Senator, with regard to my conversations with United States Senators, and with reference to Rule 4.1(13) of the 2007 ABA Model Code of Judicial Conduct, I can assure you that I have not made pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicated duties of the office. I have made no such pledges or promises to "an appointing or confirming authority." With reference to Canon 30 of the American Bar Association's 1924 Canons of Judicial Ethics, I have not announced in advance my conclusions of law on disputed issues to secure the support of any class of people who will determine whether I attain this position. With reference to Canon 3A(6) of the U.S. Code of Judicial Conduct, I have not made any "public comment on the merits of a matter pending or impending in any court." If I am confirmed as a United States District Court Judge, I will decide cases based on the facts and the law, following established precedent from the United States Supreme Court and the Seventh Circuit Court of Appeals.

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

1. **In response to a prior written question asking you to recount the subject matters that were discussed by you during conversations you had with your home state Senators, you refused to answer stating: I believe it would be inappropriate for me to describe in any further detail my private conversations with United States Senators. . . . 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." This answer is nonresponsive. Canon 5 of the Model Code of Judicial Conduct states that a "candidate for a judicial office *shall* not: with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicated duties of the office. . ." I believe that all members of the Committee are entitled to information about the topics of discussion and whether these topics included "cases, controversies, or issues that are likely to come before the court." Please reconsider the questions I asked and provide the Committee with answers.**

   Response: Senator, I can assure you that with respect to Canon 5 of the Model Code of Judicial Conduct, I have not, with respect to cases, controversies, or issues that are likely to come before the court, made pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicated duties of the office. If I am confirmed as a United States District Court Judge, I will decide cases based on the facts and the law, following established precedent from the United States Supreme Court and the Seventh Circuit Court of Appeals.