

Statement of
The Honorable Russ Feingold

United States Senator
Wisconsin
September 23, 2010

Statement of Senator Russell D. Feingold
On the Nomination of Louis B. Butler, Jr.,
to be United States District Judge for the Western District of Wisconsin
Senate Judiciary Committee Executive Business Meeting
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Mr. Chairman, it is unfortunate that the Committee has been forced to consider this nomination again, but I am pleased to support the nomination of Louis Butler to be a judge on the U.S. District Court for the Western District of Wisconsin. Justice Butler is the product of a system for picking federal judges and U.S. Attorneys in our state that has been used since the late 1970s. A nominating commission interviews and considers applicants and presents a slate of candidates to the Senators. We then send our recommendations to the President drawn solely from the commission-approved slate. This process has yielded highly qualified nominees under both Republican and Democratic presidents, and the nominees have had the support of both Republican and Democratic senators.

Justice Butler clearly has the experience and the qualifications needed to serve with distinction as a U.S. District Court judge. First, he has experience as a judge on both the trial court and appellate court levels in Wisconsin. He understands the difference between following precedent and making precedent. He has a great deal of criminal experience both as a judge and as a public defender in his early days as a practicing lawyer. He is well versed in Wisconsin law, which as we know is often applied in diversity jurisdiction cases in the federal courts.

Justice Butler is widely admired for his intellect and his judicial temperament. In 1997, Milwaukee Magazine named him the top municipal judge in the city. He has been a law professor. In short, he has a depth of experience that is unusual for a nominee to the District Court.

Justice Butler has been a trailblazer in our state, the first African-American to serve on the Wisconsin Supreme Court, and he would be the first African-American to be a judge on the Western District. He is a man of great distinction and achievement.

Let me address some of the arguments that have been made against Justice Butler.

One argument is that Justice Butler has been rejected by the voters of Wisconsin and now he is being forced on them through this nomination. First of all, 19% of the voters turned out for that election in 2008, and he lost by a 51-49 margin. That's hardly a rejection. What's more, the voters of the Western District of Wisconsin actually supported him. Second, this was a very

controversial election. Independent groups spent millions of dollars to defeat him. The ads run by these groups were harsh and misleading, and in some cases downright false. One ad, which led to a still unresolved ethics complaint against his opponent, was about a sex offender case that Justice Butler worked on as a public defender. With Justice Butler's face directly next to the face of the alleged offender, a man named Mitchell, the ad stated, "Butler found a loophole. Mitchell went on to molest another child," and then concluded, "Can Wisconsin residents feel safe with Louis Butler on the Supreme Court?" The ad failed to mention that Justice Butler, acting as the defendant's attorney, simply persuaded an appeals court to grant Mitchell a new trial, but the state Supreme Court actually reversed the order. Mitchell went to prison and did not commit the second crime until after he was released on parole.

Third, it simply cannot be that someone who has lost an election cannot be a fine judge. We want them to carry out their duties to faithfully apply the law without regard to their own popularity or the popularity of their decisions. One famous campaign loser who went on to be a judge was William Howard Taft, who lost his bid for reelection as President in 1912 and went on to be appointed Chief Justice of the United States in 1921. Judges in our federal system aren't elected. Another example is now-Fourth Circuit Judge Allyson Duncan, who in 1990 was defeated in a statewide election for a seat on the North Carolina Court of Appeals. In 2003, Judge Duncan was nominated by President George W. Bush and confirmed by the Senate 93-0 to serve on the Fourth Circuit. I don't recall anyone citing her election loss as a disqualifying factor.

Perhaps because of the absurdity of the election argument, cases that Justice Butler participated in have been bandied about as evidence of judicial activism. But the record shows otherwise. Justice Butler was criticized for a case called *Ferdon v. Wisconsin Patients Comp. Fund*, in which the Wisconsin Supreme Court held that caps on damages in medical malpractice cases violate the Wisconsin Constitution. It's important to remember that this was a decision of the majority of the Supreme Court and Justice Butler was not its author. Instead, he joined a concurring opinion by a moderate conservative judge, stressing that some limit on malpractice damages could be constitutional, but agreeing that the limits at issue in that case were too low.

Justice Butler has also been criticized for writing the majority opinion in a product liability case involving injuries from lead paint. The court's decision, by a vote of 4-2, allowed the case to go to trial even though, because the house was built in 1900, it was impossible to show that a particular manufacturer had made the paint that caused the injury. A very clear Wisconsin precedent suggested the Court should create this remedy under the Wisconsin Constitution.

Ken Davis, Dean of the University of Wisconsin Law School, and chair of the Wisconsin Federal Nominating Commission that recommended Justice Butler to fill this judicial vacancy, wrote the following about this case:

While it is becoming popular to characterize decisions with which one disagrees as judicial activism, the important point is to recognize that this was a case involving state common law. This is exactly the area where it is the responsibility of a state supreme court to "make" the law, on the basis of precedent, policy and principles, with the state legislature, the branch more closely entrusted with carrying out popular will, then free to overrule it.

So the idea that Justice Butler went beyond his role as a judge in deciding this case is just wrong. And three other justices on the court joined his opinion. And incidentally, this decision simply let the case proceed to trial, reversing the lower court's decision to find for the defendants on summary judgment. I'm informed that the plaintiffs actually lost the case at trial.

Senator Sessions also cited Dairyland Greyhound Park, Inc. v. Doyle, a case in which the Wisconsin Supreme Court ruled that the governor must honor, and could extend, earlier compacts the state had entered with tribes permitting casino gambling, and that a state constitutional amendment did not retroactively invalidate those compacts. The decision made clear that the issue at stake was the sanctity of Wisconsin's contractual obligations to the tribes, and the court noted that the voters of Wisconsin had been assured during the ratification campaign that existing Indian gambling would not be affected by the constitutional amendment. I might also note that no one asked Justice Butler about this case at the hearing, or in questions for the record.

Another of the cases that has been criticized is State v. Fisher, in which the Wisconsin Supreme Court upheld a particular conviction under the state's concealed carry statute. Contrary to Senator Sessions' suggestion, the decision did not find that the statute was constitutional in all circumstances. In any event, Justice Butler did not write the Fisher decision, and it was based not on the Second Amendment of the U.S. Constitution but rather on state court interpretations of the Wisconsin Constitution's right to bear arms - a provision that I drafted while in the state legislature. He stated very clearly in his responses to questions for the record that he would follow the Second Amendment precedent established by the Seventh Circuit and by the U.S. Supreme Court. As a strong supporter of the Second Amendment, I am confident that he will keep that commitment.

I want to make one final comment because Senator Sessions in one of our earlier markups of this nomination quoted Judge Sykes, who is now on the Seventh Circuit. The nomination of then-Justice Sykes just shows how far we have come in politicizing the judicial nomination process. In 2003, after the Wisconsin Federal Nominating Commission forwarded four names to myself and Senator Kohl, we forwarded them all on to President Bush. He chose then-Justice Sykes, and although there are a number of topics on which we do not see eye-to-eye, I nonetheless supported her nomination. Her nomination just shows that this process need not be the partisan game that it has become.

Mr. Chairman, Justice Butler is a thoughtful and conscientious judge. I know I won't agree with every decision he makes, just as I don't necessarily agree with everything he has said or done thus far. But I know he will be conscious of the judicial role, that he will make his decisions based on the facts and the law and do his very best to carry out his responsibilities with dignity and care, as he has done throughout his career. I urge my colleagues to support this nomination.