



## this issue:

Louis B. Butler, Nominee for  
Judge on the U.S. District Court  
for the Western District of  
Wisconsin

## Butler's Background

Justice in Residence and  
Lecturer, University of Wisconsin  
Law School

Justice, Wisconsin Supreme  
Court

Judge, Wisconsin Circuit Court

Judge, Milwaukee Municipal  
Court

Adjunct Professor of Law,  
Marquette University Law School

Public Defender

Attorney, Independence Bank of  
Chicago

## EDUCATION

B.A., Lawrence University

J.D., University of Wisconsin Law  
School

## Who is Louis B. Butler?

On September 30, 2009 President Obama nominated Louis B. Butler for a position on the U.S. District Court for the Western District of Wisconsin.

Butler has twice been rejected for a position on the Wisconsin Supreme Court. After losing an election in 2000 Butler received an appointment to that court in 2004 when President Bush elevated a sitting Justice Sykes to the U.S. Court of Appeals for the 7th Circuit. Butler sat on the Wisconsin Supreme Court from 2004 to 2008. His tenure was so bad that the voters of Wisconsin voted him out of office, the first time a sitting justice had lost a retention election in over four decades.

"As consolation prizes go, Louis Butler can't complain. After being twice rejected by Wisconsin voters for a place on the state Supreme Court, the former judge has instead been nominated by President Obama to a lifetime seat on the federal district court. If he is confirmed, Wisconsin voters will have years

## Loophole Louie...

to contend with the decisions of a judge they made clear they would rather live without." Fn.1.

During Butler's career he has earned the nickname

**"Wisconsin voters have twice rejected Butler for a seat on the state supreme court, a seat limited to a few years duration. Obama should not now force these same voters to endure Butler as a federal judge with lifetime tenure."**

*-Bill Wilson, President,  
Americans for Limited  
Government*

"Loophole Louie" due to his reputation for soft on crime. See Fn.1. He even embraced this nickname because it was "affectionate." Fn.2.

However, it was mainly his voting on tort cases that resulted in the voters tossing him from office:

In *Ferdon v. Wisconsin Partners*, he drew the rage of doctors and others when he dismantled the state's limit on noneconomic

damages in medical malpractices cases—the kind of tort reform that had been serving the state well. Business groups were likewise floored by his decision in *Thomas v. Mallet*, which allowed "collective liability" in lead paint cases—making any company a potential target, regardless of whether they made the paint in question. See Fn.1.

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# What you really need to know about Butler

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This lead paint case made Wisconsin the only state in country a "collective liability" standard in these types of cases.

Justice Butler soon wrote the infamous decision in *Thomas v. Mallet*, which created a guilty-until-proven-innocent approach to product liability. Wisconsin became the only state to adopt a "collective liability" theory in lead paint cases: Whether a company actually produced the lead paint that harmed a claimant was irrelevant to its guilt or innocence. See Fn.2.

The court's analysis in striking down damage caps in medical malpractice cases has been strongly criticized as allowing the court to strike down any law it doesn't like.

Then came *Ferdon v. Wisconsin Patients*, declaring unconstitutional the state's cap on noneconomic damages in medical malpractice cases. It argued that the caps bore "no rational relationship to a legitimate government interest." That conclusion was bizarre, since the legislature had specifically passed the caps to make malpractice insurance "available and affordable," and the caps worked. In 2004, the American Medical Association judged Wisconsin to be one of only six states not in a medical malpractice crisis. Marquette University law professor Rick Esenberg concluded that under the court's reasoning in that case, "almost any law is subject to being struck down." See Fn.2.

Even more amazing is the court's notion that the rationality of a statute can change over time.

The court justified its inquiry, in part, by stating that a statute that is rational when enacted may be made irrational by events and presuming that policing this "devolving rationality" is a judicial responsibility. Fn.3.

During Butler's tenure his actions as part of the court's liberal majority also drew strong criticism for their decisions on search and seizure law as well as their apparent desire to micromanage the police.

Justice Butler wrote a majority opinion finding that the state constitution provided greater protection to suspected criminals, even though its wording virtually mirrored that of the U.S. Constitution. See Fn.2.

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Although the court declined the petitioner's invitation to adopt a per se rule of exclusion of all confessions by children under sixteen who have not been given an opportunity to consult with a parent or interested adult, the court did order that, henceforth, "all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention." Presumably any evidence obtained from unrecorded custodial interrogations will be excluded. See Fn.3.

This overreaching went beyond what is required by either the U.S. or Wisconsin constitutions and demonstrates a lack of respect for the judiciary's proper role.

## NomineeAlert

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## Sources for further reading:

**Fn.1.** *The White House Butler*, THE WALL STREET JOURNAL, November 19, 2009, at A20.

**Fn.2.** John Fund, *Wisconsin's Judicial Revolution*, THE WALL STREET JOURNAL, April 5, 2008. Available online at: [http://online.wsj.com/public/article\\_print/SB120735975782591721.html](http://online.wsj.com/public/article_print/SB120735975782591721.html). (Accessed December 7, 2009.)

**Fn.3.** Rick Esenberg, *A Court Unbound? The Recent Wisconsin Supreme Court*, The Federalist Society for Law and Public Policy, May 2007, at 4. Available online at: [http://www.fed-soc.org/doclib/20070329\\_WisconsinWhitePaper.pdf](http://www.fed-soc.org/doclib/20070329_WisconsinWhitePaper.pdf). (Accessed December 7, 2009.)