UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
400 NORTH MIAMI AVENUE, TENTH FLOOR
MIAMI, FLORIDA 33128
(305) 523-5560

CHAMBERS OF JUDGE ADALBERTO JORDAN

October 4, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Ranking Member:

Attached are my responses to written questions from Senator Grassley with a correction to answer 1(a) concerning Mr. Bollea's case. In answering question 1(a), I mistakenly relied on the 2010 Sentencing Guidelines in stating that Mr. Bollea was eligible for probation with eight months of home confinement. The 2004 Sentencing Guidelines, which applied to Mr. Bollea, provided that Mr. Bollea was eligible for a split sentence of four months in custody and four months of home confinement. Please accept my apology for the mistake.

Sincerely,

Adalberto J. Jordán
United States District Judge

Enclosure

Responses of Adalberto José Jordán
Nominee to the United States Circuit Court for the Eleventh Circuit
to the Written Questions of Senator Chuck Grassley

1. **According to your questionnaire, you had five cases remanded to you for resentencing in the wake of the Supreme Court's 2005 decision in *United States v. Booker*. In one of those cases, *U.S. v. Bollea*, you wrote, "there is a possibility that I would impose a sentence that did not require incarceration ... if the Guidelines were not applicable, and if I had complete and unfettered sentencing authority as it existed before the Guidelines came into being." *Booker* of course made the guidelines effectively advisory, rather than mandatory.**

    a. **On remand, do you recall if you departed downward from the Guidelines in *Bollea*, or any of the other remanded cases? If so, could you explain the circumstances that led you to believe a downward departure was warranted?**

    Response: In three of the five cases, I imposed a sentence within and in accord with the Sentencing Guidelines on remand (with one of them involving an authorized downward departure under the Guidelines on a government motion for substantial assistance). In two of the cases, I varied from the Guidelines on remand.

    In the *Joseph* and *Alvarez* cases, I imposed the same sentence within the Sentencing Guidelines on remand, and in the *McGriff* case I imposed a sentence in accord with the Sentencing Guidelines on remand after granting a government motion for a downward departure under USSG §5K1.1 based upon the defendant's cooperation and substantial assistance.

    In the *Bollea* case, I had sentenced the defendant to six months in custody, three years of supervised release with two months of home confinement, and a $2,000 fine. On remand, the defendant was eligible for a split sentence of four months in custody and four months of home confinement under the Sentencing Guidelines, as he was in Zone C of the Guidelines with a Total Offense Level of 11 and a Criminal History Category of I. I imposed a sentence of one month in custody, five years of supervised release with six months of home confinement, and a $2,000 fine. I varied because of the defendant's age (71), and because I did not believe a greater sentence was necessary for appropriate punishment and deterrence under 18 U.S.C. § 3553(a).

    In the *Vargas-Vazquez* case, I had sentenced the defendant to 41 months in custody and two years of supervised release. On remand, I sentenced the defendant to 24 months in custody and two years of supervised release. I varied from the Sentencing Guidelines under 18 U.S.C. § 3553(a) because the reason the defendant had attempted to re-enter the United States was to visit and attend to his mother, and he had not used a false name or fraudulent identification in the attempted re-entry.

b. In light of *U.S. v. Booker*, what do you see as the role of the Guidelines in making sentencing determinations?

Response: The Sentencing Guidelines remain critically important at sentencing, as they provide an objective framework for treating similarly-situated defendants in a similar manner.

c. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes.

2. In *Watts v. Florida International University,* a student enrolled in the University's Masters of Social Work (MSW) program was terminated according to a letter he received "based on inappropriate behavior related to patients, regarding religion." The incident in question involved the student informing a Catholic patient of several options for obtaining bereavement counseling, one of which was a church. Among the student's claims was that his First Amendment Freedom of Religion rights were violated. You granted the defendant's motion to dismiss this claim. You held that the student's professed belief that a patient who espouses a religion is entitled to be informed of a religious avenue for therapy was not a "central religious belief." In a 2 to 1 decision, the Eleventh Circuit reversed you, holding that you applied the wrong standard.

a. Do you believe the Eleventh Circuit was correct in overruling your initial decision? Why or why not?

Response: The Eleventh Circuit's decision in *Watts* constitutes binding precedent, and I do not believe that it would be appropriate for me to comment on whether the decision was correct.

I would like to explain, however, that I did not rule that Mr. Watts' belief was not a central religious belief. I dismissed the free exercise claim in part because I concluded that Mr. Watts had not alleged in his amended complaint that this belief was a central one. The Supreme Court had held that "the free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989). *See also Jimmy Swaggart Ministries v. Bd. of Equalization of California,* 493 U.S. 378, 384-85 (1990) (articulating same standard). Although I believed then, and believe now, that it is not appropriate for a court to "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," *see Hernandez,* 490 U.S. at 699, I understood *Hernandez* to at least require an allegation that the belief in question is a central one.

Had Mr. Watts alleged that the belief was a central one, then it would not have been appropriate to question or examine that allegation, as the Supreme Court explained in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 886-87 (1990). I did not question the validity of Mr. Watt's belief. The problem, as I saw it, was that Mr. Watts had not alleged that the belief was a central one.

b. What is your understanding of the difference between a centrally held belief and a sincerely held belief?

Response: My understanding is that a sincerely held belief is one that is genuinely held by a person, while a centrally held belief is one that generally constitutes a main tenet of one's faith or beliefs.

3. A Judicial profile of you appeared in the September 2005 addition of the Federal Lawyer. In that article you were asked about life experiences that may provide you with a different perspective, in which you provided your immigrant background as an example saying, "I have a different sort of understanding of the issues immigrants encounter because I am an immigrant. But you're supposed to take a step back and judge cases without any reference to your personal views, and I try hard to do that."

a. As a district court judge do you believe you have been successful at taking a step back and putting your personal views aside?

Response: Yes.

b. Could you share with the Committee an example from your cases that required you to put your personal views aside?

Response: Our court has a substantial pro se docket. There are times when, based upon the allegations in the complaint -- which are initially accepted as true -- it appears to me that a pro se plaintiff may not have been treated properly and suffered some harm as a result. Nevertheless, that does not always mean that the plaintiff has a viable cause of action, and if the complaint fails to state a claim for relief under governing law, I will dismiss the complaint with leave to amend.

4. In your response to Senator Klobuchar's question about consensus building, you replied, in part of your answer, with the following statement: "But I think I understand what the process is like and what consensus building is about and how to be civil to your colleagues even when you might disagree with a position and how to try to reach middle ground on cases where that middle ground can be reached."

a. Please explain what you meant by "try to reach middle ground." Is it your view that judicial decision-making is one of negotiation and compromise?

Response: It is not my view that judicial decision-making is one of negotiation and compromise. A judge should not abandon his principles to reach a middle ground. If a judge concludes, based on the applicable law, that his view is principled and correct, he should adhere to that view.

Nevertheless, appellate decision-making is often a collective exercise, and it is important to be civil to one's colleagues even in times of disagreement. There may also be cases in which the members of an appellate panel agree on the appropriate result, but disagree on what issues can or should be addressed in arriving at that result, or on how broadly or narrowly an opinion should be written. In such cases, I believe it is appropriate to discuss various possible approaches with one's colleagues to see whether a principled consensus on the proper approach can be reached.

b. If so, what constrains a judge from engaging in policy-making rather than application of the law to the facts before the judge in order to decide the particular case or controversy before the judge?

Response: I do not believe that judges should engage in policy-making or decide cases based on their own personal views or preferences.

5. The judgeship for which you have been nominated has been listed as a Judicial Emergency due to the volume of cases being filed per panel. According to the 2005 judicial profile of you, one of the biggest challenges to you on the bench has been keeping up with the caseload. The article quotes you as admitting to being "not the fastest of judges."

a. Do you have any worries about your ability to keep up with the Eleventh Circuit's caseload?

Response: No.

b. What actions do you plan to take to help the Eleventh Circuit alleviate its judicial backlog?

Response: In the years since that judicial profile was published, I have improved my efficiency in handling cases. If confirmed, I will work as hard as possible to help the Eleventh Circuit with its caseload, keeping in mind that for most litigants the court of appeals is practically the court of last resort, and that there is a delicate balance between efficiency and accuracy.

6. **As an adjunct professor at the University of Miami School of law, you have taught a Death Penalty Seminar off and on since 1990. As such, I am interested in your views on the Supreme Court's jurisprudence in this area. The modern day jurisprudence of the Supreme Court determines whether a mode of execution offends the 8th Amendment's prohibition on cruel and unusual punishment by considering "the evolving standards of decency that mark the progress of a maturing society." Under your understanding of this precedent, what is a court to consider in determining our nation's "evolving standards of decency"?**

   Response: In determining the "evolving standards of decency that mark the progress of a maturing society," the Supreme Court has held that courts should consider "objective indicia" of society's standards, "as expressed in legislative enactments and state practice with respect to executions," as well as "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Kennedy v. Louisiana*, 534 U.S. 407, 421 (2008).

7. **Justice Scalia has been highly critical of this approach, warning in *Thompson v. Oklahoma* that "the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views."**

   a. **Do you agree this is a valid concern of the evolving standards of decency approach?**

      Response: As a lower court judge, I am bound by Supreme Court precedent, and do not believe it would be appropriate for me to comment on Justice Scalia's views.

   b. **Do you believe this concern has borne out in any of the Supreme Court's death penalty decisions? Please explain.**

      Response: As a lower court judge, I am bound by Supreme Court precedent, and do not believe it would be appropriate for me to opine on whether Justice Scalia's concern has been borne out in any of the Supreme Court's death penalty decisions.

8. **In *Roper,* the Supreme Court relied on foreign law in holding that the execution of minors violated the Eighth Amendment. Do you believe that foreign law should be considered in determining the meaning of the Eighth Amendment?**

   Response: The Constitution should be interpreted with reference to its text and history and applicable Supreme Court precedent, and not with reference to foreign law. The Supreme Court, in Eighth Amendment cases like *Roper*, has sometimes referred to foreign law as instructive, and in that limited circumstance and to that limited degree lower court judges may consider foreign law.

9. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution?

Response: No.

10. In your 1987 article, *Imagery, Humor, and the Judicial Opinion, 41 U. Miami L. Rev. 693,* you stated "The work of legal realists and critical legal theorists has demystified the images created by the formal view of law and the judiciary by pointing out what had been suspected all along: that judges have failings and that they necessarily make law because of the need to interpret and the indeterminacy of legal argument."

a. Do you believe that judges "necessarily make law" and if so, what are the limits on judges in this capacity?

Response: Federal judges are not in the business of making law, but there are some very limited and discrete areas in which, by necessity, they do develop and articulate substantive legal principles and norms. For example, in tort cases under general maritime law where Congress has not enacted governing legislation, courts are sometimes called upon to determine, on a common-law basis, what the contours of admiralty law are. *See, e.g., Atlantic Sounding Co., Inc. v. Townsend,* ___ U.S. ___, 129 S.Ct. 2561 (2009) (addressing whether seaman can seek punitive damages under general maritime law for employer's alleged willful and wanton disregard of maintenance and cure obligations). That does not mean, of course, that courts are free to do as they wish. To use the admiralty example, in trying to determine how a new admiralty issue should be resolved courts must look at the purposes of general maritime law, any relevant historical practice, how precedent in the area has evolved, and what sort of related statutory framework (if any) Congress has created.

b. Having served as a judge, do you have any current reflections on the use of imagery and humor in judicial opinions?

Response: As a general matter, I do not believe that humor is appropriate in judicial opinions. There are times, however, when historical, social, and literally allusions may be properly used in opinions.

11. What is the most important attribute of a judge, and do you possess it?

Response: The most important attributes of a judge are impartiality and fairness. I believe that I possess those attributes.

12. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should treat all litigants and attorneys with dignity and respect, be patient and even-tempered with all those who appear in court, and ensure that everyone's views are heard. These elements of proper judicial temperament usually go hand in hand.

Of these, I consider it most important to treat all litigants and attorneys with dignity and respect, and I believe that I have done that as a judge.

13. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

14. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In cases of first impression, if a constitutional or statutory provision is involved, I would first examine the relevant text. If the text was not clear, I would then consider precedent on similar or related issues for guidance, as well as precedent on the purpose of the provision or principle at issue. Where appropriate, I would consult legislative materials and historical materials, and in certain specific areas of law (e.g., state insurance law in a diversity case) I would also review authoritative treatises.

15. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?

Response: I would apply binding precedent even if I disagreed with it.

16. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: It is appropriate to declare a federal law unconstitutional only if it exceeds Congress' powers or contravenes a provision of the Constitution.

17. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: As set forth in Rule 35(b)(1)(A) of the Federal Rules of Appellate Procedure, a circuit court, sitting *en banc*, should overturn circuit precedent only where it conflicts with a decision of the Supreme Court or another decision within the circuit. Those are the factors I would consider.

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

Response: I personally drafted answers to these questions, and discussed those draft answers with an official at the Department of Justice. I then finalized the answers to the questions.

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

Response: Yes.