

Testimony of

The Honorable Roy Moore

Former Chief Justice
Supreme Court of Alabama
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Written Statement of the Honorable Roy S. Moore before the Senate Judiciary Committee,
Subcommittee on the Constitution, Civil Rights, and Property Rights
June 8, 2004

I. Chronology of Events

In November 1992, I was appointed circuit judge in Etowah County, Alabama. At that time, I continued the long-standing practice in Etowah County of opening courtroom sessions with prayer. I also placed a woodcarving containing the Ten Commandments on the wall behind my bench in the courtroom. In early 1993, the American Civil Liberties Union of Alabama expressed public concern about these acknowledgments of God, and in 1995 the ACLU represented the Alabama Freethought Society, which filed a taxpayer lawsuit in federal district court against me, complaining about both the prayers and the posting of the Commandments. On July 7, 1995, the federal district court dismissed the suit for lack of standing. In a declaratory judgment action filed by then-Governor Fob James on April 21, 1995, the ACLU cross-claimed against me, demanding that the State put a stop to my courtroom prayers and that it make me remove the Ten Commandments from my courtroom. On November 22, 1996, an Alabama circuit court ordered me to cease the practice of prayer in my courtroom. On February 10, 1997, the same circuit court ruled that the Ten Commandments plaque displayed in my courtroom violated the First Amendment's Establishment Clause and ordered me to remove it within 10 days unless I surrounded it with other historical objects. I refused to obey either of the circuit court's orders and the case was appealed to the Alabama Supreme Court. The Alabama Supreme Court, on January 23, 1998, ruled that there was no justiciable controversy and dismissed the case, leaving me free to continue the practice of prayer in the courtroom and allowing the Ten Commandments plaque to remain posted on the courtroom wall.

In 2000, I ran for the position of Chief Justice of the Alabama Supreme Court, pledging to restore the moral foundation of law to our legal system. I was elected and was sworn in as Chief Justice on January 15, 2001, promising that "God's law will be publicly acknowledged in our court." On July 31, 2001, after months of preparation, I installed a granite monument depicting the Ten Commandments in the rotunda of the Alabama Judicial Building. On October 30, 2001, the ACLU, Americans United for Separation of Church and State, and the Southern Poverty Law Center filed lawsuits on behalf of three lawyers against me in my official capacity as Chief Justice, demanding that I remove the monument from public display. After a weeklong trial, on November 18, 2002, a federal district court issued an opinion ordering me to remove the monument from public view. The district court specifically found that the monument "acknowledge[ed] the Judeo-Christian God as the moral foundation of our laws," although they conceded that "the Ten Commandments were a foundation of American law [and] that America's founders looked to and relied on the Ten Commandments as a source of absolute moral

standards." *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1293, 1300 (M.D. Ala. 2002). However, the district court explicitly refused to define the term "religion" under the Establishment Clause of the First Amendment, saying that it would be "unwise, and even dangerous, to put forth, as a matter of law, one definition of religion under the First Amendment." *Id.* at 1313 n.5 (emphasis in original). Despite being unable to define the term "religion," the district court in effect ruled that I had established religion in violation of the First Amendment by installing the Ten Commandments monument as an acknowledgment of God.

I appealed the district court's ruling, but on July 1, 2003, the 11th Circuit Court of Appeals affirmed the federal district court's decision. On August 5, 2003, before I had filed an appeal with the U.S. Supreme Court, the federal district court ordered me to remove the monument from the rotunda of the judicial building within 15 days or face the possibility of fines against the State of Alabama. On August 14, 2003, before the federal district court's deadline had lapsed, the same lawyers who filed suit against me to have the monument removed filed a complaint with the Alabama Judicial Inquiry Commission, asking that I be removed from the office of Chief Justice for "defying" a federal court order. The August 20th deadline passed without the monument being removed, and the next day the associate justices of the Alabama Supreme Court voted to order the building manager to move the monument from public view. The monument was removed from the rotunda on August 27, 2003, and it is in a locked closet in the judicial building to this day. On November 3, 2003, the United States Supreme Court denied certiorari in my case, refusing to answer the vital questions it raised concerning the right of a public official to acknowledge God.

On August 22, 2003, the Judicial Inquiry Commission charged me with six violations of the judicial canons of ethics for my refusal to obey the federal district court's order to remove the monument. On November 14, 2003, after a one-day trial, the Alabama Court of the Judiciary ordered that I be removed from the office of Chief Justice, but refused to even address the arguments I raised explaining why my actions were completely constitutional. I appealed the decision of the Court of the Judiciary, and a special Supreme Court was appointed through an unprecedented and improper process. The Special Supreme Court affirmed the decision of the Court of the Judiciary, and as a result I have been removed from the position to which I was elected by the people of Alabama because I chose to acknowledge God through a display of the Ten Commandments. Presently, I am preparing to file a petition for certiorari to the U.S. Supreme Court concerning my removal from office.

II. Why Acknowledgements of God are Constitutional

The United States Supreme Court and the lower federal courts have distorted First Amendment law as it relates to religion by applying a myriad of complex, but ultimately incoherent, judicially-fabricated tests in this area, rather than following the text of the Establishment Clause. The text of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." Acknowledgments of God such as the monument I installed in the rotunda of the Alabama Judicial Building do not violate the First Amendment because they are not "laws," they do not concern "establishments," and they are not "religion" as those terms were understood at the time the Bill of Rights was adopted. Neither my monument, nor any other Ten Commandments display that I am aware of, commands or prohibits with the force of law any action by any person; thus, under any reasonable definition of the term "law," such displays cannot be said to violate the Establishment Clause. An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a

state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (reprint 1998) (1891). Ten Commandments displays and similar acknowledgments of God do not in any fashion represent the setting up of a state-sponsored church, nor does it in any way lend government aid to one faith over another.

Most importantly, the source of most of the confusion in this area of the law is the incorrect belief that acknowledgments of God are equivalent to "religion" under the First Amendment. A prohibition on government-sponsored religion does not simultaneously forbid acknowledgments of God by public officials. An acknowledgment of God recognizes God's existence, place, and influence in our society. In contrast, a religion, as understood by the founding generation, dictates both the duties we owe to our Creator and the manner in which we discharge, or carry out, those duties. For example, a religion dictates not only that a person is to worship God, but also how he or she is to do so. Many acknowledgments of God, such as "under God" in the Pledge of Allegiance, the motto "In God We Trust," or taking an oath "so help me God," do not dictate either duties we owe to God or the manner in which we are to discharge those duties. Other acknowledgments of God, such as a Ten Commandments display or prayer by a public official, may inform as to certain duties owed to the Creator, but they do not dictate the manner in which a person is to carry out those duties. Thus, acknowledgments of God do not coerce belief or behavior, whereas, a particular religion, such as Protestantism, Catholicism, or Judaism, may require a person to believe certain tenets and act or refrain from acting in certain ways. Just as the Supreme Court has ceased over time to apply the actual words of the First Amendment in Establishment Clause cases, our society has lost this distinction concerning religion and now regularly equates any mention of God with religion, and thus indiscriminately assumes that any mention of God in the public square is unconstitutional. The importance of this distinction cannot be overstated because acknowledgments of God have been a part of our history from its inception--from the Declaration of Independence's reminder that "we are endowed by our Creator with certain unalienable rights," to the countless Thanksgiving proclamations given by Presidents of the United States, to our national motto--and they must remain a part of the fabric of our country if we are to hold onto the moral foundation of our legal system.

III. Why I Could Not Follow The Federal Court Order

My critics have said that it is one thing to disagree with the current judicial position on the Establishment Clause--and anyone who is familiar with that jurisprudence over the last 40 years will concede it is unclear at best and a model of incoherence at worst--but it is entirely something else to disobey a federal court order, what some mistakenly call "the rule of law." But, if Establishment Clause jurisprudence is in such disarray, what "rule" was I defying? Indeed, in my case the Eleventh Circuit Court of Appeals asserted that "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." *Glassroth v. Moore*, 335 F.3d 1282, 1288 (11th Cir. 2003). If, by "defying the rule of law" my critics mean that I have defied federal judges, then they are equating "the law" with the pronouncements of those judges. That is not our system. It appears that, in addition to forgetting that acknowledgments of God hold a vital and plainly constitutional place in our public discourse, we have also forgotten the basic concept that the legislature makes the law and the judiciary interprets the law. The two are separate, distinct functions.

Yet, when the federal district court ordered me to remove the Ten Commandments monument

from the rotunda of the Alabama judicial building, it did so based upon an opinion that did not just misinterpret the law--it failed to interpret the law at all. As I hopefully have made clear already, acknowledgments of God such as a Ten Commandments display do not violate the Establishment Clause of the First Amendment, properly interpreted. But the federal district court declined even to interpret the law by refusing to define the word "religion" in the First Amendment. In doing so, the federal district court neglected its duty to interpret the law, but still found that I had violated the Establishment Clause by installing a monument. A judge's ruling is an opinion on the law, not the law itself: the opinion carries the weight of the law behind it only so long as it remains faithful to the text of the law. When a judge blatantly misinterprets the law or fails to interpret the law at all, his opinion is no longer clothed in the authority of the law. If this was not the case, unelected federal judges could replace the law on a whim through their own opinions. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1856) (Curtis, J., dissenting). However, judges swear an oath to the Constitution, not to themselves or another person, precisely to prevent this very possibility. See U.S. Const. Art. VII.

As an officer of the courts, I, like the federal district judge, swore an oath to the Constitution. All judges have a duty to faithfully interpret the law of the Constitution. Furthermore, I also solemnly swore to "faithfully and honestly discharge the duties of the office" of Chief Justice of Alabama. The Chief Justice is the chief administrator of the Alabama judicial system, which carries with it an additional responsibility "[t]o take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state." Section 12-2-30(b)(7), Ala. Code 1975. The Alabama Constitution states that "the people . . . in order to establish justice . . . [and] invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama." Ala. Const. 1901, pmbl. Under these provisions, it was part of my duty as Chief Justice to acknowledge God as the foundation of our justice system.

By ordering me to remove the monument, the federal district court in effect commanded me to violate the oath I swore as Chief Justice of Alabama. The federal district court had no authority to do this because the responsibility to administer the justice system of the State of Alabama is a power clearly not delegated to the federal government under the U.S. Constitution, and, therefore, under the 10th Amendment, is "reserved to the States"

In short, I have been accused of refusing to follow the "rule of law," even though (1) the monument did not violate the only proper rule of law in this case, i.e., the Constitution; (2) the federal district court that issued the so-called rule of law refused to interpret that document; and (3) the district court's ordering me to remove the monument constituted an unconstitutional command that would have required me to violate my oath of office and my conscience. No "constitutional crisis" occurred as a result of my actions. The authority of the federal court to remove a monument should properly have been addressed to a "ministerial officer" such as the building manager, and not to a public official sworn by oath to uphold the Constitution. I submit that my actions, far from undermining "the rule of law," in fact represented an attempt to uphold the true rule of law, for no just law, independent of man's capricious whims, can exist without the acknowledgment of God as the foundation of that law.

IV. The Road to Recovery: The Constitutional Restoration Act

Given the disarray of Establishment Clause jurisprudence in the federal courts and their refusal to follow the words of the First Amendment, the only remedy is for Congress to assume its responsible role of regulating the jurisdiction of those courts. Under Article III of the

Constitution, Congress clearly possesses the power to regulate the jurisdiction of the federal courts in this area of the law, and the Constitutional Restoration Act proposes just that. See U.S. Const. Art. III, sec. 2. The federal courts have no authority to restrict acknowledgments of God, and Congress has the duty to return the courts to a proper understanding of public expressions of God.

I close with the wise words of President Ronald Reagan, spoken to the Alabama Legislature on March 15, 1982:

[S]tanding up for America also means standing up for the God Who has so blessed our land. I believe this country hungers for a spiritual revival. I believe it longs to see traditional values reflected in public policy again. To those who cite the first amendment as reason for excluding God from more and more of our institutions and everyday life, may I just say: The first amendment of the Constitution was not written to protect the people of this country from religious values; it was written to protect religious values from government tyranny.