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A CALL TO STAND WITH CHIEF JUSTICE MOORE

The storm of moral crisis has descended upon Alabama. Among the most vital issues facing American jurisprudence are (1) whether our legal system may acknowledge the Higher Law of God as the source and measure of our laws; (2) whether the establishment clause of the First Amendment prohibits the State of Alabama from acknowledging God and His law as the moral foundation of law; (3) whether the State of Alabama (and the 49 other states) are distinctive and viable entities in the American constitutional system or whether they are merely closely supervised subdivisions of a national government; and (4) whether it is ever appropriate to disobey the order of a federal judge.

All of these issues come together in the Alabama Ten Commandments case, often cited as *Glassroth v. Moore.*

The symbolic portrayal could not be more graphic. In the rotunda of the Alabama Judicial Building in Montgomery stands a 5,280 lb granite monument depicting the Ten Commandments, with various quotations from America's founding fathers on the monument's four sides. Just a few blocks away, in front of the Federal Court House, stands a sculpture of Themis, the Greek goddess of law and justice. The Ten Commandments monument was financed entirely with private donations; Themis was paid for by federal funds. And yet, Themis is guarded by federal officers, while U.S. District Court Myron Thompson has ruled that the Ten Commandments monument must be removed from the Judicial Building rotunda.

Recently I have noticed a shift in the debate. A few weeks ago the debate centered between those who say Judge Thompson is right and those who say Judge Thompson is wrong. Today, the debate seems to be between those who say Judge Thompson is wrong but his order must be obeyed, and those who say Judge Thompson is wrong and we must resist his order.

I have written at great length to articulate my belief that the Ten Commandments may properly be displayed in court houses and other public buildings; the most complete exposition of my position may be found in my article

"The Alabama Ten Commandments Case: Is the Pendulum of Establishment Clause Jurisprudence Swinging Back to Nonpreferentialism?" *Jones Law Review* II:1 December 1998 pp. 39-97.

Today I am writing to declare my belief that Alabama Chief Justice Roy Moore is justified in disobeying Federal Judge Myron Thompson's order to remove the Ten Commandments monument, and that public officials, pastors, and other citizens of Alabama and across the nation should come to Chief Justice Moore's defense.

I do not treat disobedience lightly. As a former prosecutor, a retired Air Force Lt. Colonel and Judge Advocate, and a Colonel and Chaplain in the Alabama State Defense Force, I strongly believe in the rule of law. The rule of law means we submit to lawful authority. But just as strongly, the rule of law means we resist unlawful authority. For the rule of law restrains both the people and their rulers. Where law does not restrain the people, the result is anarchy. Where law does not restrain the rulers, there is tyranny. Those who believe in the rule of law must be equally opposed to both.

It is often said that a public official, especially a State Supreme Court Chief Justice, has a higher duty than others to obey the orders of a federal court, that civil disobedience may be an option for a private citizen but not for Chief Justice Moore. The exact opposite is true. State officials have a heightened duty to resist unlawful federal authority, and when they do so it is called **interposition.**

Black's Law Dictionary, Fourth Edition offers the following definition:

> " **Interposition.** The doctrine that a state, in the exercise of its sovereignty, may reject a mandate of the federal government deemed to be unconstitutional or to exceed the powers delegated to the federal government.
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> The concept is based on the 10th Amendment of the Constitution of the United States reserving to the states powers not delegated to the United States. Historically, the doctrine emanated from *Chisholm v. Georgia,* 2 Dallas 419, wherein the state of Georgia, when sued in the Supreme Court by a private citizen of another state, entered a remonstrance and declined to recognize the court's jurisdiction. Amendment 11 validated Georgia's position.
>
> Implementation of the doctrine may be peaceable, as by resolution, remonstrance or legislation, or may proceed ultimately to nullification with forcible resistance.
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> The Constitution does contemplate and provide for the contingency of adverse state interposition or legislation to annul or defeat the execution of national laws." *In Re Charge to Grand Jury,* Fed. Case No. 18,274 [2 Spr. 292].

Far from a radical doctrine, interposition is actually a middle ground position. Absolute submission to unlawful

authority leads to and sanctions tyranny and oppression. Popular rebellion can lead to chaos and bloodshed. Interposition -- lesser magistrates, state and local authorities, placing themselves between their people and the higher magistrates or federal authorities -- is a moderate course that is less likely to result in either extreme.

Interposition has a long tradition in Western law and has led to some of the greatest advances in constitutional liberty. Medieval theologians and philosophers who addressed and endorsed interposition include John of Salisbury (1030-85 AD), James of Viterbo (circa 1300 AD), and Thomas Aquinas (1225-1274 AD). Aquinas believed that

> "...the duty of obedience is, for the Christian, a consequence of this derivation of authority from God, and ceases when that ceases. But, as we have already said, authority may fail to derive from God for two reasons: either because of the way in which authority has been obtained, or in consequence of the use which is made of it." (Book 2, *Commentary on the Sentences of Peter Lombard)*

When a ruler becomes a tyrant, his authority no longer comes from God and he becomes an illegitimate ruler. While it may be better to bear with moderate degrees of tyranny, Christians must stand against the ruler when his tyranny becomes excessive. But popular rebellion may have disastrous consequences: the ruler may suppress the rebellion and become more tyrannical than before, or those who overthrow him, fearing that others may do the same, become just as tyrannical as their predecessors. So what is the solution? Aquinas says,

> "...it seems that to proceed against the cruelty of tyrants is an action to be undertaken, not through the private presumption of a few, but rather by public authority." (Book 1, *On Kingship*)

While continental theologians wrote about interposition, English theologians and nobles put interposition into practice. Since 890 AD England had been governed under the legal code of Alfred the Great, which began with a recitation of the Ten Commandments. But after the Norman Conquest of 1066 AD, Anglo-Saxons and Celts felt themselves oppressed under the more centralized Norman rule. Finally in the 1200s, chafing under the autocratic measures of King John, English leaders decided it was time to act.

On August 25, 1213, a group of barons and bishops met at St. Paul's Cathedral in London. Stephen Langton, the Archbishop of Canterbury (also known for having divided the Bible into chapters), read to them the old Charter of King Henry, expounded to them the doctrine of interposition, and administered to them an oath that they would conquer or die in defense of their liberties and those of their subjects.

Two years later, the barons and bishops commissioned Robert Fitz Walter as Marshall of the Army of God and Holy Church. On June 15, 1215, they met King John at Runneymeade and compelled him to either sign the Magna Charta or abdicate the throne. John signed, and the 63 articles of the Magna Charta constitute a founding document of English liberty. Its main significance, however, is not the rights it contains, which are simply the reassertion of the

ancient rights of Englishmen against the encroachments of a Norman king, but rather the fact that the king was forced to sign against his will on threat of being overthrown.

This was a constitutional crisis of the first order. It was handled by interposition -- and we have been blessed with the results for nearly eight hundred years.

A century later the Scots practiced interposition against English rule under King Alexander, Malcolm Wallace, William Wallace, Robert the Bruce, and others. In April 1320 Robert the Bruce gathered the Parliament of Scotland at Arbroath Abbey, where they drafted and adopted the Declaration of Arbroath, in which they set forth their history as a free people until the usurpation of King Edward of England, and vowed that

> "...for, as long as but a hundred of us remain alive, never will we under any conditions be brought under English rule. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom -- for that alone, which no honest man gives up but with life itself."

(Scottish history and thought have greatly influenced America, especially Alabama where our state flag bears the St. Andrew's Cross. When the Scots again fought for independence in the 1740s under Bonnie Prince Charles and were brutally suppressed, thousands of them fled to America. A generation later, Scottish-Americans became leaders in the American War for Independence. The Mecklenburg Declaration, drafted in 1775 by a group of Scottish Presbyterian elders in North Carolina, bears striking parallels to the Declaration of Independence.)

Reformation leaders followed and further developed the Catholic teaching on interposition. John Calvin declared that private individuals normally should not undertake the curbing of tyrants but should follow "popular magistrates" in doing so:

> "For when popular magistrates have been appointed to curb the tyranny of kings (as the Ephori, who were opposed to kings among the Spartans, or Tribunes of the people to consuls among the Romans, or Demarchs to the senate among the Athenians; and perhaps there is something similar to this in the power exercised in each kingdom by the three orders, when they hold their primary diets), so far am I from forbidding these officially to check the undue license of kings, that if they connive at kings when they tyrannize and insult over the humbler of the people, I affirm that their dissimulation is not free from nefarious perfidy; because they fraudulently betray the liberty of the people, while knowing that, by the ordinance of God, they are its appointed guardians." *(Institutes of the Christian Religion,* Book 4, Chapter 20, 1559 AD)

Other Reformation leaders who articulated the doctrine of interposition were John Knox, father of the Presbyterian Church (1505-72 AD), the French Huguenot author of *Vindicae Contra Tyrannos* (1579 AD) who used the surname Junius Brutus, and Scottish theologian Samuel Rutherford in *Lex Rex* (1644 AD). Among Catholic and Protestant theologians alike, I am just barely skimming the surface because of time and space constraints.

In the 1600s, while the English colonies of North America were being planted and populated, England herself was locked in a struggle between the Puritans in Parliament and the Stuart kings. The common perception that the Stuarts believed in the "divine right of kings" is simplistic. Both sides believed governmental authority comes from God; the issue was lines of governmental authority. The Stuart kings believed God gives authority directly to the king. The Parliamentarians contended that God gives governmental authority to the people, who delegate that authority to lesser magistrates (local earls, sheriffs, barons, members of Parliament), and they in turn delegate authority to the king. That being so, they insisted, the king is answerable to the parliament, and the parliament in turn is answerable to the people.

Through decades of struggle, the Parliament practiced various forms of interposition: negotiation, legislation, litigation agitation. Twice they took interposition further, trying and convicting King Charles I of treason and executing him in 1649, and deposing James II in the bloodless Glorious Revolution of 1688 and forcing him to flee to France. The following year the English Parliament reaffirmed the ancient God-given rights of Englishmen in the English Bill of Rights of 1689.

And as the struggle for liberty waged in England, the American colonists looked on with approval. Nathaniel Hawthorne captured their spirit in his short story, *The Gray Champion.*

Less than a century later it was America's turn. Believing the English king and parliament were usurping their rights and the autonomy their colonial charters had guaranteed to them, the colonists came together in the first Continental Congress of 1774. On October 14 they issued their Declaration and Resolves that

> "...The good people of the several colonies...justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet, and sit in general Congress...in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted."

After two years of futile attempts to practice moderate forms of interposition and resolve their differences with England, in 1776 the Continental Congress adopted the Declaration of Independence. Perhaps the best-known document of interposition in history, the Declaration proclaims that the American colonies are entitled to independence by "the Laws of Nature and of Nature's God." It sets forth the basic "unalienable rights" endowed "by their Creator," proclaims that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." The Declaration then claims:

> That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration cautions that established governments should not be changed for light and transient reasons:

> But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them to absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

The Declaration then sets forth a list of grievances that, taken together, establish that George III has exercised tyranny over the colonies and concludes that "A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people."

The Declaration proclaims that "these United Colonies, are and of Right ought to be free and independent States,." appeals to "the Supreme Judge of the world for the rectitude of our intentions," rests "a firm reliance on the protection of Divine Providence," and the signers close by pledging "our Lives, our Fortunes, and our sacred Honor."

Think for a moment. Suppose liberty's champions of the past had believed that one should never resist higher authority. Archbishop Langton would never have forced King John to sign the Magna Charta, the Scots would not have fought for independence, the Glorious Revolution would never have taken place, the English Bill of Rights would never have been drafted, and we today would still be subject to the English king.

But they did believe in interposition. Aren't you glad they did?

The Founding Fathers did not renounce their belief in interposition once America became independent. They fought to preserve their independence, and that independence was finally secured and recognized by the Treaty of Paris of 1783, which begins with the words,

> "In the Name of the Most Holy and Undivided Trinity."

Four years later they drafted a Constitution which was designed to, among other things, "secure the Blessings of Liberty to ourselves and our Posterity;" note that "blessings must come from a Higher Source.

The Constitution was intended to ensure that government had enough power to govern effectively, but also to ensure that government did not become tyrannical and oppressive. Washington wrote that

> "Government is not reason; it is not eloquence; it is force! Like fire, it is a dangerous servant, and a fearful master."

Jefferson echoed that sentiment in the Kentucky Resolutions:

> "In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

Knowing the tendency of power to corrupt and aggrandize, they designed a Constitution that would chain down that dangerous servant and keep it from becoming a fearful master. They accomplished this end by carefully limiting the powers of government; by separating the powers vertically among federal, state and local levels and horizontally among legislative, executive and judicial branches; and by providing checks and balances whereby each branch and level, guarding its own powers against encroachments by the others, would check and balance the other branches and levels and force them to adhere to their constitutional limitations. This constitutional system has made the United States of America a great and free nation for over two centuries.

But in recent decades the system has become unbalanced. Federal power has expanded exponentially, at the expense of state and local authority and individual freedom. And the judicial branch of the federal government has become nearly absolute in its authority. Checks and balances against the judiciary still exist, but the other branches and levels of government seem unwilling to employ them. The result is that, as Professor Graglia of the University of Texas School of Law has stated,

> "...judicial usurpation of legislative power has become so common and complete that the Supreme Court has become our most powerful and important instrument of government in terms of determining the nature and quality of American life. Questions literally of life and death (abortion and capital punishment), of public morality (control of pornography, prayer in the schools, and government aid to religious schools), and of public safety (criminal procedure and street demonstrations), are all, now, in the hands of judges under the guise of questions of constitutional law. The fact that the Constitution says nothing of, say, abortion, and indeed, explicitly and repeatedly recognizes the capital punishment the Court has come close to prohibiting, has made no difference.
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> The result is that the central truth of constitutional law today is that it has nothing to do with the Constitution except that the words 'due process' or 'equal protection' are almost always used by the judges in stating their conclusions. Not to put too fine a point on it, constitutional law has become a fraud, a cover for a system of government by the majority vote of a nine-person committee of lawyers, unelected and holding office for life."

A further problem with judicial review is that many judges no longer feel bound by the plain wording of the Constitution and the intent of those who wrote it. The result, as Chancellor Kent once wrote, is that judges feel free to "roam at large in the trackless fields of their own imaginations." And if they are not bound by the plain letter of the Constitution as intended by its Framers, their power is virtually unlimited.

Good arguments can be made for judicial review, at least in a limited form. But does judicial review really mean that every time a federal judge issues an order, every other branch and every other level of government must salute, say "Yes Sir!" and march in lockstep to the beat of a federal judge's drum. As a Professor of Constitutional Law for 20 years, I challenge anyone to show me any language in the Constitution that gives federal judges such absolute power. Such a notion would fly in the face of the Framers' basic belief that no one branch or level should have such

absolute power. Many leading Americans have emphatically rejected this notion. For example, Thomas Jefferson wrote in an 1820 letter,

> "You seem...to consider the judges as the ultimate arbiters of all constitutional questions -- a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. ... Our judges are as honest as other men, and not more so... . They have, with others, the same passions for party, for power, and the privilege of their corps.
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> ... The Constitution has erected no such tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would become despots."

President Andrew Jackson refused to enforce orders of the Supreme Court with which he disagreed. Abraham Lincoln declared that

> "...if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties to personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

And Theodore Roosevelt wrote,

> "It is the people, and not the judges, who are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office -- any other theory is incompatible with the foundation principles of our government."

University of South Carolina Law Professors William J. Quirk and R. Randall Bridwell, in their book *Judicial Dictatorship* (New Brunswick: Transaction Publishers, 1997), note that

> "The philosophical assumptions of judicial review are so inconsistent with democratic theory that there is a long tradition of resistance to it. The resistance, today, is a largely underground movement that exists outside the normal academic and law school curriculum. Historically, the members of the resistance are an impressive group. The include the great democratic presidents: Thomas Jefferson, James Madison, Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, and Franklin D. Roosevelt. They include the great constitutional scholars: James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (1893) and *John Marshall* [a 1920 book by Thayer]; Louis Boudin, *Government by Judiciary* (1932); Edward S. Corwin, *Court over Constitution* (1938); Henry Steele Commager, *Majority Rule and Minority Rights* (1943); and Learned Hand, *The Bill of Rights* (1958). Who made the Court, as Learned Hand asks: 'the arbiters of all political authority in the nation with a discretion to act or not, as they please?'"

Chief Justice John Marshall firmly entrenched the principle of judicial review in *Marbury v. Madison,* 5 U.S. 137 (1803). In that opinion he declared that a law repugnant to the Constitution is null and void. But if an Act of Congress is null and void if inconsistent with the Constitution, does not follow that the order of an unelected federal judge is also null and void if inconsistent with the Constitution?

At some point we must stand up and say to the federal judiciary, "Enough is enough! You have usurped powers that the Constitution has not delegated to you. You have imposed upon the rightful authority of the states." But when do we reach that point?

I believe we have reached that point when a federal judge tells the people of Alabama that they may not place the Ten Commandments, the moral foundation of law, in the Judicial Building of the State of Alabama -- and when, to add insult to injury, they vaunt their sculpture of the Greek goddess Themis at the federal court house just a few blocks away.

The issue is more than a monument. The issue is whether a judge may acknowledge the existence of transcendent moral absolutes and use those absolutes as he interprets and applies the law.

Many pastors have criticized the U.S. Supreme Court's decision to legalize abortion in *Roe v. Wade* (1973) and to legalize sodomy in *Lawrence v. Texas* (2003). But what is wrong with a court legalizing abortion and sodomy, if God's Law has no place in American courts?

I have known Chief Justice Roy Moore for many years. In this case, and in the earlier Etowah County litigation, I have traveled with him, worked with him, dined with him, worshipped with him, prayed with him, argued with him, and I know him to be a man of unquestionable sincerity and impeccable integrity. He has taken a stand, and risked the ruination of his career on that stand, because he is firmly convinced this is the only honorable course to follow. He believes he has a duty to God and to the people of Alabama, under the oaths he has taken to uphold the United States Constitution and the Alabama Constitution, to restore the moral foundation of our law.

Alabama has an unprecedented opportunity to stand in the gap with Chief Justice Moore and resist this federal usurpation of state authority and federal dismantling of America's Biblical heritage. If the Governor, the Attorney General, and the eight Associate Justices had stood with Chief Justice Moore, if Governor Riley had issued the call on statewide television for Alabamians to come to the Judiciary Building by the thousands to stand against the removal of the Ten Commandments, if the pastors of Alabama had joined in calling upon their parishioners to respond with a massive but peaceful protest, Judge Thompson could not have enforced his order, and the federal judiciary would have had to retreat.

I regret that the eight associate justices did not join with Chief Justice Moore as did the Justices of the Supreme Court of Utah in 1968. In *Dyett v. Turner,* 439 P.2d 266, the Utah Supreme Court stood against the usurpations of the Warren Court, stating:

"The United States Supreme Court, as at present constituted, has departed from the Constitution as it has been interpreted from its inception and has followed the urgings of social reformers in foisting upon this Nation laws which even Congress could not constitutionally pass. It has amended the Constitution in a manner unknown to the document itself. While it takes three-fourths of the states of the Union to change the Constitution legally, yet as few as five men who have never been elected to office can by judicial fiat accomplish a change just as radical as could three-fourths of the states of this Nation. As a result of the recent holdings of that Court, the sovereignty of the states is practically abolished, and the erstwhile free and independent states are now in effect and purpose merely closely supervised units in the federal system.

We do not believe that justices of once free and independent states should surrender their constitutional powers without being heard from. We would betray the trust of our people if we sat supinely by and permitted the great bulk of our powers to be taken over by the federal courts without at lest stating reasons why it should not be so. By attempting to save the dual relationship which has heretofore existed between state and federal authority, and which is clearly set out in the Constitution, we think we act in the best interest of our country.

We feel like galley slaves chained to our oars by a power from which we cannot free ourselves, but like the slaves of old we think we must cry out when we can see the boat heading into the maelstrom directly ahead of us; and by doing so, we hope the master of the craft will heed the call and avert the dangers which confront us all.

But by raising our voices in protest we, like the galley slaves of old, expect to be lashed for doing so. We are confident that we will not be struck by 90 percent of the people of this Nation who long for the return to the days when the Constitution was a document plain enough to be understood by all who read it, the meaning of which was set firmly like a jewel in the matrix of common sense and wise judicial decisions.

... When we bare our backs to receive the verbal lashes, we will try to be brave; and should the great court of these United States decide that in our thinking we have been in error, then we shall indeed feel honored, for we will then be placed on an equal footing with all those great justices who at this late date are also said to have been in error for so many years."

I deeply regret that the other Justices have not seen fit to join with Chief Justice Moore in resisting this federal judge's attempt to prohibit us from acknowledging the Ten Commandments as the moral foundation of law. But other judges, legislators and public officials have stood with Chief Justice Moore, and it is therefore of crucial importance that the people of Alabama rally to the Chief Justice's defense.

In the crisis that is upon Alabama today, pastors have a special responsibility to inform their people and inspire them to action. Lord Acton observed,

> "...when Christ said 'Render unto Caesar the things that are Caesar's and unto God the things that are God's,' He gave to the State a legitimacy it had never before enjoyed, and set bounds to it that had never yet been acknowledged. And He not only delivered the precept but He also forged the instrument to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal Church."

During the American War for Independence, America's clergy led the way for their people to become involved. In Boston the "Father of the American Revolution," Sam Adams, proclaimed independence, and he was echoed by the "Black Regiment," the black-robed New England clergy who preached independence in pulpits throughout New England. Throughout the colonies, clergy of many faiths called upon their parishioners to answer their country's call.

Today Alabama faces a constitutional crisis of similar proportions: Are we subject to the higher Law of God? Or is law simply what the government says it is? Are human rights unalienable because they are the gift of our Creator, or are they simply negotiable privileges that government can give or take away at will?

Is Chief Justice Moore's battle for the Ten Commandments a "lost cause?" There is no such thing as a lost cause until the last chapter of history has been written. Various new legal moves are underway, and the Spirit of God is at work. But regardless of the outcome of this case, we must take a stand for what is right. A century from now, as Americans seek to put the pieces together and rediscover the moral foundation of law, they will remember what we did in Montgomery in that hot summer of 2003. And as my wife reminds me, God will remember even if no one else does.

And in the evening of your life, when your grandchildren ask what you did during the constitutional crisis over the Ten Commandments, what will you tell them?

> "For if thou altogether holdest thy peace at this time, then shall there enlargement and deliverance arise to the Jews from another place; but thou and thy father's house shall be destroyed: and who knoweth whether thou art come to the kingdom for such a time as this?" *Esther 4:14*

Godspeed,

John Eidsmoe