

FOUNDATION FOR MORAL LAW, INC.

IN DEFENSE OF CHIEF JUSTICE ROY S. MOORE

by
Jeffrey C. Tuomala

Voters elected Roy S. Moore to the office of Chief Justice of the Supreme Court on the promise that he would restore the moral foundations of the law in Alabama. Several months later he made good on that promise and on his oath of office. As Chief Justice he set the now-famous Ten Commandments monument in the rotunda of the Alabama Judicial Building. Three lawyers, their fragile psyches wounded, sued him in federal district court complaining that the Chief Justice's actions were an unconstitutional "establishment of religion."

Although the lawyers charged the Chief Justice with illegally establishing "religion" they argued that the court should not define the term "religion" and that in fact it would be dangerous to define it. The federal district court judge, Myron Thompson, bought their argument and refused to render a definition of "religion" admitting that he was not even qualified to define the term. *Glassroth v. Moore*, 229 F. Supp.2d 1290 (M.D. Ala. 2002). Judge Thompson nevertheless found the Chief Justice guilty of establishing that which he himself could not define and ordered the monument removed. Apparently he appropriated the oft ridiculed "I know it when I see it" test that Supreme Court Justice Potter Stewart proposed for deciding pornography cases.

The Chief Justice refused to remove the monument, triggering a series of actions by other Alabama officials. The other eight justices of the Alabama Supreme Court overruled the Chief Justice and voted to remove the monument in the name of preserving the rule of law. The Alabama Judicial Inquiry Commission next went into action and filed charges against the Chief Justice for failure to comply with the federal court's order. The Attorney General of Alabama, who supported the Chief Justice's decision to place the monument in the Judicial Building, turned the case over to his public corruption and white-collar crime unit for investigation. "Disqualified from acting as a judge," the Chief Justice now faces a trial before the Alabama Court of the Judiciary on ethics charges, and possible removal from office. Members of Attorney General Pryor's staff will prosecute the case. The Court of the Judiciary in a rush to judgment has refused to continue the trial while the Chief Justice appeals Judge Thompson's ruling to the U.S. Supreme Court.

As a result of his refusal to remove the monument, the Chief Justice has been attacked as a lawless man who simply picks and chooses laws that he wishes to obey. For many of his detractors, who themselves have no code of ethics but self interest, it is unimaginable that the Chief Justice has any motive other than personal political ambitions. Many people who applauded his decision to memorialize the foundation of law have joined the chorus of those who have criticized his failure to comply with the trial court's order. A case in point is Alabama Attorney General William Pryor.

Courts Can't Make Law

It isn't difficult to understand why those persons who believe that a public display of the Ten Commandments is the greatest threat to liberty since "In God We Trust" was placed on our money would attack the Chief Justice for failure to remove the monument. To their way of thinking, the federal judge has issued a lawful order. If a display of the Ten Commandments violates a provision of the Constitution, albeit one that the federal trial judge can't define, then it must be a lawful order to have it removed. What is difficult, especially for the layman, to understand is why those who supported the Chief Justice's decision to display the monument as a lawful exercise of his authority would now turn on him.

The reason for this is that most American lawyers and judges, be they "liberal" or "conservative," hold false views concerning certain fundamentals of our

legal system. While liberals and conservatives may hold differing opinions as to particular rules, such as whether a display of the Ten Commandments is lawful, **they share the belief that the opinion of judges about the meaning of the Constitution, and not the Constitution itself, is the law of the land.** For them Judge Thompson’s order, not the First Amendment, is the applicable rule of law. As a result, these officers believe that their oath of office is, in effect, one of allegiance to the judiciary rather than to the Constitution and the laws enacted pursuant to it.

There is a fundamental principle of constitutional law that nearly every American lawyer seems to forget somewhere between his high school civics class and his graduation from law school – Congress has the power to make law while federal courts have the power only to apply law in particular cases and controversies. The Constitution vests all legislative powers therein granted in Congress. Judicial powers are vested in the courts. Despite the clear language of the Constitution, nearly all lawyers now days mouth the platitude that courts make law.

An error that necessarily follows from the false view that courts have the power to make law is the assumption that the law is not what the Constitution says but rather what judges say about the Constitution. Through a distortion of the common law principles of precedent and *stare decisis*, a court’s holding in a particular case is converted into a law binding on all persons within the court’s jurisdiction and all inferior courts. The proper use of the principles of precedent and *stare decisis* is that holdings in past court decisions serve as a compelling guide in subsequent proceedings, but they do not bind unless they are themselves consistent with the law.

It’s Not an Oath of Fealty

This distortion of the nature of judicial powers necessitates a subtle but fundamental change in the nature of a public official’s oath of office. It changes the oath from one of allegiance to the law to an oath of allegiance to an officeholder, in this case a federal judge. This transformation takes place despite the fact that Article VI of the U.S. Constitution states: “all judicial Officers, both of the United States and of the several states, shall be bound by oath or affirmation.” State and federal judges are bound by oath to the same law. That law is the Constitution and “laws made in pursuance thereof.” The Alabama Constitution implements that provision of the U.S. Constitution prescribing the oath of office: “I, [Roy S. Moore], solemnly swear that **I will support the Constitution of the United States, and the Constitution of the State of Alabama**, so long as I continue to be a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God.” (Emphasis added.)

There is an essential difference between an oath promising to support the Constitution and an oath of allegiance to a person or persons. Compare the military oath of enlistment that a subject of the Queen of England swears with the oath of enlistment that a citizen of the United States of America swears.

A Canadian, for example, states: “I, _____, do swear (solemnly declare) that **I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second**, her heirs and successors according to law. SO HELP ME GOD (delete if declaration).” (Emphasis added.)

An American, on the other hand, states: “I, _____, do solemnly swear (or affirm) that **I will support and defend the Constitution of the United States** against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.” (Emphasis added)

The oath of allegiance sworn to the Queen is in the nature of an oath of fealty. Even today lawyers in some of the Queen’s courts therefore address judges and justices as “my Lord” or “my Lady.” Granted, the Queen is bound by her Coronation Oath to “maintain the Laws of God and the true profession of

the Gospel,” but what if she doesn’t? Do her servants and subjects have a duty to accept her word as the definitive interpretation of the law? Their oath suggests that they do. They have no duty of individual judgment.

Some may imagine that the life of the Queen’s public servant is therefore an unhappy one because his independence of thought and action is stymied. The reality is that it makes the life of the Queen’s servant easier. He can more easily justify compliance with the Queen’s order that goes contrary to conscience and law because his oath is one of allegiance to the Queen, not to the law. If the Queen’s order seems to run counter to law and justice the lower official can assuage his conscience by recourse to the principle that he is following the higher moral standard of submission to authority. Best of all, he doesn’t do time in the Tower of London, and he can convince himself that he has taken a noble course of action, not a cowardly one.

A Case in Point – Attorney General Pryor

It falls to Alabama Attorney General William Pryor to prosecute Chief Justice Moore before the Alabama Court of the Judiciary on charges brought by the Judicial Inquiry Commission. What makes this proceeding so striking and instructive is that Attorney General Pryor supported the Chief Justice’s decision to place the monument in the rotunda. He has even been quoted as stating that he considers the Ten Commandments to be the cornerstone of American law. Yet now he is prosecuting the Chief Justice. The key to understanding Attorney General Pryor’s stance is that he believes that courts make law and, by extension, that the official’s oath of office is one of allegiance to the judiciary and not to the Constitution itself.

The basis of the six charges against the Chief Justice is not that he violated the First or Fourteenth Amendments of the U.S. Constitution or any law enacted pursuant thereto, but rather that he “failed to comply with an existing and binding court order directed at him.” All six charges are basically the same. Charge Four is illustrative: “Chief Justice Moore, while serving as Chief Justice of the Alabama Supreme Court, did fail to respect and comply with the law as required by Canon 2A of the Alabama Canons of Judicial Ethics in that, in the circumstances described in paragraphs 1-21, he willfully failed to comply with an existing and binding court order directed to him.”

What is important to keep in mind is that the essence of the charge is a violation of a court order. The Chief Justice is not charged with violating the First Amendment. Attorney General Pryor would be hard pressed to prosecute him for that violation since he himself has expressed the belief that the display of the monument is lawful. The charge of failure to “respect and comply with the law” is not a failure to respect and comply with the Constitution but with a court order. The Judicial Inquiry Commission has equated a court order with law. Failure to comply with an order is illegal only if the order itself is legal, just as conviction for violating a law is valid only if the law is lawful. Every eighteen-year-old soldier, sailor, airman and Marine who has ever worn the uniform appreciates the distinction between a lawful and an unlawful order. He knows that he may not be convicted under the UCMJ of failure to obey an unlawful order.

If the Attorney General is to prosecute the Chief Justice he must prove that the order was lawful. He must prove that the Chief Justice has violated the Constitution. But how can he? He has already gone on record as stating that the Chief Justice acted lawfully. In fact the Attorney General appointed lawyers to defend the Chief Justice. He can prosecute the Chief Justice only if he has bought into the false premise that courts make law, that the Constitution means whatever a judge says it means until it changes its mind or until another bigger court with superior lawmaking authority rules otherwise.

It’s an Abomination – But It’s Not Law

Attorney General Pryor is in an extremely difficult position. He has been nominated for appointment to a judgeship on the United States Court of Appeals

for the Eleventh Circuit, the very court that affirmed the trial court's decision and order in this case. The Chief Justice's supporters will be tempted to accuse the Attorney General of playing politics in his decision to prosecute the Chief Justice. If the Attorney General were to defend the Chief Justice at this point any chance of Senate confirmation for appointment to the bench would certainly be torpedoed. However, an accusation that Attorney General Pryor is acting out of personal political expediency will be hard to make stick. From his track record the Attorney General appears to be a man of courage and a man who acts on principle. The problem is that on these most fundamental matters he is acting on the wrong principles. The fact that Attorney General Pryor suffers from the misunderstanding of most lawyers and judges is best illustrated in his answers to questions posed during his judicial confirmation hearings.

Senator Feingold of Wisconsin questioned Attorney General Pryor: "Mr. Pryor, you once said that you thought the Supreme Court's decision in *Roe v. Wade* was 'the worst abomination of constitutional law in our history.' Do you still think that?" Pryor answered, "Oh yes." In response to further questioning he stated that "it has led to the slaughter of millions of innocent unborn children." Reported in William F. Buckley, "Pryor dares to say the unthinkable," www.townhall.com.

But then, with breathtaking inconsistency, Attorney General Pryor went on to assure the Judiciary Committee that because *Roe v. Wade* is the law of the land, as a judge he would be bound to follow it. There you have it, *Roe v. Wade* is a constitutional abomination, but it is law because a court said it. And he will comply with, presumably because of his understanding of his oath of office.

"So Help Me God!"

The difference between the Attorney General and the Chief Justice does not appear to be in their understanding of the First Amendment. It appears to be primarily a difference in their view of the lawmaking power of courts and the meaning of the oath. Chief Justice Moore's position is that he has sworn an oath to uphold and defend the U.S. Constitution and the Constitution of the State of Alabama. In partial fulfillment of his duties of office he placed a monument memorializing the moral foundations of American law in the rotunda of the Alabama Judicial Building.

Several provisions of the Alabama Constitution acknowledge the Law of God as the foundation of law in Alabama. The Constitution begins with these words: "in order to establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity, invoking the favor of Almighty God, do ordain and establish the following Constitution . . ." Preamble. "[A]ll men are equally free and independent: . . . they are endowed by their creator with certain inalienable rights . . ." Section 1. The oath of office concludes with "So help me God." Article XVI, Sec. 279.

By Constitutional provision and statute the Chief Justice is the head of the judicial system in Alabama. He has the duty to ensure that judicial personnel have a proper understanding of law and that they administer justice properly. The Canons of Judicial Ethics, under which the Chief Justice is being prosecuted, place additional duties on all judges to properly administer the law. All judges are supposed to "participate in establishing, maintaining, and enforcing" high standards of conduct. They are to faithfully "maintain professional competence" in the law and be "unswayed by partisan interests, public clamor, or fear of criticism." Judges are encouraged to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." "The purpose of ethical conduct is not simply to ensure that justice will be done in individual cases but that the public will be assured of what they have a right to expect."

In short, the posting of the Ten Commandments provides the standards of personal conduct for judges and court personnel, the basis for law, and the assurance to the public of the integrity of the system and the rule of law.

The Alabama Rules of Professional Conduct governing every Alabama lawyer state that each is “an officer of the legal system and a public citizen having special responsibility for quality of justice” and that they “should seek improvement of the law, of the administration of justice, and of the quality of service rendered by the legal profession. As a member of the a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in the reform of the law, and work to strengthen legal education.”

In sum, the Chief Justice has a duty to expound the law, as does every lawyer in the state of Alabama. The foundation of the civil law is that standard of justice summarized in the Ten Commandments. That foundation is expressly recognized in the Alabama Constitution. The Chief Justice has an obligation to conduct himself in accordance with that law, he has a duty to apply that law in deciding cases, he has a duty to ensure that court personnel are educated in that law, and he has a duty to the public to ensure that that law will be applied.

The Assassin’s Dagger

The Attorney General, in asserting that the Ten Commandments are the cornerstone of the law, can hardly dispute the Chief Justice’s action in placing the Ten Commandments monument in the Judicial Building to further those ethical and legal obligations. When a federal court tells the Chief Justice that he may not perform his duties as required under law it is the federal district court judge who is violating the law. When Supreme Court justices commit Constitutional Law abominations it is their impeachment that Attorney General Pryor should be calling for. They are the ones who have violated their oath of office.

He probably does not realize it, but Attorney General Pryor shares the jurisprudence of the German judges put on trial at Nuremberg in the case of *U.S. v. Alstoetter*, a trial made famous in the Hollywood production, *Judgment at Nuremberg*. The judges in Germany swore an oath similar to the one taken by the German military: “I swear by God this sacred oath, that **I will render unconditional obedience to Adolf Hitler, the Fuehrer** of the German Reich and people, Supreme Commander of the Armed Forces” The German judges defended their actions in enforcing unjust “laws” and of convicting and even sentencing men and women to death who were innocent of wrongdoing or guilty of only minor wrongs. The German judges argued that they were simply following the law of obeying orders of higher officials. Their actions they argued were therefore justified. This is the position that Attorney General Pryor has taken with respect to *Roe v. Wade*. He has promised to withhold the protection of law from thousands of innocent unborn children until the “law” changes. He doesn’t seem to see that *Roe v. Wade* is an act of lawlessness. It is not law. Compare that to the situation that the *Alstoetter* court noted existed in Germany: “[t]he dagger of the assassin was concealed beneath the robe of the jurist.”

Value That Oath

The fact that the Chief Justice has refused to comply with an order that he maintains is illegal raises the specter of civil disorder. What will happen if judges get the idea that some decisions and orders are illegal, and that they have a duty to obey the law rather than other judges? Won’t this lead to chaos, a demise of the rule of law, maybe even the collapse of civilization?

It does not. Government officials who rule lawfully are not afraid to encourage lower officials to obey their consciences. It is hard to imagine any society in which compliance with orders is more essential than in the military. And probably no branch of the military service is more noted for its compliance with, and enforcement of, orders than the United States Marine Corps. Perhaps then it is well to consider a letter that Brigadier General Paul K. Van Riper USMC addressed to his staff and subordinate units upon assuming command of the 2d Marine Division, Camp Lejeune, North Carolina, in July 1991:

We should remind ourselves and those in our charge frequently that upon entering the Corps we each took a solemn oath to “. . . support

and defend the Constitution of the United States against all enemies, foreign and domestic . . .” Unlike the members of many armed forces throughout the world, we do not serve to protect an individual or small group of rulers, a political party, a flag, or even a cause, but an idea—the freedoms guaranteed by our Constitution through the rule of law. We should also be reminded of and remind others that we swore to “. . . bear true faith and allegiance to . . .” that same document. That is, we promise to demonstrate a loyalty and fidelity of the highest order in support and defense of the Constitution. We have, in effect, agreed to an “unlimited liability” contract with our nation—we are prepared to die in its defense! Value that oath.

. . .

For most of us these four values [faith, family, Constitution, Corps] will normally be in balance and we need make no decisions in regard to their priority. Occasionally, however, conflict can arise. If it does, use the order in which I have presented them to make a judgment. For example, if our Corps asks you to do something that would violate your oath to support and defend the Constitution *don't* do it. Or if the Nation asks you to act in a manner which violates your faith, *don't* do it. Those who live by their faith, remember family and friends, defend our Nation, and honor the Corps will be a source of pride to all who stand with and behind them on the frontiers of freedom.

BGen Paul K. Van Riper, “A Philosophy of Leadership,” *Marine Corps Gazette* p. 40 (Jan. 1992)

Duty, Honor, Country

The Chief Justice, sworn to uphold and defend the Constitution of the United States and the Constitution of Alabama, placed a monument in the Judicial Building in fulfillment of the responsibilities of his office. He has an obligation to ensure that subordinate courts and attorneys practicing law are reminded of and understand the nature of the law and their obligations under it. Ironically, the very conditions that Chief Justice Moore addressed with the monument – ignorance and disdain for the moral foundation of our laws, oaths, and national creeds – are the conditions that have led to his suspension from his public duties.

Chief Justice Moore is a graduate of the United States Military Academy at West Point. He is a veteran of the War in Vietnam. He understands the difference between a lawful order and an unlawful order. He knows why it was unlawful for Lieutenant Rusty Calley to shoot unarmed women and children at My Lai even if he was so ordered by superiors. He understands that *Roe v. Wade* is not law. He would consider it a violation of his oath of office to withhold the protection of law from unborn children or offer aid and comfort to those who do. He understands the nature of his oath of office. It is an oath sworn before God and man to support and defend the Constitution. It is not an oath of allegiance to any person, least of all to a federal judge who admits that he is unable to give a definition of the very law that he claims has been violated. On the wall of Roy Moore’s conference room hangs a picture of the inscription on the wall at Constitution Corner at West Point. It explains in the clearest terms that West Point graduates swear an oath of allegiance to the Constitution, and not to any person or leader, in language that every cadet can understand. This is the principle that every private in the Army is expected to live by and be willing to die for. It is a principle that every American, including every lawyer, judge and Attorney General, should at least understand.

Many have reviled Chief Justice Moore as an opportunist, someone who welcomes, even orchestrates, publicity in order to advance his own political career. They obviously discount his assertion that he does so as a matter of conscience, bound by the oath of office that he swore.

Some men find it simply unimaginable that other men would act upon the basis of anything other than self-interest. They might acknowledge that a few

young men, idealistic and naïve, would go off to some place like West Point and buy into that moral code which Douglas MacArthur so eloquently articulated in his Farewell Address to the U.S. Military Academy—“Duty, Honor, Country”—but certainly no grown man would. It is one of life’s great joys to enjoy the company and friendship of men who don’t become so jaded and sullied by living in this world. Chief Justice Moore is a man who has not become so jaded. One can only pity the man whose circle of friends and acquaintances only affirms the view of the cynic, the mocker, and the scoffer.

Jeff Tuomala is Associate Dean for Academic Affairs and Associate Professor of Law at Liberty University School of Law, Lynchburg, Virginia.