

IN THE SUPREME COURT OF ALABAMA

Case No. 1160002

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ROY S. MOORE, CHIEF JUSTICE OF THE SUPREME COURT OF  
ALABAMA,

Appellant,

v.

ALABAMA JUDICIAL INQUIRY  
COMMISSION,

Appellee.

---

AMICUS BRIEF OF  
8 TRIAL JUDGES OF ALABAMA  
COURT OF JUDICIARY CASE NO. 46

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## ISSUES PRESENTED FOR REVIEW

I. WHETHER THE COURT OF THE JUDICIARY CAN AVOID A SUPREME COURT RULE REGARDING THE REQUIREMENTS FOR REMOVAL, THE MOST SERIOUS SANCTION THAT CAN BE IMPOSED UPON A JUDGE CONVICTED OF MISCONDUCT?

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## SUMMARY OF ARGUMENT

The State trial court judges and appellate judges of this State are subject to investigation by the Judicial Inquiry Commission (hereafter "JIC") and prosecution for unethical judicial conduct by the Court of the Judiciary (hereafter "COJ"). Therefore, because the Chief Justice's case will set significant precedent for future investigations and prosecutions of State Court Judges, all judges have a direct interest in the outcome and procedure used in any successful prosecution of a judge or justice before the COJ, particularly one as important as the Chief Justice.

The unanimity requirement in the procedural rules governing the COJ exists for the purpose of limiting the most severe form of discipline - removal from office. We trial judges are concerned that the COJ circumvented that rule in the Chief Justice's case. We also suggest that if the judicial disciplinary system is to have the confidence of State Court Judges when accusing them of violating ethical rules, the JIC must also comply strictly with the procedural rules issued by the Supreme Court, specifically Rule 6 dealing with notice and investigations. Lastly, the

conviction and severe discipline given the Chief Justice by the COJ for disagreeing over the legal interpretation of arguably conflicting orders "chills" judicial discretion in all contexts and potentially raises the potential for an allegation of politically motivation. Contrary to the goals of judicial discipline, which include enhancing the judicial system's reputation in the public's eyes and retaining the judges' confidence in its fairness, such a perception of bias would diminish the system's reputation for fairness.

## ARGUMENT

I. WHETHER THE COURT OF THE JUDICIARY CAN AVOID A SUPREME COURT RULE REGARDING THE REQUIREMENT FOR REMOVAL, THE MOST SERIOUS SANCTION THAT CAN BE IMPOSED UPON A JUDGE CONVICTED OF MISCONDUCT?

Rule 16 of the Rules of Procedure for the Alabama Court of the Judiciary states: "With respect to removal from office, the Court shall convict only with the concurrence of all members sitting." Removal is the only sanction having a unanimous vote requirement by the COJ. The Alabama Supreme Court adopts the rules of procedure for the COJ. Ala. Const., 1901, amend. 328, § 6.18(c). Logically, a unanimity requirement places a higher standard on a court seeking to impose the most severe sanction for a judge, that is, removal from office. Therefore, it is clear that the Alabama Supreme Court created such a requirement to ensure that the most severe sanction be imposed only if there is no dissenting vote on the Court of the Judiciary.

In the Chief Justice's case, there was a lack of unanimity for removal from office. The COJ stated in its Final Judgment: "A majority of this court also agrees with the JIC that the only appropriate sanction for Chief

Justice Moore is removal from office. Removal of a judge from office, however, requires 'the concurrence of all members sitting.' Rule 16, R.P. Ala. Ct. Jud." In the Matter of: Roy S. Moore, [No. COJ046, September 30, 2016], at 48. Instead, the COJ stated in its Judgment that he "should be suspended from office without pay for the remainder of his term." Moore, supra, at 49. Coincidentally, because of his age and the fact that there are only a little more than two years left in his term, Chief Justice Moore may not run for any judicial office after his present term ends. Ala. Const., 1901, amend. 328, § 6.16. Therefore, the practical effect upon Chief Justice Moore is to permanently remove him from his present and any other judicial office; therefore, the punishment equates to removal from office.

Consider the severity of this form of punishment in the Chief Justice's case. Because he still holds a judicial office, even though suspended without pay, he can neither run for another non-judicial office nor practice law as an attorney. Canons 2, 5, 7(b)A.(2), Alabama Canons of Judicial Ethics. For almost two and a half years, he

cannot practice his chosen profession, unless he resigns or retires.

Also, for judges, the term "suspension" is a particular technical term in the world of punishment. See Ala. Code 1975, § 15-22-50. We sometimes use the terms "suspension" or "suspended" when dealing with probation. For example, a sentencing order may state: "Defendant Smith, I'm sentencing you to ten years imprisonment; however, I'm suspending the balance of your term of imprisonment for a period of five years formal probation." By definition, the suspension is temporary. We would never order an indefinite suspension of imprisonment of a defendant, which would mean unending probation. Nor would a sentencing order state that the "defendant's probation is indefinitely suspended for the rest of the defendant's natural life," which would confine the defendant to prison for an indeterminate period and be the equivalent of ordering a life sentence in prison without the possibility of parole. Using the word "suspended" in those situations would be a contradiction in terms. The term "suspension" and a terminal sentence do not go together, yet for all intents and purposes, that is what the COJ's punishment has imposed

as discipline for the Chief Justice - a terminal or indefinite suspension.

Therefore, because Chief Justice Moore's suspension keeps him from performing the duties of his judicial office for the rest of his term, the Court of the Judiciary's sentence is effectively a removal from office, the most severe sanction requiring the Court's unanimity. He also cannot run for office or practice law nor can he be paid for being Chief Justice. He has been "harpooned" as to judicial office, any other political office, and even his ability to earn a living. No concurrence of all the members of the Court of the Judiciary occurred. We trial judges find a detour like this around the rule requiring unanimity for removal troubling to say the least, for the same sanction could be applied to one of our members in the future, and the Chief Justice's case could set unassailable precedent against any argument to the contrary.

II. WHETHER THE JUDICIAL INQUIRY COMMISSION AND COURT OF THE JUDICIARY ARE BOUND BY THE RULE OF LAW WHEN CONVICTING AND IMPOSING SANCTIONS UPON JUDGES, OR ARE THOSE ORGANIZATIONS ALLOWED A FLEXIBLE INTERPRETATION OF THE RULES WHEN JUDGING JUDGES?

It is not only Chief Justice Moore who will have to live with the result of this appeal. It is all trial court judges who will also have to live with the precedent which this appeal creates. Will the result affirm a too-flexible attitude on the part of the JIC and COJ toward the rules of procedure instituted by the Alabama Supreme Court? Will judges be able to gauge just how serious and what the status of their cases are when the rules are treated with elasticity? And if one rule is subject to being set aside or given less significance than what the plain language requires, which and how many other rules will be given such treatment?

Can a system of judicial discipline be legitimate in the perception of its potential defendants when there is no room for a judge to believe that his or her honest and sincere actions are justifiable, even if risky and perhaps "push the envelope" in pursuit of what that judge believes to be the correct legal result? Yet at the same time, what if leeway is allowed to the disciplinary agencies, like JIC and COJ, to treat certain rules as optional because "the judge should have gotten the general idea?" See In the Matter of: Roy S. Moore, supra, at 44 (COJ quoting the

JIC's argument that "due process demands only the amount of notice necessary to give a judge a general idea of the charges against him"). If judges are to be held to a high standard, then so should the "judges" of the judges. If not, the system risks further loss of legitimacy in the eyes of the judges, the public, and the other two branches of government.

The JIC did not follow Rule 6 of the Rules of Procedure for the Court of the Judiciary because it never served upon Chief Justice Moore Charge No. 6 regarding his involvement in issuing a special writing in Ex parte State ex rel Alabama Policy Institute (hereafter "API II"), [No. 1140460, March 4, 2016] \_\_\_ So. 3d \_\_\_ (Ala. 2016). Rules 6C and 6D of the Rules of Procedure for the Court of the Judiciary require service of new material on a judge being investigated by the JIC, as follows.

A. Proceedings may be instituted by the commission only upon a verified complaint filed either by a member of the public or by a member of the commission or the commission's staff.

B. Within 70 days after a complaint is filed with the commission, the commission may dismiss the complaint if it determines, based on a preliminary review limited to the complaint and to public records available on the Internet, that the complaint is not worthy of further action. A complaint shall become void if the commission

fails to meet for a vote on whether to investigate the complaint within the 70 days allowed or if, upon the vote at a duly called meeting, fewer than a majority of all members of the commission vote to investigate it. If the complaint is dismissed after such preliminary review, the judge who was the subject of the complaint shall not be notified of the filing of the complaint.

C. If a complaint is not dismissed on preliminary review pursuant to Rule 6.B., **the commission**, within 14 days of its decision to conduct some investigation of the complaint, and **in no event more than 84 days after a complaint is filed**, shall serve upon the judge who is the subject of the complaint copies of the complaint and all other documents or other materials of any nature whatsoever constituting, supporting, or accompanying the complaint, or accumulated by the commission before such service upon the judge. Further, the commission shall advise the judge of those aspects of the complaint that it then considers worthy of some investigation.

D. **Every six weeks after serving the judge pursuant to Rule 6.C., the commission shall serve on the judge being investigated copies of all materials of any nature whatsoever not already served upon him or her tending to establish that the conduct either did or did not occur or that the investigation is or is not still appropriate**, and shall serve upon the judge a full statement of whether the commission intends to continue the investigation and any modification of the previous advice as to aspects of the complaint that it then deems worthy of some investigation. The chairman or acting chairman may extend any deadline arising under this subdivision for up to 21 days in the event that exigent circumstances prevent the commission from complying with such deadline. As soon as practicable after any such extension is made, the chairman or acting chairman, or his or her designee, shall notify in writing the judge to whom the materials and statement are to be

provided of the extension and shall describe the exigent circumstances necessitating the extension.

E. Notification of a judge as provided by this rule may be delayed:

(1) Where the commission has reason to believe from the nature of the complaint that providing such information to the judge is likely to result in the secreting, altering, or destroying of evidence material to the complaint. In such event, notice may be delayed until such evidence is obtained, unless the complaint is first dismissed, in which case no notification shall be necessary.

(2) Where the commission has reason to believe that the judge is mentally or emotionally unstable and is likely to act in a manner dangerous to himself or herself or to others. In such event, notice may be delayed until such danger ends, unless the complaint is first dismissed, in which case no notification shall be necessary.

(3) Where the commission has reason to believe that law enforcement is conducting a criminal investigation and that notification to the judge could jeopardize that criminal investigation. In such event, notice shall be delayed until such danger ends, unless the complaint is first dismissed, in which case no notification shall be necessary.

F. No judge may be compelled to give evidence against himself or herself; provided, however, that a judge who chooses to testify on his or her own behalf shall be subject to cross-examination.

G. Service shall be by personal service or by certified mail. Service by certified mail shall be deemed effective upon mailing.

Rule 6, R.P. Ala. Ct. Jud. (emphasis added).

These are formal rules, clearly intended to give a judge under investigation the most thorough understanding of the charges pending against him and notice of any change in the investigation as early as possible in that investigation. There is a vast difference between a question during a meeting and the service of a written statement of a new charge being investigated against a person. Yet in its Final Judgment, the COJ stated that the "JIC introduced evidence that Chief Justice Moore actually was given an opportunity to address the Charge [No. 6] at an April 17 hearing before the JIC." In the Matter of: Roy S. Moore, supra, at 44.

Can an oral comment raised in a hearing between the JIC and a judge facing investigation equate to "service" upon the judge of "all materials of any nature whatsoever not already served upon him or her?" Rule 6C, R.P. Ala. Ct. Jud. Service is to be by certified mail according to Rule 6G. Or does a comment raised in a hearing with the JIC

become the equivalent of "serv[ice] on the judge being investigated?" Rule 6D, R.P. Ala. Ct. Jud.

Reading the entirety of Rule 6 allows one to gauge the formality of that rule. Rule 6 does not give the impression that it can be replaced by an oral comment at a hearing. Even the portion of the rule allowing extensions of time for the JIC to avoid deadlines based on exigent circumstances requires such to be submitted to the judge in writing. Rule 6D, R.P. Ala. Ct. Jud. Surely "service" of an entirely new charge against a judge should be prepared in writing and in compliance with the rules of procedure required of the JIC. How difficult would it have been for the JIC to send notice to Chief Justice Moore directly after the hearing in April? The JIC should not be allowed leeway that implies it can act as if it were above the rules imposed upon it by the Supreme Court. If this rule can be ignored, what other rules of discipline and investigation by the JIC or trial by the COJ for that matter can be ignored? A judge facing future investigation needs to know.

Even beyond the prejudice caused to the Chief Justice, what other types of damage does ignoring this rule cause?

What about the perception of the system itself, a system intended to discipline duly-elected judges and justices? We judges are acutely aware that the people of Alabama watch these type of events, and the result can impact voters significantly. Also, when someone whom the voters have elected and in whom they have confidence as to that judge's judicial philosophy, is for all intents and purposes removed from office, the questions inevitably arise: Who are these organizations and who sits on them with such power that they can remove an elected official? Who supervises them? Does my vote count? And so forth. Do these questions in the public's mind, particularly involving disputes as to the effects of court rulings and administrative orders and not involving vice or criminal charges or unethical activity, enhance the reputation of our judicial discipline system or undermine it? And if the judicial discipline system is tarnished, is not the whole judicial system affected? Are we not working at counter purpose when the judicial discipline system, intended to enhance the reputation of the judiciary, ends up causing public mistrust?

The rule of law means that all, even the most powerful, are subject to "the law." If the courts become their own entity and adopt their own antagonistic position to the rules and to the objections of the people, their constitutions, and the law itself, then where do the people go to appeal such? Add to that a COJ with power to eliminate a Judge or Justice who disagrees with a particular, controversial legal opinion, and the "iron curtain" of "no option for appeal" becomes sealed in the public's mind.

Of course, the purpose of judicial discipline is to protect the judicial system from those who abuse or neglect their responsibilities as judges. Therefore, judges are to be subject to some form of discipline. However, who are to judge the judges? Are they not judges also? It cannot be asserted with any legitimacy that the "judges" of the judges may treat the rules for judging as an elastic thing, capable of flexible application or neglect or even abuse. Are the due process rules for judges facing investigation and trial that difficult to follow? Will egregious acts of judicial ethical violations escape detection and negative sanctions if the JIC and COJ must conform strictly to the

rules of procedure? If so, at what point does the flexibility end and abuse by the "judges" of the judges begin? At what point can this statement regarding a "flexible" application of the rules by the JIC or COJ not be used: "The judge should have reasonably known what we meant?" In the Matter of: Roy S. Moore, supra, at 44.

III. WHETHER, IN THE CONTEXT OF NON-CRIMINAL CHARGES BY THE JUDICIAL INQUIRY COMMISSION AGAINST A JUDGE FOR ISSUING AN ORDER OR OPINION BASED ON ARGUABLE YET NON-FRIVOLOUS LEGAL GROUNDS, THE COURT OF THE JUDICIARY SHOULD AT LEAST BE BOUND BY A RULE OF LENIENCY IN ORDER FOR IT TO AVOID THE CHARGES OF ACTING BEYOND ITS AUTHORITY AS IF IT WERE AN APPELLATE COURT OR OF ENGAGING IN LEGAL OPINION "CLEANSING?"

The trial court's judgment and punishment in this case potentially "chills" judges' discretion, particularly with respect to administrative actions; implies that the Judicial Inquiry Commission and the Court of the Judiciary may impose philosophical "litmus tests" upon judges' opinions; and imposes far-reaching effects beyond any disciplinary case involving an individual judge or this particular case involving the Chief Justice of Alabama's

Supreme Court. Trial judges facing discipline or making decisions with respect to administrative orders, like anyone facing discipline, need the ability to gauge beforehand the principles underlying the severity of possible discipline. As it stands now, this case against the Chief Justice does not assist us in even approximating such.

The punishment imposed on the Chief Justice was extreme, as explained in Issue I above. He was suspended without pay for the rest of his term, an effective removal, and was taxed with the costs of the proceeding against him, amounting to approximately \$70,000. Moore, supra, at 49. He did not engage in a crime, he did not have sexual relations with a litigant in a case pending before him, he did not rule in a case in which he or a close family member had a financial interest, he did not order someone to jail without due process, and he did not purposely favor certain lawyers or litigants for political gain. See Appendix, "Recent History of COJ Final Judgments." All of the examples of historical misconduct in Alabama and tried in the COJ since 2009 could have serious, detrimental effects upon the public's ability to trust the judgment of a judge

who has engaged in one of them. However, Chief Justice Moore did none of those things.

Right or wrong, he issued an administrative order stating what he considered to be an arguable legal position regarding the orders of two courts whose opinions have significant effect upon this State - the Alabama Supreme Court and the U.S. Supreme Court. Whatever one's position on the politically, religiously, legally and constitutionally charged majority opinion in Obergefell, and it is not the primary purpose of this brief to take a position, we understand that the Chief Justice was acting in what he thought were the best interests of Alabama's law and Constitution.

We point this out to show how judges concerned about conditions "affecting the administration of justice" in their circuit and holding an arguable basis for their concern, sometimes must wade into disputed areas of law and politically charged hot-beds. State Court Judges would like to know that they will not be labeled "unethical" because they hold a different jurisprudential opinion from that which currently has cachet in the media or the public mind and take a disputed, yet defensible, legal position in

an Order or Opinion. Not only are the judicial discipline system and the judicial system at stake in this case; at stake is the very concept of judicial discretion, a fundamental and essential aspect of judging.

Could the JIC and the COJ become a tool for dissatisfied litigants, philosophically opposed special interests, and even surrogates for political opponents? Could the JIC and COJ be perceived as not only overly severe with such philosophical disagreements, but even biased in favor of a particular political, religious or philosophical interest - depending on the political climate at the time? These are real concerns arising from the Chief Justice's disciplinary case.

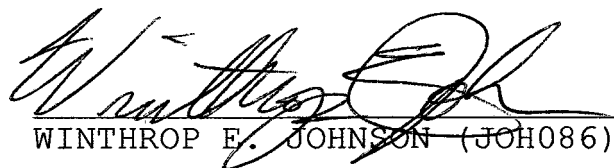
Lastly, when compared to discipline imposed on other judges for far worse conduct, the removal of his salary, his ability to pursue his chosen livelihood, and then taxing him with the costs of his own prosecution for holding a debated legal position on a Supreme Court opinion seems overly severe. Such discipline of a judicial officer is not a judicious exercise of power that enhances the Alabama Judicial System. Nor does it reassure trial judges

of the unbiased nature of charges that could be filed against them nor that the punishment will be measured.

**CONCLUSION**

Based on the foregoing, Amicus Curiae 8 Trial Judges of Alabama request that this Court reverse the trial court's judgment, rendering the Chief Justice innocent of all charges based on the fact that he simply took a different jurisprudential position on a disputed point of law and that the JIC must follow the Supreme Court's procedural rules strictly. In the alternative, the Amicus Curiae 8 Trial Judges of Alabama request that this Court remand the case to the COJ, holding that the JIC must follow its rules strictly and that the COJ may not substitute suspension without pay when that punishment effectively equates to removal from office unless there is a unanimous vote by the COJ.

Respectfully submitted,  
ATTORNEY FOR AMICUS  
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ALABAMA

  
WINTHROP E. JOHNSON (JOH086)

**TRIAL JUDGES JOINING AS AMICUS CURIAE**

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27th Judicial Circuit

T. Lee Carter, Presiding Circuit Judge  
25th Judicial Circuit

John Bentley, Circuit Judge  
25th Judicial Circuit

Mark Hammitte, District Judge  
25th Judicial Circuit

Ashley McKathan, Retired Circuit Judge  
22d Judicial Circuit

Jerry Stokes, Retired Circuit Judge  
22d Judicial Circuit

Frank L. McGuire, III, Retired District Judge  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing upon:

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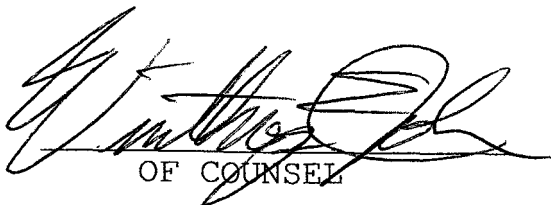
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by hand delivery or by placing a copy of same in the United States Mail, First Class postage prepaid, on this the 14th day of December, 2016.

  
OF COUNSEL

## APPENDIX

Recent History of COJ Final Judgments - from July 2009 to present

COJ048: Immediate retirement and taxed with costs of proceeding to judge for acting as probate judge in estate case in which her immediate family had an interest and were parties to the case. ADR case.

COJ047: Suspended without pay for 180 days, taxed with costs of proceeding, and ordered to counseling for sexually explicit dialogue on social media and by cell phone (often from within the courthouse) with a woman, not his wife, and whom he became acquainted because of his duties as probate judge. ADR case.

COJ045: Public censure for instructing litigants owing court costs, fines, etc. to give blood as an alternative to paying money owed.

COJ044: Suspended without pay for 180 days, ordered to take Alacourt Plus training, and taxed with costs for failure to use Alabama's electronic filing system, thus complicating and prolonging litigation for litigants in small claims court.

COJ043: Suspended without pay and ordered to take professional development courses for unauthorized, unwarranted, and unlawful orders for the arrests and jailing of litigants and witnesses in cases before the judge's court.

COJ042: Public censure, email apology to all state court judges for the email he sent, and taxed with costs of proceeding for sending out by email and posting on Facebook derogatory comments about an attorney whom the judge was holding in contempt of court.

COJ041: Public censure and taxed for costs of proceeding for dismissing traffic ticket of his own son in municipal court.

COJ040: After judge resigned from bench and left State for prejudicial actions and blatant favoritism of lawyers and litigants, judge was ordered to never again serve as a judge.

COJ039: After retiring, judge was publicly censured and prohibited from ever again serving as a judge again for abusiveness, which included cursing and yelling from the bench, and excessive severity and lack of due process in sentencing exhibited toward defendants appearing before the judge.

COJ038: Public reprimand and censure and suspended without pay for 60 days for dismissing a rape charge imposed upon a defendant so that he could live with family in spite of sex offender residence requirements and for bowing to public and political pressure in a "Bingo case."

COJ037: Publicly reprimanded and censured and suspended without pay for 90 days for not recusing from criminal cases involving family members and friends.