IN THE SUPREME COURT OF ALABAMA
October 24, 2016

1160002

Roy S. Moore, Chief Justice of the Supreme Court of Alabama v. Alabama Judiciary Inquiry Commission

ORDER

On October 3, 2016, Chief Justice Roy S. Moore filed a notice of appeal of the judgment of the Court of the Judiciary in In the Matter of Roy S. Moore, Chief Justice, Supreme Court of Alabama, Case No. 46.[1] The Court of the Judiciary held that Chief Justice Moore had violated Canons 1, 2, 2A, 2B, 3, and 3A(6), Ala. Canons of Jud. Ethics, as charged in the complaint when he issued the administrative order on January 6, 2016, directed to the State's probate judges and when he failed to recuse himself in Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 4, 2016] ___ So. 3d ___ (Ala. 2016). The Justices have been intimately involved in this Court's deliberations in Ex parte State ex rel. Alabama

[1]Section 157(b), Ala. Const. 1901, provides:

"A judge aggrieved by a decision of the court of the judiciary may appeal to the supreme court. The supreme court shall review the record of the proceedings on the law and the facts."

Policy Institute, supra; in the events preceding Chief Justice Moore's issuance of the January 6, 2016, administrative order; in the events following Chief Justice Moore's issuance of that order; and in events surrounding Chief Justice Moore's failure to recuse himself in Ex parte State ex rel. Alabama Policy Institute, supra.

The Canons of Judicial Ethics require that a judge disqualify herself or himself when her or his impartiality might reasonably be questioned. Canon 3C(1). For example, a judge's impartiality might reasonably be questioned when she or he has "personal knowledge of disputed evidentiary facts concerning the proceeding." See Canon 3C(1)(a). Because the Justices have personal knowledge of the facts and circumstances underlying this appeal, this appeal presents a situation in which all the Justices' impartiality might be questioned.

Chief Justice Moore, however, must be afforded an opportunity to be heard. The common-law Rule of Necessity applies when circumstances exist that require a judge to take action in a case in which the judge should otherwise be recused "'if the case cannot be heard otherwise.'" United States v. Will, 449 U.S. 200, 213 (1980)(quoting F. Pollack,

A First Book of Jurisprudence 270 (6th ed. 1929)). Because this appeal presents such a situation, this Court defers recusal of its Justices until a mechanism is provided for Chief Justice Moore's appeal to be heard.

Applying this Court's precedent, see this Court's December 11, 2003, order in Moore v. Judicial Inquiry Commission, 891 So. 2d 848 (Ala. 2004), this Court authorizes the Acting Chief Justice to participate with the Governor in causing cause the names of 50 judges to be drawn at random from a pool of all retired appellate justices and judges, retired circuit court judges, and retired district court judges, who are members of the Alabama State Bar, capable of service, and residents of the State of Alabama. The names of the 50 judges drawn shall be placed on a list in the order in which the names are drawn, and the first 7 judges shall constitute the special Supreme Court that will hear Chief Justice Moore's appeal. In the event any judge so selected is not willing and able to serve, then that judge's place shall be filled by the next judge on that list in order of selection who is willing and able to serve, until seven judges willing and able to serve have been selected. The names of such judges shall then be certified to the Governor.

Done this the 24th day of October, 2016.

Lyn Stuart

Lyn Stuart

Michael F. Bolin

Michael F. Bolin

Greg Shaw

Greg Shaw

James Allen Main

James Allen Main

Tommy Elias Bryan

Tommy Elias Bryan

Parker, Murdock, and Wise, JJ., dissent.

STUART, Acting Chief Justice (concurring specially).

Today, in accordance with its precedent in Moore v. Judicial Inquiry Commission, 891 So. 2d 848 (Ala. 2004), this Court provides Chief Justice Moore with a mechanism for his appeal to be heard. The mechanism set forth in the order authorizes the Acting Chief Justice to ensure that a special Supreme Court is constituted to hear Chief Justice Moore's appeal. Accordingly, acting under the common-law Rule of Necessity and in adherence to this order, I will fulfill the duties and responsibilities authorized in the order. Upon completion of those duties and responsibilities, I will recuse myself from this case.

SHAW, Justice (concurring specially).

In Moore v. Judicial Inquiry Commission, 891 So. 2d 848 (Ala. 2004), Chief Justice Roy S. Moore appealed to this Court his removal from office by the Court of the Judiciary in 2003. In a separate unpublished order of recusal issued on December 11, 2003, the eight Associate Justices of this Court stated:

> "Roy S. Moore filed a notice of appeal ... in which he described the issues as including:
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> > "'Was the decision of the Court [of the Judiciary] supported by clear and convincing evidence?'
>
> "The Canons of Judicial Ethics require that a judge should disqualify herself or himself when her or his impartiality might reasonably be questioned. Canon 3C(1). Illustrations of circumstances when impartiality might reasonably be questioned include when a judge 'has personal knowledge of disputed evidentiary facts concerning the proceeding.' See Canon 3C(1)(b)."

Following the issuance of the order in which all the remaining Justices recused themselves, a special Supreme Court of seven Justices was appointed to hear Chief Justice Moore's appeal.

As was the case in Moore, one of the issues raised by Chief Justice Moore in his notice of appeal in the instant case is whether the evidence supporting his suspension from office was sufficient. Like the Associate Justices in Moore, I have personal knowledge of the disputed evidentiary facts.

Like those Justices, I recuse myself from this case.

The separate order of recusal in Moore recognized that, if all the Justices of this Court recuse themselves without providing a mechanism by which to appoint a special Supreme Court, then there would be no court to hear Chief Justice Moore's appeal. As this Court stated in its order in Moore, under the "Rule of Necessity," the Justices may thus, even if required to recuse, create a mechanism to provide for the selection of Justices for a special Supreme Court:

> "If the entire Court were to recuse based on Canon 3C(1) without first providing Roy S. Moore the opportunity to be heard by a tribunal acting according to law as a special Supreme Court, he would be denied a constitutional right secured to him by [§ 157(b), Ala. Const. 1901]. Under the common law Rule of Necessity, there are circumstances when a judge must take action in a case in which the judge should otherwise be recused 'if the case cannot be heard otherwise.' United States v. Will, 449 U.S. 200, 213 (1980). This Court therefore defers recusal until it has provided a mechanism for affording Roy S. Moore a right to be heard.
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> "Section [149, Ala. Const. 1901,] authorizes the Chief Justice, as administrative head of the judicial system, to 'assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court.' Section [161(h), Ala. Const. 1901,] provides, 'Except to the extent inconsistent with the provisions of this

> article, all provisions of law and rules of court in force on the effective date of this article shall continue in effect until superseded in the manner authorized by the Constitution.' Emphasis added. Section 12-2-14, Ala. Code 1975[,] provides that, when 'no one of the judges is competent to sit in a case or the number is reduced below six, the fact shall be certified by the Chief Justice, if he is competent to sit, or, if not, by the judge or judges sitting, or, if no one is competent, by the clerk of the court to the Governor, who shall thereupon appoint members of the bar of the Supreme Court to constitute a special court of seven members for the consideration and determination of such case.'
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> "Under the unique circumstances of this proceeding, we resolve any potential conflict between §§ [149] and [161(h)] and § 12-2-14, Ala. Code 1975[,] by authorizing the acting Chief Justice to participate with the Governor in a random drawing of 20 judges from a pool of retired judges who are members of the Alabama State Bar, capable of service. From the 20 judges so drawn, the first 7 judges shall constitute the special Supreme Court. In the event any judge so selected is not willing and able to serve, then that judge's place shall be filled by the next judge in order of selection who is willing and able to serve until seven judges willing and able to serve have been selected."

We have, in the instant case, created a mechanism like that used in Moore to provide for the selection of a special Supreme Court. This mechanism does not provide that only sitting circuit court judges can be members of the pool from which the special Supreme Court is selected and, therefore, is not exactly the same mechanism as the one Chief Justice Moore

proposes in his motion seeking the recusal of members of this Court. However, Chief Justice Moore does not present an argument as to why this Court should not follow our previous practice. I am confident that the special Supreme Court Justices selected by our mechanism will follow the law.

In the above order in Moore, it was noted that there was a "potential conflict" between §§ 149 and 161(h) and § 12-2-14. Section 149 provides that "[t]he chief justice of the supreme court shall be the administrative head of the judicial system," who "may assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court." However, § 12-2-14, which predates § 149, provides a contrary procedure:

> "When by reason of disqualification the number of judges competent to sit in a case is reduced to eight or to six and there is equal division among them on any question material to the determination of the case, the fact shall be certified by the Chief Justice or, when he is disqualified, by the judges sitting to the Governor, who shall thereupon appoint a member of the bar of the Supreme Court to sit as a judge of said court in the determination of said case. Similarly, when by reason of disqualification no one of the judges is competent to sit in a case or the number is reduced below six,

> the fact shall be certified by the Chief Justice, if he is competent to sit, or, if not, by the judge or judges sitting, or, if no one is competent, by the clerk of the court to the Governor, who shall thereupon appoint members of the bar of the Supreme Court to constitute a special court of seven members for the consideration and determination of such case."

It appears that the selection of judges or justices for temporary service is designated by the Constitution as an administrative function of the judicial branch. Such power may not be delegated to, or exercised by, the Governor, who is a member of the executive branch. See § 43, Ala. Const. 1901 ("[T]he executive shall never exercise the legislative and judicial powers, or either of them ...."). Therefore, because it provides that the Governor would select temporary judges and justices, § 12-2-14 appears unconstitutional. Alternately, because § 12-2-14 is "inconsistent" with § 149, then § 161(h) requires that it is superseded.

Further, as Chief Justice Moore notes in his motion, § 12-2-14 was declared unconstitutional to the extent that it provided that the Governor, rather than the Chief Justice, has the power to appoint temporary judges and justices. City of Bessemer v. McClain, 957 So. 2d 1061, 1095 (Ala. 2006) (opinion on second rehearing) ("We hold § 12-2-14, Ala. Code

1975, invalid to the extent that it improperly restricts the Chief Justice's constitutionally granted power to assign Special Justices to serve temporarily on this Court."). McClain, however, specifically addressed the first portion of § 12-2-14, which governs the selection of a replacement Justice when there is an even split on the Court. This case involves the selection of Justices when all members of the Court recuse themselves, which was not addressed under the facts in McClain. Although, under the rationale of McClain and the requirements of § 43, the second portion of § 12-2-14 likewise appears unconstitutional, it has not yet been declared so by any court. Nevertheless, the hybrid selection mechanism adopted by this Court in Moore and the similar system adopted today--in which the Chief Justice's selection is ratified by the Governor--would appear to satisfy both § 12-2-14 and § 149. Therefore, I concur with the order adopting that mechanism.

PARKER, Justice (dissenting).

I dissent from the Court's order.

Only judges accountable to the people of Alabama through our election process, and not unaccountable retired judges, should be appointed to decide Chief Justice Roy S. Moore's appeal. In his motion for recusal filed with this Court, Chief Justice Moore requests that only active circuit court judges be appointed to consider his appeal. I would grant Chief Justice Moore's request, but I would not limit the selection to only circuit court judges; appellate judges are also accountable to the people of Alabama through the election process. The Court today orders that only retired judges and justices be appointed to the special Supreme Court that will decide Chief Justice Moore's appeal; I dissent from that aspect of the Court's order.

By the order of the Court, the special Supreme Court will be appointed, in part, pursuant to § 149, Ala. Const. 1901, which states that "[t]he chief justice may assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court." The plain language of § 149 does not mandate that retired judges be appointed, but it does

allow for such appointments. However, a permissible action is not always the prudent action.

To be clear, I am not taking the position that only active judges should always be appointed when there is a temporary vacancy to be filled. On the contrary, I have the utmost confidence in Alabama's retired judges to decide the vast majority of cases they are appointed to decide. However, given the political nature of this specific case, I would appoint only judges who are accountable to the people of Alabama through the election process.

A historical review of Alabama's Constitution demonstrates that the people of Alabama have increasingly sought to bring accountability to Alabama's judges. Under the Constitution of 1819, Alabama's first constitution after statehood, judges were elected by a joint vote of both houses of the Alabama Legislature, and their terms were not limited. See Ala. Const. 1819, Art. V. However, as early as 1830, the Constitution of 1819 was amended to bring accountability to all Alabama judges in the form of six-year term limits. Judges could be reelected every six years until they reached the age of 70, at which time they had to retire. Id. In

1850, the people of Alabama brought even greater accountability to the judiciary by again amending the Constitution of 1819 to provide for the popular election of circuit, probate, and inferior court judges; the Justices of this Court continued to be elected by the Legislature. However, the Constitution of 1868 took the election of the Justices to this Court from the Legislature and gave it to the people of Alabama. Alabama's current constitution retained these measures to keep the judges of Alabama accountable to Alabama's citizens.

As history demonstrates, the people of Alabama have progressively sought to impose a greater degree of accountability on their judges. Today, judges and justices in Alabama are chosen by popular election and must stand for reelection before the people of Alabama every six years. This accountability is the best way to ensure that Alabama judges and justices will uphold the rule of law by faithfully applying the laws passed by the people of Alabama through the Legislature and not seek to twist the law into conformance with their personal feelings of what the law ought to be.

More recently, as the national Democratic Party became

increasingly more liberal, it brought about a massive change in political-party alignment in Alabama. This resulted in a shift toward the election of Republican candidates at the State level. In response, liberal editorial boards and even a Democratic Chief Justice called for Alabama to abandon electing judges and justices and, instead, adopt a system by which judges and justices would be appointed. But the Legislature and the people were not interested in abandoning Alabama's electoral accountability for judges.[1]

Alabama's process of electing its judges and justices and requiring that they stand for reelection every six years stands in stark contrast to the federal system of appointing judges for life. Alabama's judges are elected and accountable. Federal judges, as recently noted by Chief Justice Roberts in his dissent in Obergefell v. Hodges, ___ U.S. ___, ___, 135 S. Ct. 2584, 2624 (2015), a case in which "five lawyers" on the United States Supreme Court announced a

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[1]A listing of recent proposed but failed legislation to change Alabama's method of judicial selection includes: SB392/HB446 in the 2006 Regular Session; HB474 and HB710 in the 2007 Regular Session; SB137/HB170, SB144/HB169, and HB444 in the 2008 Regular Session; HB17, HB126, HB127, and HB548 in the 2009 Regular Session; and HB4 and HB542 in the 2010 Regular Session.

fundamental right to same-sex marriage, are "unaccountable and unelected." In fact, three of the four dissenting United States Supreme Court Justices in Obergefell noted on eight different occasions that the "five lawyers" who decided Obergefell were unelected. Chief Justice Roberts noted on two occasions that those unelected "five lawyers" were, consequently, unaccountable. As I explained in my special concurrence to the order entered on March 4, 2016, in Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___ So. 3d ___, ___ (Ala. 2015), the unelected and unaccountable "five lawyers" constituting the majority in Obergefell did not base their decision "on legal reasoning, history, tradition, the Court's own rules, or the rule of law, but upon the[ir] empathetic feelings." Obergefell is the product of unelected and unaccountable judges.

Unelected and unaccountable judges are empowered to impose their agenda, instead of faithfully applying the rule of law. Obergefell is not the first case concerning same-sex marriage to prove this principle true. Before the United States Supreme Court decided Obergefell, the constitutionality of state laws defining marriage as between one man and one

woman had been litigated before numerous courts throughout the United States. Before Obergefell, 40 states passed laws affirming traditional marriage. In 37 of those states, the traditional marriage laws were challenged in the courts as unconstitutional. Of the 37 state laws affirming traditional marriage that were challenged in the courts, 24 of those laws were struck down by the judiciary as unconstitutional. Each of the 24 courts that struck down the traditional marriage laws as unconstitutional was composed of judges who were unelected and thus unaccountable. Unelected judges are unaccountable judges.

The Supreme Court of Iowa was one of the unelected courts that struck down Iowa's traditional marriage law as unconstitutional. The judges on the Supreme Court of Iowa are appointed by the Governor of Iowa. However, although the judges are initially appointed, they must stand for retention elections once their initial term expires. The Iowa Legislature passed into law a statute, Iowa Code § 595.2, defining marriage as between one man and one woman. Section 595.2 was challenged in the Iowa courts as violative of the Iowa Constitution's equal-protection clause. In April 2009,

in a decision largely viewed as judicial activism, the Supreme Court of Iowa unanimously overruled the democratic will of the people of Iowa and held § 595.2 unconstitutional under Iowa's equal-protection clause. See Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). The very next year, three of the judges on the Supreme Court of Iowa who had concurred in Varnum had to stand for a retention election; all three were removed from office by vote of the people of Iowa. This was the first time since Iowa adopted its retention-election system that any judge had ever failed to be retained. The people of Iowa held accountable those judges who failed to uphold the rule of law.

The people of Alabama should have the opportunity to hold their judges accountable in all cases, and particularly in those cases that present social or political issues. Given the political nature of Chief Justice Moore's case, this Court should honor the stated preference of the people of Alabama for the accountability of judges by having only sitting elected judges serve on the special Supreme Court appointed to hear Chief Justice Moore's appeal. Accordingly, I dissent from the order providing otherwise.

WISE, Justice (dissenting).

I respectfully dissent from this Court's order establishing the procedure by which a special Supreme Court will be appointed to hear Chief Justice Moore's appeal only insofar as the order limits the pool of judges for temporary service to retired judges and justices. As noted in the order, the Chief Justice, as administrative head of the judicial system, is authorized to "assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court." § 149, Ala. Const. 1901. Therefore, I would cause the names of 50 judges to be drawn at random from a pool of both active and retired appellate justices and judges, circuit court judges, and district court judges, who are members of the Alabama State Bar, capable of service, and residents of the State of Alabama.