AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **August 2005**
From: **A. Eric Johnston**
Re: **U.S. Supreme Court Issues Ten Commandments Rulings: Part II**

Introduction

In last month's Educational Update, we reported on the two cases decided by the U.S. Supreme Court concerning the display of the Ten Commandments. The first case was *McCready County, Kentucky, et al v. American Civil Liberties Union of Kentucky, et al,* 2005 WL 1498988 (June 27, 2005) which held unconstitutional the hanging of Ten Commandments plaques in two county courthouses. The counties made three attempts to draft resolutions calling for the display, along with reproductions of other historic documents, which included, at one time or the other, the Star Spangled Banner, the Declaration of Independence, the National Motto, the Bill of Rights, the Mayflower Compact, and others. Writing for the majority of justices on the court (five), Justice Souter applied the *Lemon* test, finding that the efforts of the counties to display the Ten Commandments, even with other historical documents, was religiously motivated, had no secular purpose, and therefore, was an unconstitutional establishment of religion.

Following release of the *McCready* opinion was the opinion in *Van Orden v. Rick Perry, Governor of Texas*, 2005 WL 1500276 (June 27, 2005) which upheld the placement of a granite monolith with the Ten Commandments inscribed on it. It had been there about 40 years and was part of a display which over time came to include 21 historical markers and 17 monuments on the grounds of the State Capitol of Texas. This was acceptable according to the opinion by Chief Justice Rehnquist, with whom was joined Justices Scalia, Kennedy and Thomas, because it is constitutional for government to acknowledge religion. Justice Breyer joined these four because the monument had been there 40 years, but did not concur with their reasoning.

The questions we address this month are how the Kentucky and Texas Ten Commandments cases impact activities in Alabama: (1) Roy Moore's Ten Commandment monument; (2) the Foundations of Our Law display at the Alabama Judicial Building; and (3) the proposed Historic Documents Act.

Roy Moore's Ten Commandments Monument

The most obvious question is whether the U.S. Supreme Court would have upheld former Chief Justice Roy Moore's acknowledgement of God through the Ten Commandments monument that was placed in the Rotunda of the Alabama Judicial Building. The 11th Circuit Court of Appeals (an appellant court below the U.S. Supreme Court) found the monument unconstitutional and wrote a searing opinion. Much of the court's incredulity was directed at the religious rhetoric leading up to the placement of the monument and the circumstances of its placement, in the dead of night with the participation of a religious organization.

The *McCready* decision clearly established that any "religious motive" would cause a governmental display of the Ten Commandments in any form to be unconstitutional. Consequently, the religious rhetoric leading up to the Moore monument's location would have been a religious motive and therefore the monument's location unconstitutional. To say that Chief Justice Moore had a secular purpose when he placed the monument in the Alabama Judicial Building Rotunda is not possible. His stated purpose was religious. But that very difference brings us to an important point. The mere posting of the Ten Commandments as a historic document is a different argument than Moore's argument that we must acknowledge God. The latter was not addressed by *McCready* or *Van Orden*. Under either argument, we believe the U.S. Supreme Court would have found the monument to have been an unconstitutional establishment of religion.

Foundations of Our Law Display at the Alabama Judicial Building

Following the court action in Roy Moore's case, Governor Riley and then Attorney General Bill Pryor put together a display that was first put in the old Supreme Court Chamber at the State Capitol and then moved to the Alabama Judicial Building where it now resides. Along with the Ten Commandments, the display includes reproductions of the Magna Carta, the Mayflower Compact, the Bill of Rights, the 14th Amendment, and others. If we follow the reasoning of *McCready*, perhaps the motivation was religious. Although the Kentucky counties made three good faith attempts to display historical documents, among which included the Ten Commandments, the court said their motivation was religious. The display did not have the 40 year longevity of the Texas monument in *Van Orden*, which caused Justice Breyer to decide the Texas Ten Commandments display was constitutional. Consequently, if you apply the reasoning of *McCready* along with Justice Breyer's longevity vote in *Van Orden*, and since the display grew out of the Roy Moore case, the probable conclusion is that the current display in the Alabama Judicial Building is unconstitutional.

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The Historic Documents Act

For a number of years, the Alabama Legislature has considered but never passed a bill which would require the display of reproductions of the Ten Commandments, the Magna Carta, the Declaration of Independence and the Bill of Rights in public schools. The stated purpose has been from the beginning to give students a historic perspective on documents important to our founding and our culture. Justice Souter might very well attribute a religious motive to the display and therefore a violation of the *Lemon* test. Most probably, because the Act would have been passed in the State of Alabama following the protracted Moore case, Souter would attribute a religious motive to any legislative action as being directly related to Roy Moore's case. To demonstrate this, compare the U.S. Supreme Court striking down successive Alabama statutes to allow voluntary school prayer, including finally, a mere period of silence. *Wallace v. Jaffree*, 472 U.S. 38 (1985). Similar to the display in the Alabama Judicial Building, the fact that there are a number of historic documents would not seem to matter to the U.S. Supreme Court.

Analysis

Justice O'Connor has retired. Her vote against acknowledgement of religion is gone. How nominee John Roberts may vote, if confirmed, is unknown. The possible replacement of Chief Justice Rehnquist leads to another unknown. However, those unknowns are better than what we have now and there is the possibility that the role of religion in America may find its rightful place.

The Ten Commandments debate is not close to being completed. The debate is really the acknowledgement of the importance of religion in America's legal, political and cultural life and history. Roy Moore is correct in that we have a right to acknowledge God and to some it is a duty. Chief Justice Rehnquist and Justices Scalia and Thomas are correct that acknowledgement is not an establishment of religion.

There is little likelihood of a lawsuit on the display in the Alabama Judicial Building. If there were, we believe the display would be upheld as constitutional, notwithstanding Justice Breyer's longevity concern. We believe that with the possibility of different justices and additional facts, the court might change it's opinion. The additional facts to be carefully presented would include that the State of Alabama was attempting to comply with the secular prong of the *Lemon* test by demonstrating how a constitutional display of historic documents could be made. This is further demonstrated by the public opposition of the Governor and the Attorney General to the Chief Justice. This display would fall short of the "duty to acknowledge" argument of former Chief Justice Roy Moore, but it would address the need to recognize America's history, an important and unavoidable element of which is our religious heritage.

Similarly, a display of four historic documents under the proposed Historic Documents Act would explain our heritage. In the legislative findings of that bill, it clearly explains the respective roles of the four documents, acknowledging the religious portions, but explaining their integral relationship to the rights and privileges we now enjoy. One variable with that proposal is, however, that it would be locating the documents in a public school. *Stone v. Graham*, 449 U.S. 39 (1980) held unconstitutional displaying the Ten Commandments in a public school. In that case, the Ten Commandments alone had been posted and the court held that the Ten Commandments value is religious and not secular, and therefore did not have a secular purpose under *Lemon.* We believe the proposed Historic Documents Act meets the *Lemon* test and would be constitutional.

Some of Justice Souter's language is promising. For example, if viewers fairly understand the purpose of the display to be secular and not religious, it might be constitutional. He admits the Ten Commandments "have had an influence on civil or secular law." He explained that in the chambers of the U.S. Supreme Court itself it was permissible to depict Moses holding the tablets, because he was in the company of 17 other lawgivers. His reasoning suggests he may be open to further consideration of the issue, but probably not much.

The implication is that with a case that properly presents facts demonstrating a collection of historic documents, although some may be religious, a different court may hold it constitutional. Under this immediate past Supreme Court, those arguments would not have prevailed. The decision in *McCready* had five secure votes, a majority. *Van Orden* had four secure votes, a plurality. Breyer's swing vote cannot be counted as a vote for acknowledgement of religion. However, a change in one vote with a new justice will change the outcome. If he or she agrees with the plurality, it becomes a majority and Justice Breyer's longevity position becomes meaningless, which it is. We draw closer to the analysis provided by Scalia and Thomas and as has been opined by Chief Justice Rehnquist for many years, that the acknowledgement of religion is not an establishment of religion.

Conclusion

The efforts of former Chief Justice Roy Moore, two counties in Kentucky and the Texas state government have been decided. Those cases are over. Whether the other efforts in Alabama or the many other variations on the theme existing in other parts of the country will make their way through the courts to a suitable and full explanation is something for which we must wait. We will continue working toward the goal of finally honing what is permissible. One way we can do that is to pass the proposed Historic Documents Act which would give the courts the opportunity to affirm the role of religion as being important to our county and providing appropriate acknowledgement, thereby preserving our religious heritage. From it we can derive great value.

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