

## Removal of an Elected Official as a Violation of Voting Rights

*Kuhn v. Thompson*

(*Mark E. Fuller, M.D. Ala. 2:03-cv-1136*)

On Thursday, November 20, 2003, five voters filed a federal complaint in the Middle District of Alabama against the nine members of the Alabama Court of the Judiciary, challenging removal of the state's elected chief justice by the defendants, an appointed body, as a violation of voting rights.<sup>1</sup> With their complaint, the plaintiffs filed motions for a temporary restraining order and a preliminary injunction.<sup>2</sup>

The chief justice was removed from office because he violated an order by District Judge Myron H. Thompson by refusing to remove from the rotunda of Alabama's Judicial Building a granite Ten Commandments monument, the installation of which fulfilled a campaign promise.<sup>3</sup>

After a telephonic hearing on the day after the complaint was filed, Judge Mark E. Fuller denied the plaintiffs a temporary restraining order.<sup>4</sup> On January 23, 2004, Judge Fuller granted the defendants' motion to dismiss the complaint.<sup>5</sup>

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1. Complaint, *Kuhn v. Thompson*, No. 2:03-cv-1136 (M.D. Ala. Nov. 20, 2003), D.E. 1; *Kuhn v. Thompson*, 304 F. Supp. 2d 1313, 1317, 1320 & nn.1-2 (M.D. Ala. 2004); see *Moore's Ouster Challenged*, *Montgomery Advertiser*, Nov. 21, 2003, at C1.

2. Temporary Restraining Order Motion, *Kuhn*, No. 2:03-cv-1136 (M.D. Ala. Nov. 20, 2003), D.E. 5; Preliminary Injunction Motion, *id.* (Nov. 20, 2003), D.E. 3; *Kuhn*, 304 F. Supp. 2d at 1320-21.

3. *Kuhn*, 304 F. Supp. 2d at 1318-20; see *Glassroth v. Moore*, 278 F. Supp. 2d 1272 (M.D. Ala. 2003) (August 18, 2003, denial of a motion to stay the injunction); *Glassroth v. Moore*, 275 F. Supp. 2d 1347 (M.D. Ala. 2003) (dissolving the injunction stay and ordering removal of the monument within 15 days); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (affirming a finding of an Establishment Clause violation); *Glassroth v. Moore*, 242 F. Supp. 2d 1068 (M.D. Ala. 2002) (staying the injunction pending appeal); *Glassroth v. Moore*, 242 F. Supp. 2d 1067 (ordering removal of the monument); *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002) (finding an Establishment Clause violation); see also *Glassroth v. Moore*, 229 F. Supp. 2d 1283 (M.D. Ala. 2002) (denying a motion for recusal of the district court judge because the judge was more accommodating of the plaintiffs than of the chief justice in scheduling proceedings); *McGinley v. Houston*, 361 F.3d 1328 (11th Cir. 2004) (affirming the dismissal of an action challenging the removal of the monument as establishing nontheistic beliefs); *Alabama Judge Is Removed*, *Wash. Post*, Nov. 14, 2003, at A3; Jeffrey Gettleman, *Alabama Panel Ousts Judge Over Ten Commandments*, *N.Y. Times*, Nov. 14, 2003, at A16; *Moore Pledges to Continue Crusade*, *Montgomery Advertiser*, Nov. 14, 2003, at A9.

4. Order, *Kuhn*, No. 2:03-cv-1136 (M.D. Ala. Nov. 21, 2003), D.E. 11; Minutes, *id.* (Nov. 21, 2003), D.E. 13; *Kuhn*, 304 F. Supp. 2d at 1321.

Judge Fuller resigned on August 1, 2015. Federal Judicial Center Biographical Directory of Federal Judges, [www.fjc.gov/history/home.nsf/page/judges.html](http://www.fjc.gov/history/home.nsf/page/judges.html).

5. *Kuhn*, 304 F. Supp. 2d 1313; Docket Sheet, *Kuhn*, No. 2:03-cv-1136 (M.D. Ala. Nov. 20, 2003).

Because the chief justice's appeal to Alabama's supreme court seeking reversal of his removal was still pending, the defendants were entitled to the federal court's abstention pursuant to *Younger v. Harris*.<sup>6</sup> The defendants were also entitled to judicial immunity from the plaintiffs' claims under 42 U.S.C. § 1983, because "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."<sup>7</sup>

Judge Fuller also ruled that the plaintiffs failed to state a valid claim.<sup>8</sup> The voters' right to elect the chief justice did not include a right to keep him in office for his whole term.<sup>9</sup> Nor did the plaintiffs allege intentional discrimination or some other valid equal protection claim.<sup>10</sup>

The ousted chief justice's state court appeal was unsuccessful,<sup>11</sup> and he was replaced on June 23, 2004.<sup>12</sup> In November 2012, he was again elected chief justice,<sup>13</sup> but Alabama's Court of the Judiciary suspended him for the remainder of his term in September 2016 for instructing probate judges to defy federal court rulings on same-sex marriage.<sup>14</sup>

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6. *Kuhn*, 304 F. Supp. 2d at 1323–28.

7. *Id.* at 1321–23; 42 U.S.C. § 1983 (2015).

8. *Kuhn*, 304 F. Supp. 2d at 1328–37.

9. *Id.* at 1329–31, 1333–37.

10. *Id.* at 1331–33.

11. See Ariel Hart, *Alabama Justice's Ouster Upheld in Ten Commandments Case*, N.Y. Times, May 1, 2004, at A9; *Moore Loses Bid to Regain Job*, Montgomery Advertiser, May 1, 2004, at A1.

12. See *Nabers State's New Chief Justice*, Montgomery Advertiser, June 23, 2004, at A1.

13. See *Moore Wins Old Job Back*, Montgomery Advertiser, Nov. 7, 2012, at A1.

14. See Brian Lyman, *Court Rules Alabama Chief Justice Roy Moore Violated Ethical Rules in Issuing His Same-Sex Marriage Order*, Montgomery Advertiser, Oct. 1, 2016, at A8; Campbell Robertson, *Chief Justice in Alabama Is Suspended a Second Time*, N.Y. Times, Oct. 1, 2016, at A9; see also Brian Lyman, *Court to Hear Moore Appeal*, Montgomery Advertiser, Oct. 27, 2016, at A7 ("The Alabama Supreme Court will recuse itself from suspended Chief Justice Roy Moore's appeal of his ethics convictions, and defer to a special court to hear the appeal.").