Written by **Warren Mass** on March 1, 2013

Supreme Court Justices Critique Voting Rights Law

While reviewing a challenge to the Voting Rights Act of 1965, several Supreme Court justices questioned the need for continuing an important provision of the act (Section 5), which requires, due to racial issues at the time, certain geographic areas — mainly seven Southern states, Alaska, Arizona, and three boroughs of New York City, as well as numerous smaller jurisdictions — to obtain federal preclearance before making changes in voting laws.

When Congress reauthorized the law in 2006, and President George W. Bush signed it, it provided for a continuation of the formulas mandated by the original 1965 act. The challenge was presented in the case currently before the Court: *Shelby County v. Holder, No. 12-96*. (Shelby County is in Alabama and Eric Holder is the current Attorney General of the United States.) The Supreme Court heard oral arguments for the case on February 27.

A report Thursday in the *New York Times* quoted several of the justices, including Chief Justice John G. Roberts Jr., who asked skeptically whether "the citizens in the South are more racist than citizens in the North." Justice Anthony M. Kennedy, often regarded as a "swing" vote balancing others on the High Court considered to be "conservative" or "liberal," employed a classic states' rights argument in asking whether Alabama today is an "independent sovereign" or whether it must live "under the trusteeship of the United States government."

Justice Kennedy's statement provided more credence to the constitutional principle of state sovereignty than did a statement from Justice Samuel A. Alito Jr., usually described as a "conservative."

"There is no question that the Voting Rights Act has done enormous good," said Alito. "It's one of the most successful statutes that Congress passed in the 20th century and one could probably go farther than that."

While Justice Kennedy offered a plausible defense of states' rights, one statement he made was at least semantically at odds with the language of the Constitution. In an exchange with Solicitor General Donald B. Verilli, Jr., in which Kennedy asked whether it would be proper to make the entire nation subject to the Voting Act's provision — to which Verilli answered in the negative — Kennedy continued the exchange with the following comment:

> And that is because there is a federalism interest in each state being responsible to ensure that it has a political system that acts in a *democratic* and a civil and a decent and a proper and a constitutional way. [Emphasis added.]

Article IV, Section 4. of the Constitution states: The United States shall guarantee to every State in this Union a *Republican* Form of Government, …" (Emphasis added.)

Justice Antonin Scalia said the law, once viewed as a civil rights landmark, now amounted to a "perpetuation of racial entitlement."

The *Times* reported that Scalia's remark "created the sharpest exchange of the morning," when Justice

Sonia Sotomayor countered: "Do you think that the right to vote is a racial entitlement?"

Sotomayor later asked a lawyer challenging the law, with, noted the *Times*, "an edge in her voice that left little doubt she was responding to Justice Scalia's statement": "Do you think that racial discrimination in voting has ended, that there is none anywhere?"

An AP report in the *Boston Globe* on March 1 provided more statements from participants in the argument before the Court. Shelby County's lawyer Bert W. Rein, stated:

> If you base it on the findings of 1965 … We had a huge problem at the first passage of the Voting Rights Act, and the court was tolerant of Congress' decision that it had not yet been cured. There were vestiges of discrimination. So when I look at those statistics today and look at what Alabama has in terms of black registration and turnout, there's no resemblance.

During the course of the debate before the High Court, the Obama Administration's Solicitor General Donald B. Verrilli Jr. said: ''Everyone agrees that the significant progress that we've made is principally because of Section 5 of the Voting Rights Act. And it has always been true that only a tiny fraction of submissions result in objections.''

To which Justice Scalia appealed to the constitutional principles involved, stating:

> You could always say, Oh, there has been improvement, but the only reason there has been improvement are these extraordinary procedures that deny the states sovereign powers which the Constitution preserves to them. So, since the only reason it's improved is because of these procedures, we must continue those procedures in perpetuity.

In making his rebuttal, Scalia focuses more on the negative aspects of continuing the "extraordinary procedures" "in perpetuity" than on the argument that any procedure that is "extraordinary" is also *unconstitutional*. He did not explain if he thinks that it is acceptable for Congress to grant "extraordinary" powers for a period of time shorter than perpetuity.

Those who are strict constructionists of the Constitution believe that the founding document of our Republic provides the ultimate and best guarantee of our rights, and that "bending and stretching" the Constitution in an attempt to provide temporary relief to those whose rights may have been violated is futile.

Giving the federal government the power to overrule the states under the justification of protecting certain individual rights, they argue, cerates a precedent under which the Fed can destroy the states' power to protect many other rights of their citizens. Furthermore, unbridled federal power is ubiquitous and therefore much more difficult to check than isolated abuses of power at the state and local levels.

One prominent constitutional conservative who might have been expected to vote against the Voting Rights Act of 1965, Senator Barry Goldwater, was not a member of the Senate on May 26, 1965, when it voted 77-19 to pass the legislation. Goldwater's Senate term ended in January 1965, because in the 1964 election he was his party's presidential nominee, and he chose not to run for re-election.

However, Goldwater had been a highly visible opponent of the Civil Rights Act of 1964, which was similar to the 1965 act in that it increased federal power to intervene in state matters. He stated that the reason for his opposition to the bill was Title II (banning discrimination based on race, color, religion or national origin in hotels, motels, restaurants, theaters, and all other public accommodations) which, in his opinion violated individual liberty and states' rights.

One of the most vocal opponents of the 1964 legislation (which established a precedent that made

passage of the 1965 Voting Rights Act possible) came from Senator Strom Thurmond (D-S.C.): "These so-called Civil Rights Proposals, which the President has sent to Capitol Hill for enactment into law, are unconstitutional, unnecessary, unwise and extend beyond the realm of reason. This is the worst civil-rights package ever presented to the Congress and is reminiscent of the Reconstruction proposals and actions of the radical Republican Congress."

Goldwater explained his reasons for voting against the Civil Rights Act of 1964 and also his opinion on the Voting Rights Act, while appearing on a *Firing Line* television program with William F. Buckley, Jr. in 1966.