Yesterday's Voting Rights Act Oral Argument : Shelby County Counsel Bert Rein Staggers Through Early Verbal Gauntlet Into Scalia's and Alito's Fond Embrace

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Michael Matthew Bloomer, February 28, 2013

Alabama, you got
The weight on your shoulders
That's breaking your back.
Your Cadillac
Has got a wheel in the ditch
And a wheel on the track

Neil Young, Alabama
Harvest (1972)

[caption id="" align="alignright" width="350"]

"Be as polite as possible, Mr. Rein."[/caption]

What *are* you doing Alabama?

Yesterday's oral argument did not begin well for Bert W. Rein, Shelby County's lead counsel in the blockbuster Voting Rights Act case, *Shelby County v. Holder*. The word "gauntlet" comes to mind, an ordeal swiftly doled out by Justices Sotomayor, Ginsburg, and Kagan. It was left to Justice Anthony Kennedy to calm the fray a bit. Inevitably, though, Rein fell into the loving arms of the dark eminences, Justices Scalia and Alito (while their brother dark eminence, Justice Thomas, retained his usual oral argument quietude).

Nonetheless, the initial four questioners - a literal minority of the Court - sought to undress and uncover an obvious truth: Despite Rein's arguments, and the state's voting rights kicking-and-screaming progress since 1965, on its overall record, Alabama has "a wheel in the ditch and a wheel on the track." Still.

Putting aside the legal and practical value of the three Madame Justices' fully unplugged and unapologetic attack, and despite Justice Kennedy's merciful intervention on everyone's behalf, the questioners made an essentially moral argument supported by an empirical argument. Alabama, despite whatever racial justice progress the state has achieved since the 1960's,[1] still seeks to interfere with voting rights [2] not as in the past with havoc and poll taxes and literacy tests, but with newer and subtler methods called "second generation barriers." [3]

Perhaps this case will, like the Affordable Care Act decision last March, cause happily raised eyebrows from progressives. Will Chief Justice Roberts again provide the swing vote? Nonetheless, if Justice Scalia's intemperate, bellicose, and anti-republican government statements at the *Shelby* oral argument are foreshadowing the ultimate ruling, the Voting Rights Act's Section 5 preclearance provision will itself run the gauntlet of a starkly angry and conservative-dominated court, and it, unlike Bert Rein, may not survive.

Read on for the gauntlet portion of yesterday's oral argument. In the end, petitioner's counsel Rein arrived into the warm embrace of Justices Scalia and Alito, who took it upon themselves to confuse the proceeding entirely. [See full transcript, at pages 9 and 10]

P R O C E E D I N G S
[for the full transcript]
([Feb. 27, 2013] - 10:14 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-96, Shelby County v. Holder.

Mr. Rein?

ORAL ARGUMENT OF BERT W. REIN ON BEHALF OF THE PETITIONER

MR. REIN: Mr. Chief Justice, and may it please the Court:

Almost 4 years ago, eight Justices of the Court agreed the 2005 25-year extension of Voting Rights Act Section 5's preclearance obligation, uniquely applicable to jurisdictions reached by Section 4(b)'s antiquated coverage formula, raised a serious constitutional question.

Those Justices recognized that the record before the Congress in 2005 made it unmistakable that the South had changed. They questioned whether current remedial needs justified the extraordinary federalism and cost burdens of preclearance.

JUSTICE SOTOMAYOR: May I ask you a question? Assuming I accept your premise, and there's some question about that, that some portions of the South have changed, your county

pretty much hasn't.

MR. REIN: Well, I -

JUSTICE SOTOMAYOR: In -- in the period we're talking about, it has many more discriminating -240 discriminatory voting laws that were blocked by Section 5 objections.

There were numerous remedied by Section 2 litigation. You may be the wrong party bringing this.

MR. REIN: Well, this is an on-face challenge, and might I say, Justice Sotomayor -

JUSTICE SOTOMAYOR: But that's the standard. And why would we vote in favor of a county whose record is the epitome of what caused the passage of this law to start with?

MR. REIN: Well, I don't agree with your premises, but let me just say, number one, when I said the South has changed, that is the statement that is made by the eight Justices in the Northwest Austin case. And I certainly -

JUSTICE GINSBURG: And Congress -- Congress said that, too. Nobody -- there isn't anybody in -- on any side of this issue who doesn't admit that huge progress has been made. Congress itself said that. But in line with Justice Sotomayor's question, in the D.C. Court of Appeals, the dissenting judge there, Judge Williams, said, "If this case were about three States,

Mississippi, Louisiana, and Alabama, those States have the worst records, and application of Section 5 to them might be okay."

MR. REIN: Justice Ginsburg, Judge Williams said that, as he assessed various measures in the record, he thought those States might be distinguished. He did not say, and he didn't reach the question, whether those States should be subject to preclearance. In other words, whether on an absolute basis, there was sufficient record to subject them -

JUSTICE KAGAN: But think about this State that you're representing, it's about a quarter black, but Alabama has no black statewide elected officials. If Congress were to write a formula that looked to the number of successful Section 2 suits per million residents, Alabama would be the number one State on the list.

If you factor in unpublished Section 2 suits, Alabama would be the number two State on the list. If you use the number of Section 5 enforcement actions, Alabama would again be the number two State on the list.

I mean, you're objecting to a formula, but under any formula that Congress could devise, it would

capture Alabama.

MR. REIN: Well, if -- if I might respond, because I think Justice Sotomayor had a similar question, and that is why should this be approached on face. Going back to Katzenbach, and all of the cases that have addressed the Voting Rights Act preclearance and the formula, they've all been addressed to determine the validity of imposing preclearance under the circumstances then prevailing, and the formula, because Shelby County is covered, not by an independent determination of Congress with respect to Shelby County, but because it falls within the formula as part of the State of Alabama. So I -- I don't think that there's any reluctance upon on this -

JUSTICE SOTOMAYOR: But facial challenges are generally disfavored in our law. And so the question becomes, why do we strike down a formula, as Justice Kagan said, which under any circumstance the record shows the remedy would be congruent, proportional, rational, whatever standard of review we apply, its application to Alabama would happen.

MR. REIN: There -- there are two separate questions. One is whether the formula needs to be addressed. In Northwest Austin, this Court addressed the formula, and the circumstances there were a very small jurisdiction, as the Court said, approaching a very big question.

It did the same in Rome, the City of Rome. It did the same in Katzenbach. The -- so the formula itself is the reason why Shelby County encounters the burdens, and it is the reason why the Court needs to address it.

JUSTICE SOTOMAYOR: Interestingly enough, in Katzenbach the Court didn't do what you're asking us to do, which is to look at the record of all the other States or all of the other counties. It basically concentrated on the record of the two litigants in the case, and from that extrapolate -- extrapolated more broadly.

MR. REIN: I don't think that -

JUSTICE SOTOMAYOR: You're asking us to do something, which is to ignore your record and look at everybody else's.

MR. REIN: I don't think that's a fair reading of Katzenbach. In Katzenbach, what the Court did was examined whether the -- the formula was rational in practice and theory. And what the Court said is, while we don't have evidence on every jurisdiction that's reached by the formula, that by devising two criteria which were predictive of where discrimination might lie, the Congress could then sweep in jurisdictions as to which it had no specific findings.

So we're not here to parse the jurisdictions. We are here to challenge this formula because in and of itself it speaks to old data, it isn't probative with respect to the kinds of discrimination that Congress was focusing on and it is an inappropriate vehicle to sort out the sovereignty of

individual States.

I could tell you that in Alabama the number of legislators in the Alabama legislature are proportionate to the number of black voters. There's a very high registration and turnout of black voters in Alabama. But I don't think that that really addresses the issue of the rationality in theory and practice in the formula.

If Congress wants to write another statute, another hypothetical statute, that would present a different case. But we're here facing a county, a State that are swept in by a formula that is neither rational in theory nor in practice. That's the -- that's the hub of the case.

JUSTICE KENNEDY: I suppose the thrust of the questions so far has been if you would be covered under any formula that most likely would be drawn, why are you injured under this one?

MR. REIN: Well, we don't agree that we would be covered under any formula.

JUSTICE KENNEDY: But that's -- that's the hypothesis. If you could be covered under most suggested formulas for this kind of statute, why are you injured by this one? I think that's the thrust of the question.

MR. REIN: Well, I think that if -- if Congress has the power to look at jurisdictions like Shelby County individually and without regard to how they stand against other States -- other counties, other States, in other words, what is the discrimination here among the jurisdictions, and after thoroughly considering each and every one comes up with a list and says this list greatly troubles us, that might present a vehicle for saying this is a way to sort out the covered jurisdictions -"

Enter now . . . Justices Alito and Scalia . . . For their comments see full transcript, at pages 9 and 10, etc.

I'm from a new land
I come to you
And see all this ruin
What are you doing Alabama?

Neil Young, *Alabama*

1. For example, Alabama's present House includes 25, or 24%, African Americans of the 105 total; the Senate includes seven, or 25%, of 28 total ?

2. *See, for example,* Alabama's 2011 voter ID law (effective date: "photo identification requirements of this act shall be operative in the first statewide primary for 2014"). The law, however, presently requires preclearance under VRA §5, and the Alabama AG has delayed submitting the law to the Department of Justice until the *Shelby v. Holder* ruling, a choice both as ironic as it is strategic. *Also see*, Alabama's Republican right wing "rising star" Bryan Tayor's SB 155, introduced on Feb. 7, 2013, which, under provisions already in place, would further shorten from 10 to 17 days the time one may register in all Alabama counties except Jefferson County, home of the state's largest city, Birmingham. ?
3. Section 2 of the 2006 reauthorization of the Voting Rights Act mentioned 2nd generation barriers, Public Law 109-246, 120 STAT. 577, July 22, 2006:

"SEC. 2. CONGRESSIONAL PURPOSE AND FINDINGS. (a) Purpose.--The purpose of this Act is to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution.

(b) Findings.--The Congress finds the following:

> (1) Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.
>
> (2) However, vestiges of discrimination in voting continue to exist as demonstrated by **second generation barriers** constructed to prevent minority voters from fully participating in the electoral process." (For PL 109-246 in full) ?