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High court questions legality of Voting Rights Act

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Congress renewed the Voting Rights Act of 1965 three years ago with wide bipartisan support. But on Wednesday, the future of the law seemed in peril, as conservative members of the Supreme Court expressed strong doubt about its constitutionality.

The Court heard oral arguments in *Northwest Austin Municipal Utility District Number One v. Holder*, a challenge to the pre-clearance provisions of the law which require that certain jurisdictions, but not others, submit proposed changes in voting laws or procedures to the Justice Department for approval to prevent dilution of minority voting power.

Justice Anthony Kennedy, whose vote will be crucial, voiced deep concern about the differential treatment of states under the law, and the affront to the sovereignty of the states that are required to go through the preclearance procedures.

In passing the law, Kennedy said, Congress "has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. ... And the governments in one state are to be trusted less than the governments in the others." At another point Kennedy said, "No one questions the validity, the urgency, the essentiality of the Voting Rights Act," but he added, "The question is whether or not it should be continued with this differentiation between the states." That concern for sovereignty may mean he'll side with Court's conservative wing to form a majority to strike down the law.

As soon as the arguments were over, the audio was released to the media, and within minutes bloggers and others were offering their predictions about the outcome. Most foresaw bad news for civil rights advocates. J. Gerald Hebert, executive director of the Campaign Legal Center, who supports the preclearance provisions, came away thinking that Kennedy's comments were "more negative than positive," making him a possible but not certain loss to his side.

"The more likely scenario is five votes to strike down the Act," said Rick Hasen, a professor at Loyola Law School in Los Angeles who writes the Election Law Blog, after live-blogging the argument from the audio. But Hasen and others said that if Section 5 of the law—the pre-clearance provision—is struck down, an emboldened Democratic Congress may respond by passing what he called "a new and perhaps even better Voting Rights Act."

In the case before the Court the small utility district in Texas, a covered jurisdiction, filed suit challenging the renewed Voting Rights Act soon after it was passed. It claimed that with changes in society and voting patterns, the pre-clearance provisions are no longer required and are unconstitutional. "After 20 years of steadfast compliance with the Voting Rights Act, [the district] is entitled to be free from the intrusive burdens of preclearance," the district's lawyer Gregory Coleman of Yetter, Warden & Coleman in Austin told the justices.

Coleman's brief had offered the election of the first African-American as president last fall as evidence that pre-clearance is not needed, but Barack Obama was not mentioned by name during the argument. Wednesday was the final day of arguments for the current term, leaving the justices with May and June to complete writing of decisions in already-argued cases.

Justice Ruth Bader Ginsburg and other justices on the liberal side countered Coleman's argument by noting that Congress had made findings that the law was still needed because of what Ginsburg described as "second generation discrimination," where "the discrimination becomes more subtle, less easy to smoke out." Justice David Souter also said that no matter what progress has been made, pre-clearance is needed to keep discrimination from creeping back to weaken minority voter participation. "In the real world," Souter said, "if the Section 5 safeguard is taken away, the pushback is going to start. It has never stopped."

Deputy Solicitor General Neal Katyal also defended the law as a "paradigmatic" example of "what to do in Congress." Instead of reflexively renewing the law, he said, Congress held numerous hearings and gathered evidence on whether the law was still needed. "Congress looked at the evidence and determined that their work was not done."

Chief Justice John Roberts Jr. questioned that assertion, noting that only a small fraction of voting changes that are submitted for pre-clearance are denied. But that means that "Section 5 is actually working very well, that it provides a deterrent," Katyal countered.

Roberts brushed off that argument, analogizing it to an "elephant whistle" that someone might boast about. "There are no elephants, so it must work."

Justice Antonin Scalia also made light of the claim that widespread congressional support for the law's renewal deserved deference from the Court. "Everybody who voted for this system was elected under this system," said Scalia. "Should it be surprising that they think it's a good idea?"

Debo Adegbile, litigation director of the NAACP Legal Defense and Educational Fund, argued that "racial discrimination in voting has been persistent and adaptive," making Section 5 still essential. Picking up on Kennedy's concern about the differential treatment of covered and non-covered states under the law, Justice Stephen Breyer asked Adegbile why Congress did not consider applying the pre-clearance requirement to states other than those already covered.

Said Adegbile, "It wanted to stay the course of ridding the covered jurisdictions from discrimination."

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