Voting Rights Act Supporters See Glimmers Of Hope In Anthony Kennedy

By: Sahil Kapur - February 28, 2013

After brutal questioning from conservative justices during Supreme Court oral arguments Wednesday, supporters of the Voting Rights Act were searching for signs of hope that one of the signature achievements of the civil rights movement will survive.

There wasn't much to cling to, but proponents of the law heard some things from Justice Anthony Kennedy that made him seem at least plausibly in play, unlike the other conservative justices.

"I think Justice Kennedy was very methodical and deliberate in his assessment," Texas State Rep. Trey Martinez Fischer (D), an outspoken voting rights advocate, told TPM after witnessing the argument. "I don't think he showed anybody anything. I think what he showed is that he knows the Voting Rights Act very well, and knows the case very well."

In his questioning, Kennedy expressed profound skepticism of the validity and fairness of Section 5, sounding far from convinced that the preclearance requirement for specific state and local governments passed constitutional muster under the equal protection clause. He even compared it to antiquated programs like the Marshall Plan and said "times change."

But other times, he wrestled with a central question in the case: whether the jurisdictions covered under Section 5 are in fact the most likely to pass discriminatory voter laws, and whether other provisions of the Voting Rights Act provide enough tools to snuff them out.

Kennedy also asked the challenger's lawyer Bert Rein whether the "reverse engineering" approach Congress used to ensure coverage of certain states was "appropriate under the test of congruence and proportionality." If so, he wondered, "What is wrong with that?"

Later in the argument, he asked whether it would be an "effective remedy" to simple "bail in" jurisdictions to the preclearance requirement rather than use a formula to determine which state and local governments are covered. His follow-ups were limited.

David Gans, the director of the Civil Rights Program at the liberal-leaning Constitutional Accountability Center, admitted that the "conservative bloc of the Court was skeptical about the Act," but said there were "glimmers of hope" in Kennedy.

"At points during the oral argument, Justice Kennedy asked questions suggesting that he appreciated the irony that Shelby County, with its robust recent record of racial discrimination, was challenging the Voting Rights Act," Gans said. "He seemed to understand that the Federal government needs to continue to carefully monitor the voting rights practices of jurisdictions such as Shelby County. Hopefully that will lead him to uphold, rather than strike down, this iconic civil rights law."

Still, opponents of Section 5 are cautiously optimistic about winning over Kennedy.

"If I had to put down money," said Ilya Shapiro, a senior fellow at the Cato Institute, "I would say it'll be 5-4 for striking down either Section 5 altogether or at least the Section 4 coverage formula. I have maybe a 60 percent confidence level in that. Kennedy is indeed the most likely swing vote — but of course that's what the conventional wisdom also said about [the health care case]."

Proponents of the law believe the four-liberal leaning justices are firmly in their camp on upholding Section 5. Some aren't ready to publicly give up on Chief Justice John Roberts, despite his overtly hostile questioning and long record of skepticism toward their cause.

"I think the silver lining is ultimately that oral arguments are rarely a predictor of outcomes of the case. We've seen that in so many other examples," Caroline Fredrickson, president of the liberal-leaning American Constitution Society, told TPM after the argument.

In the end, Kennedy deemed Section 5 "utterly necessary in 1965" but wasn't convinced it still is.

"But with a modern understanding of the dangers of polling place changes," he said, "with prospective injunctions, with preliminary injunctions, it's not clear — and with the fact that the Government itself can commence these suits, it's not clear to me that there's that much difference in a Section 2 suit now and preclearance. I may be wrong about that. I don't have statistics for it. That's why we're asking."