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Supreme Court Justice equates Black voting rights with ‘racial entitlements’

By GEORGE E. CURRY

NNPA Editor-in-Chief

WASHINGTON (NNPA) – In the oral arguments last week before the Supreme Court to determine whether a key section of the Voting Rights Act should be upheld, Justice Antonin Scalia referred to the provision as "perpetuation of racial entitlement."

It was the kind of comment that could easily spark a demonstration in front of the court. But when Scalia made his comment about the pre-clearance provision of the 1965 law last Wednesday, there were already protesters in front of the U.S. Supreme Court marching in support of the Voting Rights Act.

The Voting Rights Act was originally passed in 1965. When Section 5 was scheduled to expire, it was extended by Congress in 1970, 1975, 1982 and for another 25 years in 2006. It was approved the last time with broad bipartisan support. It passed the House by a 390-33 margin and the Senate 98-0.

Under Section 5 of the 1965 Voting Rights Act, jurisdictions with a history of racial discrimination must receive pre-clearance from the Justice Department or a federal court before they are allowed to make any changes in their voting procedures.

Inside the court, Scalia addressed the various extensions of the Voting Rights Act since its passage.

"…The initial enactment of this legislation in a – - a time when the need for it was so much more abundantly clear – - in the Senate, there – - it was double-digits against it. And that was only a 5-year term. Then, it is reenacted five years later, again for a 5-year term. Double-digits against it in the Senate. Then it was reenacted for seven years, Single digits against it. Then enacted for 25 years, eight Senate votes against it. And this last enactment, not a single vote in the Senate against it. And the House is pretty much the same.

Scalia then said, "Now, I don't think that's attributable to the fact that it is so much clearer now that we need this. I think it is attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement. It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political process."

Justice Sonia Sotomayor did not let Scalia’s entitlement comment go unchallenged.

She pressed Bert W. Rein, the lawyer representing Shelby County, Ala., four times on the issue. She asked, “Do you think that the right to vote is a racial entitlement in Section 5?” Rein finally answered, “…May I say Congress was reacting in 1964 to a problem of race discrimination which it thought was prevalent in certain jurisdictions. So to that extent, as the intervenor said, yes, it was intended to protect those who had been discriminated against.”

Stephen G. Breyer said the case should be looked up through a historical context.

“So in 1965, well, we have history,” he said. “We have 200 years or perhaps of slavery. We have 80 years or so of legal segregation. We have had 41 years of this statue. And this statue has helped a lot. So, therefore Congress in 2005 looks back and says don’t change horses in the middle of the stream, because we still have a ways to go.”

If Section 5 is upheld on this conservative-leaning court, it would probably be on the vote of Anthony M. Kennedy. The right-leaning justice hinted that the Voting Rights Act may have run its course.

After Solicitor General Donald B. Verrilli, Jr. praised the effectiveness of the Voting Rights Act, Kennedy said, “Well, the Marshall Plan was very god, too, the Morale Act, the Northwest Ordinance, but times change.”

Sotomayor said Shelby County has not changed enough.

“Assuming I accept your premise, and there’s some question about that, that some portions of the South have changed, your country pretty much hasn’t.” she said. “In the period we’re talking about, it has many more discriminating – - 240 discriminatory voting laws that were blocked by Section 5 objections.”

Shelby County went to court after the Justice Department rejected a redistricting plan that evidently played a role in the defeat of Ernest Montgomery, the only Black member of the 5-member city council in Calera, Ala., a bedroom community of 12,000 people near Birmingham.

Montgomery was elected to the council in 2004 from a district that was nearly 71 percent Black. The district was redrawn two years later, reducing the Black presence to 23 percent. Montgomery narrowly lost his 2008 re-election bid to a White challenger. But the Justice Department invalidated the election because district changes had not been pre-cleared. Shelby County went to court to overturn the decision. In meantime, Montgomery won a newly-called election.

Chief Justice John Roberts wrote an opinion in 2009 that might signal how he will vote in this case.

He said at the time, “Things have changed in the South. “The evil that Section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”

Elena Kagan, an Obama appointee, referred to Senate support of the Voting Rights Act.

“Well, that sounds like a good argument to me, Justice Scalia,” she said. “It was clear to 98 Senators, including every Senator from a covered state, who decided that there was a continuing need for this piece of legislation.”