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## Law and Politics: What's the Matter with Kansas (and Arizona)?



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Kansas and Arizona won an important victory in court the other day. In [\*Kobach v. The United States Election Assistance Commission\*](#), a federal judge ruled that a state was constitutionally permitted to require voters to produce proof of citizenship before being allowed to vote in federal elections. Going forward, birth certificates, passports, or other citizenship-related IDs could be demanded in congressional or presidential elections. The ruling obviously is an invitation for other states to follow suit, making it more difficult for many otherwise eligible voters to cast a ballot in this year's midterm elections.

Let's back up a bit. The legal issue here is whether or not the United States Congress had preempted a state's ability to enact such laws when it passed the National Voter Registration Act of 1993 ("NVRA"). In relevant part, the NVRA compels states to "accept and use" a standardized voter registration form in federal elections – a form that requires the voter to aver, under penalty of perjury, that she or he is a citizen. The form does not, however, require any documentary proof beyond that. In response to a challenge by Arizona on whether that state could demand such documentation, the United States Supreme Court said no, holding just last year that the NVRA did indeed preempt state law, voiding Arizona's proof-of-citizenship requirement for registrants in federal elections [[\*Arizona v. Inter Tribal Council of Arizona\*, 133 S.Ct. 2247 \(2013\)](#)].

So how is it that a United States District Court Judge sitting in Kansas could cite to the Supreme Court's holding in *Inter Tribal* and rule as he did?

Justice Scalia, writing for the Court in *Inter Tribal*, in addition to holding that NVRA preempted more stringent registration requirements, also said, somewhat inconsistently, that states wishing to demand further proof of citizenship could petition the Election Assistance Commission, the federal agency that generated the registration form, and seek permission to obtain documentation so that non-citizens could not vote. Justice Scalia added that if the EAC turned

down a state's request for state-specific add-ons to the federal form, the state could sue under the federal Administrative Procedure Act. That is exactly what Kansas and Arizona did here.

To the chagrin of voting rights lawyers and activists, the Kansas Judge made the distinction between "registration requirements" on the federal form and "eligibility requirements" to vote, such as citizenship documentation demanded by the states. To say the least, it is a highly nuanced (or hair-splitting, if you prefer) analysis by the Judge, admittedly relying upon "indications," "suggestions" and "intimations" by the Supreme Court's *Inter Tribal* decision. In other words, even the Judge conceded that his decision did not necessarily follow directly from the Supreme Court's holding.

A few commentators have already weighed in. The League of Women Voters said the decision is "[harsh.](#)" and [a Brennan Center lawyer](#) said that the decision, if not reversed, would erode Congress' power to protect voting rights. *The New York Times*, in its editorial [Suppressing the Vote](#), went further, warning that "the legal dispute should not distract anyone from recognizing the underlying purpose" of such laws as "intended[ing] to keep eligible voters from the polls." After all, it is not as if there were any substantial proof of fraudulent voting by non-citizens: in Kansas, Secretary of State Kobach found only approximately 20 non-citizens on a voter roll of some 1.73 million; Arizona had found only 196 out of 2.7 million.

For their part, Kansas and Arizona state officials were obviously delighted. Kobach has said that he hopes "Kansas has paved the way for all states to enact proof-of-citizenship requirements."

Just like the efforts across the country enacting tough new "voter ID" laws, a proliferation of new rules requiring proof-of-citizenship documentation prior to voting would undoubtedly have an adverse impact on persons who tend to vote Democratic. Still, whether one is a partisan, or a non-ideological supporter of a robust electoral system, the *Kobach* decision warrants our attention.

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