

ARIZONA ATTORNEY COLUMN

A Final Chapter?

Attorney General Horne is set to sue after the Federal Elections Assistance Commission ignored Secretary of State Ken Bennett's petition for guidance on adding a citizenship requirement for those registering to vote.

By **JOSEPH KANEFIELD**

The final chapter is about to be written in Arizona's long-fought effort to implement the 2004 voter-approved measure that requires Arizonans to show evidence of citizenship when registering to vote and to produce identification when voting at the polls.

I'm looking forward to reading the book although I have a pretty good idea how it's going to end. I was there at the beginning. I served as our State's Election Director under then-Secretary of State Jan Brewer in 2004 when over one million Arizona voters passed Proposition 200 into law. We were charged with implementing this major election reform in the face of staunch and litigious opposition.

Our fight to respect the voters' wishes went up and down the federal court system. We ultimately prevailed in defending the identification at the polls requirement and dozens of elections have been held since without the parade of horrors we were told to expect by the opposition. The fact that these election reforms were implemented in an organized and fair manner is a tribute to the professionalism of our state, county and municipal election officials.

But the fight isn't quite over. The United States Supreme Court held this past June in *Arizona v. Inter Tribal Council of Arizona* that Arizona's evidence-of-citizenship requirement, as applied to federal-form applicants, is pre-empted by the National Voter Registration Act's mandate that States "accept and use" the federal form. But the Court also held that Arizona may request the federal Election Assistance Commission to include its specific instructions on the federal form, and it may challenge the EAC's rejection of that request (or failure to act on it).

Secretary Brewer tried to do just that in 2006, but she was met with resistance by the EAC. This led to her 2008 testimony before the U.S. House of Representatives Administration Committee. She described the EAC's refusal to incorporate Arizona-specific instructions into the federal form despite her numerous requests and the numerous legal rulings that were contrary to the EAC's position. Importantly, she also testified that unless the law was changed to remove the EAC's oversight over the federal form, Arizona would be left with no choice but to sue the EAC. Not surprisingly, the U.S. Supreme Court agreed this past May with now Governor Brewer's 2008 prediction.

Arizona Secretary of State Ken Bennett and Attorney General Tom Horne (who argued the case before the Court on behalf of Arizona) are continuing the fight to this day. Secretary Bennett sent a letter to the EAC requesting that the agency instruct voters using the federal registration form about Arizona's proof of citizenship requirement and Attorney General Tom Horne threatened to sue the EAC if it did not comply with Secretary Bennett's request by August 19. However, this suit is inevitable because there are currently no commissioners appointed to serve on the EAC. In other words, there is no one to respond to Secretary Bennett and Attorney General Horne.

Justice Scalia posed the question in his opinion on behalf of the court whether a court can compel the EAC to take an action that it is incapable of taking because it lacks a lawful quorum. If the answer to that is no, Justice Scalia opined that Arizona might be able to assert a constitutional right to demand concrete evidence of citizenship apart from the Federal Form.

It doesn't take an election law scholar to see where this is going. We can expect a polite but non-compliant letter back from EAC staff and a subsequent federal court lawsuit brought by Attorney General Horne seeking a judgment declaring Arizona's right to demand proof of citizenship when voters register using the federal form. Given Justice Scalia's comments, the odds are good that the lower courts will rule in favor of the Arizona voters who passed Proposition 200 into law and close the final chapter of this Arizona election novel. For what it's worth, given the EAC's unremarkable record since its inception in 2002 and its willingness to fight with states like Arizona rather than working with them, Congress at a minimum should take Governor Brewer's advice and remove oversight of the federal form from the EAC and place it back in the hands of the Federal Election Commission.

At the end of the day, the Arizona voters will prevail and our election officials will assure that all of the election laws are administered and enforced in a fair and impartial manner. Although I have a pretty good idea how this book will end, I look forward to reading every page when it's complete.



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