

STATEMENT OF JUDITH A. BROWNE
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VOTING IN 2004: REPORT TO THE NATION ON AMERICA'S ELECTION PROCESS
DECEMBER 7, 2004

Thank you for the opportunity to address you today on the critical issue of voter suppression and the role it played in the 2004 election cycle. Advancement Project is a racial justice legal action organization that is committed to securing a Just Democracy in this country. In the November 2000 election, a combination of systemic, technical and procedural problems and inappropriate actions taken by election officials disenfranchised 4 to 6 million people. Florida's problems in this regard may be the most notorious, but voters of color in many other states faced obstacles that were not only demoralizing but also sufficiently problematic to change election outcomes. Advancement Project and other civil rights organizations sued the State of Florida and seven counties on behalf of the NAACP and Black voters for violations of civil rights laws relating to the 2000 election. In an effort to avoid another debacle, Advancement Project focused its 2004 election cycle work on pre-election solutions. Through our Clearing the Path for Just Democracy Program, Advancement Project lawyers worked with voter registration and voter protection coalitions in eight states to investigate, advocate and litigate voting rights issues where necessary.

In 2004, it became clear that there were efforts underway to dust off Reconstruction Era statutes in order to disenfranchise voters, particularly minority voters. These statutes permit voters or party representatives, called pollwatchers or observers, to challenge the eligibility of other voters, ultimately giving private citizens the power to prompt the purging of other voters immediately prior to and on Election Day. In many counties throughout the country, challenges had not been used in decades and thus, elections officials were not prepared to handle them. In fact, in many places there were no operative standards or procedures for challenges. Thus, it appeared that challengers might have unbridled power to deprive voters of their right to vote.

There were clear warnings that challenges would be used to disenfranchise voters. Prior to Election Day in Nevada and Ohio, 17,000 and 35,000 challenges were filed, respectively, disproportionately in urban areas. (Over 17,000 of the Ohio challenges were filed in Cuyahoga County.) In addition, poll observers registered in unprecedented numbers in Florida and Ohio, with the intent to engage in massive challenges inside polling places. By all news accounts, the culprits of these activities were national and state Republican Party committees. The targets were new voters in urban areas. In Ohio and Nevada, the pre-Election Day challenges were filed by state party officials. In Florida, the state Republican Party announced that it would use the infamous felon purge list created by the State, and later withdrawn by the State, to target challenges. Despite knowing that the State's list was tainted by racial discrimination, the State Republican Party used it as a starting point and devised a list of almost 14,500 persons to challenge.

Party officials reportedly acknowledged that the list had some of the same flaws as the State's list. The Wisconsin GOP even went so far as to conduct background checks on newly registered voters. This is voter suppression in 2004.

A review of the history of challenge statutes in Florida and Ohio demonstrates that these laws are rooted in this country's sordid history of racial oppression. The Florida challenge statute, for example, was passed in 1868, just one year after Blacks were granted the right to vote in Florida and as part of a package of bills (which included the Florida felon disenfranchisement statute) aimed at disenfranchising newly freed slaves.¹ The Ohio statute, originally codified in 1831, was amended in 1859 to permit challenges based upon a voter's possession of a "visible admixture of African blood." In 1868, the law was again amended to include questions for challenged voters about their racial identity and the racial composition of their neighborhoods and schools. In 2004, there was serious concern that the discriminatory nature of these statutes would be resurrected.

Déjà Vu

In 1981, the Republican National Committee – through its infamous "Ballot Security" program – used mailings to target Black and Latino voters in New Jersey for Election Day challenges. Under the pretext of ferreting out fraud, the RNC compiled a challenge list of 45,000 individuals from returned mail sent to an outdated voter registration list and then attempted to have these individuals removed from the rolls, without knowing whether these voters still resided in the precinct. The RNC also hired law enforcement and security officers to monitor polling places in minority precincts. Sued by the Democratic National Committee in federal court, the parties agreed to a Consent Decree, under which the RNC could no longer "us[e], nor appear[] to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud...." The court further directed the RNC to "refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct . . . such activities . . . and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose."²

In 1986, the RNC violated this decree by attempting to have 31,000 Louisiana voters removed from the rolls after mail sent to them was returned undelivered. As a result, the Consent Decree was expanded to require that the RNC obtain prior court approval for all efforts to combat "vote fraud" other than normal poll watcher activities. Additionally, the court ordered that poll watchers cannot use the fruits of pre-election ballot security efforts unless court-approved. This Amended Consent Decree is still in effect.³

¹ See Report to State and Local Election Officials on the Urgent Need for Instructions for Partisan Poll Watchers, at www.advancementproject.org/apvs.html.

² *DNC v. RNC*, (Civ. Action No. 81-3876, U.S. District Ct. of NJ).

³ *DNC v. RNC*, (Civ. Action No. 86-3972, U.S. District Ct. of NJ).

The North Carolina Republican Party was also sued for similar efforts in conjunction with the Helms for Senate Committee in 1990. Through this effort, 81,000 postcards were sent out to registered Democrats (in precincts in which 94% of the registered voters were black) and another 44,000 postcards exclusively to black voters. The cards contained false information on the eligibility to vote for people who had recently moved, and also set forth the federal criminal penalties for election fraud. Postcards returned as undeliverable were used to compile a list of voters to be challenged. In 2004, the RNC sought to repeat these efforts.

Challenges in 2004

The handwriting was on the wall in 2004: partisan voter suppression efforts had to be stopped. An analysis of Republican poll watcher assignments in Hamilton County, Ohio and Miami-Dade, Florida indicated that these poll watchers were disproportionately assigned to minority voting precincts. In Hamilton County, while 55% of voting age whites and 62% of voting age Hispanics live in areas covered by Republican pollwatchers, 89% of voting age Blacks live in areas where Republican pollwatchers were assigned. Similarly, in Miami-Dade, Republican pollwatchers were 30 percentage points more likely to be assigned to large and heavily Black precincts than to other precincts. This analysis concluded that in both places heavily Black precincts were being targeted.⁴

Advocacy and litigation were undertaken to "Suppress the Suppressors." In October, the Leadership Conference on Civil Rights wrote to the DNC and RNC requesting a meeting and urging them to cease any efforts to suppress the vote through discriminatory and baseless challenges. With no response from the RNC, the Leadership Conference held a vigil on the steps of the RNC's headquarters. A party official told the civil rights groups in attendance that in fact, the party had hired challengers to be in polling places throughout the country.

Voter protection advocates in the battleground states moved quickly to diminish the harm of these would-be challengers. Coalitions immediately met with elections officials to craft challenge procedures that would eliminate discriminatory and baseless challenges, while minimizing the disruption that challenges might have on the orderly conduct of the election. In many places, elections officials had determined that they would literally shut down precincts while a challenge was being processed, requiring that others voters wait until a decision was reached. Of course, in an election where most jurisdictions were ill-prepared for the turnout already, this would have exacerbated these problems. Advocates were successful in negotiating fair procedures in many places.

Ultimately, litigation was needed to quell the potential detrimental effect of challenges. The Ohio Democratic Party successfully halted challenge hearings throughout the State but that did not deter the Ohio Republican Party, which declared that it would resort to Election Day challenges. The Ohio Democratic Party also filed lawsuits to limit the

⁴ See Report to State and Local Election Officials on the Urgent Need for Instructions for Partisan Poll Watchers, Exhibit 5 - Affidavit of Philip Klinkner, at www.advancementproject.org/apvs.html.

number of challengers in each precinct,⁵ restrict their activities⁶ and ultimately, to bar all challengers. Another case filed on behalf of African-American voters charged that the Secretary of State's challenge procedures were in violation of federal law and that the statute itself and its discriminatory use were unconstitutional. In this case, *Spencer v. Blackwell*,⁷ a U.S. District Court Judge granted a preliminary injunction enjoining all challenges other than those by election judges and voters throughout the State of Ohio. These cases were appealed and the lower courts' orders were stayed. The status of these cases was questionable at any given moment on Election Day.

Advancement Project also filed an action to protect minority voters by preventing the discriminatory use of challenges on Election Day. On behalf of Ebony Malone, a first-time African-American voter in Cuyahoga County, Ohio, whose name appeared on the Republican challenge list, we intervened in the New Jersey *DNC v. RNC* case to enforce the Consent Decree.⁸ The federal court in New Jersey granted our intervention. After approximately two days of discovery, we presented evidence to the court that successfully demonstrated that the RNC was in violation of the consent decree.

The evidence in the case demonstrated that the RNC participated actively in a joint effort with the Ohio Republican Party to use returned mailings to challenge the rights of thousands of newly registered voters to cast ballots on November 2nd. On August 10, 2004, the RNC mailed over 49,000 letters to newly registered voters in Cuyahoga County. The mailing was done by the RNC, but undeliverable mail was returned to the Ohio Republican Party. The Ohio Republican Party shared the list of 3,353 returned letters with the RNC. While the RNC claimed that the purpose of the mailing was to simply "welcome all newly-registered voters," the list was in fact analyzed by the RNC for voter fraud.⁹ This evidence placed the case squarely within the Consent decree's reach to review plans for "voter fraud" and "ballot security" programs.

Again in September, another list was compiled by the Ohio Republican Party and shared with the RNC. This time, letters were sent to newly-registered voters in Cuyahoga, Franklin, Summit, Hamilton and Montgomery counties. This list produced 15,238 undeliverable letters. Again, the RNC investigated this list. While a party official represented during a deposition that RNC personnel did not discuss voter fraud with the Ohio Republican Party because the consent decree forbade it, emails produced showed that these strategies were discussed on a regular basis internally and with officials in Ohio. In fact, the RNC hosted "Voter Registration Fraud Strategy conference calls." These calls included State chairmen and discussed Nevada, Ohio, New Mexico and Pennsylvania. RNC staff also suggested cross-checking absentee ballots against returned

⁵ *Miller et al v. Blackwell*, No. 1:04-CV-00735-SJD (6th Cir. Oct. 29, 2004).

⁶ *Metzger v. Lucas County Board of Election*, No. MS04-1540, (Court of Common Pleas, Lucas, Ohio, filed Nov. 2, 2004).

⁷ *Spencer v. Blackwell*, 2004 U.S. Dist. LEXIS 22062.

⁸ The law firm of Howry & Simon served as co-counsel in this case.

⁹ The RNC's analysis of the list showed that of 950 addresses reviewed, 50-80 were "suspicious" and 10 were "highly suspicious." Testimony from challenge hearings held in Summit County, Ohio illustrated that undeliverable mail is not conclusive of voter fraud.

mail in Nevada, Florida, Pennsylvania, New Mexico and Ohio. A RNC staff person wrote an email indicating:

Jack Christopher and I have already tasked our IT person with creating a match list between the [Board of Elections] return mail and the [Absentee Ballot] request list...I can't speak to other states, but if they don't have flagged voter rolls, we run the risk of having GOP fingerprints...

These actions indicated "participation" and "assistance" by the RNC in efforts to identify and challenge newly registered voters, in direct violation of the Consent Decree.

The evidence also demonstrated the Ohio challenge list consisted of a disproportionate number of African-American voters. For example, in Hamilton County (Cincinnati), voters in precincts with the highest concentration of black voters were eight times more likely to be challenged than voters in the most heavily non-black precincts. In Cuyahoga, similarly situated voters were three times more likely to be challenged.

Ultimately, the District Court of New Jersey issued an order prohibiting the RNC from engaging in challenges in Ohio based upon the lists. This order was stayed by the Third Circuit on Election Day.

To date, the extent to which challenges were made remains undetermined. On Election Day, the Election Protection Hotline received some complaints of challenges. For example, in Franklin County, Ohio, a complaint was received that instead of challenging voters, poll watchers were checking identification of voters while the voters waited in line. Advancement Project is in the process of collecting data indicating the number of challenges made on Election Day. Thus far, information indicates that some challenges were made in Florida based upon the flawed "suspected" felon list. However, we believe that much fewer challenges were made than anticipated. Litigation and advocacy clearly played a role in diminishing the potential impact of challenges.

While challenges may not have caused the catastrophe that we feared, there is a clear indication that voter suppression through challenges was planned and that minority voters were the intended target. The curtailment of these activities may have been successful, yet, the mere threat of challenges may have in fact achieved the ultimate goal of discouraging minority voters from participating on November 2nd.