

The Honest Elections Clause of the Constitution:
How to Re-Establish Legitimacy of the American Electoral Process

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I. Three Fifths of a Man: Securing the Right of African Americans to Vote

Since the bad guys can't be allowed to get away with it but the cops are not in pursuit, what is a citizen to do to fight back against the theft of American democracy? The failure to bring the criminals to justice for stealing the election in Florida in 2000 led to more brazen vote suppression and fraud in more states in 2004. While this should be the task of organizations far more powerful than ours, who have lawyers and money and national attention, we regrettably conclude by reading their press releases that they've "moved on" and are prepared to fight indefinitely on a political battlefield that is hopelessly tilted in favor of the party in power.

After the civil war the nation's congressional leadership thought long and hard about how to penalize states that failed to conduct honest elections, and they built a severe penalty into the Constitution as the second clause of the Fourteenth Amendment. It says that when the right to vote in an election for president is "denied...or in any way abridged" that the state which commits this crime shall have its representation in Congress reduced in proportion to the percent of the population that is blocked from voting.

The fears that motivated the victorious north to write this clause into the Constitution were borne out, yet the penalty was never invoked. The white elites in the former slave states received a bonus when they came back into the union. While each slave was worth 3/5ths of a man for the purposes of apportioning Congressional representation the newly freed former slaves were each worth as much as any other citizen of the Republic. The white elites thus got more Members of Congress but worked diligently for more than a hundred years to prevent the decedents of African slaves from voting. It isn't until the civil rights era that blacks rose up against American apartheid and, with the assistance of white liberals over the virulent opposition of white conservatives, secured the ability to vote in American elections.

At least they thought they had. The first truly notable exception in more than 30 years was the purge of black voters from the rolls in Florida in 2000, done with taxpayer money by Florida Republicans to make sure that the state's electoral votes would be delivered to the governor's brother. Hundreds of thousands of predominantly African American Floridians were denied due process and removed from the lists of eligible voters by the ruse of "mistaking" their names for those of convicted felons. Tens of thousands more were blocked from voting by an organized misinformation and intimidation campaign that gave them the wrong day, place or time of voting or threatened them with arrest if they tried to vote and were wanted for questioning in any police matter. Black citizens had to pass through police barricades to vote in a number

of cities, barricades that somehow were deemed not to be necessary where Florida's white population voted. Broken voting machines were placed in minority neighborhoods and the self-correction capabilities of the machines themselves (which can automatically reject a ballot for which no vote may be read) were turned off. The state that had virtually banished African-Americans from its boundaries through murder and the burning of the communities in which they lived – surely as bad as any pogrom against Jews anywhere in European history – now made them disappear legally rather than physically.

II. The Making of the President 2004

These odious and illegal methods worked to secure a bare 500 vote “victory” for Bush. A subsequent recount showed he had received fewer votes than his opponent and that had a methodical statewide recount been permitted Gore would have been declared the winner. Since there were no investigations, indictments or convictions and the conspiracy was a success – and since the weakness of Bush as a candidate and his dubious record of achievement in public office made it necessary -- the Republicans set out to use these same techniques in more states in 2004.

In Nevada a Republican contractor falsely represented itself as a non-partisan organization in order to get people to complete voter registration forms and then discarded forms from citizens who did not register in the Republican Party. According to former employees, 300 people were employed full time for at least 8 weeks, so conservatively they generated several hundred thousand new voter registrations even if they were horribly inefficient at the task. Bush's 21,000 vote “victory” in Nevada rests on the effective elimination by this method of five to ten times that many Democratic and other non-Republican voters. That contractor used the same method in a number of other states and is under indictment in Oregon, yet the FBI refuses to carry the investigation forward because they no longer see crimes that are committed by Republicans.

In New Mexico the number of “undervotes,” or ballots for which no vote for president was recorded when run through vote counting machines remains unknown. What is known, however, is that the number of “spoiled” ballots is one or two orders of magnitude larger than the slender 6,000 vote victory recorded by Bush in the state. In an honest democracy those ballots would be counted by hand and an investigation launched to find out why New Mexico's balloting produced such an unusually high number of ballots without a legitimate vote cast for the top race.

In Florida the same techniques pioneered in 2000 were used again with the same effect, except that the efficiency of these methods was improved so that the margin of “victory” could be large enough so that the commercial news media would not investigate. Once again, the surveys of voters as they left the polling place showed they wanted a Democratic president, but this data was “adjusted” after the election to make sure that it matched the official results.

And Ohio is the place where any and every technique was used to secure a fraudulent claim of victory and make it seem credible. The manipulation of the results can be thought of as being in three categories: vote suppression on a massive scale, fraud in the casting of the votes and fraud in the counting of the votes. To cite examples of these in Ohio:

- **Vote Suppression:** The deliberate misdistribution of voting equipment on election day was the most visible vote suppression technique. Not only is it possible to show wide disparity between the time it took African Americans and college students – the two most visible targeted classes – to vote on election day and the average time of the whole of the voting population, it may be possible to make the claim that this constitutes an poll tax, specifically forbidden in the 24th Amendment to the Constitution.
- **Fraud in vote casting:** There is a provable disparity between Bush’s totals in the relatively small percentage of the state (~25%) that voted on electronic voting equipment provided by Diebold and other vendors and Bush’s totals in areas of the state where there exists a verifiable paper record. The Republican share of the vote was considerably greater in the areas where there is no method to verify the results and this can be shown to be true even when other variables such as race, ethnicity and socio-economic status are held constant.
- **Fraud in vote counting:** Just 9 of the state’s 88 counties account for virtually all of the Republican “victory” margin, the single most important of which provided a third of the margin itself. Warren County closed its vote counting to the public because the Federal Department of Homeland Security advised the local emergency services coordinator that Warren County (suburban Cincinnati) was a ten on a scale of ten as potential terrorist targets on election day. Since this is the single most important county in the nation to Bush’s claim of victory it is at least procedurally suspect, particularly now that the Department of Homeland Security disavows ever making this claim or contacting the local county official. However, the actual reported results are even more suspicious. Democratic voter registration rose by 30% from 2000 to 2004 while Republican registration actually fell by 10%, and on a statewide basis Bush’s support declined between 2000 and 2004. Yet support for Bush allegedly surged in this place, which was the last polling place in the state to close and which enabled the Republicans to claim victory and begin the process of intimidating the Democrats into conceding.

Since we can anticipate that once again there will be no serious investigation by the Federal Bureau of Investigation into these crimes, no prosecution by the U.S. Department of Justice or by state authorities and no large scale investigation by the commercial news media, it falls to citizens to secure justice through other avenues. Fortunately such a mechanism is built into the Constitution.

III. The Constitutional Remedies for Massive Vote Suppression

The second clause of the 14th Amendment gives us the tool we need. It says that when the right to vote in an election for president is “denied or in any way abridged” that the state which fails to hold honest elections will have its representation in Congress reduced in proportion to the number of citizens prevented from voting.

We are consulting with a number of constitutional lawyers and recruiting a legal team, but this gives us at least three possible ways of securing standing and asking for a remedy:

1. Individual voters: If each Member of Congress represents approximately 550,000 voting age citizens then we can collect this number of sworn affidavits and build the case on the affidavits, which can include voters in these states of any age, race or other identifying characteristic. The trial phase of the case would look a lot like a traditional election law case in which first the judge would determine if a sufficient number of legitimate complaints had been filed and then determine if the proposed remedy fell within his or her power to grant.
2. African Americans in Ohio as a class of voters discriminated against: We can argue in federal court that the attempt to deny the right to vote to African Americans was systematic, expose how it was done and seek a ruling reducing Ohio’s Congressional delegation by 11%, which is the percent of the population that is of African decent according to the census.
3. Democrats in Ohio as a class of voters discriminated against: While the correlation between race and political party makes it appear to be race-based discrimination, clearly some of the same techniques were used to suppress the vote by college students, who were not predominantly African-American. Under this argument, any Democrat in the state whose right to vote was denied or abridged would have standing and the remedy would be to reduce Ohio’s representation in Congress by approximately 17.5%, that being the percentage of Ohio’s voting aged population formally registered with county election offices as Democrats.

In practical terms this means asking that Ohio’s 18 seats in the House of Representatives would be reduced to 17, 16 or 15 seats depending on which of these arguments is presented if it is successful.

IV. The Unintended Consequences: How the Republicans Would Fight Back

If we were to win a ruling in our favor and Ohio’s Congressional delegation were reduced it would mean the district lines would have to be redrawn so that each Member of Congress represents more people than the average nationwide. It would not be constitutional to leave citizens unrepresented in Congress (a penalty reserved only for America’s remaining colony of decedents of former slaves, the District of Columbia).

It should be expected that not just the Republicans but the Democrats in Congress from Ohio would also fight this remedy. Their concern would be that the Republicans, who completely control all offices in the state government as well as appointments to the Ohio state courts, would take this remedy and use it to their advantage to make elections in Ohio even harder to win for Democrats.

The first counterargument to this is that it cannot get any worse than it is for Democrats in Ohio. Since 1994 Ohio has been effectively a one party state. The Republicans have a 12-6 margin in the Congressional delegation, a 22-11 margin in the state Senate and 62-37 in the state House. There is no statewide office held by a Democrat and the state's Democratic party is functionally bankrupt. Most of the political mobilization work done in 2004 was from non-party organizations and by hoards of volunteers from out of state. If we are not now at the limit of how much the power of the Democrats in Ohio can be reduced we are surely very close to that limit now. Of the Democrats in the House from Ohio (Ted Strickland, Marcie Kaptur, Dennis Kucinich, Stephanie Tubbs Jones, Sherrod Brown, Tim Ryan) the only one even nominally at risk is Strickland, whose district stretches 325 miles along the Ohio River from Kentucky all the way up to Pennsylvania. But someone has to represent the people of these districts and the Republicans have already done everything in their power to reduce Democratic representation to a bare minimum. Even in a 15 seat delegation – which is inevitable if current population trends continue – the Democrats will be able to hold their own since 75% of Ohio's population lives in urban or suburban areas and there is just a physical limit to how much this population can be diluted by the manipulation of the redistricting process.

The Republicans would also threaten Ohio with the loss of Federal benefits that are distributed in proportion with Congressional representation. However, since the governor and both U.S. Senators (Voinovich and Dewine) are both senior Republicans they ought to be able to prevent harm to Ohio's citizens from Republican party hacks seeking revenge for winning a lawsuit against the state for failing to administer honest elections. If they cannot then the claim of candidates in campaigns against them will become clear and very compelling.

V. Likely and Possible Outcomes

The plausible place to file the first of the 14th Amendment lawsuits would be the Northern District of Ohio, which sits in Cleveland, Akron, Toledo, and Youngstown. The Chief Judge is James G. Carr, a Clinton appointment. The Southern District of Ohio sits in Columbus, Dayton and Cincinnati and its Chief Judge is Sandra Beckwith, appointed to the bench by President George H. W. Bush in 1992.

Our goal would be the exposition in a clear and methodical way of how the misadministration of the election produced an outcome at odds with the will of the people, focusing attention on the degree to which boundaries between the State of Ohio and the Republican Party of the State of Ohio have been deliberately obfuscated to the detriment of the citizens of the state, and a substantive decision in our favor at the trial and appeal levels.

While an overturning of a verdict in our favor by the U.S. Supreme Court could mean we do not receive the remedy we are seeking, we believe there are members of the Court who would endeavor to avoid another decision like Bush v. Gore. It is not just Democrats who believe that decision undermined public confidence in the Federal judicial system and showed the Supreme Court to be another institution captured and run in the interests of the Republican Party rather than of the people of the United States. We suspect that there are Republican appointees who would not want to see the court used to protect one party government in the face of a clearly violated Constitutional right and specific remedy.