

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>MARIAN A. SPENCER</b>	:	<b>Case No. 1:04-CV-738</b>
<b>AND DONALD A. SPENCER,</b>	:	
	:	<b>Judge Susan J. Dlott</b>
<b>Plaintiffs,</b>	:	
	:	
<b>Vs.</b>	:	<b>EXPERT DECLARATION OF</b>
	:	<b>HOWARD TOLLEY, Ph.D., J.D.</b>
<b>J. Kenneth Blackwell, et al.,</b>	:	
	:	<b>CORRECTED VERSION</b>
<b>Defendants.</b>	:	
	:	
	:	
	:	

I, Howard Tolley, Jr., pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury under the United States of America that the foregoing is true and correct and is based on my own personal knowledge:

**I. INTRODUCTION**

My name is Howard Tolley, Jr. I have been asked by the plaintiffs to provide an expert opinion on the history of discrimination against African American voters based on my academic training in political science and law.

**II. QUALIFICATIONS**

I earned a Ph.D. in Political Science from Columbia University in 1971 and a J.D. from the University of Cincinnati in 1983. I am currently Professor of Political Science and Adjunct Professor of Law at the University of Cincinnati. I joined the U.C. faculty in 1984 after twelve years as a professor at Wilberforce University. I offer undergraduate, graduate, and law school public law classes on the U.S. Constitution and legal system as well as courses on international law and human rights, my primary field of research and publication. In Fall 2003 I lectured as a

Fulbright scholar on U.S. Constitutional Law and politics at the University of Nijmegen, Netherlands, and I have had visiting appointments at Northern Kentucky University's Chase Law School and on Semester at Sea. I serve on the Ohio State Employment Relations Board Roster of Neutrals.

I am not receiving a fee for my work in this case. I am providing this testimony as an independent expert, and I am not speaking as a representative of the University of Cincinnati. My earliest study of racial discrimination in 1965 while a college student in Vermont, took me to Montgomery Alabama for the march organized by the Rev. Martin Luther King, Jr. in support of the federal Voting Rights Act. I subsequently taught at the middle school level in Central Harlem while a graduate student in New York, and I instructed African American undergraduates at Wilberforce University, Ohio from 1971 through 1983.

### **III. OPINION**

All of my opinions expressed in this declaration are held to a reasonable degree of professional certainty.

It is my opinion that discriminatory tactics to suppress African American voting in the South are increasingly employed in Northern cities with large concentrations of minority voters, including Cincinnati. As the Supreme Court and Congress progressively eliminated formal legal barriers to registration and voting, partisan challengers have increasingly engaged in extra-legal intimidation of African American voters at the polls. A system of challengers posted disproportionately in African American precincts in Hamilton County under the rules of engagement approved by the Hamilton County Board of Elections will serve to intimidate African American voters in much the same way other techniques have been used to deny the franchise to African Americans.

BASIS FOR OPINION: Over a thirty-year career in higher education, I have annually taught Civil Rights classes that included units on equal protection case law involving racial gerrymanders and minority voting rights. In addition, my classes on Judicial Process examine Cincinnati racial issues that have brought national attention to our city's polarization. In preparing for my undergraduate, graduate, and law school lectures I have studied the latest developments in the field.

**1. Post Reconstruction White Supremacy in the South and in Cincinnati**

The first era of black enfranchisement immediately following the Civil War ended with the compromise of 1877 resolving a contested Presidential election. As whites regained power throughout the South, the Democratic Party purged Republican former slaves from the voting rolls, bringing an end to African American representation in the U.S. Congress, state, and local government. Not until the 20<sup>th</sup> Century did the Supreme Court rule as unconstitutional tactics such as the grandfather clause, all white Democratic primary elections, and the gross racial gerrymander in Tuskegee, Alabama. None of those judicial opinions altered the reality of black disenfranchisement enforced by KKK nightriders, cross burnings, lynchings, and intimidation of vulnerable sharecroppers.

The Ohio legislature passed the Act of April 16, 1868 (65 Ohio L. 97) in order to “preserve the purity of elections.” The 1868 Act permitted challenges in the polling place to a male voter's race and required the voter to prove he did not have an “admixture of African blood.” The voter's race was challenged at the polls if he could not answer these questions to the satisfaction of the election judges:

Do you solemnly swear or affirm that you will to the best of your knowledge and belief, full and true answers make to such questions as may be put to you touching your qualifications as an elector? The judges shall put the following to him the following questions:

1. What is your age?
2. Where were you born?
3. Were your parents married . . . ?
4. Had your parents, or either of them, a visible and distinct admixture of African blood?
5. In the Community in which you live are you classified and recognized as a white or colored person, and do you associate with white or colored persons?
6. Are there schools for colored children in operation in the township . . . in which you live . . . ?

The Ohio Supreme Court declared this law unconstitutional holding that the law was calculated to impede and defeat the right to vote of persons with an “admixture” of African blood by imposing on them unreasonable burdens of proof and additional evidence required of them, by authorizing the unconditional rejection of their votes, and for discriminating against them as to punishment and penalties for a violation of the election laws. *Monroe, et al. v. Collins*, 17 Ohio St. 665 (1867). It appears, therefore, that the roots of the statute authorizing polling place challengers are grounded in *de jure* discrimination.

## **2. The 1965 Voting Rights Act and Redistricting Hamilton County**

After the 1930s, the parties reversed roles, as Democrats increasingly championed the interests of their new African American supporters. A Democratic administration and Congressional majority responded to the civil rights movement with the 1965 Voting Rights Act that significantly increased minority representation in the House of Representatives as well as in state and local government.

According to *Political Participation*, a 1968 study by the U.S. Commission on Civil Rights, the act led to “a great upsurge in voter registration, voting, and other forms of political participation,” but new barriers were also being developed. The Commission noted the switch to at-large elections, consolidating counties so that African-American voters concentrated in the central city would become outvoted minorities in larger districts. When the Supreme Court

declined to find such redistricting a 14<sup>th</sup> Amendment violation in Mobile, Alabama, Congress amended the Voting Rights Act to assist African Americans victimized by such changes.

That new provision had a direct local impact after the Republican controlled Ohio General Assembly consolidated the Cincinnati and Hamilton County municipal courts. African American plaintiffs obtained a 1986 federal court order under the Voting Rights Act that resulted in the creation of 14 judicial districts. The judgment enabled minority judges to win election to the bench.

### **3. Intimidating African American Voters at the Polls**

The Voting Rights Act has not prevented another discriminatory practice that is increasingly widespread, both North and South. A study published in the 1981 *Civil Rights Research Review*, reported that in almost half the counties in Georgia, poll watchers intimidated or discriminated against prospective African American voters. A November 11, 1993 report by *Associated Press* reporter Jim Abrams quoted an anonymous Justice Department official about post-1988 developments in Los Angeles: “All of these moves are called ballot security moves, moves by plain citizens to keep illegal voters from the polls, but none targeted illegal voters. They all targeted minority voters and specifically threatened them with some dire consequence if there are problems with voter records.”

In a 1996 study, David Burnham reported that The Republican National Committee and the New Jersey Republican State Committee engaged in a “concerted effort to threaten and harass black and Hispanic voters” via a “ballot security” effort. The NAACP in conjunction with People for the American Way has recently documented a nationwide pattern in “The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today.”

<http://www.pfaw.org/pfaw/general/default.aspx?oid=16367> Selected examples include:

\*In 1987 “ballot security” efforts were launched against minority voters in Louisiana, Georgia, Missouri, Pennsylvania, Michigan and Indiana. Republican National Committee documents said the Louisiana program alone would “eliminate at least 60- 80,000 folks from the rolls,”

\*In 2002 **Pennsylvania** GOP Rep. George Gekas reportedly put together a systematic effort to “challenge” voters in counties favorable to his Democratic opponent. The *Lebanon Daily News* wrote: “Gekas...has distributed among county officials and volunteers an 18-page manual that includes a section about ‘challenging a voter.’ That’s right: Gekas volunteers aren’t just going to challenge absentee ballots, but are going to try to block some people who show up at the polls from casting votes.” A Gekas campaign spokesman who said the manual “had been drafted by Republican authorities at the national level and had not been tailored to Pennsylvania law.”

\*In 2002 In Pine Bluff, **Arkansas**, five Republican poll watchers – including two staff members of Senator Tim Hutchinson’s office – allegedly focused exclusively on African Americans, asking them for identification and taking photographs during the first day of early voting. The chair of the county Democratic Party and Election Commission said the tactics caused some frustrated black voters to not vote. “They are trying to intimidate African American voters into not voting,” said the Democrat coordinating national efforts with Arkansas’ campaigns. “They were literally going up to them and saying, ‘Before you vote, I want to see your identification.’” Local law enforcement officials escorted the poll watchers out, but they later returned.

\*In 2002 a **Tennessee** state Republican Party plan to challenge would-be voters at polling places drew the scrutiny of elections officials and the Justice Department just a few days before the general election. The state’s Election Coordinator accused state Republicans of spreading “misinformation” about voter eligibility to GOP poll workers and urged county election officials to reject inappropriate challenges at the polls. The warning was prompted by an internal GOP e-mail, obtained by Justice Department lawyers, which encouraged party poll watchers to “Challenge voters who concern you.” A subsequent memorandum of understanding identified unlawful activities as: directly confronting voters, intimidating legitimate voters, giving voters misleading information, dressing to look like law enforcement officials, photographing voters with the intent of intimidating them, and interfering with voters as they prepare to and cast their ballots.

\*In the 2003 mayoral campaign in Philadelphia, voters in African American areas were systematically challenged by men carrying clipboards, driving a fleet of some 300 sedans with magnetic signs designed to look like law enforcement insignia.

\*In summer 2004, **Michigan** State Rep. John Pappageorge (R-Troy) was quoted in the *Detroit Free Press* as saying, “If we do not suppress the Detroit vote, we’re going to have a tough time in this election.” African Americans comprise 83% of Detroit’s population.

\*This summer In **Kentucky**, Jefferson County Republican chair Jack Richardson announced plans to put challengers in predominantly Democratic precincts for the

November elections. The party had executed a similar plan in 59 minority precincts in 2003, with a recruitment flyer alleging voter fraud by black labor unions. A group of Republicans described the challenger plan as “rogue and racist behavior” and called for Richardson to resign.

#### **4. Hamilton County Challenger Scheme**

I understand that the Hamilton County, Ohio Republican County has filed a list of challengers in predominantly African American precincts. Pursuant to the protocol for challengers issued by the Hamilton County Board of Elections, challenges by Republicans will cause the precinct election judges headed by the presiding Republican judge to subject African American voters to a detailed regimen of questions backed by a threat of a fifth degree felony if there should be an incorrect answer. This procedure will surely intimidate potential African American voters, unfairly deny some the right to vote, delay others to the point that they leave the voting lines and impose burdens on the franchise far in excess of any benefit possibly achieved from the procedure.

#### **IV. CONCLUSION**

The long history of discrimination against African American voters has not been fully remedied by legislated reforms of the civil rights era. Creative partisans have adapted new techniques to suppress the African American vote. The courts must once again address the Madisonian dilemma by securing minority rights in a liberal democracy governed by majority rule. The disproportionate deployment of Republican Poll challengers to predominantly African American precincts in Hamilton County, Ohio under the protocol established by the Hamilton County Board of Elections will impose serious restrictions on African American voters unless the court intervenes.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Howard Tolley, Jr.

Howard Tolley, Jr., Ph.D., J.D.

Dated: Oct. 27, 2004