

Former Ohio Elections Chief Blackwell Brings a Troubled Record on Elections to Fraud Commission

J. Kenneth Blackwell, named in May 2017 to the Presidential Advisory Commission on Election Integrity, is perhaps most memorable in political circles for his fraught term as Ohio’s chief election official from 1999 to 2007. In that time, Blackwell became notorious for partisan conflicts, attempts to restrict access to the ballot, and chaotic election administration. Since leaving office, Blackwell served most recently as chief domestic policy advisor on President Trump’s transition team.¹ He was also one of the very few current or former election officials to echo President Trump’s false allegation of widespread illegal voting in the 2016 election² — most, including many Republicans, have disputed that claim.

A Cloud of Partisan Conflict

When in office, Blackwell earned a reputation for sowing partisan conflict — a challenging dynamic in a position that involved running elections. In 2004, he served as co-chair for President Bush’s re-election campaign in Ohio, a “swing state” where the election he oversaw was vigorously contested — and also campaigned for a “defense of marriage” amendment on the ballot that year. In that same election, Blackwell issued a series of decisions that both restricted access to voting (discussed below) and invited criticism for the appearance and substance of partisanship.

Greg Hartmann, the Republican who ran to succeed Blackwell in 2006, called Blackwell’s choice to co-chair the Ohio Bush campaign a mistake.³ Newspaper editorial boards observed “a disturbingly erratic combination of inattention to his job and blatant partisanship in the conduct of elections,”⁴ as well as an “overtly partisan record.”⁵ The Columbus Dispatch framed the issue as a question: “Can an elections chief be so partisan that his ability to manage a clean vote comes into question? In Blackwell’s case, yes.”⁶

Blackwell triggered further controversy over conflicts of interest when the public learned that he had accidentally invested in Diebold — a voting machine manufacturer from which his office purchased equipment — and later accepted campaign donations from that company’s lobbyist. While running for governor in 2006, he admitted that his investment portfolio purchased stock in the company in 2005. Though Blackwell also reported selling the stock as soon as he learned that he owned it,⁷ his

¹ Tony Romm, *New details emerge on Trump transition organization*, POLITICO, Nov. 9, 2016, <http://www.politico.com/story/2016/11/new-details-emerge-on-trump-transition-organization-231152>.

² Ken Blackwell, *Confirm Jeff Sessions as Attorney General*, DAILY CALLER, Dec. 20, 2016, <http://dailycaller.com/2016/12/20/confirm-jeff-sessions-as-attorney-general/>.

³ Catherine Candisky, *GOP candidate cautious in criticizing Blackwell*, COLUMBUS DISPATCH, Sept. 27, 2006.

⁴ *Editorial: Failed Election Oversight*, TOLEDO BLADE, July 25, 2006.

⁵ *We need a leader who can work with both parties*, LANCASTER (OH) EAGLE-GAZETTE, Oct. 31, 2006.

⁶ *Conflicting Interests* (Editorial), COLUMBUS DISPATCH, Jan. 30, 2005.

⁷ Sandy Theis, *Blackwell reports embarrassing buy of Diebold stock: Rivals pounce on controversy over accidental share purchase*, CLEVELAND PLAIN DEALER, Apr. 4, 2006.

gubernatorial campaign accepted \$10,000 in campaign contributions from one of Diebold's registered lobbyists.⁸

In 2007, after Blackwell's term ended, experts at Ohio State University published a study assessing election administration in five Midwestern states. They called Ohio "a poster child for reform," noted that Blackwell's "activities raised concern about [his] impartiality," and recommended that the state replace the elected secretary of state position with a nonpartisan appointee.⁹

Restricting Access to Voting

Blackwell also used his power as Secretary of State to restrict access to the ballot, especially in the run-up to the 2004 election. His office interpreted existing law in ways that made voting more cumbersome, sometimes in open defiance of federal law.

During the 2004 election, Blackwell infamously instructed state election officials to reject any voter registration forms that were not printed on 80-pound thickness cardstock (the paper weight used for things like paperback-book covers).¹⁰ The move received immediate backlash, but Blackwell's office didn't reverse the guidelines until nearly three weeks later — just five days before the registration deadline, and well after some county election boards had reportedly rejected some registrations and forced voters to re-submit them.¹¹

That same year, Blackwell attempted to limit access to provisional ballots, a safeguard required under the federal Help America Vote Act (HAVA). Provisional ballots allow people with registration issues to cast a vote that can be counted if the issue is later sorted out. His office instructed pollworkers to deny provisional ballots to voters who were not confirmed as residents of a given precinct.¹² A federal district court ruled that this instruction violated HAVA,¹³ but Blackwell's office refused to make revisions that would ensure his rule complied with federal law. In the face of this defiance, the court issued its own instructions,¹⁴ noting that the original instructions would have "disenfranchised large numbers of Ohio voters."¹⁵

At least one news source reported that Blackwell then suggested he would rather go to jail than comply with the court order, saying, "some of the best writing in history has been done from jail."

⁸ John McCarthy, *Republicans flock to Blackwell campaign*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, June 10, 2006.

⁹ Steven F. Huefner, Daniel P. Tokaji, and Edward B. Foley, *From Registration to Recounts: The Election Ecosystems of Five Midwestern States*, Election Law @ Moritz at the Ohio State University Moritz College of Law, 2007, <http://moritzlaw.osu.edu/electionlaw/projects/registration-to-recounts/book.pdf>.

¹⁰ See Editorial, *Playing With the Election Rules*, N.Y. TIMES, Sept. 30, 2004, http://www.nytimes.com/2004/09/30/opinion/playing-with-the-election-rules.html?_r=0.

¹¹ *Id.*; Jim Siegel, *Blackwell election decisions blasted*, CINCINNATI ENQUIRER, Oct. 1, 2004; see Andrew Welsh-Huggins, *Counties ignoring order for voter registration on heavier paper*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 28, 2004.

¹² Directive 2004-33. See *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 979-80 (N.D. Ohio 2004) (reproducing the text of Directive 2004-33).

¹³ *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d at 988-95 (discussing the directive's failure to comply with HAVA).

¹⁴ *Sandusky County Democratic Party v. Blackwell*, 340 F. Supp. 2d 815 (N.D. Ohio 2004) (issuing provisional voting guidelines to replace those previously held invalid).

¹⁵ *Id.* at 818.

Blackwell also stated that he would not issue guidelines he thought disagreed with state law,¹⁶ even in the face of directly applicable federal law. A federal appeals court ultimately concluded Blackwell's instruction violated HAVA by denying ballots to voters whose residence was not confirmed.¹⁷

Troubled Administration

The Ohio Secretary of State's office also struggled to deliver consistent, incident-free election administration under Blackwell's leadership. The state's problems were so comprehensive in 2004 that *The New York Times* labeled it an "example for every ailment in the United States' electoral process."¹⁸ Those ailments were detailed in a federal lawsuit where litigants described "severe wait times," a polling place where "voting was not completed until 4:00 a.m. on the day following Election Day," "inadequate training" for poll workers, voters sent to the wrong polling place, and provisional ballot problems.¹⁹ The litigants argued that Ohio's election administration was so poor that it amounted to a due process violation — and the court found those claims credible enough to allow the case to move forward.

Blackwell managed an election where there were hundreds of complaints of excessive waits to cast a ballot, with some up to ten hours long.²⁰ One Democratic Party-sponsored survey estimated that the wait caused as many as 129,000 Ohioans to leave their polling place without voting.²¹ The problem was attributed in part to resource allocations.²²

A 2004 incident involving voter challenges is emblematic of Blackwell's administration: confusing and disenfranchising.

¹⁶ Gregory Korte & Jim Siegel, *Defiant Blackwell rips judge*, CINCINNATI ENQUIRER, Oct. 22, 2004.

¹⁷ *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). The court also found, however, that HAVA did not mandate that these provisional ballots be counted.

¹⁸ James Dao, Ford Fessenden, & Tom Zeller Jr., *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. TIMES, Dec. 24, 2004, http://www.nytimes.com/2004/12/24/us/voting-problems-in-ohio-spur-call-for-overhaul.html?_r=0.

¹⁹ *League of Women Voters v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008) (finding allegations sufficient to support equal protection and substantive due process claims). The case eventually settled. See Order Enforcing Settlement Agreement, *League of Women Voters v. Brunner*, No. 05-cv-7309 (N.D. Ohio June 19, 2009).

²⁰ See *Voting Problems in Ohio Spur Call for Overhaul*, *supra* note 1 (citing "464 complaints about long lines in Ohio collected by" voting rights advocates); Status Report of the House Judiciary Committee Democratic Staff, *Preserving Democracy: What Went Wrong in Ohio* 8, Jan. 5, 2005,

<http://www.openvotingconsortium.org/files/Conyersreport.pdf>; Michael Powell & Peter Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio*, Wash. Post, Dec. 15, 2004,

https://www.washingtonpost.com/archive/politics/2004/12/15/several-factors-contributed-to-lost-voters-in-ohio/73aefa72-c8e5-4657-9e85-5ec8b2451202/?utm_term=.69f3b9b77e79 ("In Columbus, Cincinnati and Toledo, and on college election officials allocated far too few voting machines to busy precincts, with the result that voters stood on line as long as 10 hours -- many leaving without voting.").

²¹ Democratic National Committee Voting Rights Institute, *Democracy at Risk: The 2004 Election in Ohio* 13, June 22, 2005, <http://www-personal.umich.edu/~wmebane/Ohio2004/OhioReportCover2Cover.pdf> ("Two percent of voters who went to the polls on Election Day decided to leave their polling locations due to the long lines. This resulted in approximately 129,543 lost votes. However, these potential voters would have divided evenly between George Bush and John Kerry.")

²² Benjamin Highton, *Long Lines, Voting Machine Availability, and Turnout: The Case of Franklin County, Ohio in the 2004 Presidential Election*, 39 PS: POLITICAL SCIENCE AND POLITICS 65, 68 (2006) (identifying "machine scarcity" as "a cause of lower turnout" in Franklin County, Ohio).

That year, the Ohio Republican Party created a controversial plan to use thousands of private citizens to challenge the eligibility of prospective voters,²³ primarily in majority-black precincts.^{24 25} A court noted that 97 percent of first-time voters in majority-black precincts would encounter challengers at the polls under the plan, compared to 14 percent of new voters in a majority white location.²⁶ Weeks before the election, Blackwell issued a memorandum that established challenge procedures (Ohio statutes left certain issues unclear) which allowed the party plan to move forward.²⁷

Litigation followed, challenging both the GOP plan and the related statutes, and Blackwell's office ultimately shifted its position on challengers three times in ten days. A federal court observed "complete confusion among designated challengers and even between the two top elections officials of Ohio as to how this process will actually work."²⁸ The saga ended when an appeals court allowed the challenges to proceed.²⁹

Blackwell's administration faced further issues even after 2004. In 2006, his office publicly released private and sensitive personal information — documents containing constituents' full social security numbers (SSNs). Compounding the problem, removing this sensitive information from the web proved to be a slow process, as data was still available for months — even after the office settled a lawsuit over the disclosure.³⁰ And just two months after the settlement, the office mistakenly released voter registration lists that included millions of individual SSNs, and had to scramble to contain the problem.³¹

²³ Henry Weinstein, Ohio Court Limits 'Challengers' at Voting Stations, Los Angeles Times, Oct. 31, 2004 (reporting that the Ohio Republican Party had registered "3,600" individuals to serve as challengers at polling sites).

²⁴ Nicolas Riley, Brennan Center for Justice, VOTER CHALLENGERS 12 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf ("Under [the] proposed plan, 97 percent of first-time voters in majority-black precincts would have encountered challengers at the polls compared to just 14 percent of first-time voters in majority-white precincts.").

²⁵ See Donna Iacobani, *Judge cuts number of challengers at polling stations*, CLEVELAND PLAIN DEALER, Oct. 31, 2004.

²⁶ *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004).

²⁷ Memorandum on Challenger and Witness Guidelines, Ohio Secretary of State's Office, Oct. 20, 2004, <http://moritzlaw.osu.edu/electionlaw/docs/ohio/1101wolf-exhibita.pdf>, p

²⁸ *Spencer v. Blackwell*, 347 F. Supp. 2d at 535.

²⁹ *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547 (6th Cir. 2004) (lifting injunctions that limited who was permitted to bring voter challenges at Ohio polling places). See Dale Smith, *Preserving Rights or Perpetuating Chaos: An Analysis of Ohio's Private Challengers of Voters Act and the Sixth Circuit's Decision in Summit County Democratic Central and Executive Committee v. Blackwell*, 74 U. Cin. L. Rev. 719 (2011).

³⁰ Jim Provance, *Private data still public on Ohio office's web site*, THE BLADE, TOLEDO, OHIO, Sept. 15, 2006.

³¹ Julie Carr Smyth, *Identity Thefts prompt credit freeze proposal*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, June 30, 2006.