

# ROLL CALL

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## **It's Time for the House to Pick Up the Pieces in Florida's 13th District**

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Remember the infamous “butterfly ballot” of Palm Beach County, Fla., in the 2000 presidential election? Back then, poor ballot design appeared to have caused many supporters of Democrat Al Gore to vote for conservative third-party candidate Pat Buchanan for president, effectively allowing George Bush to win Florida’s electoral votes and the presidency. The courts said there was nothing that could have been done about the problems with the ballot even though there was strong evidence that more Florida voters came to their polling places intending to vote for Gore than for Bush.

The elections last month brought us the 2006 version of the butterfly ballot. This time, it appears that poor ballot design or machine malfunctions with electronic voting machines caused thousands of voters to skip the race for Florida’s 13th Congressional district, leading to a 369-vote victory by the Republican candidate over the Democratic one. Once again the matter is in court, and once again the courts are not likely to give a remedy.

But this time there’s another option. The House can — and should — declare the seat vacant, requiring the seat to be filled by a special election.

First, a bit of background. In the 13th, Congressional district lines don’t coincide with county lines, so voters in all or parts of five Florida counties voted either for Republican Vern Buchanan or Democrat Christine Jennings. There was an unusually high number of “undervotes” — that is, an absence of a recorded vote in the race for this seat — with the vast majority coming from Sarasota County.

About 13 percent of Sarasota County votes cast using electronic touch-screen voting machines showed no vote in Florida’s 13th contest. This rate was much higher than the undervote rate among Sarasota County voters who voted using absentee ballots, and it was much higher than the undervote rate in the other four counties in that district — including one, Charlotte County, that uses the same type of electronic voting machines that Sarasota uses.

What accounts for the high undervote rate in Sarasota County, in a hard-fought Congressional race in a swing district? Machine malfunction remains a possibility, but based on the evidence available thus far, the most likely culprit appears to be poor

ballot design. In Sarasota County — but not in Charlotte County — the 13th district race appeared on the second electronic “page” of the electronic ballot, right at the top of the page above a larger heading for state races. A number of voters appeared to have missed the race because of its placement on the page.

A recent academic analysis by Laurin Frisina, Michael Herron, James Honaker and Jeffrey Lewis notes that in Charlotte County, the undervote rate in the state attorney general race was huge. In Charlotte — but not in Sarasota — the attorney general race was paired with another contest on the same electronic ballot page, mirroring the placement of the House race on the Sarasota County ballot. Fortunately for Floridians, the race for attorney general was not close.

A separate analysis recently completed by the Sarasota Herald-Tribune bolsters the poor ballot design hypothesis. Looking at every ballot cast in the county, the newspaper found that the people you’d most expect to vote in the House race — loyal party voters who voted Republican or Democrat throughout the ballot — were the ones most likely to have skipped voting in the race.

If it turns out that Florida courts concluded that poor ballot design caused the high undervote rate in the Congressional race, it is unlikely that there will be a judicial remedy. Overturning an election in the courts is tough, absent proof of fraud or proof that legal votes were not counted.

But there is another option. The Constitution provides that “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members ... .” The House has resolved disputed elections before. For two reasons, the House should declare the seat vacant, triggering a special election.

First, the House is not bound by the restrictive rules for ordering new elections that courts are. Assuming that the problem was poor ballot design, why should voters be victims of the design incompetence of election administrators? The fair thing to do — even if it is not legally compelled — is to hold a new election where everyone in the district gets to vote.

This case is unlike the butterfly ballot situation, where it would have been unfair to hold an election for a national office — president — in only one county in one state. A side benefit will be that the controversy will focus attention on problems with election administration, and get Congress and the country thinking more about the problems with how we administer our elections.

This course is not without risks. In 1984, the House, then controlled by the Democrats, waded into the bitter contest between incumbent Rep. Frank McCloskey (D-Ind.) and his Republican challenger, Rick McIntyre. The decision by the majority to seat McCloskey, which prompted widespread disgust within the House Republican Conference, is now cited as a contributing cause in the widening partisan divide in Congress.

In addition, some argue that it would be bad precedent to let the House make this decision on extralegal grounds.

But just like the House makes a political judgment as to what constitutes grounds for impeachment, it can make decisions about new elections on a political basis as well. A Democratic House's decision to grant a revote in these circumstances is a lot less likely to contribute to partisanship in Congress than was the Republican House's decision to impeach then-President Bill Clinton.

More importantly, such political judgments are self-limiting. If the Democratic House started overturning election results for no good reason, voters would see such moves as illegitimate and vote the Democrats out of office.

We cannot rerun the 2000 election in Palm Beach, but the House can provide some justice to this year's voters in Sarasota County without triggering a national crisis.

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