

**THE CASE OF THE DISAPPEARING VOTES:
LESSONS FROM THE *JENNINGS V. BUCHANAN*
CONGRESSIONAL ELECTION CONTEST**

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The November 2006 congressional balloting in Florida’s Thirteenth District was a model for how not to conduct an election. The final margin was less than 400 votes out of nearly a quarter million total ballots cast.¹ But the candidate who officially “lost” came up short only because 18,000 congressional ballots cast on paperless electronic touchscreen voting machines in her home county turned up blank.² The ensuing litigation, both in state court and in the U.S. House of Representatives, demonstrated that about 14,000 of those 18,000 Sarasota County congressional “undervotes”—ballots with no vote for either congressional candidate—were likely unintentional, and that had those ballots been counted as they had been intended, the candidate who officially lost by nearly 400 votes would instead have triumphed by about 3,000.³

That is no way to run an election.

This Article, however, focuses not on the substantive outcome, but rather on the procedures used during the “election contest” litigation that followed the voting. That litigation dragged on through more than half of the congressional term; even if it ultimately had led to a reversal of the election result, the less popular candidate still would have represented the district for most of the 110th Congress.⁴ Even worse, the litigation ultimately was utterly inconclusive as to the reason for the 18,000 electronic undervotes because discovery targeting the defective voting system was thwarted when the voting machines’ manufacturer successfully invoked the trade-secret

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¹ Jeremy Wallace, *Democrats Seize House; Crist In; Buchanan Leads; Slim 368-Vote Margin Will Trigger a Recount for the 13th District*, SARASOTA HERALD-TRIB. (Fla.), Nov. 8, 2006, at A1 [hereinafter Wallace, *Slim Margin*].

² Bob Mahlburg & Maurice Tamman, *Dist. 13 Voting Analysis Shows Broad Problem; Sarasota County Vote Review Indicates 13% Undercount*, SARASOTA HERALD-TRIB. (Fla.), Nov. 9, 2006, at A1.

³ COMM. ON HOUSE ADMIN., DISMISSING THE ELECTION CONTEST RELATING TO THE OFFICE OF REPRESENTATIVE FROM THE THIRTEENTH CONGRESSIONAL DISTRICT OF FLORIDA, H.R. REP. NO. 110-528, pt. 1, at 7 (2008) [hereinafter H.R. REP. NO. 110-528].

⁴ See *id.* at 15–17 (providing a time line of the litigation).

privilege to block any investigation of the machines or their software by the litigants.⁵ Today, all we know with any degree of certainty is that the electorate's second choice was awarded the congressional seat.⁶ We will never know why.

That is no way to run an election contest.

Part I of this Article recounts what happened on election day in Florida's Thirteenth Congressional District. Part II describes and analyzes the state-court election contest, and Part III does the same for the election contest filed in the House of Representatives, which is the ultimate arbiter of all contested House elections. Because this Article's co-authors represented the plaintiff in those election contests, the discussion reflects first-hand experience litigating the cases. Building on the problems encountered in Parts II and III, Part IV of this Article addresses several specific areas ripe for procedural reform. Enacting these reforms, some at the state level, others at the federal, would help ensure that the citizens of other states and congressional districts do not suffer the same mistreatment that befell the voters of Florida's Thirteenth District.

I. THE NOVEMBER 2006 ELECTION FOR CONGRESS IN FLORIDA'S THIRTEENTH DISTRICT

The November 2006 contest for Representative in Congress from Florida's Thirteenth District was one of the most hard-fought in the country.⁷ Indeed, with expenditures totaling more than \$13 million, the campaign was the most expensive House contest in the nation in 2006, and one of the most expensive ever.⁸ Democrat Christine Jennings and Republican Vern Buchanan engaged in a fight to the finish for the open seat, previously held by the infamous Katherine Harris, who in 2000 had presided over the Bush/Gore dispute as Florida's Secretary of State.⁹ Given the fierceness of the 2006 battle, few were shocked when the election night results showed that the victor, Vern Buchanan, had squeaked by with a razor-thin margin—only 369 votes.¹⁰ What was surprising, however, was that the election-night numbers showed more than 18,000 voters apparently had not voted in this hotly contested race.¹¹ Most of

⁵ *Id.* at 3.

⁶ See discussion *infra* Part IV.

⁷ See Wallace, *Slim Margin*, *supra* note 1.

⁸ See Jeremy Wallace, *District 13 Costliest Race at \$13.1 M; The Congressional Race Brings New Calls for a Law to Limit Spending*, SARASOTA HERALD-TRIB. (Fla.), Jan. 18, 2007, at A1.

⁹ See Peter Whoriskey, *Vote Disparity Still a Mystery in Fla. Election for Congress*, WASH. POST, Nov. 29, 2006, at A3.

¹⁰ See Wallace, *Slim Margin*, *supra* note 1. The original count showed a 368-vote margin in the race and was later certified on Nov. 20, 2006, as a 369-vote margin after the recount. See *Official Certificate of the State Elections Canvassing Comm'n of the Gen. Election Held on the Seventh Day of Nov., A.D. 2006*, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 1877-92.

¹¹ Mahlburg & Tamman, *supra* note 2.

these voters cast choices for every other contest on the ballot—from United States Senator to hospital board.¹² Yet, somehow, these voters reportedly registered no choice at all in the high-profile Jennings-Buchanan congressional race.¹³

The numbers were not a complete surprise, however. Florida allows early voting, and during the early-voting period, reports had already begun to surface of voters encountering difficulties getting their choices for Congress to register on the electronic touchscreen voting machines.¹⁴ Attorneys for the Jennings campaign had sent a letter to the Supervisor of Elections for Sarasota County, where all of the reports had originated, before election day, citing problems some voters were having casting their ballots in the congressional race.¹⁵ In response, Supervisor Kathy Dent instructed all poll workers to warn voters to look out for the congressional race on the touchscreen's electronic ballot.¹⁶ And as more reports poured in on election day, the Jennings campaign held a midday press conference to highlight the issue.¹⁷ Yet it was clear that for thousands of Sarasota County voters, this had not been enough.

A. *The Undervote*

Sarasota County, where the enormous undervote occurred, is one of the five counties that constitute Florida's Thirteenth Congressional District.¹⁸ To put these 18,000 undervotes in perspective, this figure corresponds to undervote rates of 13.9% for those who voted on touchscreen machines in Sarasota County on election day and 17.6% for those who did so during the early-voting period. Overall, more than one out of every seven votes cast on Sarasota County's touchscreen machines turned up blank for the congressional race.¹⁹ In contrast, the undervote rate for those who voted via paper absentee ballots in Sarasota County was a mere 2.5%.²⁰ And the

¹² Indeed, in Sarasota County more voters made choices in the hospital-board race than in the congressional race. *See id.*

¹³ *Id.*

¹⁴ *See* Todd Ruger, *Voting Glitch Prompts Warning*, SARASOTA HERALD-TRIB. (Fla.), Nov. 5, 2006, at B1 (noting that, during early voting, voters reported to the Supervisor of Elections office that “they picked Jennings, but the 13th Congressional District had no vote registered for either Jennings or Republican Vern Buchanan when a screen reviewing their votes came up”).

¹⁵ Letter from Kendall Coffey, Partner, Coffey & Wright, L.L.P., to Kathy Dent, Supervisor of Elections, Sarasota County Dep't of Elections (Nov. 2, 2006), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 3185–93.

¹⁶ *See* Bob Mahlburg, *Election Day Trouble Was Widespread; Many Officials Said the Congressional Race Was Their Biggest Headache*, SARASOTA HERALD-TRIB. (Fla.), Nov. 14, 2006, at A1.

¹⁷ *See* Wallace, *Slim Margin*, *supra* note 1.

¹⁸ *See* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 6–7 (listing the other counties that make up the Thirteenth Congressional District).

¹⁹ *Id.*

²⁰ *Id.*

undervote rate was also historically anomalous: in 2002, the last midterm election, the congressional undervote rate in Sarasota County had been only 2.2%.²¹ Sarasota County's 2006 undervote rate also stood in stark contrast to that of the other four counties in the Thirteenth District in the same 2006 congressional election: 2.5% in Charlotte County, 2.1% in DeSoto County, 5.8% in Hardee County, and 2.2% in Manatee County.²² So Sarasota County, Jennings's political stronghold, accounted for just over half of the district's total congressional votes, but fully 86% of the district's congressional undervotes.²³

Three theories quickly emerged to explain the outsized undervote.²⁴ The first, espoused by Sarasota County Election Supervisor Dent, was that voters deliberately chose not to vote in the congressional race because they were turned off by the two candidates.²⁵ The second theory, championed by the maker of the touchscreen voting machines, Election Systems & Software, Inc. (ES&S) of Omaha, Nebraska, was that the ballot had been poorly designed by Dent's staff and that despite admonitions from poll workers, voters (especially senior citizens) were simply confused by the ballot design and, therefore, missed making a choice in the congressional matchup.²⁶ The third theory, argued by Jennings and others, was that the touchscreen voting system had malfunctioned, misrecording actual votes cast for one candidate or the other as undervotes, likely because of a software "bug" or a hardware defect (or the interaction of both).²⁷ So Jennings claimed that the machines malfunctioned, ES&S claimed that the voters malfunctioned, and Dent claimed that the candidates malfunctioned.

B. The iVotronic System

At the time, Sarasota County used the ES&S iVotronic voting system, which is a direct recording electronic (DRE) system.²⁸ For the iVotronics, local election

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1200.

²⁴ See Whoriskey, *supra* note 9 (summarizing the three main theories used to explain the undervote).

²⁵ See, e.g., Wallace, *Slim Margin*, *supra* note 1 ("We had a real heated race in the primary, and I think it turned people off." (quoting Supervisor Dent)).

²⁶ See Defendant Election Systems & Software, Inc.'s Answer to Plaintiff Jennings's First Amended Complaint to Contest Election at 5, *Jennings v. Elections Canvassing Comm'n of the State of Fla.*, No. 2006-CA-2973, 2006 WL 4404531 (Fla. Cir. Ct. Nov. 21, 2006), *cert. denied*, 958 So. 2d 1083 (Fla. Dist. Ct. App. 2007). For a screenshot showing the page of the ballot with the congressional race, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-425T, RESULTS OF GAO'S TESTING OF VOTING SYSTEMS USED IN SARASOTA COUNTY IN FLORIDA'S 13TH CONGRESSIONAL DISTRICT 10 (2008) [hereinafter RESULTS OF GAO'S TESTING], available at <http://www.gao.gov/new.items/d08425t.pdf>.

²⁷ See Complaint to Contest Election 1–3, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531 [hereinafter Jennings Complaint].

²⁸ For a more detailed overview of how the iVotronic system works, see RESULTS OF GAO'S TESTING, *supra* note 26, at 6–11.

officials design a multi-screen electronic ballot, which is stored on a device called a personal electronic ballot (PEB).²⁹ For each voter, the PEB is then inserted into an iVotronic machine, and the voter makes her choices using a pressure-sensitive touchscreen.³⁰ The voter can “page” through the ballot using buttons at the bottom of the screen.³¹ At the end of the ballot, the voter sees all of her selections on a summary screen.³² If she failed to vote in a particular contest, the touchscreen displays in bright red letters, “No selection made.”³³ Only after the voter confirms her choices on the summary screen, including any race displaying the words “No selection made,” can she record the votes by pressing the “Vote” button on the iVotronic.³⁴ The voter’s choices are then recorded to three internal flash memories.³⁵ The iVotronic system has no paper trail; all data is stored electronically only.³⁶

Unbeknownst to the public until well into 2007, the state and county election officials had been aware of serious problems with the iVotronic system three months before election day, but had done nothing to fix them.³⁷ An August 15, 2006 letter from ES&S to Florida elections officials described a problem ES&S had discovered with the touchscreens’ “smoothing filter” that resulted in a “delayed response to touch.”³⁸ ES&S noted that this problem “may vary from terminal to terminal and also may not occur every single time a terminal is used.”³⁹ The manufacturer further informed state and county officials that this problem would require “an update to the [source code] and state-level certification” and stated that it planned to complete the needed repairs “in time for use for the November, 2006 General Election.”⁴⁰ But the update and certification were never completed.⁴¹ When asked about this, Sarasota County Elections Supervisor Dent claimed that “[i]t wasn’t any big deal.”⁴²

²⁹ *Id.* at 6–10.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 18.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Paul Quinlan & Jeremy Wallace, *Call for Paper Trail, New Election; Democratic U.S. Lawmakers Condemn the Way Sarasota’s Election Was Run*, SARASOTA HERALD-TRIB. (Fla.), Nov. 16, 2006, at A1.

³⁷ See Anita Kumar, *Sarasota Officials Ignored Warning About Voting Machines*, ST. PETERSBURG TIMES (Fla.), Mar. 15, 2007, at A1.

³⁸ Letter from Linda Bennett, Reg’l Account Manager, Election Systems & Software, Inc., to Fla. [iVotronic] Users (Aug. 15, 2006), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 2637–38.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Kumar, *supra* note 37.

⁴² *Id.*; see also Memorandum Responding to the Honorable Charles A. Gonzalez’s April 3, 2007 Letter Regarding the Investigation of the Election for Representative in the One

For Sarasota County voters, however, problems with the iVotronics were a very big deal. Ironically, the November 2006 ballot also included an initiative sponsored by a citizens group called the Sarasota Alliance for Fair Elections (SAFE) requiring the county to get rid of the paperless iVotronic machines.⁴³ The ballot measure passed overwhelmingly,⁴⁴ but it was too late for those disenfranchised by the iVotronics in the 2006 congressional election.⁴⁵

C. The “Recount”

Under Florida law, the Jennings-Buchanan race automatically required a “manual” recount because the margin of victory had been less than one-quarter of one percent.⁴⁶ But with no paper trail, the “manual” recount of electronic undervotes was a meaningless exercise.⁴⁷ There was simply nothing to manually recount. The “recount” consisted of the county officials again adding up the numbers that the iVotronic machines told them to add.⁴⁸ So, it was hardly surprising that the electronic vote totals remained unchanged.⁴⁹

The Jennings campaign therefore began preparing to challenge the election results under both Florida and federal law. It was clear that the only way to determine what had happened to these 18,000 votes was to look at the iVotronic machines and software.

Hundred Tenth Congress from Florida’s Thirteenth Congressional District (Apr. 13, 2007), reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 2570–73.

⁴³ See Dale White, *Sarasota Favors a Paper Ballot*, SARASOTA HERALD-TRIB. (Fla.), Nov. 7, 2006, at A18.

⁴⁴ *Id.*

⁴⁵ Due largely to the Jennings-Buchanan controversy and Governor Charlie Crist’s leadership, paperless electronic voting systems have now been banned statewide in Florida. See FLA. STAT. § 101.56075 (2008).

⁴⁶ See FLA. STAT. § 102.166(1) (2006) (“If . . . a candidate for any office was defeated or eliminated by one-quarter of a percent or less of the votes cast for such office . . . the board responsible for certifying the results of the vote on such race or measure shall order a manual recount of the overvotes and undervotes cast in the entire geographic jurisdiction of such office or ballot measure.”).

⁴⁷ See Quinlan & Wallace, *supra* note 36.

⁴⁸ *Id.*

⁴⁹ Buchanan’s lead increased from 368 to 369 votes after recounting all of the ballots, including paper ballots from military and overseas voters. See Jeremy Wallace, *Buchanan Wins Recount; Legal Action Looms; Jennings Might Challenge Her 369-Vote Loss After a Significant Undervote in Sarasota County*, SARASOTA HERALD-TRIB. (Fla.), Nov. 18, 2006, at A1.

II. THE STATE-COURT ACTION

The purpose of Jennings's state-court action was threefold: first, to find out why the congressional undervote rate was so high for Sarasota County's electronic ballots; second, to find out whether that abnormally high rate changed the election's outcome; and third, to prevent Buchanan from taking office in early January 2007 if, in fact, his election victory reflected voting-machine malfunction, rather than the will of the electorate.⁵⁰ If Buchanan were seated when the new 110th Congress convened in early January, the focus inevitably would shift from the state court to the United States House of Representatives, so speed was critically important.

The "primary consideration in an election contest is whether the will of the people has been effected."⁵¹ But under the Florida election-contest law, there are only four grounds upon which a candidate or voter can challenge the result of an election:

(a) [m]isconduct, fraud, or corruption on the part of any election official . . . sufficient to change or place in doubt the result of the election[;] (b) [i]neligibility of the successful candidate for the nomination or office in dispute[;] © [r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election; [or] (d) [p]roof that any elector, [or] election official . . . was given or offered a bribe or reward [or] . . . anything of value for the purpose of procuring the successful candidate's nomination or election⁵²

A. The State-Court Complaint

On November 20, 2006, within hours of the state certifying the vote totals, Jennings filed an election-contest complaint in Florida state court.⁵³ The complaint

⁵⁰ See Jennings Complaint, *supra* note 27.

⁵¹ Boardman v. Esteve, 323 So. 2d 259, 269 (Fla. 1975), *cert. denied*, 425 U.S. 967 (1976); see also Barber v. Moody, 229 So. 2d 284, 286 (Fla. Dist. Ct. App. 1969) ("There [is] no doubt that the purpose of the statutes permitting election contests is to prevent the thwarting of the will of the electors either by fraud or by common mistakes honestly made."), *cert. denied*, 237 So. 2d 753 (Fla. 1970); COMM. ON HOUSE ADMIN., EXAMINATION AND RECOUNT OF THE VOTES CAST FOR REPRESENTATIVE IN CONGRESS, FIFTH CONGRESSIONAL DISTRICT OF INDIANA, AT THE GENERAL ELECTION OF NOVEMBER 8, 1960, H.R. REP. NO. 87-513, at 22 (1961).

⁵² FLA. STAT. § 102.168(3)(a)–(d) (2006). After the 2000 presidential election, the Florida legislature eliminated a fifth, "catch-all" provision allowing for an election contest based on "[a]ny other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question." See 2001 Fla. Sess. Law Serv. 40 (West) (amending FLA. STAT. § 102.168 by deleting section 3(e)).

⁵³ See Jennings Complaint, *supra* note 27.

alleged that a malfunction of the iVotronic machines had caused the rejection of a number of legal votes sufficient to change or place in doubt the result of the election.⁵⁴ Jennings named the state and county election officials as defendants, as well as Vern Buchanan, as Florida's election-contest statute required.⁵⁵ Along with her complaint, Jennings moved for expedited discovery and requested access to the ES&S hardware, software, and source code in the possession of the state and county.⁵⁶ Jennings requested an immediate hearing on her motion, citing the provision of the election-contest statute that entitled her to expeditious treatment.⁵⁷

In her complaint, Jennings quoted the sworn affidavits of numerous voters who came forward during or immediately following the election to describe the difficulties they had encountered in registering their votes on the touchscreen machines.⁵⁸ These citizens attested that they had voted for Jennings, but when they reached the end of the ballot, the summary screen showed that no vote had been recorded in the congressional race.⁵⁹ Jennings's complaint also quoted contemporaneous "incident report" forms kept by the Supervisor of Elections that reflected problems with the iVotronics.⁶⁰ According to the county's own records, multiple iVotronic machines "were taken out of service on Election Day because they were 'slow to respond to touch,' or 'required a hard/extended touch before [a] vote was recognized,' or because they were 'not recording some votes [and] the touchscreen was not working properly.'"⁶¹ Later, in

⁵⁴ *Id.* at 8–9.

⁵⁵ See FLA. STAT. § 102.168(4) (2006); Jennings Complaint, *supra* note 27, at 4.

⁵⁶ See Plaintiff's Request for Production of Documents and for Inspection of Tangible Things at 6–7, Jennings v. Elections Canvassing Comm'n of the State of Fla., No. 2006-CA-2973, 2006 WL 4404531 (Fla. Cir. Ct. Nov. 21, 2006); Plaintiff's Motion to Compel Expedited Discovery, Jennings, No. 2006-CA-2973, 2006 WL 4404531.

⁵⁷ See FLA. STAT. § 102.168(7) (2006) ("Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing.").

⁵⁸ See Jennings Complaint, *supra* note 27, at 10–17.

⁵⁹ For example, one Sarasota County voter filed an affidavit stating:

I went through the ballot making my selections on the iVotronic touchscreen voting machine and took my time making sure that I voted in every race. I am certain that I cast a vote for Christine Jennings. When I reviewed the ballot at the end of the voting process, I noted that the race for the 13th Congressional District . . . indicated that I had made no selection. . . . I have more than 15 years experience in selling computer systems, five of those years are in selling touch screen systems. Based on my experience, I believe there was a software "bug" in the voting machine software causing the software not to register the touch.

Affidavit of Alisa Janette Behne, Jennings, No. 2006-CA-2973, 2006 WL 4404531; see also H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 2641–654 (providing examples of other affidavits submitted by voters).

⁶⁰ Jennings Complaint, *supra* note 27, at 17–18.

⁶¹ H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 465–66; see also *id.*, pt. 2, at 3024–50 (providing examples of log sheets kept by the supervisor of elections).

discovery, Jennings learned that even Buchanan's wife reported difficulty voting for her husband, apparently pressing the "Vote" button three times before her vote would register.⁶²

In addition to these eyewitness accounts and official reports, Jennings attached to her complaint two expert declarations.⁶³ As to whether there were a number of legal votes "sufficient to change or place in doubt the result of the election," the first expert was Professor Charles Stewart III, the chair of the political-science department at the Massachusetts Institute of Technology (MIT).⁶⁴ Professor Stewart examined data regarding undervote rates in Sarasota and surrounding counties and concluded that about 14,000 of the 18,000 undervotes were unintentional.⁶⁵ Using the actual "ballot-image logs" for each individual ballot to examine voters' preferences in other races, Professor Stewart later determined that if the 14,000 unintended undervotes had been properly recorded, Jennings would have won the election by more than 3,000 votes.⁶⁶ Professor Stewart further found that even if only 1,500 of the 18,000 undervotes were due to a malfunction of the iVotronics, the results of the race would have been reversed, with Jennings rather than Buchanan prevailing.⁶⁷

As to whether the rejection of these thousands of legal votes had been caused by a malfunction of the iVotronics, Jennings also attached to her complaint the declaration of Professor Dan S. Wallach of the Computer-Science Department at Rice University.⁶⁸ Professor Wallach postulated that the cause of the anomalous undervote rate might be a software bug in the iVotronics and proposed rigorous testing of the iVotronic system, including its source code, to determine whether such a bug existed.⁶⁹

B. The Thwarted Discovery Process

The election contest was assigned to Florida Circuit Judge William L. Gary in Tallahassee.⁷⁰ The day after the complaint was filed, Judge Gary held a non-evidentiary

⁶² See Memorandum from Sally Tibbetts to Ron Turner (Dec. 26, 2006), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 3069 ("Mrs. Buchanan indicated that she had to hit the button more than once, I think she said three times—to record her vote for Mr. Buchanan.").

⁶³ See Declaration of Charles Stewart III on Excess Undervotes Cast in Sarasota County, Florida for the 13th Congressional District Race, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531 [hereinafter Declaration of Stewart]; Declaration of Dan S. Wallach, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531 [hereinafter Declaration of Wallach].

⁶⁴ Declaration of Stewart, *supra* note 63, at 1.

⁶⁵ *Id.* at 2–3.

⁶⁶ *Id.*

⁶⁷ *Id.* at 2–3, 24–35.

⁶⁸ See Declaration of Wallach, *supra* note 63.

⁶⁹ *Id.* at 4–5.

⁷⁰ See Hearing Transcript, *Jennings v. Elections Canvassing Comm'n of the State of Fla.*, No. 2006-CA-2973, 2006 WL 4404531 (Fla. Cir. Ct. Nov. 21, 2006), *reprinted in* H.R. REP.

hearing on Jennings's request for expedited discovery.⁷¹ He denied the request and instead granted the state and county defendants fifteen days to file written responses.⁷² Judge Gary also stated that ES&S, the manufacturer of the iVotronic system, must be given "an opportunity to be heard" before he would consider granting any request for access to the system's source code.⁷³ Given Judge Gary's admonition that he would not allow access to the iVotronic source code without hearing from ES&S, Jennings amended her complaint to name ES&S as a defendant.⁷⁴

Jennings's request for the source code was critical because the code is what allows a computer scientist to "read" electronic-voting-system software and determine whether a bug exists that could have caused a voter's choices to be incorrectly recorded, or not to be recorded at all.⁷⁵ "Without access to the source code that runs the [electronic voting machine], auditing becomes a pointless endeavor because all an auditor has to work with is potentially flawed election data produced by a black box in which it is impossible to see how it created that data."⁷⁶ Under Florida law, ES&S was required to keep a copy of the source code for the iVotronic system in escrow with the state.⁷⁷ Jennings, therefore, filed a motion to compel the state to produce the escrowed source code, reiterating that although ES&S may have an interest in the litigation, the discovery she sought was in the state's possession.⁷⁸ Jennings also sought to compel the county to produce eight actual iVotronic machines and related equipment used in the election.⁷⁹

The state and county defendants objected to producing the vast majority of the materials requested (including all of Jennings's requests for hardware, software, and

NO. 110-528, *supra* note 3, pt. 1, at 895. Under Florida law, election-contest complaints for multi-county races must be filed in Leon County. FLA. STAT. § 102.1685 (2006).

⁷¹ See Hearing Transcript at 42, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 896.

⁷² See Response of Elections Canvassing Comm'n, Secretary of State Sue M. Cobb, and Dawn K. Roberts to Plaintiff's Motion to Compel Expedited Discovery at 2-3, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531.

⁷³ See Hearing Transcript at 42, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 896.

⁷⁴ See First Amended Complaint to Contest Election at 1-2, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531.

⁷⁵ See Andrew Massey, "But We Have to Protect Our Source!": *How Electronic Voting Companies' Proprietary Code Ruins Elections*, 27 HASTINGS COMM. & ENT. L.J. 233, 234 (2004).

⁷⁶ *Id.* at 243.

⁷⁷ See FLA. STAT. § 101.5607(1)(a) (2006); FLA. ADMIN. CODE ANN. r. 1S-2.015(5)(f) (2006).

⁷⁸ See Plaintiff Jennings's Motion to Compel Production of Items Within the Custody and Control of the State Under Fla. Stat. § 101.5607 and Fla. Admin. Code Rule 1S-2.015(5)(f) at 1, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531.

⁷⁹ See Plaintiff's Motion to Compel Expedited Discovery at 3, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531.

source code), claiming that these were “trade secrets” belonging to ES&S.⁸⁰ Florida’s evidence code provides for a trade-secret privilege, granting that “[a] person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice.”⁸¹ The evidence code further notes that “[w]hen the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require.”⁸²

Invoking the trade-secret privilege to prevent scrutiny of a contested election was apparently unprecedented. The privilege is typically invoked either in commercial disputes, for example when competitors are engaged in a lawsuit over theft of intellectual property and access to the property is at issue, or in products-liability cases, for example when plaintiffs seek to discover how the product that harmed them was made.⁸³ Never before had state and county election officials hidden behind a voting-machine manufacturer’s invocation of the trade-secret privilege to avoid investigating a disputed election.

Nonetheless, recognizing that the defendants were unwilling to provide the requested discovery due to the trade-secret privilege, Jennings took two unusual steps that she believed would expedite the discovery process and more speedily resolve the election contest. First, she conceded—solely for purposes of her motion—that the materials she had requested could be deemed trade secrets, thereby relieving the defendants of the potentially time-consuming burden of proving that the privilege did apply in this situation.⁸⁴ Second, Jennings proposed that her experts would be bound by a stringent protective order that would accommodate any interest ES&S might have in protecting its proprietary information from business competitors, while ensuring that Jennings’s experts could access the evidence needed to test the allegations of her complaint.⁸⁵ After some delay (fostered by the judge’s unwillingness to hold a case-management conference, issue a scheduling order, or accord the case priority status

⁸⁰ See Defendant Dent’s Response to Plaintiff’s Request for Production of Documents and for Inspection of Tangible Things at 3–4, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531; State Defendants’ Response to Plaintiff Jennings’s Request for Production of Documents and for Inspection of Tangible Things, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531.

⁸¹ See FLA. STAT. ANN. § 90.506 (2006).

⁸² *Id.*

⁸³ See, e.g., *Seta Corp. of Boca v. Office of Attorney Gen.*, 756 So. 2d 1093, 1094 (Fla. Dist. Ct. App. 2000) (ordering discovery because the party seeking trade secrets was “not a competitor” and protections could be taken to prevent disclosure to non-party business competitors); *Freedom Newspapers, Inc. v. Egly*, 507 So. 2d 1180, 1184 (Fla. Dist. Ct. App. 1987) (“The likelihood of [any] abuse of the discovery process is lessened where, as here, the party seeking discovery appears to have no real interest in the business techniques of the [party invoking the trade-secret privilege].”).

⁸⁴ See Plaintiff Jennings’s Motion for Entry of a Protective Order at 2, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531.

⁸⁵ See [Proposed] Protective Order, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 860.

as required by Florida law), ES&S eventually responded by requesting an evidentiary hearing to determine whether Jennings actually needed these discovery items.⁸⁶

Under Florida law, the test for determining whether trade secrets should be disclosed is whether the plaintiff has a “reasonable necessity for the requested materials.”⁸⁷ But the “burden is on the party resisting discovery to show ‘good cause’ for protecting or limiting discovery by demonstrating that . . . disclosure may be harmful.”⁸⁸ It seemed obvious that in a case alleging voting-machine malfunction, one would of course have a “reasonable necessity” to access the voting machines themselves, and their software. Equally obvious is that a stringent protective order, backed by the power to hold anyone who violated the order in contempt of court, would prevent any harmful disclosure of trade secrets. Moreover, neither Jennings nor her experts were competitors to ES&S, so the whole *raison d’être* for the privilege did not apply here. But the Florida state courts did not ultimately see it this way.⁸⁹

C. Jennings’s Day in Court

A full month after Jennings filed her state-court complaint and discovery requests, with the December holidays rapidly approaching, the trial judge finally held an evidentiary hearing to determine if Jennings had a “reasonable necessity” to access the iVotronic system to determine whether defects in that system had cost her the election.⁹⁰ At the hearing, Jennings presented testimony from Professors Stewart and Wallach.⁹¹ Neither Buchanan nor the governmental defendants who were the targets of Jennings’s motion to compel presented any witnesses.⁹² ES&S presented one expert on elections and voting patterns, Professor Michael C. Herron of Dartmouth College’s Government Department.⁹³

Consistent with the declaration he had filed in support of Jennings’s complaint, Professor Stewart testified that the undervote rate in Sarasota County was far above normal, that Jennings would have won the election had the undervote rate been any-

⁸⁶ See Defendant Election Systems & Software, Inc.’s Motion Requesting Fifteen (15) Days to Respond to Plaintiff’s Request for Production, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 884.

⁸⁷ *Sheridan Healthcorp, Inc. v. Total Health Choice, Inc.*, 770 So. 2d 221, 222 (Fla. Dist. Ct. App. 2000).

⁸⁸ *Am. Express Travel Related Services, Inc. v. Cruz*, 761 So. 2d 1206, 1209 (Fla. Dist. Ct. App. 2000).

⁸⁹ See *infra* note 107 and accompanying text.

⁹⁰ See Evidentiary Hearing Transcript at 6, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1155.

⁹¹ See Evidentiary Hearing Transcript at 25–168, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1160–95.

⁹² See Evidentiary Hearing Transcript at 4, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1154.

⁹³ See *infra* note 97 and accompanying text.

where near normal, and that machine malfunction had likely altered the election's outcome.⁹⁴ Stewart's expert statistical analyses of the election returns, on a machine-by-machine basis, showed that the undervote problem was worst on touchscreens that were set up and "calibrated" on days when the county election staff was busiest—which strongly suggested that the undervote rates were tied to machine malfunction, not voter confusion or some other factor.⁹⁵ Also consistent with his declaration, Professor Wallach testified that machine malfunction could have caused the abnormal undervote rate and described the investigation of the hardware, software, and source code needed to test that hypothesis.⁹⁶

ES&S's political science expert Professor Herron testified—without ever having examined the iVotronic hardware, software, or source code and with no computer-science expertise whatsoever—that poor ballot design was the sole cause of the elevated undervote rate.⁹⁷ According to Professor Herron, because the congressional race appeared on the same page as the gubernatorial race, voters simply "skipped" the former.⁹⁸ Professor Herron's theory also posited that each of these voters must have missed the summary page's bright red warning, telling the voter there had been "No Selection Made" in the congressional race.⁹⁹ But Professor Herron agreed with Professor Stewart that the undervote rate in Sarasota County was not normal and that had it been normal, Jennings would have won the election by roughly 3,000 votes.¹⁰⁰

ES&S also introduced into evidence a "Parallel Test Summary Report," which the state defendants produced the night before the evidentiary hearing.¹⁰¹ The report

⁹⁴ See Evidentiary Hearing Transcript at 25–72, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1160–71.

⁹⁵ See Evidentiary Hearing Transcript at 68–71, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1170–71; see also Evidentiary Hearing Transcript at 155–56, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1192.

⁹⁶ See Evidentiary Hearing Transcript at 148–56, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1190–92.

⁹⁷ See Evidentiary Hearing Transcript at 257–389, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1236–69.

⁹⁸ See Evidentiary Hearing Transcript at 277, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1241.

⁹⁹ See *supra* text accompanying notes 29–34 (discussing how the iVotronic voting system works).

¹⁰⁰ See Evidentiary Hearing Transcript at 330–31, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1255 (stating that Jennings would have won if one attributed the undervote to machine malfunction); see also Laurin Frisina, Michael C. Herron, James Honaker & Jeffrey B. Lewis, *Ballot Formats, Touchscreens, and Undervotes: A Study of the 2006 Midterm Elections in Florida*, 7 ELECTION L.J. 25, 25 (2008) (“[T]here is essentially a 100 percent chance that the 13th Congressional District election result would have been reversed in the absence of the large Sarasota undervote.”).

¹⁰¹ See Parallel Test Summary Report, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, at 1285.

described the state's post-election testing of ten iVotronic machines, five of which had not even been used during the election.¹⁰² In the test, the state used "mock voters," who were permanent employees of the State's Division of Elections, to carefully enter their selections into the iVotronic machines using pre-set scripts.¹⁰³ These scripts assumed that those who undervoted did so intentionally.¹⁰⁴ The report concluded that because these ten iVotronic machines recorded the scripts correctly, the "parallel tests were successful in demonstrating 100% accuracy in recording the vote selections as indicated on the review screens."¹⁰⁵ The report was introduced over Jennings's objection that it was hearsay and that she should be allowed the opportunity to cross-examine its author.¹⁰⁶

D. The Ruling and the Appeal

Nine days after the evidentiary hearing on Jennings's "reasonable necessity" for discovery, Judge Gary issued an order denying her requests for access to the iVotronic hardware, software, and source code.¹⁰⁷ The court stated that granting Jennings's motions to compel "would require [it] to find that it is reasonably necessary for the Plaintiffs to have access to the trade secrets of [ES&S] based on nothing more than speculation and conjecture, and would result in destroying or at least gutting the protections afforded those who own the trade secrets."¹⁰⁸ Thus, Judge Gary held that ES&S's trade-secret privilege trumped the public's right to know what had gone so very wrong in the 2006 congressional election.¹⁰⁹

Jennings immediately appealed the trial court's ruling by filing an emergency petition for a writ of certiorari in Florida's First District Court of Appeal.¹¹⁰ Given that the term of the contested office was a mere two years and that Buchanan was about to be sworn into the office while Jennings still had not even gained access to basic dis-

¹⁰² See Parallel Test Summary Report at 4, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, at 1288.

¹⁰³ See Parallel Test Summary Report at 6, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, at 1290.

¹⁰⁴ See Parallel Test Summary Report at 2-3, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, at 1286-87.

¹⁰⁵ See Parallel Test Summary Report at 8, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, at 1292.

¹⁰⁶ See Evidentiary Hearing Transcript at 253-56, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1235-36.

¹⁰⁷ See Order on Motions at 2-4, *Jennings*, No. 2006-CA-2973, 2006 WL 4404531.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ See *id.* at 4.

¹¹⁰ See Emergency Petition for a Writ of Certiorari, *Jennings v. Elections Canvassing Comm'n of the State of Fla.*, 958 So. 2d 1083 (Fla. Dist. Ct. App. 2007), reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 535.

covery, she also requested expedited consideration of her appeal.¹¹¹ Paradoxically, the appellate court granted Jennings's petition for expedited consideration,¹¹² but then waited five months to issue a ruling.¹¹³ On June 18, 2007, the appellate court issued a terse two-page opinion concluding that "an order denying discovery is ordinarily not reviewable by certiorari because the harm from such orders, as a general rule, can be rectified on plenary appeal."¹¹⁴ The order stated that Jennings had not met the "extraordinary burden to demonstrate that the trial court departed from the essential requirements of law, resulting in irreparable, material injury for the remaining trial proceedings that cannot be rectified on direct appeal."¹¹⁵ In other words, Jennings should proceed with her case, without the key discovery, inevitably lose in the trial court, and then bring a second appeal from that unfavorable final judgment—just to raise precisely the same issues she already had raised in her "expedited" emergency appeal.¹¹⁶ Jumping through those additional hoops would take months or even years. Jennings's state-court case was effectively finished.

III. THE FEDERAL PROCEEDINGS

At the same time that Jennings was pursuing her state-court suit, she also initiated an action in the United States House of Representatives.¹¹⁷ Under Article I, Section 5 of the United States Constitution, "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members."¹¹⁸ The House of Representatives, therefore, bears the ultimate constitutional responsibility to adjudicate disputed House elections, regardless of any state-court action.¹¹⁹

Successful House election contests are rare, but hardly unprecedented.¹²⁰ In contested-election cases, the House has found the contestant to be entitled to the seat

¹¹¹ See Emergency Petition for a Writ of Certiorari at 24–25, *Jennings*, 958 So. 2d 1083, reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 565–66.

¹¹² Court Order, *Jennings*, 958 So. 2d 1083 (No. 1007-11).

¹¹³ See *Jennings*, 958 So. 2d 1083 (denying certiorari).

¹¹⁴ *Id.* at 1084 (quoting *Ruiz v. Steiner*, 599 So. 2d 196, 197 (Fla. Dist. Ct. App. 1992)).

¹¹⁵ *Id.*

¹¹⁶ *Id.*; see *supra* note 114 and accompanying text.

¹¹⁷ See *infra* text accompanying note 134.

¹¹⁸ U.S. CONST. art. 1, § 5, cl. 1; see *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987) (explaining that the Constitution provides not just that "each House 'may Judge' [congressional elections], but that each House 'shall be the Judge'"); *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985) ("The House is not only 'Judge' but also final arbiter.").

¹¹⁹ U.S. CONST. art 1, § 5, cl. 1.

¹²⁰ See Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789–2002*, 18 STUD. IN AM. POL. DEV. 112, 115 (2004) ("There have been 601 contested election cases in the House [from 1789–2002], or an average of 5.6 per Congress.").

on 128 occasions; and the election has been voided, and the seat vacated, in another 66 cases.¹²¹ Most of these successful contests, however, took place many decades ago, with the greatest concentration in the last quarter of the nineteenth century.¹²²

To discharge its constitutional responsibilities, the House generally employs the procedures outlined in the Federal Contested Elections Act (FCEA).¹²³ The FCEA is largely a procedural statute. It sets forth rules about who may contest an election, the form of a notice of contest, service of such notice, and deadlines for various motions and discovery processes, as well as for final briefing.¹²⁴ But the statute says almost nothing about the substantive standards for judging a notice of contest.¹²⁵ Under the FCEA, the candidate contesting the election must file a notice of contest within thirty days of state certification of the election results.¹²⁶ The only substantive requirements for the notice are that the contestant must “state grounds sufficient to change [the] result of [the] election” and must “claim [the] right to [the] contestee’s seat” in Congress.¹²⁷ The contestee then has thirty days either to file an answer or to move for dismissal.¹²⁸ Under the FCEA, the burden of proof rests with the contestant, who “must overcome the presumption of the regularity of an election, and its results, evidenced by the certificate of election presented by the contestee.”¹²⁹ The FCEA also sets forth procedures for an adversarial system of taking depositions and other discovery.¹³⁰

Traditionally, the Committee on House Administration appoints a bipartisan three-member task force to investigate and report on an FCEA proceeding.¹³¹ Generally, the task force investigates the contest and makes a recommendation to the Committee on House Administration, which then issues a report and sends a resolution to the full House regarding the disposition of the contest.¹³² “The committee may recommend, and the House may approve by a simple majority vote, a decision affirming the right

¹²¹ *Id.* at 120; *see also* H.R. Res. 231, 73d Cong., 78 CONG. REC. 1510 (1934) (agreeing to a House resolution stating that there had been no valid election, that the state certified winner was not entitled to a seat, and that the Speaker of the House should notify the Governor of the vacancy).

¹²² For a general description of these successful contests, *see* Jenkins, *supra* note 120.

¹²³ 2 U.S.C. §§ 381–96 (2006).

¹²⁴ 2 U.S.C. §§ 381–93.

¹²⁵ 2 U.S.C. § 383(b).

¹²⁶ 2 U.S.C. § 382(a).

¹²⁷ 2 U.S.C. § 383(b).

¹²⁸ 2 U.S.C. § 382(a).

¹²⁹ JACK MASKELL & L. PAIGE WHITAKER, CONG. RES. SERVICE, PROCEDURES FOR CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES, at Summary (2008) [hereinafter CRS REPORT]; *see also* 2 U.S.C. § 385 (2006) (stating that “the burden is upon [the] contestant to prove that the election results entitle him to contestee’s seat”).

¹³⁰ CRS REPORT, *supra* note 129; *see* 2 U.S.C. §§ 386–93 (2006).

¹³¹ *See* CRS REPORT, *supra* note 129, at CRS-14 (noting an election contest in the 99th Congress in which the House Administration Committee “appointed a three-person Task Force composed of two Democrats and one Republican”).

¹³² *Id.* at Summary.

of the contestee to the seat, may seat the contestant, or find that neither party is entitled to be finally seated and declare a vacancy.”¹³³

A. Jennings’s FCEA Complaint

On December 20, 2006, Jennings filed an FCEA Notice of Contest stating that the pervasive malfunctioning of the iVotronic system in Sarasota County, as recounted by numerous eyewitnesses, provided grounds sufficient to change the result of the election.¹³⁴ As to her entitlement to the seat, Jennings noted the consensus among political scientists and statisticians that (1) the vast majority of the undervote was unintended and (2) had the votes been counted as they were intended, Jennings would have beaten Buchanan by approximately 3,000 votes.¹³⁵ Within the statutorily required thirty days, Buchanan filed a motion to dismiss the contest.¹³⁶

On January 4, 2007, while Jennings’s state-contest proceeding was still pending in the Florida appellate court and her federal notice of contest was pending before the House, Vern Buchanan was sworn in as the Representative in the 110th Congress for Florida’s Thirteenth District.¹³⁷ At that time, then-Chairwoman of the House Administration Committee Juanita Millender-McDonald hoped that the state courts would still allow Jennings the discovery necessary to determine whether the iVotronic machines had malfunctioned.¹³⁸ To that end, the Chairwoman wrote to the Florida appellate court to express her desire that the discovery matters be expeditiously resolved by the state judiciary.¹³⁹ The appellate court, however, refused to consider or even docket her letter.¹⁴⁰ And, as recounted above, the court then sat on Jennings’s appeal for five months before ultimately denying further discovery.

¹³³ *Id.*

¹³⁴ See Notice of Contest Regarding the Election for Representative in the One Hundred Tenth Congress From Florida’s Thirteenth Congressional District, *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1626–37.

¹³⁵ Notice of Contest Regarding the Election for Representative in the One Hundred Tenth Congress From Florida’s Thirteenth Congressional District at 1–24, *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1626–38.

¹³⁶ See Congressman Buchanan’s Motion to Dismiss Election Contest, *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 1655.

¹³⁷ See H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 4.

¹³⁸ See Letter from Juanita Millender-McDonald, Chairwoman, Comm. on House Admin., to Jon S. Wheeler, Clerk, Fla. First Dist. Court of Appeal, *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 25.

¹³⁹ *Id.*

¹⁴⁰ Court Order, *Jennings v. Elections Canvassing Comm’n of the State of Fla.*, 958 So. 2d 1083 (Fla. Dist. Ct. App. 2007) (No. 2006-CA-2973).

B. The FCEA Task-Force Investigation

Because there had been some hope that the discovery issues might be resolved in the state courts, the three-member task force appointed to investigate the Jennings-Buchanan contest was not established until March 23, 2007,¹⁴¹ and did not officially meet for the first time until May 2, 2007,¹⁴² four months into the twenty-four-month congressional term.¹⁴³ The delay was also due in part to the recalcitrance of the House Republicans to nominate anyone to the task force: the Ranking Member of the House Administration Committee stated that he felt “organizing the task force while Ms. Jennings’s case is under careful consideration in the Florida Circuit and Appeals Courts is an inappropriate interference of the federal legislative branch in state judicial proceedings.”¹⁴⁴ This theme was echoed in Buchanan’s motion to dismiss Jennings’s FCEA case, which accused Jennings of bringing the action while failing to exhaust all state remedies.¹⁴⁵

Nonetheless, the Republicans eventually nominated a member to the task force, and at its first official meeting the panel voted unanimously to retain the Government Accountability Office (GAO) to investigate the election.¹⁴⁶ The GAO was thereby engaged “to design and propose testing protocols to determine the reliability of the equipment used in the FL-13 election.”¹⁴⁷

¹⁴¹ H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 15.

¹⁴² *Id.* at 16.

¹⁴³ Prior to its first official meeting, the task force held a closed-door briefing with counsel for Jennings and Buchanan. At that briefing session, counsel were asked to address four issues: (1) whether there were compelling reasons for the task force not to proceed with an investigation at that time; (2) what discovery the parties anticipated undertaking if the task force were to authorize discovery in the FCEA proceeding; (3) whether the task force could rely on any of the testing of the iVotronic system that had been done to date by the State or county; and (4) how the task force could protect the proprietary interests of ES&S if discovery would entail an examination of trade secrets. *See* Letter from Charles A. Gonzalez, Chairman, Task Force, to Hayden R. Dempsey, Counsel (Apr. 3, 2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 59–60.

¹⁴⁴ Letter from Vernon J. Ehlers, Ranking Member, Comm. on House Admin., to Juanita Millender-McDonald, Chairwoman, Comm. on House Admin. (Apr. 16, 2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 61; *see also* Jeremy Wallace, *GOP, Seeking ‘Clarity,’ Holds Up Task Force*, SARASOTA HERALD-TRIB. (Fla.), Mar. 28, 2007, at A1.

¹⁴⁵ Congressman Vern Buchanan’s Motion to Dismiss Election Contest, *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 1655–97.

¹⁴⁶ Congressman Kevin McCarthy, the task force’s Republican member, first voted not to initiate any investigation into the election. But once the task force voted 2-to-1 to commence an investigation, he voted in favor of retaining GAO to conduct it. H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 21.

¹⁴⁷ *Id.*

Neither Jennings nor Buchanan had recommended retaining the GAO. Instead, Buchanan had argued that no investigation was necessary,¹⁴⁸ while Jennings had set forth a specific proposal for an adversarial process, consistent with the adversarial nature of the FCEA statute, allowing each side's experts to undertake specific testing, with deadlines that would ensure completion of their investigation into the iVotronic system within forty-five days.¹⁴⁹ Jennings recommended that the task force subpoena the key evidence (the iVotronic hardware, software, and source code), divide it between the two parties' expert teams, ask the parties' experts to analyze the evidence and submit reports and counter-reports under oath, assess those reports, and then resolve the case on an expedited basis.¹⁵⁰ The task force rejected this forty-five-day plan in favor of retaining the GAO.¹⁵¹

The task force then let forty-three more days pass before approving the GAO's proposed "engagement plan" on June 14, 2007.¹⁵² The GAO advised the task force that it expected its "engagement" would not be completed until at least September 2007.¹⁵³ Unlike Jennings's proposal, which the task force had rejected, the GAO's plan did not involve securing or testing any of the voting machines that Sarasota County actually had used in the 2006 election.¹⁵⁴ Rather, in this initial engagement, the GAO proposed simply to study the testing that had already been completed by the State and county to determine whether any further testing of the iVotronic system was warranted.¹⁵⁵ By that time, the state had issued a second report exonerating the iVotronic machines based on an investigation in which a team of academics performed a static "reading" of the iVotronic source code, but did not perform any hands-on testing of the code on actual iVotronic machines.¹⁵⁶

¹⁴⁸ See Congressman Vern Buchanan's Motion to Dismiss Election Contest, *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 1655.

¹⁴⁹ Memorandum Responding to the Honorable Charles A. Gonzalez's April 3, 2007 Letter Regarding the Investigation of the Election for Representative in the One Hundred Tenth Congress from Florida's Thirteenth Congressional District (Apr. 13, 2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 2604-07.

¹⁵⁰ *Id.*

¹⁵¹ H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 21.

¹⁵² *Id.* at 16.

¹⁵³ GAO Engagement Plan 4 (June 14, 2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 81.

¹⁵⁴ GAO Engagement Plan 1-4 (June 14, 2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 78-81.

¹⁵⁵ GAO Engagement Plan 1 (June 14, 2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 78.

¹⁵⁶ ALEC YASINSAC ET AL., SOFTWARE REVIEW AND SECURITY ANALYSIS OF THE ES&S iVOTRONIC 8.0.1.2 VOTING MACHINE FIRMWARE (2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 3071-137. For a detailed critique of this report, pointing out its many shortcomings, see DAVID L. DILL & DAN S. WALLACH, STONES UNTURNED: GAPS IN THE INVESTIGATION OF SARASOTA'S DISPUTED CONGRESSIONAL ELECTION (2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 2618-35.

As it turned out, it took the GAO the next four months to determine “[t]o what extent were tests conducted on the voting systems in Sarasota County prior to the general election and what were the results of those tests” and, “[c]onsidering the tests that were conducted on the voting systems from Sarasota County after the general election, [whether] additional tests [were] needed to determine whether the voting systems contributed to the undervote[.]”¹⁵⁷ On October 2, 2007, nine months into the twenty-four-month term of office, the GAO presented its findings in a report carefully titled “Further Testing Could Provide Increased But Not Absolute Assurance That Voting Systems Did Not Cause Undervotes in Florida’s 13th Congressional District.”¹⁵⁸ Thus, almost a full year after the election, the GAO finally decided to test the actual iVotronic machines and to look at the source code—steps that Jennings had proposed undertaking within days of the election.¹⁵⁹

The GAO did not, however, undertake the battery of tests that Jennings’s computer science experts had recommended. Instead, the GAO conducted just three limited tests: (1) a firmware verification test conducted on 115 of the 1,500 iVotronic machines that Sarasota County had deployed in the 2006 elections; (2) parallel testing on ten iVotronics; and (3) calibration testing on two iVotronic machines.¹⁶⁰ On February 8, 2008, after another four months had passed and with the congressional term more than half over, the GAO finally issued its findings that the iVotronic system did not contribute to the undervote and further testing was not necessary.¹⁶¹ The GAO report did not analyze whether voter confusion caused by poor ballot design contributed significantly to the undervote, much less whether poor ballot design alone could explain the entirety of the abnormal undervote. Nor did the report offer any other explanation of what caused thousands of Sarasota County votes to “disappear.”¹⁶²

Shortly thereafter, the Committee on House Administration, and then the full House, approved a resolution dismissing Jennings’s case.¹⁶³ Jennings’s election contest was finished.

¹⁵⁷ GAO Engagement Plan 1 (June 14, 2007), *reprinted in* H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 78.

¹⁵⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-97T, FURTHER TESTING COULD PROVIDE INCREASED BUT NOT ABSOLUTE ASSURANCE THAT VOTING SYSTEMS DID NOT CAUSE UNDERVOTES IN FLORIDA’S 13TH CONGRESSIONAL DISTRICT (2008), *available at* <http://www.gao.gov/new.items/do897t.pdf>.

¹⁵⁹ *Id.* at 17.

¹⁶⁰ *See* RESULTS OF GAO’S TESTING, *supra* note 26, at 1–2.

¹⁶¹ *Id.* at 3–4.

¹⁶² *See* Verified Voting Foundation, GAO Report Not a Clean Bill of Health for Voting Machines 1–4, <http://www.verifiedvotingfoundation.org/downloads/VVF-Statement-GAO.pdf> (last visited Dec. 1, 2008).

¹⁶³ H.R. RES. 989, 110th Cong. (2008) (enacted).

IV. LESSONS FROM THE FLORIDA CONGRESSIONAL DEBACLE

The injustice of the outcome of the election contest for Florida's Thirteenth Congressional District is obvious: despite the consensus view of experts on both sides of the dispute that about 3,000 more voters attempted to vote for Jennings than for Buchanan, the seat was awarded to Buchanan.¹⁶⁴ So, for two years, the people of Florida's Thirteenth District have been "represented" in Congress not by the candidate of their choice, but by the runner-up.

Even setting aside the substantive unfairness of the outcome, the Jennings-Buchanan election contest reveals a striking set of procedural problems. The case took more than fifteen months to be "resolved," by which time most of the congressional term had expired.¹⁶⁵ And even then, the litigation never came even remotely close to answering *why* Sarasota County's iVotronic system recorded 14,000 excess under-votes.¹⁶⁶ When an election contest neither answers the fundamental questions about what went wrong nor results in the correct candidate being seated, something has gone seriously awry.

So, what lessons are to be learned from this case? The most obvious reforms are substantive ones—demanding tougher tests before certifying voting machines, insisting on paper trails or other means for independently verifying votes, and perhaps replacing paperless electronic touchscreens with precinct-based optical-scan systems or ballot-marking devices, just to mention a few.¹⁶⁷ And undoubtedly, stricter requirements for ballot design should be enacted in most states.¹⁶⁸

But those reforms are not the focus of this Article. Rather, here the focus is on how to conduct election contests, not elections. Our suggestions for reform fall into four categories: (1) the discovery of alleged trade secrets, (2) the timing of state-

¹⁶⁴ *Id.*

¹⁶⁵ See H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 15–17.

¹⁶⁶ See Verified Voting Foundation, *supra* note 162, at 4.

¹⁶⁷ For a readable, nontechnical, and opinionated discussion of some of these topics, see AVIEL D. RUBIN, *BRAVE NEW BALLOT: THE BATTLE TO SAFEGUARD DEMOCRACY IN THE AGE OF ELECTRONIC VOTING* (2006). See generally Susan M. Boland & Therese Clarke Arado, *O Brave New World? Electronic Voting Machines and Internet Voting: An Annotated Bibliography*, 27 N. ILL. U. L. REV. 313 (2007).

¹⁶⁸ See LAWRENCE NORDEN ET AL., BRENNAN CTR. FOR JUSTICE, *BETTER BALLOTS* (2008), available at http://brennan.3cdn.net/d6bd3c56be0d0cc861_hlm6i92v1.pdf; see also *id.* at 24–27 (recommending that, unlike Sarasota County's 2006 congressional and gubernatorial ballots, two contests should never be placed on one screen). But see FRANKLIN COUNTY, OHIO BD. OF ELECTIONS, *HELPING FRANKLIN COUNTY VOTE IN 2008: WAITING LINES 4* (2008), available at <http://vote.franklincountyohio.gov/assets/pdf/2008/general/gen2008-voting-machine-allocation.pdf> (arguing that the "one-page-per-item" rule slows down the average voter by about seventy-five seconds, dramatically lengthens lines at polling places, and does not significantly diminish voter confusion).

court actions, (3) the relationship between state-court actions and FCEA cases, and (4) the process for adjudicating FCEA claims.

A. Discovery of Alleged Trade Secrets

If the Florida courts had properly applied the trade-secret privilege in the Jennings-Buchanan election contest, the defendants would have been forced to hand over the iVotronic hardware, software, and source code, subject to a protective order.¹⁶⁹ This case, however, highlights the need for express statutory guidance on this issue. Legislatures should declare unambiguously that the trade-secret privilege has only limited application to voting technology and cannot be invoked to hide defects in our electoral processes. If a voting-machine manufacturer invokes the privilege in an election contest, the solution is not to block discovery entirely, but rather to order appropriate protective measures.¹⁷⁰ In some circumstances, there may be risks to the electoral system itself if voting-machine source code becomes widely available.¹⁷¹ But those concerns are best addressed through protective measures, backed by the courts' contempt power, not by outright denial of discovery.¹⁷²

More generally, election-contest statutes should emphasize the need for liberal discovery. Georgia law, for example, expressly grants trial judges in contested-election cases the power to do everything "necessary and proper" to expeditiously hear and resolve the dispute, including "to compel the production of evidence which may be required at such hearing."¹⁷³ And Illinois law allows plaintiffs in contests involving statewide elections to request the examination of "records and equipment under the control of an election authority."¹⁷⁴ To deter the filing of frivolous requests, the Illinois statute requires the posting of a bond.¹⁷⁵

¹⁶⁹ As the Supreme Court has noted, "orders forbidding any disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel or to the parties." Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 362 n.24 (1979) (internal citations omitted).

¹⁷⁰ See David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 180–83, 187–93 (2007).

¹⁷¹ See Joseph Lorenzo Hall, *Transparency and Access to Source Code in Electronic Voting*, http://josephhall.org/papers/jhall_evt06.pdf (last visited Nov. 19, 2008). *But cf.* N.C. GEN. STAT. ANN. § 163-165.7(a)(6), (d)(9) (West 2007) (requiring companies that sell voting machines in North Carolina to make their source code available for inspection, merely upon request, to a wide group of potentially interested individuals, including the state chairs of every recognized political party and up to three persons designated by each party chair).

¹⁷² Cf. CONG. RESEARCH SERV., RL 31836 CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER 7 (2003) (noting that "legislative needs" embodied in a congressional subpoena can override a private party's asserted "need to protect confidential trade secrets").

¹⁷³ GA. CODE ANN. § 21-2-525(b) (2008).

¹⁷⁴ 10 ILL. COMP. STAT. ANN. 5/23-1.6a (West 2003).

¹⁷⁵ See *id.*

B. Timing of State-Court Actions

In *Jennings v. Buchanan*, the trial court did not even rule on the key discovery request—let alone the election contest itself—until nearly two months after the election.¹⁷⁶ And the appellate decision on that discovery ruling, although denominated an “expedited” proceeding, took more than five additional months.¹⁷⁷ Especially where the office at stake has a term of only twenty-four months, these sorts of delays should not be tolerated.

The goal of a state-court election contest should be to resolve the question of which candidate is entitled to the seat *before* the seat is actually filled. In the case of Congress, members typically are seated during the first week of January, following the November general election.¹⁷⁸ Therefore, state election codes should set a general deadline for completing discovery and trial-court proceedings in these contests by some point in December, roughly a month after the official certification of the election results, and well before the date on which the winning candidate is to be sworn into office. To ensure some degree of flexibility, the deadline should take the form of a rebuttable presumption, offering the trial judge the opportunity to file a written opinion justifying any extension that would prevent entering the final judgment before the presumptive December deadline, for example, when discovery is proceeding expeditiously but some extra time is needed.

This approach is not unrealistically speedy. Indeed, California law requires trial courts to decide election contests and to file findings of fact and conclusions of law within *ten days* of the evidentiary hearing.¹⁷⁹ At a minimum, states should follow New York’s lead in telling trial judges to give election-contest proceedings “preference over all other causes in all courts.”¹⁸⁰ Similarly, in Pennsylvania, the election code instructs courts to “proceed without delay” and to postpone all other business “if necessary . . . to the hearing and determination of [an election] contest.”¹⁸¹

Furthermore, as *Jennings v. Buchanan* amply illustrates, it is important for the state-court appellate processes also to be expedited (and not just nominally). For appeals in primary-election contests, California law requires the appellate court to give “precedence over all other appeals” and to act within ten days after the appeal is filed;¹⁸² the same approach could be applied to general-election contests, too. And, at least for contests involving federal or statewide offices, states also should

¹⁷⁶ H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 15.

¹⁷⁷ *Id.* at 16.

¹⁷⁸ *Id.* at 15.

¹⁷⁹ See CAL. ELEC. CODE § 16603 (West 2003).

¹⁸⁰ N.Y. ELEC. LAW § 16-116 (Consol. 1986).

¹⁸¹ 25 PA. CONS. STAT. ANN. § 3404 (West 2007); see also GA. CODE ANN. § 21-2-525(a), (b) (2008) (requiring the judge to set a hearing within twenty days and then “to proceed without delay” and even to “postpon[e] . . . all other business”).

¹⁸² CAL. ELEC. CODE § 16920 (West 2003).

consider granting “pass-through” appellate jurisdiction, which would allow the state supreme court to review the trial court’s judgment, bypassing any ruling on the merits from the intermediate appellate court. Illinois law provides that trial-court findings go immediately to the state supreme court, where the parties can file objections; the court then can accept, reject, or modify the findings, and can even take more evidence if needed.¹⁸³

C. Relationship Between State-Court Actions and FCEA Cases

A rebuttable presumption that state trial-court proceedings will conclude in December, followed by highly expedited review by the state supreme court, also would alleviate the current tensions that exist between state litigation and federal cases under the FCEA. In *Jennings v. Buchanan*, the House’s desire to defer to the state judiciary contributed to months of delay.¹⁸⁴ This desire was predicated in part on the House Democrats’ hope that the state courts would allow Jennings to undertake the necessary discovery, thus rendering a separate House investigation unnecessary, but also in part on the insistence of the House Republicans that “initiating Committee involvement in this case prior to the full pursuit of state remedies by the contestant [would be] premature and risky.”¹⁸⁵ During this delay, Buchanan was serving in Congress, but under a cloud. And for that entire time, Jennings’s 2008 campaign was effectively on ice, as she continued to pursue victory in the mangled 2006 election. Had Jennings actually succeeded in state court after the 110th Congress commenced in January 2007, there might well have been an additional layer of controversy over whether the state judiciary had the power to effectively unseat a sitting Member of Congress. That could have become a heated constitutional fight that would be best avoided.

To the extent that states adopt the sort of timing reforms suggested here, thus ensuring full judicial review before the first day of the new Congress, the House of Representatives could adjust its practice under the FCEA. First, the House could have far more confidence that the correct candidate is in fact being seated. Second, at the very beginning of the new Congress, without delay, the House Administration Committee could empanel the three-judge task force to review the FCEA case. And third, that panel usually would not need to await the outcome of pending state-court litigation, since that litigation would be finished already. Therefore, it could immediately move forward with its own review of the findings of fact and conclusions of law in the now-completed state-court case, and could also, if need be, commence its

¹⁸³ See 10 ILL. COMP. STAT. ANN. 5/23-1.10a (West 2003).

¹⁸⁴ Letter from Vernon J. Ehlers, Ranking Member, Comm. on House Admin., to Juanita Millender-McDonald, Chairwoman, Comm. on House Admin. (Apr. 16, 2007), reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 1, at 61.

¹⁸⁵ *Id.*

own independent investigation of the facts. The months of sitting around and waiting that plagued the Jennings-Buchanan case would thus be circumvented.

D. Process for Adjudicating FCEA Claims

To accomplish this reform, Congress should amend the FCEA to provide for quicker action, at least where state-court litigation has concluded before the new Congress convenes. As currently drafted, the FCEA simply cannot fulfill its mission of “provid[ing] efficient, expeditious processing of the cases and a full opportunity for both parties to be heard.”¹⁸⁶

Under the current FCEA, for example, the contestee has a full thirty days to file a motion to dismiss.¹⁸⁷ But once that motion has been filed, the statute sets no deadline for ruling on the motion.¹⁸⁸ Curiously, the FCEA sets deadlines for various parts of the process—for example, the filing of final briefs by both parties¹⁸⁹—but other parts, such as rulings on dismissal motions, are left to the unfettered discretion of the House Administration Committee or its three-member task force.¹⁹⁰ And even aside from those schedule gaps in the statutory scheme, if all the time periods enumerated in the statute are totaled up, it is hard to imagine any hotly contested FCEA case taking less than six or eight months. Clearly, that is too long.

Instead, each step of the adjudication should be mapped out in the statute, with a specific, and relatively short, deadline. As with the state election contests discussed earlier, it probably would be wise to express most of these deadlines as rebuttable presumptions that can be extended only when justified in a written order. In amending the FCEA, the goal should be to keep the entire proceeding short, commensurate with the key fact (which was given such short shrift in *Jennings v. Buchanan*) that House terms last only twenty-four months.¹⁹¹ An election contest that consumes most of those twenty-four months is nearly worthless. The goal should be to resolve these contests in a matter of weeks, not months. After all, Congress made the FCEA applicable to House, but not Senate, contests in part because two-year terms present much greater urgency than six-year terms.¹⁹² When a House seat is at stake, every week, much less every month, really counts.

Finally, in addition to imposing a series of deadlines for each phase of an FCEA case, Congress should reiterate that the statute calls for an adversarial process. It is

¹⁸⁶ COMM. ON HOUSE ADMIN., FEDERAL CONTESTED ELECTION ACT, H.R. REP. NO. 91-569, at 3 (1969).

¹⁸⁷ 2 U.S.C. § 383 (2006).

¹⁸⁸ *See id.*

¹⁸⁹ *Id.* § 392(d)–(f) (allowing up to eighty-five days for briefing—forty-five days for contestant’s initial brief, thirty for contestee’s answer brief, and ten for contestant’s reply brief).

¹⁹⁰ *See supra* discussion Part III.

¹⁹¹ U.S. CONST. art. 1, § 2, cl. 1.

¹⁹² 2 U.S.C. §§ 381–382 (2006).

fundamentally unfair to “penalize contestants who cannot fully support their credible allegations because the proof of their claims is in the hands or minds of those who have committed the errors or violations at issue.”¹⁹³ In *Jennings v. Buchanan*, the three-member task force strayed from that principle. The task force called on the GAO to conduct an independent investigation, behind closed doors, and with no direct input from the two parties, while denying Jennings’s request that both sides’ experts be given access to the iVotronic hardware, software, and source code.¹⁹⁴ In the end, the GAO conducted only a partial investigation that encompassed far less testing and analysis than the parties’ experts would have done.¹⁹⁵ And the GAO took far longer to do it.¹⁹⁶ It would be better, in such circumstances, to give both the contestant and the contestee immediate access to the critical evidence, and then let the adversarial process work its course. The two candidates for the House seat, after all, have the greatest incentive to dig out the truth (or, presumably, at least one of them has such an incentive). At a minimum, the parties’ efforts would likely sharpen the areas of factual disagreement; at best, they might resolve the case entirely. Even assuming, as at least one task-force member predicted in *Jennings v. Buchanan*, that the result of an adversarial process would be an inconclusive “battle” of conflicting experts, it would be best to allow such a battle, subject to reasonably tight time constraints, and only thereafter bring in the GAO or some other independent investigative entity to resolve whatever factual disputes remain.

CONCLUSION

Reaffirming the centrality of the adversarial process to resolving federal contested elections—in combination with setting a series of precise deadlines for adjudicating FCEA cases, establishing a tight but realistic timetable for state-court litigation, and ensuring liberal discovery untainted by excessive protection of trade secrets—would go a long way toward preventing repetition of the mistakes that plagued *Jennings v. Buchanan*. The next time voting machines fail in a close House election and thousands of votes “disappear,” these reforms would help ensure that key questions do not go unanswered as the congressional term slips away. And perhaps these reforms will even ensure that, next time, the candidate who attracts the most voters will actually be allowed to represent those voters in Congress.

¹⁹³ COMM. ON HOUSE OVERSIGHT, DISMISSING THE ELECTION CONTEST AGAINST CHARLIE ROSE, H.R. REP. NO. 104-852, at 6–7 (1996).

¹⁹⁴ See *supra* notes 151–52 and accompanying text.

¹⁹⁵ Compare RESULTS OF GAO’S TESTING, *supra* note 26, with Memorandum Responding to the Honorable Charles A. Gonzalez’s April 3, 2007 Letter Regarding the Investigation of the Election for Representative in the One Hundred Tenth Congress from Florida’s Thirteenth Congressional District (Apr. 13, 2007), reprinted in H.R. REP. NO. 110-528, *supra* note 3, pt. 2, at 2604–07.

¹⁹⁶ *Id.*

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