

**STATE OF HAWAII
OFFICE OF ELECTIONS**

802 LEHUA AVENUE
PEARL CITY, HAWAII 96782
www.hawaii.gov/elections

KEVIN B. CRONIN
CHIEF ELECTION OFFICER

TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE HOUSE COMMITTEE ON LEGISLATIVE MANAGEMENT
ON HOUSE CONCURRENT RESOLUTION NO. 267, HD 1

REQUESTING THE OFFICE OF ELECTIONS TO PROVIDE AN INFORMATIONAL BRIEFING AND DEMONSTRATION TO THE APPROPRIATE SENATE AND HOUSE COMMITTEES REGARDING THE OPERATION AND USE OF NEW ELECTRONIC VOTING SYSTEM AND TO PROVIDE INFORMATION PRIOR TO CONTRACTING TO PURCHASE ANY NEW VOTING SOFTWARE OR EQUIPMENT RELATED TO ANY NEW VOTING SYSTEM.

April 4, 2008

Chair Magaoay and members of the House Committee on Legislative Management, thank you very much for providing the opportunity to testify on House Concurrent Resolution No. 267, HD 1.

This resolution, if adopted, would do three things.

First, it would require the Office of Elections to provide to the legislature an informational briefing about and demonstration of the operation and use of the proposed new electronic voting system for all the state's county, state, and federal elections beginning with the primary election in September 2008.

Second, the resolution would require the Office of Elections to provide funding amounts relating to the systems and equipment, and the sources of such funds, and to provide justification that all future appropriations are reasonable and necessary.

Finally, the resolution would require the elections office to answer questions and to provide information before the purchase of any new electronic voting machines and equipment.

Before addressing each purpose in turn, let me provide some general background information.

In 1998, the Office of Elections migrated from the DATAVOTE punch card voting system to a mark sense voting system, which required voters to completely darken an oval with a black ink pen next to their selections. All registered voters who voted used this system.

In 2002, Congress passed the Help America Vote Act which, among other things, required that each polling place be equipped with an accessible voting system. This federally-mandated voting system required “the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place” under 42 U.S.C. § 15481(a)(3)(B). This requirement was implemented in the state of Hawaii by allowing voters to vote on either the mark sense voting system in use since 1998 or a Direct Recording Electronic (DRE) system.

In 2006, the Hawaii Legislature in its wisdom and to its credit passed a law that requires all electronic voting systems, including the DRE, to have a voter verifiable paper audit trail (VVPAT) that allows voters using the DRE system to review a printout of their selections before casting their ballot. The printouts are maintained for auditing and recordkeeping purposes.

In 2007, after the then existing voting systems contracts expired, the Office of Elections issued a Request for Proposals for a new voting system. The Evaluation Committee--the city and county of Honolulu Clerk; the county clerks of the islands of Hawaii, Kauai, and Maui; representatives of individual voters with disabilities in the community, and a representative of the Office of Elections--recommended a vendor to provide the traditional paper voting system (mark sense) and DRE voting system that is most advantageous to the state, taking into account price and other evaluation factors provided in the request for proposal and that meets the existing federal requirements. As in previous elections, each voter can decide how he or she will cast his or her ballot.

Let me now speak in turn to each purpose of this resolution.

First, the Office of Elections recognizes and respects this committee’s role concerning jurisdictional issues as representative of the legislature on behalf of the citizens of our state. Perhaps no issue is more fundamental, if not more significant, to maintaining and enhancing our democratic system and its integrity. The sophistication of our society today obliges the implementation of electronic voting systems that are secure and promote integrity. This committee and the legislature as a whole provide a valuable public service to all citizens with its request for an informational briefing about and demonstration of the operation and use of the proposed new electronic voting system.

The elections office agrees and is more than willing to provide such an informational briefing and demonstration of the proposed new electronic voting system’s operation and use upon this resolution’s adoption.

If this resolution is not adopted, in the interest of transparency and good government, the elections office is willing to provide a less formal informational briefing and demonstration at the State Capitol at a time and place to be scheduled.

Second, the Office of Elections would be more than willing to provide information regarding funding amounts and the source of funding. The office is also willing to provide justification that all future appropriations are reasonable and necessary.

Like the first purpose, if this resolution is not adopted, in the interest of transparency and good government, the elections office is willing to still provide this information to the Legislature.

Permit me to turn now to the resolution's final purpose to require the elections office to answer questions and to provide information before the purchase of any new electronic voting machines and equipment. I begin with our observations of three of the resolution's recitals.

The recital on page 1, lines 16-19 provides, "WHEREAS, the key complaint with the electronic voting system is that the system does not provide a reliable way to audit the results to check whether the tallies accurately reflect the votes casts."

Our observation is that all electronic (DRE) voting systems can be audited, either by using the ballot image recorded when a vote is cast or by the voter verifiable paper audit trail. All electronic voting systems create and record a ballot image. Each such ballot image becomes a record of all votes a voter may cast.

Additionally, the state of Hawaii requires all electronic voting systems at a minimum generate a voter verifiable paper audit trail. These are paper printouts, verified by the voters at the time of voting, that records a voter's choices and stores them for auditing and record keeping. All VVPATs are then collected, and 15% are randomly audited and secured on election night to enhance the election's fairness and integrity. This audit process is enhanced by two additional tests: one is the logic and accuracy test, a test of the logic and accuracy of the voting system performed by official election observers, the vendor, and the Office of Elections, and the other is the network test when the tabulation accuracy is tested before the election.

Furthermore, all voting systems are required to have audit capabilities to receive certification by the Federal Elections Assistance Commission under the Help America Vote Act, 42 U.S.C.A. § 15481 (a)(2)(A) and (B).

Next, the recital on lines 21-24 provides, "WHEREAS, several nongovernmental election observers questioned the use of this technology in Hawaii since the previous voting system allowed for the ballots to be manually recounted."

In 2002, when Congress passed the Help America Vote Act (HAVA), it required a voting system to be accessible for voters with disabilities. "A voting system shall be accessible for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters" under 42 U.S.C.A. § 15481(a)(3)(A). Additionally, the Act adds, "The voting system shall satisfy the requirements of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting

system equipped for individuals with disabilities at each polling place” under 42 U.S.C.A. § 15481(a)(3)(B).

Based on its obligations under HAVA, the Office of Elections as authorized under law chose to use a DRE to implement the federal law because we believe the DRE system provides to all voters the most accessible voting system on the market.

Next, the recital at page two, lines 1-4, provides, “WHEREAS, some election software experts and observers questioned the reliability of the electronically stored ballots claiming the data stored could be flawed by a computer virus or bug and still result in a satisfactory audit.”

We cannot comment about the accuracy and merit of such a reliability issue. We think it is not relevant to the state of Hawaii’s elections. Since the 2006 elections, the Office of Elections has not used ballot images for auditing purposes. Instead, the office used the VVPAT for auditing purposes. These voter verified paper audit trails are verified by the voter before casting his or her ballot.

Finally, the recital on lines 19-26, provides, “WHEREAS, there is insufficient information at this time to confirm whether the funding for this amount is reasonable or that it will be provided by all necessary sources, including federal, state, and county funds, and whether the proper procedures and certifications required under Sections 103D-309 and Section 103-9, Hawaii Revised Statutes, were correctly and completely adhered to and completed, or in some instances abridged.”

Let me provide the following information.

The law requires, the RFP provided, and each interested vendor including Hart, whose proposal was accepted, and ESS, whose proposal was not accepted, acknowledged in writing which I have with me today the voting machine system contract to be awarded is not binding unless funds are available as Haw. Rev. Stat. § 103D-309 provides. The total \$6,599,999.000 to pay the first year, the 2008 elections now less than six months away when substantial needed election preparations have been stayed by the pending appeal of ESS’s protest that was denied, comes from several sources. \$ 4 million dollars comes from HAVA funds on hand in the bank. A total \$1.3 million dollars is available from the four counties of Hawaii, Kauai, Maui and Honolulu, which I have been assured is available to pay their required shared cost under the law. The balance \$1.3 million dollars from the state is appropriated and on hand now.

With the law and funds available at this time based on everything I have read in the RFP’s files, as a former prosecutor, I note I find no basis in fact exists for any reasonable person to consider, much yet act on, any claim the Office of Elections and the offices of the county clerks of Hawaii, Maui, and Kauai, and the city clerk from the city and county of Honolulu through their representatives provided any false certificates or approvals inconsistent with Haw. Rev. Stat. § 103-9.

Let me briefly comment about the substance of the proposed requirement of the elections office to answer questions and to provide information before the purchase of any new electronic voting machines and equipment.

I respect this committee's and, more broadly, the legislature's role with this important election issue.

As we may all recall, know, and understand, the Office of Elections conducted a Request for Proposal Process under existing state law and, after due diligence, the office selected a vendor and issued a Notice of Award. Then an unsuccessful vendor protested the decision to not award it the contract. The protest continues on appeal under state law. Its resolution date is uncertain.

Simultaneously, the Office of Elections is under a stay required by state law prohibiting the office and each county from working with the successful vendor to prepare for elections to be held in less than six months. At this time, the elections office is beyond the eleventh hour by which it needs to begin election preparations for setting up the counting centers on each island, for determining communications needs, for determining ballot parameters for the voting machines, and no less important for establishing a meaningful voter education program to enable minimal confusion, if not eliminate it, for thousands of voters on election day.

I cannot stress enough how this resolution, if passed, would impair the county clerks' and Office of Elections' planning and implementation processes for the coming 2008 primary and general elections.

Given the nature of this resolution, if adopted, and the state election and procurement law currently in effect on the one hand and on the other my duties and obligations as chief elections officer under state law, with all due respect, I believe my duty and obligation is to follow state law. I offer most respectfully I cannot commit to answer questions and provide information before purchasing any new electronic voting machine equipment.

Permit me to make one final observation. The legislature has broad authority to do what it chooses to do as long as its actions are not inconsistent with the Hawaii and/or United States Constitutions. This is basic. The legislature certainly has the authority to consider and, if it chooses, adopt HCR 267 HD1 before you today. But let's take a step back and look at what adoption of this resolution may do as a matter of appropriate legislative action and sound public policy in this case.

As a matter of legislative action, the legislature has already established a reasonable state procurement system for acquiring goods and services. It is what it is. The system provides due process for an unsuccessful bidder to protest for fact and legal reason any procurement decision. It is orderly. It is reasonable. It provides remedies. In short it works well, freeing the legislature to work on important public issues and shape general policy. The existing procurement system does not allow an unsuccessful bidder to run to the legislature to intervene for relief which appears to be happening here. Why is not the current appeal process ESS is following appropriate for them? If the legislature adopts this resolution, isn't the legislature informing

every unsuccessful bidder in the future it now can both protest under the existing procurement law and run to the legislature to enlist its aid? If so, and I think this is the message of this resolution here, the legislature is saying to the state that its procurement process is not good enough and the legislature is now part of the procurement process. If this is what the legislature wants, that's okay, but then be prepared to become involved in procurement appeals from unsuccessful vendors who want to seek extraordinary remedies in the future.

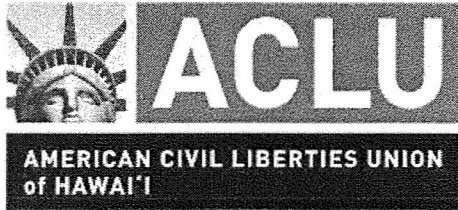
As a matter of public policy, again, the legislature may adopt this resolution. That's okay. The reality here is this. As the chief election officer, I am more than willing to arrange a demonstration and Q and A for any committee of the house and/ or the senate of for each as a body at any place and time. Simply let me know. This recognizes the legislature's policy making function to spend its time dealing with broad and important social, economic, and political issues of the day. It recognizes and respects the existing procurement process the legislature chose for itself now in the law. It recognizes the existing procurement law provides relative certainty that anyone seeking state business needs to know it is being fairly treated. Which is better public policy, following the course emerging that this resolution represents and its implications of injecting politics into the procurement process or following existing law that provides a measure of equity, fairness, and confidence in the procurement system? This is the legislature's call.

In conclusion, electronic voting machines by themselves are not necessarily impenetrable to electronic attacks. The use of an electronic (DRE) voting system is, however, required by federal law. Additionally, the office does not believe that the voting rights and right to privacy for voters with disabilities should be sacrificed because of alleged but unproven vulnerabilities in the voting machine system that the county clerks and Office of Election concluded as the Evaluation Committee provides the best voting system for the state's voters. It is the entire election process, which includes voters engaging in the act of voting, precinct officials, election administrators, and the final tallying and certification of results that taken as a whole constitute a secure, open, and honest, but perhaps not perfect, voting system.

Thank you for the opportunity to testify on House Concurrent Resolution 267, HD 1.

Respectfully Submitted:

By Kevin B. Cronin



BY EMAIL: LMGtestimony@Capitol.hawaii.gov

Committee: Committee on Legislative Management

Hearing Date/Time: Friday, April 4, 2008, 2:55 p.m.

Place: Room 423

Re: Testimony of the ACLU of Hawaii in Support of HCR 267, HD1

Dear Chair Magaoay and Members of the Committee on Legislative Management:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of HCR 267, HD1.

An efficient, accessible and accountable election system is critical to democracy. Election integrity is achieved only when all Hawaii voters can cast a secret and secure ballot. A paper record is necessary to audit the voting machines, to diagnose problems, to conduct a recount in a close election, and to provide a measure of voter confidence, especially given increasing voter unease over stories of hacking and malfunctions of voting equipment. Therefore, it is in the best interest of Hawaii's voters for the Office of Elections to provide an informational briefing and demonstration of new electronic voting systems so as to guarantee the integrity of future elections in Hawaii.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

American Civil Liberties Union of Hawaii
P.O. Box 3410
Honolulu, Hawaii'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org

**BEFORE THE
HOUSE COMMITTEE ON LEGISLATIVE MANAGEMENT**

Rep. Michael Y. Magaoay, Chair
Rep. James Kunane Tokioka, Vice Chair

**HCR 267, HD1 REGARDING REQUEST FOR INFORMATIONAL BRIEFING
AND DEMONSTRATION OF THE OPERATION AND USE OF NEW
ELECTRONIC VOTINGS SYSTEMS**

**TESTIMONY OF
ROBERT G. KLEIN and DAVID J. MINKIN
ATTORNEYS FOR HART INTERCIVIC, INC.**

April 4, 2008, 2:55 p.m.
State Capitol Conference Room 423

Chair Magaoay, Vice Chair Tokioka and Committee Members:

My name is David Minkin. I am a partner with McCorriston Miller Mukai MacKinnon, the Hawai'i attorneys for Hart Intercivic, Inc. ("Hart").

Hart complied with all rules and regulations related to the request for proposal issued by the Office of Elections for the provision of equipment for upcoming elections. Hart followed all requirements and procedures in the procurement process. When Hart was chosen to provide equipment, software, and services for the upcoming elections, another entity that was unsatisfied with the award to Hart filed a protest. Hart is participating fully in that proceeding being conducted by the Department of Commerce and Consumer Affairs. It should be noted that Hart has won similar and separate procurements from the Office of Election in 2004 and 2006. The same entity also protested both those awards. In each case, the award to Hart was validated.

We believe that the Resolution unacceptably interferes in the procurement process, as well as the protest proceeding. Nevertheless, we are here before this Committee to show Hart's commitment to cooperate with the Chief Elections Officer to conduct any demonstrations that he believes necessary to satisfy this Committee's concerns.

Thank you for the opportunity to testify about this significant matter. Hart Intercivic, Inc. strongly urges this Committee to hold this Resolution. If passed out, the Resolution will unnecessarily and unacceptably interfere with the procurement process, and impede the protest proceeding.

TESTIMONY OF ELIZABETH HAWS CONNALLY
BEFORE THE HOUSE COMMITTEE
ON LEGISLATIVE MANAGEMENT

April 4, 2008

2:55 P.M.

Conference Room 423

HCR 267, HD1

REQUESTING THE OFFICE OF ELECTIONS TO PROVIDE AN
INFORMATIONAL BRIEFING AND DEMONSTRATION TO THE
APPROPRIATE SENATE AND HOUSE COMMITTEES REGARDING THE
OPERATION AND USE OF NEW ELECTRONIC VOTING SYSTEMS AND
TO PROVIDE INFORMATION PRIOR TO CONTRACTING TO PURCHASE
ANY NEW VOTING SOFTWARE OR EQUIPMENT RELATED TO ANY NEW
VOTING SYSTEM

Chairman Magaoay and Members of the Committee:

My name is Elizabeth Haws Connally. I am an attorney with the law firm of Alston Hunt Floyd & Ing. My firm represents Election Systems & Software, Inc. ("ES&S").

We support the resolution not only to enable lawmakers to view the voting technology leased by the Office of Elections, but to provide transparency to the Office of Elections' procurement processes. ES&S is the election equipment and services contractor that has conducted Hawai'i's elections for the past six elections. ES&S believes it is important for Hawai'i's taxpayers to receive reliable voting equipment at fair prices.

Although this resolution requests that the Office of Elections provide a briefing and a demonstration BEFORE award of a contract, the Office of Elections has already issued a notice of contract award to Hart InterCivic ("Hart") at a price of nearly \$53 million. ES&S' proposal at \$18 million was ranked second after Hart's, and it was found to be technically acceptable. The Office of Elections insists the contract to Hart was only for \$43 million but that is because it wants to obscure the fact that the contract is for five election cycles and a sixth cycle can be optioned for Hart's total proposed price to taxpayers of nearly \$53 million.

In accordance with relevant procurement code procedures, ES&S filed a protest of the award to Hart, which was denied by Chief Elections Officer Kevin Cronin. ES&S then requested that an administrative Hearings

Officer review the Office of Elections' actions in making the contract award to Hart. In connection with the review, ES&S filed a motion seeking a ruling on whether the Office of Elections had a duty to ensure Hart's offered price was reasonable, i.e., conduct a cost and price analysis, before awarding a contract.

On March 24, 2008, the hearings officer issued a ruling that said the Office of Elections had a legal duty to perform an analysis of Hart's offered price to determine whether the price was reasonable. He ruled that the undisputed evidence established that no such analysis was performed by the Office of Elections prior to the awarding of the contract to Hart. He therefore granted summary judgment for ES&S on this point.

ES&S is filing another motion to ask the Hearings Officer to make additional findings. However, if ES&S is required to go to a full administrative hearing, the following issues are still pending:

- Whether the Office of Elections' evaluation procedures were in violation of the procurement code rules and the terms of the Request for Proposal; and
- Whether the Office of Elections' actions in this procurement and earlier procurements show it has acted in "bad faith" in favor of Hart and to the prejudice of ES&S. The Office of Elections contends its actions were proper. ES&S contends, however, that the Office of Elections has committed numerous acts calculated to prevent ES&S' receipt of a contract, including payment of approximately \$132,000 in State funds to settle a previous Hearings Officer's decision that ES&S should have won the earlier contract.

Thank you for this opportunity to provide this testimony on this important matter.

TESTIMONY OF MATTHEW NELSON, ON BEHALF OF
ELECTION SYSTEMS & SOFTWARE, INC. (ES&S)
BEFORE THE HOUSE COMMITTEE
ON LEGISLATIVE MANAGEMENT

April 4, 2008

2:55 P.M.

Conference Room 423

HCR 267 HD1

REQUESTING THE OFFICE OF ELECTIONS TO PROVIDE AN INFORMATIONAL BRIEFING AND DEMONSTRATION TO THE APPROPRIATE SENATE AND HOUSE COMMITTEES REGARDING THE OPERATION AND USE OF NEW ELECTRONIC VOTING SYSTEMS AND TO PROVIDE INFORMATION PRIOR TO CONTRACTING TO PURCHASE ANY NEW VOTING SOFTWARE OR EQUIPMENT RELATED TO ANY NEW VOTING SYSTEM

Chairman Magaoay and Members of the Committee:

My name is Matthew Nelson and I am the Senior Vice-President, Corporate Sales, of Election Systems & Software (ES&S). Election Systems & Software is the world's largest and most experienced provider of voting equipment and services. ES&S provides voting solutions in 46 states and more 1,700 jurisdictions worldwide. No company has more experience meeting the needs of election officials and voters. ES&S has also played a key role in Hawai'i elections for eight years. Over the past several years, approximately 95 percent of Hawai'i voters have voted on technology supplied to the state by ES&S.

ES&S supports this resolution because many serious concerns have been raised about the manner in which the State awarded a multi-million dollar contract for Hawai'i voting equipment to the highest bidder. Despite ES&S's proven record in Hawai'i elections, the State awarded the contract to Hart Intercivic at a price that will cost Hawai'i taxpayers an extra \$34 million over the next six election cycles. Let me repeat that.

The state's contract with Hart Intercivic will cost \$34 million dollars more than the voting solution offered by ES&S. ES&S proposed a solution that would have provided Hawai'i with proven and certified voting equipment, along with the necessary service and support for a little more than \$18 million over the next six elections. In contrast, Hart Intercivic's proposal will cost the state more than \$52 million during that same time frame.

This may not be surprising given that in 2006 ES&S charged the state \$2.57 million for equipment that was used by nearly 600,000 Hawai'i voters, while Hart charged \$3.1 million for equipment used by just 41,000 voters.

Hart's proposal is also substantially more than the amount Hawai'i has been spending on elections. For the past two election cycles, the state has spent approximately \$5.4 million per election cycle. Hart's plan will cost the state an average of \$8.8 million per election cycle.

All of this occurred because the state failed to conduct a detailed price analysis as required by state statute. An administrative hearings officer's ruling on march 24, 2008 confirmed that the Office of Elections had a legal duty to do this and it did not. HRS 103D-312 and its implementing rules require the procurement officer to analyze the cost and price of specific types of solicitations where the danger of predatory pricing is high. The rule requires that the officer determine in writing that the proposal selected represents the best value to the government. In this case, that analysis and determination never happened. No one bothered to follow statutory requirements to determine whether the Hart Intercivic proposal represented the best value to the state. That failure to follow procedure will end up costing state taxpayers, if the contract stands.

In addition to these very serious issues about the state's financial stewardship of taxpayer dollars, there is also serious concern about the functionality of the chosen system. Specifically, the Hart system does not meet the Hawai'i "pick a party" or cross party requirements. Further still, unlike the ES&S system that has been used successfully in many Hawai'i elections, the Hart system has not been proven in the state. All of these are not only legitimate, but significant, concerns that should have been taken into consideration during the procurement process.

Based on the facts we have seen several things are clear:

- The contract with Hart will waste millions of taxpayer dollars over the next six election cycles.
- The state procurement officer had an obligation to carefully review the pricing structure of each contract to determine the best value for the state. That did not happen.
- ES&S's proposal would have provided Hawai'i with voting technology that meets the applicable standards established to ensure reliability, accuracy and security. In addition, ES&S would have brought more experience in Hawai'i elections to meet the state's ongoing needs.

We reiterate that we support the intent of this Resolution, especially the "BE IT FURTHER RESOLVED" clause. However, if a demonstration is to be performed, we respectfully request that all options that were under consideration by the Office of Elections be part of the demonstration and that the respondents to the RFP in question be allowed to take part in the demonstration and be available to answer questions for the appropriate committees of the Legislature.

We hope you will take all of this into consideration as you proceed onto decision-making on this Resolution. In addition we ask that in light of the serious questions that remain unanswered about the selection of a new system and to avoid endangering the integrity of the 2008 elections, that this Committee request that the Office of Elections use the systems employed in the 2006 elections and issue a new RFP for a voting system beginning with the 2010 election.

Thank you for this opportunity to provide testimony on this important matter.

Robert G. Babson, Jr.
Maui Election Observer
3371 Keha Drive
Kihei, Hawaii 96753
808 874-1166

March 23, 2008

Mr. Kevin Cronin
Chief Election Officer
State of Hawaii
802 Lehua Avenue
Pearl City, Hawaii 96782

SENT BY CERTIFIED MAIL RETURN RECEIPT REQUESTED

This is an Official Petition for the Adoption, Amendment, or Repeal of Rules in accordance with Hawaii Administrative Rules, Title 2, Chapter 50, Adoption, Amendment, or Repeal of Rules by Chief Election Officer. This is a public document and should be widely circulated for all to read so as to be aware of the serious weaknesses in the Hawaii election system.

Dear Mr. Cronin,

Congratulations on your appointment as the new chief election officer for the State of Hawaii. I majored in accounting in college and was an auditor for three years following graduation. In 2004, I was a precinct official for both the primary and general elections, and in 2006, I was a Maui election observer in both the primary and general elections. I would like to bring to your attention the following Hawaii election system weaknesses I observed during the 2006 elections and formally request that you adopt the necessary administrative rules as required by law to protect the citizens of Hawaii by strengthening the Hawaii election system so that all citizens will know their votes are being accurately counted. Valid and legitimate election results are critical to our democracy.

Since Hawaii's votes are transmitted over telephone lines and local area networks (LAN's), I believe the entire Hawaii election system is compromised and subject to hacking and flipping. Election vendors can easily put a dialup modem into any voting machine which is attached to a telephone line. Election machines can easily be programmed with an 800 # that will go to an internet service provider and the election machines can automatically be placed onto the world wide web and have the ability to send votes to a remote website which could be controlled by the election vendor and/or could be hacked by hackers. The election vendor and/or hacker(s) could then flip votes. Votes could be taken from one candidate and given to another candidate and nobody would ever know the difference since the total vote count would not change. Voting machines are "proprietary assets" and the law does not allow anyone to inspect the insides of voting machines under "intellectual property" laws and so there is no way for the citizens of Hawaii to know for sure that vote counts are not transmitted over the internet to a remote website where they can be flipped. Once the votes are flipped, then the election vendor's computer at the state count center can dial the same 800 # and also use a dialup modem to get onto the same website and download the "flipped" votes and put them into final statewide vote count. This is why we need all of the below described administrative rules to verify and double check the accuracy and honesty of the final statewide vote counts. In conclusion, I continue to believe the overall best solution would be to totally ban the use of telephones and LAN's and instead fly all the PCMCIA cards (memory cards) from all voting machines to the state count center in Honolulu where they can be directly "read" into the vendor's computer and tabulated. Hawaii should not "blindly trust" their election vendor(s).

Hawaii Administrative Law, Chapter 50, states: Section 2-50-2: Petitions for the adoption, amendment, or repeal of rules. (a) Any interested person or agency may petition the chief election officer for the adoption, amendment, or repeal of any election rule. The petition need not be in any prescribed form, but it shall contain all of the following:

(1) The name, address, zip code, and telephone number of the petitioner: My name is Robert G. Babson, Jr., aka Bob Babson, 3371 Keha Drive, Kihei, Hawaii 96753. My phone number is 808 874-1166. My email address is babsonb001@hawaii.rr.com.

(2) The signature of the petitioner: I have signed this petition below.

(3) A statement of the nature of petitioner's interest: I am a citizen of Hawaii and of the United States of America and I have a legal right under both the laws of the State of Hawaii and of the United States to expect that my vote, and all votes by all citizens, be accurately counted and that the Hawaii election system be of the highest integrity to insure same. Valid and legitimate election results are critical to our democracy.

(4) A draft or substance of the proposed rule or amendment or a designation of the provisions sought to be repealed: The substance of the proposed rules is as follows:

a. To write new administrative rules to govern all voting done on Direct Record Electronic (DRE) voting machines since it appears none have ever been written.

b. To adopt, amend or repeal administrative rules to insure that the Hawaii election system is of the highest integrity and that election fraud is virtually impossible. Citizens should not be required to "blindly trust" the office of elections and/or the election vendors. Safeguards, double checks and verifications must be implemented at all levels of the Hawaii election system to insure that all votes are counted accurately.

(5) A statement of the reasons in support of the proposed rule, amendment, or repeal: All citizens of Hawaii have the absolute legal right to expect that their vote is accurately counted and that their Hawaii election system is of the highest integrity and that election fraud is virtually impossible. Hawaii administrative law must be complied with to determine administrative rules for how to eliminate election system weaknesses, safeguard votes and insure that the Hawaii election system is of the highest integrity. Specifically, the following reasons for new rules are:

a. Reason #1 for new administrative rules: Please see Chapter 51: "2-51-99 Direct Recording Electronic (Reserved)." The State has been using DRE machines since 2002, and it appears they have never written any administrative rules for them. There should be mandatory safeguards in place. Specifically, I recommend the following minimum administrative rules be adopted:

1. All DRE voting machines should print out election results at the precinct after the precinct closes. Such printouts should be traced into the final statewide vote counts the next day to double check the accuracy of telephone and LAN transmissions. Such printouts should then be permanently stored with the paper ballots in accordance with state law in case of a recount and/or a criminal investigation.

2. All PCMCIA cards (memory cards) used in DRE voting machines should be treated the same as paper ballots and therefore at all times be accompanied by election observers on election day and be permanently stored with the paper ballots in accordance with state law in case of a

recount and/or a criminal investigation. They specifically should not be left alone with the election vendor at anytime during election day nor kept by the election vendor after the election.

b. Reason #2 for new administrative rules: Votes are currently transmitted over telephone lines. This procedure is authorized by the request for procurement (RFP). Telephone lines can be used by computers with a "dialup modem" to get onto the internet. Votes can be hacked and/or flipped at remote websites. Administrative rules must be made to totally eliminate the possibility of hacking or flipping of votes. Specifically, I recommend the following minimum rules be adopted:

1. All telephone and LAN transmissions of votes should be banned altogether, and no voting machines should be connected to any telephone line and/or wifi system of any kind. Instead, all PCMCIA cards from the counties should be flown by air from Hawaii, Maui and Kauai Counties on election night to Honolulu. This would totally eliminate any possible hacking and/or flipping of votes sent over telephone lines and/or a LAN. The printouts would still be traced in the next day as a double check. It would take less than an hour to fly the PCMCIA cards to Honolulu and get them to the state count center. The election results could still be released to the media by 11 pm on election night. But above all, it is far more important to have accurate vote counts than it is to have speedy news releases. This would require no change in the existing election equipment just purchased since all voting machines have a PCMCIA card in them. Instead of sending the data over the telephone lines and/or a LAN, the card would simply be flown to Honolulu and "read" directly into the state tabulating computer while election observers watched. All future RFP's should specifically ban the use of telephones and the internet in any way whatsoever.

2. All voting machines (DRE's, optical scanners, etc.) should print out final election results on election day. Precincts should printout such results when the precincts close and the county count centers should printout such results at the end of the election night. Such printouts should be traced into the final statewide vote counts the next day to double check the accuracy of telephone and LAN transmissions. Such printouts should then be permanently stored with the paper ballots in accordance with state law in case of a recount and/or criminal investigation.

3. All PCMCIA cards used in all voting machines should be treated the same as paper ballots and therefore at all times be accompanied by election observers on election day and never left in the sole possession of the election vendor during election day. They should be permanently stored with the paper ballots in accordance with state law in case of a recount and/or criminal investigation. They specifically should not be left alone with the election vendor at any time on election day nor should they be kept by the election vendor after the election.

4. Telephone transmissions of votes must be over "dedicated" telephone lines, not just "open" telephone lines where any number can be dialed. The telephone company used must be required to issue a certified statement under oath that the two telephone lines are dedicated to each other and no other number can be dialed from either number. In addition, election observers must be required to observe all transmissions of votes from the county count center to the state count center and keep a diary of such transmissions for later comparison to make sure that all calls were simultaneous. Such diaries must then be stored with the paper ballots in case of a recount and/or criminal investigation.

c. Reason #3 for new administrative rules: Votes are currently transmitted over "Local Area Networks" (LAN's). This procedure is authorized by the request for procurement (RFP). One definition of a local area network is the worldwide web. So it is currently legal for election vendors to use the world wide web to transmit votes. Votes can be hacked and/or flipped at remote websites. Even LAN's can be hacked and votes flipped. There is no justification whatsoever to justify allowing an

election vendor to use a LAN and/or the internet. Specifically, I recommend the following minimum rule be adopted:

1. Totally prohibit the Office of Elections and/or any election vendor to ever use a LAN and/or the internet. There is virtually no way to safeguard the votes of Hawaii from hackers and flippers if they are allowed to be transmitted over a LAN. All future RFP's must specifically prohibit the use of a LAN and/or the internet in any way whatsoever.

d. Reason #4 for new administrative rules: During the 2006 general election, the manual audit team only counted one candidate in one race in 7 of 44 precincts in Maui County and the absentee ballot precinct (AB-Mail) which is the largest precinct is never counted because it is "too big." Counting one candidate in one race in a precinct does not constitute counting a precinct. HRS 16-42 (b) (3) requires "audit of a random sample of not less than ten percent of the precincts if the chief elections officer seeks to rely on the electronic tabulation of votes." Administrative rules must be made to randomly select and audit 10% of the precincts. Specifically, I recommend the following minimum rules be adopted:

1. The manual audit team should meet on the day following the election and be given the final statewide vote count showing the vote in all precincts. A piece of paper representing each precinct in the county should then be put in a basket and a team member should then randomly select 10% of the precincts. This selection must be observed by at least five election observers who should sign a statement that it was random. In the case of Maui County with 44 precincts, 5 precincts should be randomly selected (rounding up). Since counting every candidate in every race in these 5 precincts would be very time consuming, "random sampling" methods should be used to select the candidates to be 100% counted. All CPA firms use "random sampling" to audit accounts receivable, accounts payable, etc. The same techniques should be used by the manual audit team. Generally speaking, this is how it works: by randomly selecting approximately 5% of the candidates and then counting their votes 100% and tracing these vote totals into the final statewide vote count, and finding no errors, then it can be stated statistically that the votes are accurate with 99% confidence. The chief election officer should retain the services of a professional statistician or CPA firm to draw up and provide a table showing what percent of the candidates and issues must be counted 100% to insure a 99% confidence level that the statewide vote count is accurate. If errors are found, then the manual audit team would need to expand the scope of their counts just like CPA firms do when they find errors. Again, for each precinct, all candidates and issues should be put on a piece of paper and put in a basket and randomly drawn. At least five election observers should observe the random selection and counting of the candidates selected and the tracing in of the total votes to the statewide vote count and should sign a statement that all candidates and issues were randomly selected and all votes for those selected were counted and traced into the statewide count totals. Example: if a typical precinct has a total of 50 candidates and/or issues, then 5% of 50 would be 3 candidates and/or issues to count 100% (rounding up). So if there are 5 precincts, then this would be 15 candidates and/or issues total for the manual audit team to count. Beginning the day after the election the manual audit might take several days to complete, but this is the greatest safeguard to democracy we have and is well worth it.

e. Reason #5 for new administrative rules: During the general election of 2006, the manual audit team selected the precincts to count and started counting about 7:00 pm on election night. The statewide vote totals were not completed until about 11:00 pm. The Hart InterCivic representative operating her computer was only about 30 feet away from the manual audit team. Since the statewide vote was not final at 7:00 pm, it would be very valuable information if an election vendor or hacker was to find out what was being audited and what wasn't in case they wanted to flip some votes. Administrative rules must be made to eliminate this possibility. Specifically, I recommend the following minimum rules be adopted:

1. The manual audit team should meet on the day following the elections and be given a copy of the statewide final vote count and then randomly pick the precincts and candidates and/or issues to be audited as outlined above.

f. Reason #6 for new administrative rules: During the 2006 general election, no "qualified" computer experts were part of the official Maui observer team. In fact, there were no academic or professional qualifications ever mentioned in order to be an election observer. HRS 16-42 (b) (1) requires electronic voting system must be "subject to inspection, audit, and experimental testing, by qualified observers, before and after the election if the chief elections officer seeks to rely on the electronic tabulation of votes." Administrative rules must be made to define exactly what constitutes "qualified observers" and how they shall be chosen. Specifically, I recommend the following minimum rules be adopted:

1. The office of elections shall retain at least two qualified computer experts (and pay them a professional fee for their services, if necessary) to serve on each of the four county election observer teams and on the state election observer team for a total of ten computer expert election observers. The minimum qualification to be a "qualified" computer expert is a bachelor's degree in computer sciences from an accredited university and/or equivalent computer industry experience of 5 years or more. Each of the ten qualified computer experts should be required to keep a written diary of all irregularities they witness, time of day, place, people involved, who the irregularity was reported to, and what action they took and what the result was. Copies of said ten diaries shall be required to be made public under the Hawaii Freedom of Information Act and further, said original diaries shall be stored with the paper ballots in case of a future recount and/or criminal investigation.

g. Reason #7 for new administrative rules: The request for procurement (RFP) for the purchase of the 2008 election vendor was not readily available to the general public. Since the purpose of RFP's is to solicit bids from as many vendors as possible so as to get the lowest competitive price, I don't understand why Hawaii citizens can't also easily see the RFP so as to learn how democracy is being conducted and safeguarded here in Hawaii. Administrative rules should be made to make all election related RFP's easily available to the public. Specifically, I recommend the following minimum rules be adopted:

1. All election related requests for procurement (RFP's) shall be immediately posted on the office of elections website for the public to examine. Further, any citizen shall be able to call on the telephone, write or email the office of elections and request a RFP and the office of elections shall promptly send the RFP to the requesting party by letter or email. Further, all election related RFP's should be made public documents and available under the Hawaii Freedom of Information Act.

h. Reason #8 for new administrative rules: During the general election of 2006, at the end of the night when the final statewide vote count had been tabulated and released to the media, all election observers were told they could go home. There was an official "debriefing" a few days later. However, there was no further election observing for us to do. My concern here is that the elections were not actually certified until 20 days later. During that time, changes could have been made to the statewide election results and no election observers would have been involved. Administrative rules should be made to notify and reconvene election observers in the counties in question if any further changes are made to the statewide vote count after election night and ask them to examine such changes and approve them in writing prior to the final certification date. Specifically, I recommend the following minimum rules be adopted:

1. In the event of any changes to the statewide vote count following the official release to the media on election night, then the chief election officer shall be required to reconvene the election observers in the county in question and allow them to review the changes and approve them before the final certification of the statewide vote counts on the 20th day following the election. This would include, but not be limited to, all findings of any errors by the manual audit team. Such written approval of vote count changes shall be stored with the ballots in case of a recount and/or criminal investigation.

i. Reason #9 for new administrative rules: Under federal law, all chief executive officers (CEO) and chief financial officers (CFO) of publically traded companies are required to certify under oath that the annual financial statements of their company are true and correct to the best of their knowledge. This certification is published in all annual reports for all shareholders to read. I believe the chief election officer and his deputy and the CEO of the election vendor and his executive vice president plus all vendor employees and temporary hires in Hawaii should all be required to certify under oath that the final certified statewide vote count is true and accurate to the best of their knowledge. Administrative rules should be made to require this certification. Specifically, I recommend the following minimum rules be adopted:

1. Prior to the final certification of the statewide vote count, the chief election officer and his deputy, and the president, executive vice president and all employees and temporary hires of the election vendor working in Hawaii shall write a letter to the governor and state legislature and the general public certifying under oath that to the best of their knowledge, the certified statewide vote count is true and accurate to the best of their knowledge. This letter shall be placed on the office of elections website for the public to read and be available to the general public under the Hawaii Freedom of Information Act.

2. All future RFP's shall require that the president, executive vice president and employees and temporary hires working in Hawaii of the election vendor shall sign the letter described above as a mandatory condition of the contract.

j. Reason #10 for new administrative rules: During the general election of 2006, the election vendors (Election Systems and Software (ES&S) and Hart InterCivic - working together) created several final vote tabulations which were certified under Hawaii law and are currently shown on the office of elections website. The two most important tabulations are:

1. "General Election of 2006 - State of Hawaii - Statewide, November 7, 2006, SUMMARY REPORT, FINAL SUMMARY REPORT, Printed on 11-22-06 at 12:35:00 pm" and is in PDF format and is 5 pages long. This tabulation shows the total vote for each candidate statewide, but does not show any precinct detail.

2. "General Election of 2006 - State of Hawaii - Statewide, November 7, 2006, FINAL REPORT, Printed on 11-22-06 at 12:36:51 pm" and is in PDF format and is 736 pages long. This tabulation shows the vote for all candidates and issues in all precincts statewide, but does not show totals statewide for statewide or multi-precinct candidates like U. S. Senator, U. S. Representative, Governor, State Senator, State Representative, etc.

It is of the highest importance that a team of auditors randomly select statewide and multi-precinct candidates on the 5 page statewide summary and then go through every precinct in the 736 page statewide precinct count detail and add them up and make sure all votes on the summary are 100% supported by the votes on statewide precinct count. Remember, the manual audit team is counting ballots and tracing them into the 736 page statewide precinct count. Therefore, we need to further trace the statewide precinct

counts into the 5 page statewide summary. The citizens of the State of Hawaii should not just "blindly trust" the mathematical accuracy of a computer printout. CPA firms add up large columns of numbers everyday and trace them into summaries. Administrative rules must be made to make this math audit mandatory. Specifically, I recommend the following minimum rules be adopted:

1. A new team called the "Math Audit Team" should be created for the purpose of randomly selecting candidates and issues on the statewide summary count and then adding up all the votes for this candidate or issue in all precincts in Hawaii to insure they are the same. They should meet on the day following the election and be given the two final vote count printouts mentioned above to audit mathematically. If changes are made later prior to the 20 day certification deadline, then they should be reconvened to audit the changes mathematically to insure the final certified vote count is correct. At least five election observers should observe the random selection of the candidates in the statewide summary and the counting of these candidates in all precincts and the tracing in of the results to insure that the summary vote is 100% accurately supported in the precinct detail. The five election observers should certify in writing that they observed same and this certification should be stored with the ballots in accordance with state law. Copies of these certifications should be available to the general public under the Hawaii Freedom of Information Act.

k. Reason #11 for new administrative rules: As mentioned above, all voting machines at precincts and county count centers should print out the final results at close of business and these printouts should be traced into the statewide vote count to insure that all votes were accurately transmitted over telephone lines and/or LAN's and no votes were flipped. Administrative rules must be made to make this mandatory. Specifically, I recommend the following minimum rules be adopted:

1. All voting machines must printout total vote counts at close of business. Precincts must forward such printouts in a secure container to the county count center. The county count center must place all printouts from precincts and from the optical scanner(s) at the county count center into a secure container.

2. A new team called the "Printout Audit Team" should be created. They should report for work the day following the election. Their job will be to trace the votes for all candidates and issues on all printouts into the final statewide vote count, precinct by precinct. They will open the secure container with all the printouts and trace them into the final statewide vote count, precinct by precinct.

1. Reason #12 for new administrative rules: During the elections of 2006, election observers were not required to keep a diary of their activities during election day. Election observers are performing a very important job safeguarding democracy in Hawaii. In case of a recount or criminal investigation, it would be important to have the diaries of all the election observers to review. Accordingly, I believe it is important that election observers document their activities during each election by keeping a diary. Administrative rules must be made to make this mandatory. Specifically, I recommend the following minimum rules be adopted:

1. All election observers including computer expert election observers mentioned above must keep a written diary of all activities and observations. The office of elections shall provide each election observer and computer expert election observer with an appropriate binder to keep such diary. Such diaries shall include all general observations performed and all irregularities they witness, if any, time of day, place, people involved, who they reported the irregularity to, and what action they took and what the result was. Copies of said diaries shall be required to be made public under the Hawaii Freedom of Information Act and further, said original diaries shall be stored with the paper ballots in case of a future recount and/or criminal investigation.

(6) Any other information pertinent to the petition: I submit the following:

a. The Hawaii primary election is in September, 2008, which is only five months from now. Since the above weaknesses are serious and need immediate emergency action to guaranty the accuracy of elections here in Hawaii, I urge you, as the chief election officer, to expedite the rule making inaccordance with Section 2-50-6 "Emergency rule making." This enables the chief election officer to adopt emergency rules as provided in HRS 91-4.

b. I believe the overall best solution to improve Hawaii election integrity would be for Hawaii to vote like Oregon does - 100% absentee ballot. Most precincts could be closed and save a lot of money. All voters would be sent a ballot and could vote and mail it back to the county where the voter signatures are verified on the outer envelope. High speed optical scanners could count all votes at the county count centers on election day and the PCMCIA cards could be flown to the state count center in time for the 11:00 pm release of vote counts to the media. Oregon has a high voter turn out and to the best of my knowledge has no problems. As chief election officer, I believe it is within your power to implement an Oregon sytle voting system if you want to. It is clean and simple and would be a huge improvement.

The above constitutes my petition in accordance with Hawaii administrative law, section 2-50-2 (a) and I look forward to hearing from you within 30 days. I urge you to immediately formulate emergency new administrative rules to eliminate all of the election system weaknesses I have mentioned above in time for the primary and general elections later this year and to comply with the full letter and spirit of Hawaii Administrative Rules, Title 2, Chapter 50, Adoption, Amendment, or Repeal of Rules by Chief Election Officer. By allowing evoting machines to transmit votes over the telephone lines and a LAN, the Hawaii election sytem is completely compromised as it stands now. By the powers granted to you as Chief Election Officer under 2-50-6, "Emergency Rule Making," you have the power to correct all of these weaknesses and insure to the people of Hawaii that every vote will be counted honestly and accurately. It is further my hope you will use your powers under 2-50-1 to initiate all other rules deemed necessary to make the Hawaii election system of the highest integrity and to schedule public hearings and take testimony as called for by administrative rule making.

Further, it is my understanding that in accordance with Hawaii administrative law, section 2-50-2 (b), this petition "shall become a public record upon filing" so all citizens of Hawaii can be informed of the serious election system weaknesses currently being used.

Please contact me if I can be of further assistance in this matter. I have mailed a large number of letters to the Office of Elections expressing my concerns for election system integrity during the last two years beginning with my first letter in December, 2006. They should all be on record there for you to read. However, if you would like, I can make copies of all of them and send them to you again, in case they are not on record there in your office.

Sincerely,

Robert G. Babson, Jr.
Maui Election Observer