



**STATE OF HAWAII
OFFICE OF ELECTIONS**

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KEVIN B. CRONIN
CHIEF ELECTION OFFICER

TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE HOUSE COMMITTEE ON JUDICIARY
ON HOUSE CONCURRENT RESOLUTION NO. 267

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.

March 25, 2008

Chair Waters and members of the House Committee on Judiciary, thank you very much for providing the opportunity to testify on House Concurrent Resolution No. 267.

This resolution, if adopted, would do two 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 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.

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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.

Permit me to turn now to the resolution's second 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

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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.

Finally, the recital at page two, lines 2-5, 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.

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.

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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.

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 system. 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.

Respectfully Submitted:

By Kevin B. Cronin

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DISABILITY AND COMMUNICATION ACCESS BOARD

919 Ala Moana Boulevard, Room 101 • Honolulu, Hawaii 96814
Ph. (808) 586-8121 (V/TDD) • Fax (808) 586-8129

March 25, 2008

TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY

House Concurrent Resolution 267/House Resolution 227 – 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

The Disability and Communication Access Board (DCAB) is a statewide board with seventeen (17) members appointed by the Governor, thirteen (13) of whom are persons with disabilities or family members. DCAB's mission is to advocate and promote full integration, independence, equal access, and quality of life for persons with disabilities in society. This testimony represents a position voted upon by the Legislative Committee of the Board.

DCAB supports House Concurrent Resolution 267/House Resolution 227 – 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.

The DCAB worked with the Office of Elections on a grant to make elections accessible to voters with disabilities under the federal Help America Vote Act (HAVA) of 2002. During the 2004 and 2006 Elections, Direct Recording Electronic (DRE) voting machines were used at each polling place allowing voters with disabilities the opportunity to vote independently and privately. An informational briefing to demonstrate new accessible electronic voting equipment to the Legislature is an excellent idea, and will provide first hand information about new voting equipment.

The Office of Elections is administratively attached to the Department of Accounting and General Services and is responsible for procuring new equipment for elections, we defer to them regarding the appropriate procedure to use for contracting and purchasing. We do however emphasize that whatever system is purchased be accessible for everyone to use to vote privately and independently.

Thank you for the opportunity to testify.

Respectfully submitted,

PATRICIA M. NIELSEN
Chairperson
Legislative Committee

FRANCINE WAI
Executive Director

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BY FAX: 586-9456

Committee: Committee on Judiciary
Hearing Date/Time: Tuesday, March 25, 2008, 4:05 p.m.
Place: Room 325
Re: Testimony of the ACLU of Hawaii in Support of HCR 267

Dear Chair Waters and Members of the Committee on Judiciary:

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

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

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TESTIMONY OF CORIANNE W. LAU
BEFORE THE HOUSE COMMITTEE
ON JUDICIARY
March 25, 2008
4:05 P.M.
Conference Room 325

HCR 297

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 Waters and Members of the Committee:

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

ES&S is the election equipment and services contractor that has conducted Hawai'i's elections for the past six elections. Mr. Matthew Nelson, the Senior Vice President of Corporate Sales at ES&S, has provided separate written testimony to the committee. His testimony expresses ES&S' concerns about the manner in which the Office of Elections has conducted the contract competition to conduct the elections for the next six election cycles. I commend Mr. Nelson's testimony to you with respect to questions you may have about the Office of Elections' decision to make a nearly \$53 million contract award to ES&S' competitor and reject ES&S' offered price of \$18 million.

I appear today to set the record straight concerning the status of the Office of Elections' voting systems contract. This resolution requests that the Office of Elections provide a briefing and a demonstration BEFORE award of a contract. My testimony is to advise you that the Office of Elections has already issued notice of contract award to Hart InterCivic ("HART") at a price of nearly \$53 million. In accordance with relevant procurement code procedures, ES&S protested the award to Hart and because it was denied, has requested that an administrative Hearings Officer review the Office of Elections' actions in making the contract award to Hart.

The issues now pending before the Hearings Officer for resolution are:

- Whether the Office of Elections has a duty to ensure offered prices are reasonable before awarding a contract.
 1. The Office of Elections contends that it has no duty to check to ensure a proposed contract price is reasonable, and its failure to check on the reasonableness of Hart's price is proper.
 2. ES&S contends all government agencies have a duty to confirm prices are reasonable before the agency may bind the taxpayer to the offered price.

- Whether the Office of Elections' evaluation procedures were in violation of the procurement code rules and the terms of the Request for Proposal.
 1. The Office of Elections contends it made no errors.
 2. ES&S contends the Office of Elections made numerous errors, including assessing low scores to ES&S for equipment ES&S never offered in its best and final offer.

- Whether the Office of Elections' actions in this procurement and earlier procurement show it has acted in "bad faith" in favor of Hart and to the prejudice of ES&S.
 1. The Office of Elections contends its actions were proper.
 2. ES&S contends 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 decision that ES&S should have won the earlier contract.

We anticipate the Hearings Officer will issue his decision shortly on ES&S' motion for summary judgment and on the State's motion to dismiss ES&S's administrative appeal. Depending on the ruling, however, a hearing on the matter may be required.

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 JUDICIARY
March 25, 2008
4:05 P.M.
Conference Room 325

HCR 297

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 Waters 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.

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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. 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.

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.

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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.