

STATE OF CALIFORNIA

SECRETARY OF STATE

PUBLIC HEARING

ELECTION SYSTEMS & SOFTWARE, INC.

OFFICE OF THE SECRETARY OF STATE

1500 11TH STREET

1ST FLOOR AUDITORIUM

SACRAMENTO, CALIFORNIA

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10:04 A.M.

KATHRYN S. SWANK, CSR  
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PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES

STAFF MEMBERS

Ms. Jennie Bretschneider, Moderator

Ms. Judith Carlson, Senior Staff Attorney

Mr. Lowell Finley, Deputy Secretary of State for Voting Systems Technology and Policy

Mr. Bruce McDannold, OVSTA Interim Director

Mr. Chris Reynolds, Deputy Secretary of State for HAVA Activities

ALSO PRESENT

Mr. Alec Bash, Democracy Action

Mr. Jerry Berkman

Mr. Judy Bertelsen

Mr. Alan Dechert, Open Voting Consortium

Mr. Roger Donaldsen, San Francisco Voting Integrity Project

Ms. Chandra Friese, San Francisco Voting Integrity Project

Ms. Michelle Garbriel

Ms. Elaine Ginnold, Marin County Registrar of Voters

Mr. John Groh, ES&S

Mr. Steven Hill, New America Foundation

Ms. Sacha Ielmorini, San Francisco Voting Integrity  
Project

Mr. M. Stephen Jones, Merced County Registrar of Voters

Ms. Jill LaVine, Sacramento County

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES CONTINUED

Mr. Lee Munson, San Francisco Voting Integrity Project

Mr. Gary Olivi, AutoMARK Technical Systems, Inc.

Mr. Brian Phillips, SysTest Labs, Inc.

Ms. Joan Quinn, Sacramento for Democracy

Mr. Brian Rothenberger, Save Elections Monterey County

Mr. Jim Soper

Mr. Robert Stigile, National Federation for the Blind -  
California

Mr. Richard Tamm, Voting Rights Task Force

Mr. Brent Turner, San Francisco Election Integrity League

Mr. Steve Weir, Contra Costa County

Ms. Anne West

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

## INDEX

	PAGE
I. Introductory Remarks	1
II. Secretary of State report on the following voting system: a. Election Systems & Software, Inc. (ES&S) Optical Scan Voting System	3
III. Voting System Vendor Response to Reports	11
IV. Public Comment Period	35
V. Adjournment	81
VI. Reporter's Certificate	82

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

## 1 PROCEEDINGS

2 MODERATOR BRETSCHEIDER: If everyone would have a  
3 seat, we're going to get started.

4 Good morning. And welcome to everyone here and to  
5 everyone watching on the California Channel today.

6 I'm Jennie Bretschneider, the assistant chief  
7 deputy secretary of state. And I'm going to be serving as  
8 the moderator for today's hearing.

9 This is a public hearing on the Elections  
10 Systems & Software Optical Scan Voting System. This  
11 hearing is being conducted according to the California  
12 Elections Code, Section 19214.5, paragraph C.

13 The panelists for today's hearing are seated to my  
14 right and will be listening to the presentations today and  
15 may ask questions of the presenters in order to clarify  
16 any points made.

17 The panelists are Chris Reynolds, Deputy Secretary  
18 of State for HAVA activities, on the right; Judith  
19 Carlson, Senior Staff Attorney from the Secretary of  
20 State's Elections Division; and Bruce McDannold, Interim  
21 Director of the Office of Voting System and Technology  
22 Assessment.

23                   As set forth in the agenda, the format for this  
24 hearing is as follows:

25                   First, the Secretary of State's Office will

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1 present the results of its investigation thus far  
2 regarding ES&S's Optical Scan Voting System;

3           Second, ES&S will have an opportunity to respond  
4 and present any information that it deems relevant;

5           Third, there will be a public comment period.

6           Under this format, there will be no opportunity  
7 for the Secretary of State's Office to respond to the  
8 statements made by ES&S during this hearing. That being  
9 said, the lack of such a response by the Secretary of  
10 State's Office should not be construed as agreement or  
11 acquiescence with any of the statements ES&S may make  
12 today.

13           Today's hearing is designed to gather information.  
14 There will be no decision made today regarding what  
15 action, if any, the Secretary of State will take against  
16 ES&S. The panel will receive today's presentations, and  
17 the Secretary of State will review the information  
18 presented today before making a decision.

19           Secretary of State's decision on whether to pursue  
20 relief against ES&S will be in writing and will set forth  
21 the findings of the Secretary. Before we get started, I  
22 would like to take care of a couple of housekeeping items.

23 For those of you in the audience who would like to speak  
24 during the public comment period, there are sign-up cards  
25 at the back table, at the entrance to the auditorium. And

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1 we'll take speakers in the order they have signed in,  
2 under public comment.

3           Each person speaking under public comment will be  
4 allotted three minutes for a presentation. Anyone who  
5 wishes to submit written testimony can do so by delivering  
6 a hard copy today or by e-mailing an electronic copy to  
7 [votingsystems@sos.ca.gov](mailto:votingsystems@sos.ca.gov) by October 26th. We will post  
8 the written testimony we receive on the Secretary of  
9 State's hearing Web site. All comments made verbally or  
10 in writing as part of this hearing are a matter of public  
11 record.

12           With that, I think we're ready to begin. And I  
13 will ask Lowell Finley, Deputy Secretary of State for  
14 Voting Systems Technology and Policy, to step up to the  
15 podium and begin his presentation.

16           DEPUTY SECRETARY OF STATE FINLEY: Good morning.

17           My presentation this morning will be in three  
18 parts. First, I am going to present the relevant  
19 provisions of the California Elections Code that applied  
20 to the facts that we have developed in our investigation  
21 to date. Then I will be discussing the preliminary  
22 factual allegations based on the information we have

23 gathered up to now. And finally, I will be making some  
24 concluding remarks that indicate how we believe, at this  
25 stage, the applicable law as applied to the facts bears

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1 out the existence of violations of California law by ES&S.

2           There are several provisions of the California  
3 Elections Code that make it clear that a voting system  
4 vendor must notify the Secretary of State before changing  
5 or modifying any part of the state-certified voting  
6 system.

7           The first of these is Elections Code 19213, which  
8 states, in relevant part, that "when a voting system or  
9 any part of a voting system has been approved by the  
10 Secretary of State, it shall not be changed or modified  
11 until the Secretary of State has been notified in writing  
12 and determined that the change or modification does not  
13 impair its accuracy and efficiency sufficient to require a  
14 reexamination and re-approval."

15           I think there are three noteworthy points about  
16 Section 19213: First, the notification to the Secretary  
17 of State must be in writing; second, the reason for the  
18 notification requirement is to give the Secretary of State  
19 the opportunity to determine whether, on the one hand, it  
20 can be quickly and easily determined that the change has  
21 no detrimental effect, or whether, on the other hand, the  
22 only way to determine if the change worsens the accuracy

23 and efficiency of the voting system is to put it through  
24 the entire process of State certification testing; the  
25 third noteworthy point about Section 19213 is that the

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1 California Legislature intended that the decision on the  
2 effect of the change in a voting system should be made by  
3 the Secretary of State, not by the vendor, and not by any  
4 federal body or federal testing authority.

5 The vendor may be confident that the change it has  
6 made is inconsequential. But it is not the vendor's  
7 decision to make.

8 I will return in a moment to the powerful  
9 enforcement mechanisms that the Legislature has provided  
10 for violation of section 19213. But first, I will review  
11 the other provisions of the State Elections Code that  
12 apply in this situation. The first is Elections Code  
13 Section 18564.5, which in subdivision (a)(6) "empowers the  
14 Secretary of State, the Attorney General, or local  
15 elections officials to seek penalties against anyone who,  
16 quote, 'fails to notify the Secretary of State prior to  
17 any change in hardware, software, or firmware to a voting  
18 machine, voting device, voting system, or vote tabulating  
19 device, certified or conditionally certified for use in  
20 this state.'"

21 In that same section, subdivision (a)(5),  
22 authorizes the same group of officials to seek penalties

23 against anyone who, quote, "knowingly and without  
24 authorization inserts or causes the insertion of  
25 uncertified hardware, software, or firmware, for whatever

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1 purpose, into any voting machine, voting device, voting  
2 system or vote tabulating device, or ballot tally  
3 software."

4 As I indicated a moment ago, the Legislature has  
5 authorized severe penalties for violations of these  
6 provisions.

7 For failure to provide the advanced written notice  
8 required by Elections Code 19213, Section 19214.5 of the  
9 Elections Code permits the Secretary of State to seek any  
10 or all of the following remedies:

11 First, \$10,000 per violation with each machine  
12 that is found to contain the unauthorized hardware,  
13 software, or firmware defined as a separate violation;

14 Second, immediate commencement of decertification  
15 proceedings for the voting system in question;

16 Third, banning the manufacturer or vendor of the  
17 voting system from doing election-related business in  
18 California for one, two, or three years;

19 Fourth, refund of all monies paid by a locality  
20 for a compromised voting system, whether or not the voting  
21 system has been used in an election;

22 And finally, any other remedial action to prevent

23 the unjust enrichment of the offending party.

24 For violation of either of the subdivisions of

25 Elections Code Section 18564.5, that I quoted, the statute

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1 authorizes penalties of \$50,000 per act.

2 Before proceeding to discuss the facts, three  
3 points are worth noting about the offenses defined by  
4 these statutes:

5 First, these are strict liability offenses. The  
6 statutes do not turn on whether the violator has a  
7 particular motive for implementing changes without first  
8 notifying the Secretary of State, nor do they require  
9 proof that a violation caused harm;

10 Second, the violation is complete once the change  
11 or modification to the voting system is implemented  
12 without first giving notice to the Secretary of State. No  
13 subsequent act can cure that violation;

14 And third and finally, failure to give the  
15 Secretary of State notice, standing alone, is a serious  
16 matter.

17 The Legislature provided very harsh penalties for  
18 failing to give notice. And it did so without requiring  
19 proof that unauthorized change actually impairs the  
20 accuracy or efficiency of the voting system, and even in  
21 circumstances where the modified voting system has not  
22 been used in an election.

23                    Now to the preliminary factual allegations.  These  
24  allegations are preliminary because at this point the  
25  Office has not completed its investigation and it has not

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1 made use of subpoena powers or had access to the discovery  
2 process that is part of the formal proceedings the  
3 Secretary of State is considering.

4           The factual situation before us is that ES&S has a  
5 ballot marking device called the AutoMARK. Only one  
6 version of the ES&S's AutoMARK, the A100, which has also  
7 been identified as version 1.0, with firmware version 1.0,  
8 has been certified for use in California.

9           The previous Secretary of State certified a system  
10 that includes the AutoMARK A100, or version 1.0, on  
11 August 3rd, 2005. That is the only ES&S system with the  
12 AutoMARK device that is regularly certified in California.

13           AutoMARK version A200, which first came on the  
14 scene during 2006, has several hardware changes or  
15 modifications from the earlier version, the certified  
16 A100.

17           ES&S has acknowledged that the location inside the  
18 AutoMARK of at least two circuit boards was changed  
19 between the two versions. And photographs and schematics  
20 provided by ES&S to the Secretary of State's Office  
21 indicate that the A200 includes several other  
22 modifications from the A100 version.

23                    In the period March through August 2006, ES&S sold  
24                    and delivered 972 AutoMARK A200 ballot marking devices to  
25                    five California counties. Those counties are Colusa,

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1 Marin, Merced, San Francisco, and Solano, with the largest  
2 number of A200 machines going to the City and County of  
3 San Francisco.

4 ES&S did not notify the Secretary of State in  
5 writing, or otherwise, that it had made changes in the  
6 AutoMARK, nor did ES&S obtain authorization for the  
7 changes from the Secretary of State before it sold and  
8 delivered the 972 version A200 machines.

9 ES&S did not even attain federal approval of the  
10 AutoMARK A200 until the last day of August, 2006, after  
11 delivery of the 972 unauthorized A200 devices.

12 Claims ES&S has made, that the previous Secretary  
13 of State certified the AutoMARK A200 for use in San  
14 Francisco's rank choice voting system, are not supported  
15 by the evidence.

16 The prior Secretary of State granted one-time  
17 approval for use of the rank choice voting system in an  
18 order dated October 25th, 2006. And that order refers  
19 specifically to the AutoMARK version 1.0, again, also  
20 known as the phase -- the AutoMARK A100, not to the A200.

21 ES&S did not disclose to the Secretary of State's  
22 Office until a July 2007 conference call that it had mixed

23 some A200 machines in with A100 machines during volume  
24 testing of the equipment that was conducted around Labor  
25 Day of 2006, a year earlier. ES&S withdrew its

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1 application for California certification of an upgraded  
2 version of its overall Optical Scan and AutoMARK system in  
3 2006, when that volume testing revealed significant errors  
4 in the AutoMARK devices.

5           This summer, after the conference call that  
6 disclosed the fact that A200 machines has been included in  
7 that volume testing, unbeknownst to the Secretary of  
8 State's Office at the time, Secretary of State staff  
9 reviewed the records of the volume testing conducted last  
10 year and determined that significant errors were found in  
11 what we now know were AutoMARK A200 machines as well as in  
12 AutoMARK A100s.

13           The conclusions we can draw from the relevant law,  
14 as it's applied to the preliminary facts, are as follows:

15           ES&S has committed hundreds of violations of  
16 Elections Code Sections 19213 and 18564.5. These  
17 violations occurred during the period March through August  
18 of 2006, when 972 unauthorized A200 AutoMARK devices were  
19 sold and delivered to California counties;

20           Second, the Elections Code gives the Secretary of  
21 State the power to decide whether to pursue the penalties  
22 provided in Section 19214.5 and in Section 18564.5 against

23 ES&S;

24                   Finally, the agency's presentation of the relevant  
25 law and preliminary factual evidence is one part of the

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1 information the Secretary of State will consider in  
2 deciding whether to seek penalties against ES&S. Other  
3 sources of information will be the presentation that ES&S  
4 makes here, this morning, and comments offered by members  
5 of the public.

6 If there are no questions at this time, I thank  
7 you.

8 MODERATOR BRETSCHEIDER: Thank you.

9 Next we have three presenters who will be speaking  
10 during ES&S's allotted time today: John Groh, Senior Vice  
11 President of Government Relations for ES&S; Brian  
12 Phillips, President and CEO for SysTest Labs; and Gary  
13 Olivi, Vice President of Technical Operations and Chief  
14 Operating Officer of AutoMARK Technical Systems,  
15 Incorporated.

16 First is John Groh.

17 John you may proceed.

18 (Thereupon an overhead presentation was  
19 presented as follows.)

20 MR. GROH: Good morning, and thank you to the  
21 public for everyone coming out to this meeting this  
22 morning. Thank you to the panel that will listen to

23 information that I think pertains to this.

24 My name is John Groh, and I represent Elections

25 System and Software. I am one of the senior vice

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1 presidents of this corporation out of Omaha, Nebraska. I  
2 can tell you that ES&S appreciates the opportunity to  
3 provide the Secretary of State's Office with what we  
4 believe is valuable information and the public with  
5 important information that we think pertains to these  
6 allegations.

7 Elections Systems & Software, I want you to know,  
8 has the greatest respect for federal and state  
9 certifications. We have a long history of working to  
10 comply with these extensive and thorough examinations of  
11 our voting technology. And I can assure you, we are fully  
12 committed to working with California Secretary of State's  
13 Office to comply in future and ongoing -- with all  
14 California certification required as defined by the  
15 Secretary of State.

16 --o0o--

17 MR. GROH: Today, as soon as Lowell Finley is  
18 done, I would like to take and tackle this task of  
19 presenting this information to you in a series of steps.  
20 First, I would like to give you a brief overview of our  
21 company. I think it's important for you to know who is  
22 ES&S. I will also provide some details about the AutoMARK

23 technology, which is specific to this situation and its  
24 positive impact it's had on voters. I will also provide  
25 ES&S's perspective about the processes established to

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1 qualify and certify voting systems at the federal and the  
2 state levels. And finally, I will offer you timelines  
3 recapping what we think are important events in the  
4 certification processes during the relevant time frames.

5 Separately, you will also hear from  
6 representatives of SysTest Labs. SysTest is a recognized  
7 independent testing authority charged with reviewing and  
8 testing voting systems. And you will also hear from  
9 AutoMARK Technical Systems, the makers of the AutoMARK  
10 technology.

11 I will then offer you some summary conclusions of  
12 my remarks.

13 --o0o--

14 MR. GROH: Let me begin -- before I begin, let me  
15 summarize, a little bit, ES&S's perspective of this  
16 matter. It is important for the people of California and  
17 the voters of California to know that the AutoMARK voter  
18 assist terminal is federally qualified and California  
19 certified.

20 ATS made some nonfunctional, what the federal  
21 testing labs would consider, de minimis modifications to  
22 the AutoMARK hardware. The testing labs determined that

23 those hardware modifications did not affect the form, fit,  
24 or function of the terminals. And as a result, those  
25 hardware modifications were approved through the federal

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23                   MR. GROH:  As I move a little bit to who is ES&S,  
24  let me talk a moment about our company and our long  
25  standing commitment to the federal and the state level

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1 certification process.

2 As a company located in Omaha, Nebraska, our 365  
3 employees have at the core of our mission and have  
4 always -- it's always been to maintain voter confidence  
5 and enhance the voting experience for all voters. For  
6 more than 30 years, we've provided secure, accurate, and  
7 reliable voting solutions used by jurisdictions all over  
8 the United States and, for that matter, in many parts of  
9 the world.

10 In addition to our history of producing quality  
11 results, we have a long history of complying with federal  
12 and state certifications. We would not have remained in  
13 business this long if this had been an issue with our  
14 company. In fact, I want to point out a couple of what,  
15 we think, are key significant determiners of this: One  
16 was that ES&S was the first company to ever receive a  
17 certification under the first federal certification  
18 program, back in 1994. Additionally, we were also the  
19 first company to receive certification of a total  
20 end-to-end system under the 2002 voluntary voting  
21 standards. We take this subject of certification very  
22 seriously.

23

--o0o--

24

MR. GROH: The issue that is focused today is on

25

the AutoMARK voter assist terminal. So as you all know,

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1 the field of elections was transformed with the passage of  
2 Help America Vote Act, or HAVA, in 2002. Among many other  
3 changes, that act provides that all voters must be able to  
4 vote privately and independently via new accessible voting  
5 systems.

6 In light of HAVA, one of the most exciting forms  
7 of technology has been the AutoMARK voter assist terminal.  
8 The AutoMARK is a ballot marking device that allows people  
9 with disabilities or special needs to vote privately and  
10 independently when using a paper optical scan ballot.

11 In April of 2004, ES&S contracted with AutoMARK  
12 Technical Systems for the manufacturing of the AutoMARK  
13 voter assist terminals. The AutoMARK does not tally or  
14 store votes, but it allows voters to mark the ballot. For  
15 example, a blind voter is able to take a paper optical  
16 scan ballot to the AutoMARK where the voter can listen to  
17 the choices through head phones, in the language of their  
18 choice. The voter makes a selection, and the voter assist  
19 terminal marks that ballot. The AutoMARK also allows the  
20 voter, if they choose, to reinsert his or her ballot into  
21 the AutoMARK and it will read back the selected votes that  
22 appear on that ballot. Then the voter will take his or

23 her ballot to the ballot box or the tabulator in the  
24 precinct, just as other voters are able to do, privately  
25 and independently.

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23 ensure that the voting hardware and system meet the  
24 highest standards of accuracy, reliability, durability,  
25 and security. In many cases, those independent test labs

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1 spend months evaluating voting systems before reporting  
2 back to NASED Technical Committee where the system would  
3 then receive a NASED number documenting that the system  
4 was qualified for certification.

5 --o0o--

6 MR. GROH: The independent test authorities play a  
7 significant role in this factor, in this matter. Federal  
8 certification process relies on these nationally  
9 recognized independent test authorities. The ITAS have  
10 been approved and accredited by NASED and they conduct  
11 extensive testing of the voting system in their  
12 laboratories.

13 Under the process in place at the time, the ITAs  
14 provided detailed reports to NASED's Technical Committee  
15 of Experts on voting systems. Those experts reviewed the  
16 testing lab reports and made a final determination about  
17 whether to qualify the voting system that's been  
18 presented. Another important part of the ITA's  
19 responsibility is to consider and review normal hardware  
20 modifications that are planned to the voting system, that  
21 have already been qualified through NASED process. To do  
22 so, the ITAs review the submission of what are called

23 engineering change requests, or ECRs.

24 After reviewing an ECR, it's been the ITAs'

25 responsibility to determine what, if any, action is

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1 required. Again, the ITAs are authorized by NASED to  
2 determine the next steps when hardware modifications were  
3 made.

4 This was the first step that we had to adhere to.

5 --o0o--

6 MR. GROH: Let me provide you with a little bit  
7 more about the use of ECRs and give you some background on  
8 how this is used in the process. They are planned  
9 modifications to hardware and voting systems that have  
10 already been extensively tested and qualified at the  
11 federal level. ECRs are used for modifications to  
12 hardware only. They do not apply to software and  
13 firmware. It is a hardware-only, specific, event that  
14 ECRs are used. They do not involve proposed changes to  
15 software or firmware.

16 There are many things that lead to the need for  
17 ECRs. They provide a process that allows the independent  
18 test labs to analyze these proposed hardware changes from  
19 the vendors. The modifications may be designed to improve  
20 the manufacturability or ease of performance or  
21 preventative maintenance of the voting systems that have  
22 already been tested and qualified for certification.

23                   ECRs also deal with the supply of hardware  
24 components, including those components that are commercial  
25 off-the-shelf or more familiarly referred to as COTS,

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1 those items that are at the end of their manufacturing  
2 supply life chain cycle and those that may need to be  
3 replaced by equivalent hardware parts.

4 --o0o--

5 MR. GROH: If an ITA's review of a submitted ECR  
6 finds that a proposed hardware modification are determined  
7 de minimis or not involving or affecting the form, fit, or  
8 function of the voting system, then the ITA's view in  
9 standard practice had been that, one, no new voting system  
10 is created. The change involves de minimis changes to an  
11 already reviewed, approved, and qualified voting system.

12 Also, there was no need for a new NASED  
13 qualification number. It was not part of the process.  
14 The previously qualified voting system is viewed as  
15 unchanged and unaffected. After that de minimis  
16 determination, the historical practice of the states,  
17 including California, had been that they did not require  
18 further action or notice of these changes.

19 --o0o--

20 MR. GROH: The ECR process is a part of the  
21 situation we are talking about today. In late 2005, ATS  
22 determined that some minor hardware modifications would

23 make the AutoMARK easier for jurisdictions and vendors to  
24 service while also increasing manufacturing efficiencies.

25 At ES&S we were aware of those changes, but ATS is

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1 here to provide you with more detail about them in a few  
2 minutes.

3           From the beginning, it was clear that these  
4 modifications would have no impact on the terminals'  
5 function, operation, reliability, accuracy, or security.  
6 They did not involve any changes or modifications to the  
7 firmware or software in any shape or form. And certainly,  
8 these changes had no impact on the manner in which the  
9 votes were tabulated, because the AutoMARK is not a  
10 tabulator.

11           ATS worked through the process established at that  
12 time and submitted a hardware modification, labeled as  
13 AutoMARK Phase 2, to the independent testing labs, SysTest  
14 in this case, that had performed all of the testing on the  
15 AutoMARK Phase 1 hardware and qualified it for  
16 certification.

17           The testing lab, under its authority, reviewed the  
18 ECR change and determined that two tests would need to be  
19 performed. Those tests were conducted. The Phase 2  
20 AutoMARK completed those tests successfully, and the  
21 testing lab, under its authority from NASED, determined  
22 that the modifications were de minimis and would be

23 incorporated in the manufacturing process. That allowed  
24 that no additional testing was required, no new NASED  
25 qualification number was required, and the existing,

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1 already-qualified, certified voting system was determined  
2 to be unaffected and unchanged. Thus, the Phase 2  
3 AutoMARK is part of the existing original NASED qualified  
4 system.

5 I would like to share with you three separate  
6 timelines. And first, I would like to provide an overview  
7 of that federal certification process.

8 --o0o--

9 MR. GROH: In June of 2005, NASED provided a  
10 qualification number to the system that included Phase 1  
11 AutoMARK hardware, the original submission. This only  
12 occurs after an exhaustive and extremely detailed review  
13 and testing process that is conducted by the independent  
14 test authorities. Then we began the manufacturing of the  
15 AutoMARK during the time frame of June 1 of '05 to March  
16 27th of '06, of these original units.

17 In December of 2005, engineering change requests  
18 had been submitted by ATS -- that had been submitted by  
19 ATS were evaluated by SysTest labs, the independent test  
20 authority that was reviewing this product.

21 And then in January of 2006, they performed  
22 additional testing, and it was completed and the

23 independent testing authority determined that no  
24 additional action was required. That review meant that  
25 the modifications were part of the existing NASED

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1 qualified voting system. Accordingly, in March, ATS began  
2 manufacturing the Phase 2 units, as we were released to do  
3 so by the process we had been through.

4 And so from March 27th through July 27th of 2006,  
5 we were manufacturing only Phase 2 hardware.

6 --o0o--

7 MR. GROH: Next timeline I would like to provide  
8 is a view into the California certification timeline. It  
9 begins with in August of 2005.

10 After the June event at the federal level, the  
11 AutoMARK was included as part of a voting system that  
12 received state certification. And again, that  
13 certification came only after extensive review and testing  
14 of the system.

15 Of an issue that I wish to also point out in this,  
16 the firmware version was 1.0.168, more commonly referred  
17 to as 1.0. Additionally, the firmware version that was  
18 used was also referred to as Version 1.0. In many cases,  
19 sometimes those two versions are confused with each other  
20 or they are noted when the Version 1.0 is referring to the  
21 firmware, not the hardware.

22 Secondly, on October 26th of 2006, the Secretary

23 of State's Office issued a certification of a voting  
24 system that included the AutoMARK with the NASED  
25 ITA-approved hardware modifications.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345



23 San Francisco voting system that involved the Phase 2  
24 units.

25 --o0o--

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1           MR. GROH: At this time, I am going to invite up  
2 Brian Phillips to provide you some insight into what an  
3 independent test authority is, what is their involvement,  
4 how do they interact with the vendors and with the State  
5 on this point.

6           And after that, I will introduce our second  
7 presenter.

8           Brian?

9           MR. PHILLIPS: Thank you. Good morning.

10          My name is Brian Phillips. And I am the president  
11 and CEO of SysTest Labs. SysTest Labs is a fully  
12 accredited election systems commission, or EAC, voting  
13 system test lab, VSTL, and was a full independent test  
14 authority for the National Association of State Election  
15 Directors from August of 2001 through August of 2006, when  
16 the EAC officially took over responsibilities for the  
17 ITAs.

18          I am here today to present to the Secretary of  
19 State information regarding the processes used by ITAs  
20 under the auspices of NASED.

21          The processes covered the review, testing, and  
22 assessment of equipment change requests, or ECRs, for

23 NASED qualified electronic voting systems.

24           We all recognize the extreme importance of  
25 thorough and valid testing of electronic voting systems,

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1 and the processes for testing and qualification followed  
2 by the ITA, under NASED, was intended to ensure that the  
3 electronic voting systems met the requirements established  
4 in the voluntary voting system standards.

5 An integral part of that process involved the  
6 evaluation of ECRs, made by a manufacturer for previously  
7 NASED-qualified electronic voting systems.

8 An ECR is submitted to the ITA when a manufacturer  
9 is required to modify the previously qualified hardware  
10 due to a discontinued component or updates for ease of  
11 manufacturing.

12 The intent of the ECR process is to allow for  
13 hardware modifications to a qualified voting system,  
14 modifications that are considered to be de minimis, or  
15 those that do not affect the form, fit, or function of the  
16 voting system, without affecting the voting system's  
17 qualification.

18 The process requires that all proposed ECRs must  
19 be reviewed by the ITA that perform the original  
20 qualification testing of the hardware device.

21 NASED empowered the ITAs with the authority to  
22 determine if the proposed updates are, in fact, de minimis

23 changes.

24                   At SysTest Labs, ECRs are reviewed by our  
25 hardware -- our manager of hardware and environmental

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1 testing. And the results of all ECRs are recorded on the  
2 ECR form -- or the results of ECR analysis are recorded on  
3 the ECR form. Some ECRs require no testing while others  
4 may require limited environmental testing. We advise  
5 NASED of these de minimis hardware changes on a biannual  
6 basis, and only to the extent of the built materials  
7 change, as opposed to hardware revision levels.

8           It is important to note that the current ECA --  
9 EAC process regarding de minimis equipment change requests  
10 to previously qualified and certified voting system  
11 hardware follows the same process but with the reporting  
12 of de minimis equipment change requests and voting system  
13 hardware to the EAC as soon as the VSTL has determined  
14 that the EAC -- the ECR, equipment change request, is a de  
15 minimis change.

16           The ECR is associated with the specific  
17 modifications under question to the voting system known as  
18 the ATS, VAT, or AutoMARK, Version A100, include ECRs 256  
19 through 278. SysTest Labs understood, at the time of the  
20 review, that the rationale for these proposed ECRs was to  
21 improve the manufacturing efficiency of the devices. In  
22 fact, there was no engineering or system issue involved

23 with these modifications. And therefore, they were not  
24 being submitted and mitigating an existing problem. They  
25 simply were introduced for ease of manufacturing.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

1           Each of these ECRs was thoroughly reviewed and  
2 evaluated by SysTest Labs' hardware environmental test  
3 manager. SysTest Labs validated that the modifications  
4 were expressly being made to improve manufacturing  
5 efficiency, and that none of the ECRs affected the form,  
6 fit, or functionality of the hardware device.

7           There were no firmware or software changes  
8 associated with any of these proposed ECRs. Our  
9 assessment included that each of these proposed ECRs were  
10 in fact a de minimis change and that the qualification of  
11 the ATS, VAT, Version A100, or AutoMARK device was not  
12 affected by these modifications. Therefore, no new NASED  
13 qualification was necessary, and the modifications  
14 represented by the ECR became part of the already existing  
15 NASED qualified AutoMARK device.

16           Had any of the proposed ECRs affected the form,  
17 fit, or functionality of the AutoMARK device, SysTest Labs  
18 would have required that the voting system, which includes  
19 the AutoMARK device, would be submitted for  
20 requalification testing and a new NASED qualification  
21 number would have been required.

22           As a result of the analysis by SysTest Labs, the

23 manufacturer was advised that the modifications were  
24 acceptable and could be incorporated in its manufacturing  
25 process.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

1           No further testing was required.

2           No new or different NASED qualification was  
3 involved, and both the model A100 and A200 AutoMARK  
4 carried the same NASED qualification number.

5           Moreover, in April of 2006, we presented to  
6 NASED's Technical Committee our report recommending  
7 approval for qualification of a voting system involving  
8 ES&S Unity Version Software 3.0.1.0, which voting system  
9 included the Phase 2, or A200, AutoMARK operating device.

10           During qualification testing of the ES&S Unity  
11 3.0.1.0 voting system, we determined that no new hardware  
12 testing of the VAT A200 AutoMARK device was required, and  
13 we accepted the analysis we performed as part of the  
14 ERC -- ECR process in our qualification testing.

15           That voting system, which, as mentioned,  
16 previously included the A200 AutoMARK, was approved by  
17 NASED's Technical Committee and assigned a NASED  
18 qualification number on August 31st, 2006.

19           A new NASED number was required because of  
20 software changes to the Unity system and not because of  
21 modifications to the AutoMARK hardware device.

22           In summary, numerous de minimis hardware changes

23 occur on any given voting system because of matters such  
24 as end of life as to a particular component, a change in  
25 the off-the-shelf item which is incorporated into a

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1 system, or because of manufacturing efficiencies.

2           These changes, once approved by an ITA, would not  
3 affect the qualification of the voting system. This is  
4 the process that was in place and existed at the time the  
5 modifications were made from the A100 to the A200 of the  
6 AutoMARK VAT.

7           Thank you.

8           MODERATOR BRETSCHEIDER: Thank you.

9           MR. GROH: Thank you, Brian.

10           I would also like to allow some time for Gary  
11 Olivi, the vice president of technical operations and the  
12 chief operating officer of AutoMARK Technical Systems, to  
13 come up and talk a little bit about their participation  
14 and involvement in this situation and manner.

15           Gary?

16           MR. OLIVI: Thank you. Good morning, Madam Chair,  
17 panelists, and members of the public.

18           My name is Gary Olivi, and I am the vice president  
19 of technical operations and the chief operating officer of  
20 AutoMARK Technical Systems.

21           Between April 2004 and December of 2005, AutoMARK  
22 Technical Systems supplied AutoMARK voter assist terminals

23 to Election Systems & Software under an exclusive  
24 equipment supply contract. AutoMARK voter assist  
25 terminals supplied under this contract were manufactured

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1 by a manufacturing partner, Ricoh Electronics,  
2 Incorporated, in our Tustin, California, assembly plant,  
3 between April of 2004 through August of 2005.

4           Early in the development and manufacturing of the  
5 AutoMARK voting assist terminal, AutoMARK Technical  
6 Systems recognized that certain modifications could be  
7 engineered into the units that would improve the  
8 manufacturability and the ease of performing preventive  
9 maintenance.

10           Three specific assembly processes were noted to  
11 have an impact on the efficiency of manufacturing our  
12 units: Having to turn the unit upside down to install two  
13 printed circuit boards into the base; routing several  
14 cables throughout the unit; and then finally making the  
15 physical connections between the components and those  
16 cables.

17           Although those desired modifications were small in  
18 number, some of the modifications would require minor  
19 revisions to other components. For instance, moving a  
20 printed circuit board from one location to another would  
21 require mounting holes to be located in the new location.  
22 Those combined modifications were documented and submitted

23 to the independent testing authority, SysTest Labs, in  
24 November and December of 2005, as AutoMARK engineering  
25 change request No. 324 through 346, and a SysTest

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1 engineering change request, 256 through 278.

2           It is important to note that these part revisions  
3 did not involve any changes to firmware. The requested,  
4 and ITA's approved, modifications were implemented using  
5 the certified Version 1.0 firmware. In fact, all AutoMARK  
6 voting assist terminals that AutoMARK Technical Systems  
7 produced for Elections Systems & Software were produced  
8 with 1.0 certified software.

9           During our review process, AutoMARK Technical  
10 Systems recognized it would be very beneficial to be able  
11 to differentiate units in the field according to the  
12 manner in which they were constructed.

13           Because our submitted revisions caused absolutely  
14 no change in the physical appearance or the operation of a  
15 voting assist terminal, AutoMARK Technical Systems decided  
16 to uniquely label our voting assist terminals on which the  
17 approved changes were incorporated. We labeled these  
18 units A200. Sometimes you hear it called Phase 2.

19           Thus, without any changes in the voting assist  
20 terminal function, operation, or security, we were able to  
21 greatly reduce assembly time and improve our quality  
22 assurance inspection rates. The net result was our

23 ability to supply an easier-to-build voting assist

24 terminal to Elections Systems & Software.

25 Thank you.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

1           MODERATOR BRETSCHNEIDER: Thank you very much.

2           MR. GROH: Thank you, Brian and thank you, Gary.

3           I just have a couple of closing, you know,  
4 comments here. And so I would like to summarize a little  
5 bit, because this is a lot of information.

6   --o0o--

7           MR. GROH: Those that are on the panel and those  
8 of us that are in this business work with this every day.  
9 But for many of you in the audience, we've covered a lot  
10 of ground very quickly.

11           But in summary, what I would like to leave  
12 everybody with is that all the AutoMARKs used in  
13 California are federally qualified and California  
14 certified. The nonfunctional and the de minimis hardware  
15 modifications were approved through the established  
16 federal process. I had no other actions that I knew to  
17 take and was following the practices of the day.

18           NASED and the ITA considered these to be approved  
19 hardware modifications to an existing qualified and  
20 certified system. The historical practice of states,  
21 including California, was that they did not require notice  
22 of these changes and they were not considered a change to

23 the voting system.

24           As we've shown you, the Secretary of State's  
25 Office was fully aware of the hardware modifications, as

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1 ES&S submitted these and used the Phase 1 and the Phase 2  
2 units during California certification events in the time  
3 frame that's involved.

4 In fact, the State actually used and evaluated  
5 Phase 2 units only during the San Francisco voting system  
6 certification. The voting system received a California  
7 certification.

8 Around these events, there are many technical data  
9 packets and documents that are submitted. And so this is  
10 detailed documentation that is submitted and given to the  
11 Secretary of State's Office and all of the people that are  
12 involved.

13 At no time has the federally qualified and  
14 California certified AutoMARK firmware changed as to any  
15 AutoMARK unit sold or deployed in California. At no time  
16 was the software or the firmware modified in any of these  
17 systems from the original certified software and firmware.

18 --o0o--

19 MR. GROH: In conclusion, I want to impress upon  
20 everybody that our company has acted in good faith  
21 throughout this process. And we've always been -- we've  
22 always complied with what we understood to be the State's

23 preferred practice and procedures relating to  
24 certification -- how people did things at the time that we  
25 were doing them is what we followed.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

1           In no way was any part of the voting systems'  
2 functional operation, accuracy, efficiency, or reliability  
3 altered, affected, or in any way compromised. And at no  
4 time were the California approval use procedures, that  
5 were originally submitted, changed or needed to be  
6 modified with the changes that had been made.

7           Based on this additional information that we've  
8 been able to provide today, we respectfully request that  
9 the Secretary of State's Office make a no cause  
10 determination in this matter.

11           I can tell you that ES&S appreciates the  
12 opportunity to provide the Secretary of State's staff and  
13 the public with what we think is important pieces of  
14 information, from our perspective, on what has transpired.  
15 As we have informed you previously, we certainly will work  
16 closely with the staff of your office to address future  
17 certifications in the manner in which you want them taken  
18 and done.

19           Thank you for allowing us the opportunity to be  
20 here today. I appreciate this chance to speak to  
21 everybody publicly.

22           MODERATOR BRETSCHNEIDER: Thank you very much.

23                   Now we're going to move to the public comment  
24   portion of this hearing.  So if you would like to speak at  
25   this time and you have not filled out a speaker card yet,

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1 if you could please do that. There are cards at the  
2 entrance.

3 We're going to take these in the order that they  
4 came in. And so the first speaker under public comment  
5 will be Elaine Ginnold, Registrar of Voters from Marin  
6 County; and then after that we'll have Jill LaVine with  
7 Sacramento County.

8 Elaine?

9 And each speaker will have three minutes. And  
10 we'll have -- Jason Heyes over here has some cards to --  
11 when you get close to your time.

12 MS. GINNOLD: Good morning. My name is Elaine  
13 Ginnold. I'm the registrar of voters in Marin County.

14 And I just wanted to let you know that we've been  
15 using the ES&S AutoMARK machine since the June 2006  
16 primary election. And they've worked well for us.

17 Of course, in each of the elections that we've  
18 used them -- the June election and the November general  
19 election -- only 17 voters used them in each of those  
20 elections. The volume isn't very high, the usage volume.  
21 But they have worked well. We've had no problems with  
22 them.

23                    Now, we now -- we have an election coming up on  
24   November 6th.   And we have borrowed the Phase 1 AutoMARKs  
25   from Contra Costa County to use in this election while

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1 this question is being resolved. And we -- I am concerned  
2 about the February 5th election, because even though we're  
3 borrowing these machines for November 6th, we'll not be  
4 able to borrow from any of the other counties for the  
5 February 5th primary election. There just aren't enough  
6 to go around.

7 So what I would ask you is to please, while you  
8 are resolving this issue with ES&S, find a way to allow  
9 these five counties to use their AutoMARKs for the  
10 February 5th election.

11 Thank you.

12 MODERATOR BRETSCHEIDER: Thank you. Next we have  
13 Jill LaVine, Registrar of Voters for Sacramento County;  
14 and then after that, Steve Weir, Registrar of Voters for  
15 Contra Costa County.

16 MS. LAVINE: Good morning, panel. My name is Jill  
17 LaVine. I am the registrar of voters for Sacramento  
18 County.

19 Sacramento County has taken a long, difficult path  
20 to get to the point where we are today. We used the punch  
21 card system for close to 30 years. And when they were  
22 decertified, we went off looking for a new system to use.

23                   And as we were pursuing this, we actually put out  
24 three different RFPs trying to find the best system for  
25 Sacramento County. And unfortunately, as we were going

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1 through this process, the rules kept changing. And so it  
2 was very difficult to find the best system. But after  
3 several years, we -- and after traveling to other states  
4 to see what they were using, and inviting vendors into our  
5 office to show us their systems, we settled, or chose,  
6 ES&S and their system.

7 We chose it because of the -- being able to have  
8 an optical scan paper-based system.

9 At that time, we bought a thousand AutoMARKs, a  
10 thousand M100s, which is the optical precinct scanner. We  
11 felt it was our best choice. Our voters could use the  
12 optical scan ballot, filling in the bubble, and have the  
13 original paper ballot to use in any recounts or challenged  
14 elections.

15 This meant, to meet the needs of our voters with  
16 disabilities and to meet those that needed language  
17 assistance, we chose the AutoMARK. This ballot marking  
18 device allows the voter to mark independently and review  
19 their ballot.

20 It shows our -- it allows our office to have the  
21 paper ballot, just like all the other voters have and use  
22 to vote. And we can use that for any challenge or

23 recounts.

24                   In November 2005, we rolled out these AutoMARKs  
25 for the first time in California. It was one of the

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1 biggest rollouts, I think, in the nation. We had visitors  
2 coming from North Dakota, Arizona, Illinois. Secretary of  
3 State sent representatives. The EAC sent representatives.  
4 And even members of my board of supervisors were there to  
5 watch and participate in this occasion. We considered it  
6 a success. And from the comments of our voters, they  
7 considered it a success.

8           We have used this system for four, soon to be five  
9 elections. With this system, because of the paper-based,  
10 we are able to resolve any concerns that we might have.  
11 We hope to complete the manual recount -- we've had a  
12 recovery requested voter recount and that was no change in  
13 the winner on that system, or that election.

14           At this point, we were able to loan our equipment  
15 to Solano County and to Merced County to help them through  
16 this November election. But we will not be able to loan  
17 them in February. Each county has different needs. While  
18 this system may not be the best system for every county,  
19 it is a great system for Sacramento County and for our  
20 voters. It is a great paper-based system. And I urge  
21 your reconsideration of keeping the AutoMARK in  
22 California.

23 Thank you.

24 MODERATOR BRETSCHNEIDER: Thank you. Next is

25 Steve Weir, Registrar of Voters for Contra Costa. And

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1 after that is Sacha Ielmorini.

2 MR. WEIR: Well, thank you, panel, and ladies and  
3 gentlemen.

4 I'm Steve Weir, the registrar of voters from  
5 Contra Costa County.

6 I am one of 14 counties in California that uses  
7 the AutoMARK. And as with my big sister, Sacramento  
8 County, we sort of came in at the same time and rolled  
9 out, in November of '05, the AutoMARK. Now, we weren't  
10 able to roll it out countywide, but we were one of the  
11 first counties to do so. And so we've had a lot of chance  
12 to watch the AutoMARK.

13 This process has been an education, I think, to  
14 all concerned. I know that Lowell Finley and I now serve  
15 on the EAC Standards Board, and we're sort of the new  
16 kids. So in February at the hearing, they gave us a  
17 briefing on how the world works, and it was, to say the  
18 least, overwhelming, to try to take in the whole  
19 certification process.

20 But one thing we did learn, or I certainly  
21 learned, was, de minimis changes to voting systems does  
22 not require recertification.

23           I think that what you are hearing the state say  
24   today is, and backing away from, the statement that ES&S  
25   rolled out noncertified equipment. The issue seems to be

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1 more "de minimized," if I can say that word, down to a  
2 notification question.

3 Elections administration in California in 2007 has  
4 been, I think, on the verge of losing its way, because  
5 we've had so many issues pop up and they seem to be  
6 adversarial.

7 This process that we're in right now maybe is a  
8 diversion and not necessarily for the good. ES&S has an  
9 application before this state for modifications to the  
10 AutoMARK to make it more functional. And I as a customer  
11 very much want to see that happen.

12 I'm looking to the Secretary of State to show her  
13 leadership and to have a measured response to the  
14 allegations and the questions that are before us. We are  
15 much too close to November to be making any more changes  
16 to our voting systems.

17 Thank you very much.

18 MODERATOR BRETSCHNEIDER: Thank you.

19 Sacha Ielmorini, San Francisco Voting Integrity  
20 Project; and after that, we'll have Chandra Friese.

21 MS. IELMORINI: Hi. San Francisco Voting  
22 Integrity Project. Sacha Ielmorini.

23                   And I'm just here to express the difficulties that  
24 we, in San Francisco, have had with working with ES&M --  
25 ES&S. And we've invited them to meetings -- some of our

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1 committees have. And they don't send representatives.  
2 And we would like to support the Secretary of State and  
3 the work that she's doing.

4 Thank you very much.

5 MODERATOR BRETSCHNEIDER: Thank you.

6 Chandra Friese, and after that we'll have Lee  
7 Munsen.

8 MS. FRIESE: Thank you, panel.

9 Chandra Friese, San Francisco Election -- San  
10 Francisco Voting Integrity Project.

11 I would like to start by fulfilling a request of a  
12 friend from Los Angeles who could not be here today. Her  
13 name is Mimi Kennedy. She is the chair of Progressive  
14 Democrats of America and a member of California Election  
15 Protection Network.

16 I will read her statement, and then I will add my  
17 own. Mimi states:

18 "ES&S's legal violations of California elections  
19 law have provided -- has proved an unreliable vendor for  
20 election service in this state. Legal violations and  
21 dishonesty are a breach of contract and trust between  
22 government and contract whenever they occur.

23                    "When such violations and dishonesty come from a  
24 contractor hired to count the vote, they must absolutely  
25 eliminate the contractor from providing that service for

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1 that government.

2 "In Los Angeles, activists warned the Board of  
3 supervisors last year against allowing ES&S to tabulate  
4 the vote. With a 44-page document from Voters United,  
5 entitled 'ES&S in the News, a Partial List of Documented  
6 Failures,' L.A. activists urged the L.A. County Board of  
7 Supervisors not to do business with ES&S.

8 "ES&S was nonetheless given 24 million of L.A.'s  
9 HAVA dollars to provide disability access and under and  
10 overvote protection in L.A. County, enhancing federal  
11 compliance for our paper ballot-based InkaVote system.

12 "L.A. County did not, however, spend 24 million on  
13 an ES&S tabulator. Therefore, ES&S does not count the  
14 vote in L.A. County. InkaVotes are counted on a central  
15 optiscanner formerly run by outvoted countybuilt software.  
16 In the future, they may be counted by a Diebold GEMS 2  
17 optiscanner if the software is certified by the Secretary  
18 of State in November. L.A. activists will address  
19 Diebold's record as a vendor at that time.

20 "Today, I support Secretary Bowen in applying  
21 legal sanctions and financial penalties to ES&S for its  
22 violations. But because the distinction between counting

23 the vote and assisting the vote counting, as ES&S products  
24 do in L.A. is fundamental to understanding the fight for  
25 election integrity, I support allowing ES&S to continue

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

1 its contracts for nontabulating disability access and vote  
2 protection equipment and services.

3 "As an unreliable vendor, ES&S can no longer be  
4 allowed to produce election results in California without  
5 100 percent verification from another source."

6 I have only one difference with my friend from  
7 L.A. And that is, in San Francisco, ES&S does count our  
8 votes. We use the Eagle 2 optiscan machines to count our  
9 votes at the precinct level, except for this year,  
10 Secretary of State requires that they are only the under  
11 and overvote protection. And we will be counting them  
12 centrally.

13 But even centrally, we have three central  
14 tabulators from ES&S. Actually, we only use two of them.  
15 One of them is cannibalized for parts. So we only have  
16 two of them in operation.

17 And those tabulators are run by ES&S employees,  
18 not by county employees. They are counted in secret. We  
19 cannot get close to them because we, as observers, have to  
20 stand behind a glass. We are watching -- we don't know  
21 what's going on. It is totally secluded and private from  
22 the citizens of San Francisco.

23                   MODERATOR BRETSCHNEIDER:  If you can wrap up, your  
24  time is up.

25                   MS. FRIESE:  I would just follow by saying that I

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1 do agree with my friend from Los Angeles that legal  
2 violations and dishonesty are a breach of contract and  
3 trust, between government and contract whenever they  
4 occur. When such violations and dishonesty come from a  
5 contractor hired to count the vote, they must absolutely  
6 eliminate that contractor from providing that service for  
7 development.

8 Thank you.

9 MODERATOR BRETSCHNEIDER: Thank you.

10 Lee Munson is next, and then we'll have Jerry  
11 Berkman.

12 MR. MUNSON: If it's appropriate, Chandra Friese  
13 may have gone over 20 seconds, and I will allocate that  
14 time for my time.

15 MODERATOR BRETSCHNEIDER: Thank you.

16 MR. MUNSON: I am a member of the San Francisco --  
17 the same San Francisco group.

18 We're concerned about voting integrity. And we  
19 have a new Secretary of State who has a deep interest in  
20 checking out the voting opinions. We totally support her  
21 in this. The kinds of things we have seen around the  
22 country in voting machines is appalling. You see

23 people -- you see 18,000 votes get lost for a democratic  
24 candidate in a heavily democratic district. It doesn't  
25 seem like it's just a natural occurrence.

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1           There's no record to show what happened.

2           I am sure there are similar things happening,  
3 perhaps to republican candidates, in other districts.  
4 We've got a major problem with these voting machines.

5           Secretary of State Debra Bowen is doing an  
6 investigation. She wants to make sure that they are  
7 accurate, reliable, and that no funny business can happen.  
8 I don't know how many of you have read results of the  
9 recent tests of three major voting systems -- Diebold,  
10 Sequoia, and Hart InterCivic.

11           I have -- it's about three or four hundred pages  
12 of stuff. When you review that and you see how vulnerable  
13 those machines are. One thing that disturbs me about ES&S  
14 is this they refuse to submit any of their machines for  
15 review. I am not sure whether they've recently come to  
16 the party and submitted some data or not, but there was a  
17 deadline, and they didn't bother to meet it. Until ES&S  
18 complies and has their machines reviewed by the Secretary  
19 of State's experts, I don't think they should -- I don't  
20 think they should be doing any voting machine work here,  
21 in California.

22           Now, I know -- I know that the AutoMARK is not

23 technically a voting machine, but I think that the fact  
24 that they didn't come forward and say, "Look, we think  
25 this machine in good faith has been approved." I didn't

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1 hear anything about that in the paper. All I heard is  
2 that they were stonewalling here. That's not the way to  
3 build a trusting relationship.

4 So I am very disturbed by the fact that now, at  
5 the last minute, ES&S is saying, "Well, everybody knew."  
6 Everybody didn't know.

7 There's been some -- there's been some  
8 gamesmanship going on here and trying to find some excuse.  
9 Why didn't they submit their machine at the time it was  
10 requested? They could have submitted it and said, "Well,  
11 we think it's already been approved." Under the law, she  
12 has the ability to ask every machine to be submitted.  
13 They stonewalled her. I am very disturbed by that.

14 I totally support Debra Bowen and the actions  
15 she's taking. And I'm sure she will sit down at some  
16 point and talk with the people from ES&S as to what an  
17 appropriate and fair outcome is. But they have come to  
18 the party very, very late. And particularly considering  
19 that they've been recognized as the largest of the voting  
20 machine manufacturers, they are setting a terrible  
21 example.

22 I don't think -- I don't think it's very smart to

23 try and stonewall the Secretary of State of the largest  
24 state in the country on an issue that's as important,  
25 nationally, as this issue is.

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1           So thank you very much.

2           MODERATOR BRETSCHNEIDER: Thank you.

3           MR. MUNSON: So I'm immediately speaking to you,  
4 you guys from ES&S.

5           MODERATOR BRETSCHNEIDER: Jerry Berkman is next,  
6 and then Michelle Gabriel.

7           MR. BERKMAN: I'm Jerry Berkman. I'm a retired  
8 computer programmer, formerly working at UC Berkeley.

9           I believe the Secretary of State should enforce  
10 the law with maximum penalties, because otherwise there's  
11 already people just ignoring the law all over the place  
12 with respect to both -- to voting machines.

13           Mr. Groh said California Secretary of State's  
14 Office was fully aware but doesn't say how. I imagine  
15 what he perhaps is implying is that Steven Freeman, who's  
16 a California tester, or was, and is also on the NASED  
17 Board, must have seen the changes as a NASED member  
18 tester.

19           However, as a NASED tester, he is under an NDA,  
20 nondisclosure agreement, so he can't say, "Oh, gee, in my  
21 NASED testing, I saw this," and say that to the California  
22 Secretary of State; he would be violating the agreement.

23                   ES&S has a very poor record across the country of  
24   delivering software, firmware, and other products around  
25   the country.  You can see this if you read the "Daily

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1 Voting News." Countlessly, they are delivering ballots  
2 and software and machines just right before the election.

3 They really don't deserve to be allowed in  
4 California.

5 Also, they were the ones who supplied the machines  
6 in the -- Sarasota County that lost 18,000 votes somehow.

7 ES&S installs a different module, executable  
8 module, for each polling place. And I can give you the  
9 reference. This means that the software they have in  
10 escrow isn't actually being used in the election anywhere  
11 in the state. It's something that's modified for each  
12 precinct, for each polling place. This does not satisfy  
13 the VVSG, the Voluntary Voting System Guidelines, which  
14 California requires them to follow. It also doesn't  
15 follow -- meet California law.

16 The system should never have been approved in the  
17 first place, if the testers had really looked at it. And  
18 also, violates California EC 19103(a), which requires, "No  
19 voting system may be used for an election unless an exact  
20 copy of the ballot tally software program source codes is  
21 placed in escrow."

22 Okay. Selling the noncertified software is making

23 a mockery of our laws. The law is very clear. ES&S sells  
24 a lot of products in California. They can get somebody  
25 that actually reads the law and sees what they are

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1 required to do.

2 Thank you.

3 MODERATOR BRETSCHNEIDER: Thank you.

4 Michelle Gabriel; and after that, Joan Quinn.

5 MS. GABRIEL: Good morning. I am going to -- my  
6 comments are coming from a different angle from what I  
7 heard from ES&S and SysTest Labs today.

8 First, I want to establish my credibility. I have  
9 an engineering background, I have two degrees from MIT,  
10 and I have an MBA from UC Berkeley.

11 And I have been involved with a number of  
12 companies that manufacture electronic equipment, including  
13 Motorola and Sybase for software. And I have a lot of  
14 experience with ECRs, engineering change requests. And I  
15 will give you a few questions that maybe you want to ask  
16 ES&S about.

17 So let me start out with saying that form, fit, or  
18 function changes, it's an expression that comes from  
19 military qualification and that my experience,  
20 preventative maintenance would be a function change.

21 The man from ES&S, the gentleman, referenced that  
22 these changes were not just for changing out of

23 end-of-life components, but was also for preventative  
24 maintenance. I would think that you might want to do some  
25 discovery about that and what was within the company,

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1 about whether this was a significant change.

2 In addition, it's a major change for a company to  
3 change the name of the product from an A100 to an A200.  
4 I've been in marketing. I've been in many new product  
5 introductions. To do that, you have to throw out all your  
6 old marketing literature and come up with a new marketing  
7 literature. You have to do training for everyone in the  
8 field.

9 You know, I've been through this. And what you do  
10 is you change it from A100.1 to A100.2 if it's just a de  
11 minimis change. Now, whether the ITA said it was a de  
12 minimis change I think is besides the point, because  
13 California needs to have the time to decide whether it's a  
14 de minimis change. And it certainly was not a de minimis  
15 change within the company to have that significant a  
16 change. It's huge to change the part number on a sales  
17 part outside of the company. It's really significant;  
18 it's not just a minor thing.

19 And I also have questions about the quality of  
20 this product, since I understand it, it didn't pass on the  
21 certification. Yet Mr. Groh kept saying about the quality  
22 of this product. I've heard that certain counties, they

23 wanted to buy two AutoMARKs instead of one because they  
24 broke down so much. Now, I don't call that a quality  
25 product. I think you might want to do some of that in the

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1 discovery process. I think they needed those changes  
2 because it was breaking down so much.

3 I think that what the Secretary of State needs to  
4 do is enforce the laws. When I started in this election  
5 integrity thing, I was really naive. I thought, okay,  
6 there's laws on the books, and that will protect us. Then  
7 I found out, no, the laws have to be enforced. And I  
8 think this Secretary of State needs to enforce the  
9 Election Code with the vendors, with everybody else that's  
10 affected by the Election Code.

11 And I think that those Election Code violations,  
12 they have to be enforced to the maximum extent of the law  
13 to show -- to send a message to everyone involved in the  
14 elections, that this Secretary of State, who I strongly  
15 support, is going to enforce the law.

16 Thank you.

17 MODERATOR BRETSCHEIDER: Thank you.

18 (Applause.)

19 MODERATOR BRETSCHEIDER: Joan Quinn; and then  
20 we'll have Brian Rothenberger.

21 MS. QUINN: Yes, thank you. My name is Joan  
22 Quinn. I am a retired staff attorney for California

23 Superior Court. I worked for 22 years for California  
24 Superior Courts specializing in criminal law at the felony  
25 level. That involved analyzing the facts of the case,

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1 applying California law or federal law to the case, and  
2 making a legal -- drawing a legal conclusion for which I  
3 recommended to the judges. This went from every felony up  
4 to many death penalty cases.

5 Mr. Groh has referred to, quote, practices  
6 established at the time, unquote; quote, historical  
7 practice. With all due respect, I find that laughable.

8 We don't have arguments about what practices were  
9 at the time regarding a criminal violation. I might point  
10 out that ignorance of law is not an excuse. Are we going  
11 to allow practices established at the time and historical  
12 practice to override California election law?

13 As strongly as I feel about the death penalty, I  
14 feel that California election law, all election law is at  
15 least as important as a person's life.

16 In our history, we've been proud to sacrifice life  
17 for freedom. If our votes don't count, what did that  
18 mean? I don't care about the history of ES&S as a  
19 company. You know, that's a distraction. I care about  
20 whether California law was complied with. From what I  
21 have seen and heard and what I understand, which is  
22 considerable, it has not been. I think that is the only

23 question here.

24                   The obfuscation that went on about past practices

25 is just that, it's obfuscation. Past practices,

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1 historical practice, practices established at the time  
2 have -- are totally irrelevant to the requirements of  
3 California law. I hope you remember that.

4 I didn't spend 22 years analyzing difficult felony  
5 questions for superior court at every level to accept some  
6 garbage as past practices and as historical practice, as  
7 overriding the requirements of California law.

8 I will just point out that I went to Ohio in  
9 December 2004 and in January 2005 to research what's now  
10 been established. And I found, personally, the incredible  
11 election fraud in Ohio. I came home knowing everything,  
12 or many things, about Ohio to find out that my state was  
13 in dire peril. I support Secretary of State Bowen in  
14 enforcement of California law, in applying maximum  
15 penalties to ES&S.

16 I am over. Just one second. I have to tell you,  
17 I know a lot about NASED. NASED's --

18 MODERATOR BRETSCHEIDER: I'm sorry.

19 MS. QUINN: -- known as a rubber stamp for the  
20 election manufacturing companies.

21 And I would like you to ask ES&S and other  
22 election equipment manufacturers what money they

23 contributed to NASED and if NASED ever turned down a  
24 project that was established.

25 Thank you.

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1           MODERATOR BRETSCHNEIDER: Thank you.

2           Brian Rothenberger; after that, Alan Dechert.

3           MR. ROTHENBERGER: My name is Brian Rothenberger  
4 and I am with Save Elections Monterey County.

5           And I have a statement I'm going to read out. And  
6 it's more specific to Sequoia voting systems that we have  
7 in Monterey County. But it applies to all electronic  
8 voting systems.

9           Ballots electronically displayed on a DRE screen,  
10 precinct results transported within memory-dependent on  
11 battery power, absentee and paper ballots scanned en  
12 masse, and then all the separate counts tabulated with  
13 software -- where in all this does a voter's vote remain  
14 constant, immutable, immutable on its way to being part of  
15 a tally, an election result, a winning or a losing?

16           With each new election conducted in Monterey  
17 County, the Sequoia Voting system used there is designed  
18 to be alterable. It's meant to be malleable. It is  
19 supposed to change.

20           RAM on a motherboard, EEPROM on a circuit card,  
21 PCMCIA cards, USB sticks -- all these memory devices are  
22 used in electronic voting systems throughout entire

23 process of voting and tabulating the votes. For example,  
24 the electronic memory on a results cartridge used in one  
25 election is purged of data and reused again, in a

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1 subsequent election, as is the configuration ROM and the  
2 public counter, both EEPROMs within the Edge are reset for  
3 one election cycle. So from one election to the next, the  
4 record of your vote is written over, wiped clean,  
5 in-permanent [sic].

6 But there is nothing truly keeping the recorded  
7 vote constant within an election. The means used to write  
8 the original vote to memory and later used to wipe clean  
9 that memory is the same means used to rewrite the ones and  
10 zeros that represented your selection on the electronic  
11 ballot to another selection or to no election at all.  
12 That means is the programming code which makes up the  
13 software and the firmware which is, itself, loaded into  
14 memory.

15 What we want is to not have what we don't want,  
16 elections that are inherently always malleable. We do not  
17 want electronic memory to be the record of our vote,  
18 because what can be written to memory can be overwritten  
19 again, at any time, within an election. We do not want  
20 software or firmware accessing the record of our vote,  
21 because software and firmware can be rewritten to pass  
22 over some votes as not there and count some other votes

23 twice -- twice or more.

24 No amount of security can preclude these things

25 from electronic voting because it is a fundamental nature

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1 of electronic memory to be changeable, to be not constant.

2 Thank you.

3 MODERATOR BRETSCHNEIDER: Thank you.

4 Alan Dechert; and after that, Judy Bertelsen.

5 MR. DECHER: I am Alan Dechert, Open Voting  
6 Consortium.

7 I would like to touch on three things: The costs,  
8 the need for transparency, and the prospect for public  
9 solutions.

10 Elaine Ginnold -- I want to pick up on one thing  
11 that she said. And I have heard this; this is quite  
12 common, that these machines are -- the accessible units,  
13 we absolutely need them, by federal law. But they are  
14 rarely used. And I think the AutoMARK is like the  
15 proverbial \$900 hammer. It's a very expensive machine.  
16 If you look at the cost per ballot, I think you are  
17 looking at thousands of dollars per ballot cast on these  
18 machines. We need -- we need a better solution.

19 I also want to point out the need for  
20 transparency, your own review here, you're -- I think  
21 Mr. Reynolds, you asked Matt Bishop about the -- isn't  
22 keeping these things secret, isn't this part of the

23 security layer? And Professor Bishop said, "Yes, but it's  
24 a very thin layer of security." It's paper thin because  
25 we don't want to rely on that. And, in fact, I would go

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1 so far as to say that there's no excuse for any secrets in  
2 the voting system at all. And Secretary Bowen certainly  
3 campaigned on that issue as well. And all of these things  
4 we're hearing now -- we shouldn't be having to have  
5 hearings to get this information. This should be  
6 routinely published, all details, about how these systems  
7 are built, how they run, how they are tested. This should  
8 be routinely public information. There's no excuse for  
9 any secrets here in the voting system, whatsoever.

10 We should begin to look at a state-developed  
11 system, volunteer scientists and programmers and engineers  
12 around the country have developed a precinct-based optical  
13 scan system. It's not quite ready for certification, but  
14 it's not far from being ready for that.

15 And I think there's a potential here for the state  
16 to take leadership here for a transparent public system,  
17 take the -- what's been developed here that's public  
18 already, with a precinct-based optical scan system,  
19 finish, it, and certify it. And I think you will have a  
20 much better cost effective use of the taxpayers' money.  
21 It's our money that we are spending \$5,000 apiece for  
22 these machines. And I don't want my money to go for \$900

23 hammers. And I don't want it to go for voting machines  
24 that really are way more expensive than what the solution  
25 requires.

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1 Thank you very much.

2 MODERATOR BRETSCHEIDER: Thank you.

3 Judy Bertelsen, and after that, Alec Bash.

4 MS BERTELSEN: Hello. I am Judy Bertelsen. I'm a  
5 voter in Alameda County. And I fully support Secretary  
6 Bowen's efforts to enforce the law, the Election Code.  
7 That -- it seems to be simply what she's doing and it's  
8 high time.

9 The federal qualification process is known to be  
10 flawed and nontransparent. The process of having a vendor  
11 pay a private company to do a secret test of its product  
12 is not adequate and is compromised by obvious conflict of  
13 interest. And we have no business or we shouldn't be  
14 expected to simply trust that process.

15 Not only do we need to have the laws enforced, but  
16 we need to encourage the development of open source  
17 equipment. And I would hope the secretary would go  
18 further and consider commissioning the UC Berkeley  
19 computer experts or others to develop reliable equipment  
20 that will be tailored to the precise needs of voters and  
21 the counties rather than having the counties have to take  
22 whatever the vendors come up with. We've had to deal with

23 some very poorly designed equipment in the past, and we  
24 really shouldn't have to do that. We should have  
25 equipment that's designed to meet the specified needs of

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1 the counties.

2 I just add one other thing that may seem  
3 extraneous to the specific point of -- or questions of  
4 ES&S. But no matter what system is used, we will need to  
5 have real audits of the elections.

6 And I want to say, I commend the Secretary in  
7 having developed the Post-Election Audit Systems Working  
8 Group. And they have made a strong recommendation for  
9 real audits. And we need to take steps to see that these  
10 are done and that plenty of time is allotted for audits to  
11 be done. We need to get past the idea that we need to  
12 have results within minutes of the close of polls. We  
13 need to learn to wait for an audited, reliable, result in  
14 our elections.

15 Thank you.

16 MODERATOR BRETSCHNEIDER: Thank you.

17 Alec Bash; and after that, Fred Turner.

18 MR. BASH: Good morning. I am Alec Bash with San  
19 Francisco's Democracy Action.

20 I would like to associate myself with the comments  
21 made by my colleagues with the San Francisco Voting  
22 Integrity Project, and also with those of -- many of the

23 other private citizens here, particularly including Alan  
24 Dechert with the Open Voting Consortium, who, in his  
25 comments, noted the great desirability of the State of

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1 California undertaking its own efforts towards creating a  
2 voting system that could be utilized by counties of the  
3 state at their discretion, but based upon open source code  
4 software, such that there would be some transparency in  
5 elections.

6 I register many voters in our county and in other  
7 places. And there's that real crisis of confidence in our  
8 voting systems. I know people who decide, no, I don't  
9 want to register to vote because I have no assurance my  
10 vote is going to be counted.

11 As we think about global warming, we have reached  
12 a tipping point on global warming in this country where  
13 even those who thought it was all -- mad scientists are  
14 now reluctant to continue to say that.

15 With voting elections, the crisis of confidence is  
16 something that is growing. The mainstream press has not  
17 picked up on it. For those of you that are on the  
18 internet, you see a tremendous amount of articles,  
19 documentation, analysis, that does not make it into the  
20 press. But it is going to in the same way that now there  
21 are more and more articles about global warming. And it  
22 is much -- as you find the evidence mounting, that it's

23 much worse than any of the scientists have predicted  
24 people are getting increasingly concerned in a sense that  
25 the members of the public who speak before you are the

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1 canaries in the mines, who are out there, who have their  
2 feet on the ground, and the pulse of a lot of people who  
3 are concerned about these things and really support the  
4 work that Debra Bowen is doing. Many campaign for her on  
5 the basis, on the country needs to have that -- her  
6 leadership and those of others like her, who will look  
7 with some skepticism upon the secrecy that is inherent in  
8 our electronic voting machines. So we do wish to commend  
9 her for the work they are undertaking.

10           And it's very pleasing to hear a presentation from  
11 ES&S. We, in San Francisco, have heard from our director  
12 of elections time and time again, that we'd like to have  
13 meetings -- how unresponsive they are to all requests for  
14 information from San Francisco.

15           We are glad that they have come here today to at  
16 least share some of their thoughts with us.

17           Thank you.

18           MODERATOR BRETSCHEIDER: Thank you.

19           Fred Turner; and then Jim Soper after that.

20           MR. TURNER: Hello. My name is Fred Turner. I am  
21 a canary, and I am the president, vice president, of the  
22 San Francisco Election Integrity League. I'm also

23 associated with Black Box Voting and the Election Defense  
24 Alliance.

25 We've been watching in San Francisco the ongoing

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1 with ES&S. I just wanted to make clear that, you know, in  
2 our findings, there's -- myself as a national activist  
3 also focused primarily in San Francisco, we're finding  
4 that all four vendors, the big four, as we call them, are  
5 exactly the same.

6 So, you know, in our initial findings and  
7 discovery of the information, we're not noting any  
8 differences between the four companies.

9 And it's nice to be here today. And it's easy to  
10 kick ES&S. But as we kick them, we want to just put on  
11 record that, you know, we should be kicking all of them  
12 exactly the same, because there are no differences in the  
13 technology. There might be some style differences in the  
14 corporations. But the problem is, as has been stated  
15 properly here, that it is a corporate interest issue, and  
16 that we need to make sure that this proprietary secret  
17 software code is immediately taken out of our election  
18 systems.

19 I also work as a volunteer assistant for the Open  
20 Voting Consortium. And certainly, the information  
21 regarding remedy is easily available to the state. And I  
22 think we're moving in that direction.

23                   I wanted to just make a few quick points here.  
24    Last year's San Francisco audit went well, which is  
25    interesting, because -- and I was there.  And what that

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1 shows is that we can make an audit turn out okay. It  
2 certainly went better than the San Mateo County audit,  
3 which I also attended. That was changed in the middle  
4 when the practices were deemed inappropriate. And so we  
5 have issues with our audits as well.

6           What we need is cross verification with the open  
7 source code versus the complete paper ballot. And it has  
8 to reconcile. And it sounds like Secretary of State Bowen  
9 now has audit procedures coming that will help make sure  
10 that this all happens correctly.

11           The problem here appears to be what qualifies as  
12 de minimis. That goes back, again, to the secret nature  
13 of the proceedings.

14           Roy Saltman, who is credited with being one of the  
15 founding fathers of the certification process, he states,  
16 clearly, that the certification process is terminally  
17 broken, never to be healed, as long as we have secret  
18 software code. He is also a proponent of open source  
19 software code in elections.

20           And I agree with Mr. Weir that this is now a side  
21 issue due to the fact that the elections are coming right  
22 at us. We do want to mention that the ITAs are

23 interesting, that they are coming to the defense of a  
24 vendor. We note the relationship between the two of them.  
25 This would also be cured by the open source software

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1 systems that we hope the State of California puts  
2 together.

3 Thank you very much.

4 MODERATOR BRETSCHNEIDER: Thank you.

5 Jim Soper and then Steven Hill.

6 MR. SOPER: Good morning. My name is Jim Soper.

7 I am a senior software consultant and the author of a Web  
8 site called countedascast.com, C-O-U-N-T-E-D-A-S-C-A-S-T.  
9 One vote -- every vote should be counted as cast.

10 I appreciate the presentations of the gentleman  
11 from ES&S and their representatives. I would like to ask  
12 if they would post on the Web site the four ECRs, because  
13 they vaguely talked about them in generalities, but we  
14 don't know the details. The entire testing process is  
15 secret, and that's a big problem already. The entire  
16 testing process is run by the same small clique of people.  
17 And the entire testing process has been shown to be  
18 faulty; it's got a lot of problems that was -- that came  
19 out already in February, over a year ago, with the  
20 Berkeley report showing that they were missing egregious  
21 programming problems with the Diebold things. The testing  
22 problem is not a defense. The testing system is not a

23 defense.

24 I would also like to suggest that they post the  
25 documentation that California knew about these systems,

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1 about the A200 systems. They should post the written  
2 notice that they gave to California to show that  
3 California really knew and ask that they provide written  
4 notice.

5 I don't think that the de minimis defense works  
6 here, on a couple of grounds.

7 One is, you go from a system, 100 to 200. Within  
8 the computing industry, that means you are making major  
9 changes, not just some small manufacturing changes. You  
10 are making major changes when you go from Version 1 to  
11 Version 2. And that's not de minimis. So something's not  
12 computing here. Something doesn't fit, and it smells to  
13 me like they may make changes. We need to find out where.

14 They also make a claim that the system was  
15 certified for the San Francisco rank choice voting. Rank  
16 choice voting is a major change. Now, it's explained that  
17 that's still in the ballot programming -- programming of  
18 the machines that's done a dozen weeks before the  
19 election.

20 Well, the system should never have been certified  
21 in the first place, because you certified a system fully  
22 programmed, and they are reprogramming the thing a dozen

23 weeks before the election. So they are changing the thing  
24 in midstream, and that's not allowed by the state code.

25 And I would finally point out that the

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1 certification we had for San Francisco was provisional,  
2 one time only. And then it was extended and extended.  
3 This was not real state certification. It was  
4 provisional. And they were letting these things slide  
5 with the same group of pals and buddies, including  
6 Secretary of State McPherson, and letting everything slide  
7 through. And now we have a new Secretary of State who  
8 believes in the law and is going to enforce the law.

9 Thank you.

10 MODERATOR BRETSCHEIDER: Thank you.

11 Steven Hill.

12 (Applause.)

13 MODERATOR BRETSCHEIDER: And after Robert  
14 Stigile.

15 MR. HILL: Thank you, members of the commission.

16 My name is Steven Hill. I am the director of  
17 Political Reform at the New America Foundation. Some call  
18 me -- have called me the father of instant runoff voting  
19 in California, for better or worse, depending on what you  
20 think about the particular form. I worked with Kevin  
21 Shelley's office, close, in implementing instant runoff  
22 voting in San Francisco, and am now working with other

23 cities who are trying to implement it.

24           And my colleague attended the federal and state  
25 simultaneous testing of the ES&S system in Rockville,

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1 Illinois, under -- when secretary Shelley was overseeing  
2 that.

3 And I also would like to say, I supported Debra  
4 Bowen when she ran as Secretary of State, and I've -- used  
5 Lowell Finley's excellent services as an election lawyer.  
6 So I come here as a friend and increasingly find myself on  
7 a different page with my friends when it comes to many of  
8 these issues.

9 In listening to ES&S's presentation corroborated  
10 by SysTest about de minimis changes, they are basically  
11 saying that you are making a mountain out of a mole hill.  
12 And I will be listening closely to your response to that.  
13 Because in my experience, in San Francisco, where you have  
14 ordered some changes to the elections this November, you  
15 are clearly making a mountain out of mole hill.

16 Your orders there reflect little understanding of  
17 what happens in a San Francisco election -- the safeguards  
18 built into the San Francisco election, the voting  
19 equipment-like error notification. Your order reflects  
20 little understanding of rank choice voting or instant  
21 runoff voting and how it works.

22 Fair Votes, which a nonprofit nonpartisan,

23 organization had issued an analysis with recommendations  
24 to your orders in San Francisco. And I very much concur  
25 with the -- basically, they're saying that your conditions

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1 are heavy handed including the not allowing of the  
2 releasing of preliminary results on election night, which  
3 has caused Bev Harris from Black Box Voting to say that  
4 this places the election in a potential situation of a  
5 high risk for fraud.

6           There's no time to go into the other things that  
7 you have ordered in San Francisco that similarly just  
8 don't make sense; they are overbearing, they are heavy  
9 handed. They actually don't increase security in San  
10 Francisco elections and potentially undermine security in  
11 certain ways.

12           Some of your other orders that you are either  
13 thinking about, or apparently have issued, like no  
14 sleepovers, with the delivery of voting equipment for  
15 election day, will cause great consternation in many  
16 counties in California. Think of a county like Los  
17 Angeles, where there are over 5,000 counties, and the idea  
18 of having to deliver all voting equipment for those 5,000  
19 counties the morning of an election. You would need to  
20 have an army paid. That just simply doesn't exist in  
21 their budget. So the idea of creating these regulations  
22 when you are not dialogued with counties and not really

23    seeing what the impact is going to be on election  
24    administrators and, ultimately, on voters on election day.  
25            Generally, you are creating, with some of your

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1 orders -- and I will finish up here -- a climate where  
2 innovations, like instant runoff voting are increasingly  
3 difficult to do. That's already fairly difficult to do,  
4 but is increasingly difficult to do.

5           And, you know, I would urge you, in closing, to  
6 make your interventions to be narrowly tailored to the  
7 problem that you are trying to solve and trying to deal  
8 with, and not use these broad, sweeping, ones that affect  
9 a whole bunch of other things don't have much to do of  
10 what you are trying to solve.

11           And finally, I would encourage you to reengage  
12 with members of the public, like myself, who have been  
13 working on these issues for a number of years, engaging  
14 with vendors, engaging with counties, and have a handle on  
15 some of the issues that need to be dealt with and reengage  
16 with us to figure out what solutions will be the ones that  
17 are narrowly tailored and will achieve all of the goals  
18 that we all have, of having secure elections, transparent  
19 elections, but also allow innovations, like instant runoff  
20 voting to proceed in those cities particularly where they  
21 have been passed and they are now being held up because of  
22 the climate that's been created.

23 Thank you.

24 MODERATOR BRETSCHNEIDER: Thank you. Robert

25 Stigile; and after, that Anne West.

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1           MR. STIGILE: Good morning. My name is Robert  
2 Stigile. And I am the president of the National  
3 Federation of the Blind for California, an affiliate of  
4 the National Federation of the Blind, an organization that  
5 is more than 50,000 members strong and is the largest and  
6 most active organization of blind people in the United  
7 States.

8           I am here this morning to encourage that the  
9 AutoMARK be kept in place. And the reason for this is,  
10 is, I want to tell you that blind voters going to a  
11 polling place. And with AutoMARK, they can sit down with  
12 head phones, and they can listen to the ballot at their  
13 preferred language, speed, and other settings, and be able  
14 to go through the ballot and make their choices and vote,  
15 as any other person would come in and be able to vote.

16           Before HAVA, blind voters had two choices --  
17 either to fill out an absentee ballot, which if -- like  
18 myself, who is blind and my wife is blind, we have to get  
19 someone to read it. That's right back to the drawing  
20 board of having to have someone come in. And it doesn't  
21 allow us to have it, to vote as a private and at our own  
22 time.

23           So what we do now is, we're able to go in and sit  
24 down and vote at our own time, our own speed, and make the  
25 choices, and sit there until we are done and have -- and

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1 feel that the choices have been made.

2           The other choice that we have before HAVA was to  
3 go in and have a polling member employee fill out the  
4 ballot for us. We don't know if they're marking our  
5 choice or if they're marking their choice. We take time.  
6 And people in back of us are waiting; they want to get in  
7 and out and get back to work. Those are not options that  
8 were very good.

9           And so therefore, with the AutoMARK, we're able to  
10 go in, as I said, sit down, and take our time, fill it  
11 out, and do it until we feel that we've made the choices.

12           So I am here this morning to encourage the  
13 Secretary of State to keep the AutoMARK in place so that  
14 blind voters in California can continue to have their  
15 choice of voting and go in and vote, just like everyone  
16 else in this country.

17           Thank you.

18           MODERATOR BRETSCHNEIDER: Thank you.

19           Anne West; and then after that, Stephen Jones.

20           MS. WEST: I would like to comment a little bit on  
21 the players here, that have spoken here. And then also  
22 Microsoft, I would just like to briefly mention that

23 Microsoft has been actively opposing the development of  
24 open source software, and even told that -- they  
25 intervened in development of the whole field -- remove the

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1 open source and data and try to make it proprietary again.  
2 So Microsoft is a significant player in the back of the  
3 picture.

4           The other thing I would like to say about Steven  
5 Hill is that I heard him here, in this room, testify,  
6 several years ago -- and it was a discussion of San  
7 Francisco's software and ES&S. And I heard him, with my  
8 own ears, saying, "ES&S should be allowed to use  
9 uncertified software," not merely de minimis changes. But  
10 he was actually saying that ES&S should be allowed -- you  
11 can check your records. I can't remember, it was during,  
12 you know, Secretary of State Shelley's era. "They should  
13 be allowed to use uncertified software," very significant,  
14 much different than de minimis.

15           As far -- and then -- like -- about SysTest -- one  
16 comment I would like to make about SysTest is that I get  
17 the feeling that because they receive money, the vendor --  
18 from the vendors -- the vendors such as ES&S pay for the  
19 services of such companies like SysTest, that SysTest and  
20 make sure the other ITAs are possibly operating, at least  
21 unconsciously, a bit unconsciously, on behalf of such  
22 vendors. SysTest testing, therefore, of ES&S should be

23 considered in that light.

24           And another thing I would like to say about that  
25 is that Mr. Soaries, who was the first president, chair,

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1 of the Election Assistance Commission selected by  
2 President Bush, he said -- and I read it in the newspaper  
3 during my Google searches -- that the reason that there's  
4 only three companies like SysTest, one of which is  
5 SysTest, is that no one else applied. This is not a --  
6 you know, a federal system. This is just the only three  
7 companies who applied. Who are these companies? You  
8 know, I mean they are getting paid by the vendors to do  
9 the kind of work they do. And maybe Mr. -- the head of  
10 SysTest was paid today to come today, himself.

11 Finally, my question with regard to what happened  
12 with the Secretary of State is, why would it be necessary  
13 to keep these allegedly de minimis changes a secret from  
14 the current Secretary of State, so secret that it was only  
15 by accident that she seemed to -- she found out about  
16 them, on this July conference call. More transparency is  
17 needed, and the Secretary of State should not be the last  
18 to be told about such changes. Since the information was  
19 not readily available to the current Secretary of State,  
20 perhaps one might argue that the alleged earlier approval  
21 of Phase 2 was actually pre -- backdated, so that it  
22 seemed to have occurred earlier, during the fall of 2006.

23 Thank you.

24 MODERATOR BRETSCHNEIDER: Thank you.

25 Stephen Jones. And the last -- I think we have

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1 two more, actually. Richard Tamm will be after Stephen  
2 Jones.

3 MR. JONES: Stephen Jones, Merced County auditor,  
4 controller, recorder clerk, and registrar of voters.

5 Merced County came late in with the AutoMARK.  
6 We've been using it since 2006. We've had no problems  
7 with the machine. The machine is a -- is used minimally,  
8 as there isn't a lot of demand for it. We set our own  
9 machines up. We test our own machines. We make sure that  
10 we do all of our own testing. We are open to the public.  
11 We bring the public in to watch us test as well as watch  
12 us count.

13 We -- one point that I would like to make today  
14 is, we're a Title 5 county because we have an airbase and  
15 because in 1972, there -- the state institution required  
16 that we -- because of the airbase, we became a Title 5.

17 Because we're a Title 5, we need to have action  
18 rather rapidly. December 5th is the last date I can apply  
19 for permission to run the February 5th election. If I  
20 don't have results by then, then we have other -- we have  
21 numbers of issues in being in compliance with HAVA --  
22 would obviously be one of those.

23                   So I would ask that this panel and the Secretary  
24 of State work diligently to come up with whatever results  
25 there is.

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1           Again, thank you. And please, we need the results  
2 by the -- by December 5th.

3           MODERATOR BRETSCHNEIDER: Thank you.

4           Richard Tamm; and then last, Roger Donaldsen.

5           MR. TAMM: Good morning. My name is Richard Tamm.

6           I have been a computer programmer for over 30  
7 years. I worked for UC Berkeley, UCSF, San Francisco  
8 Federal Reserve Bank, Chevron, Lucky Stores.

9           I, as a computer programmer, do not trust closed  
10 source software. Anything could be in there. Anything  
11 can happen. It could easily be hidden.

12           I agree with Michelle Gabriel and Jim Soper that  
13 when you change a version number from 1 to 2, rather than  
14 1.00n to 1.00n+1, it indicates a major change. And if it  
15 is de minimis, why would you make such a major number  
16 change? It doesn't make sense. It doesn't compute. And  
17 therefore, it needs to be looked at much more carefully.

18           So I feel the only reason we discovered, oh, it's  
19 de minimis is because ES&S got threatened with  
20 \$9.72 million in fines and \$5 million in refunds, and they  
21 finally are talking to us. This company has a reputation  
22 for stonewalling, for having unreliable equipment. That's

23 why some counties are trying to have two machines in a  
24 polling place because it's too unreliable.

25 I think that we need to insist that they

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1 communicate a lot better, that we don't have to get to the  
2 point where we threaten them with such a large fine before  
3 they said, "Oh, this is de minimis. You can go back to  
4 sleep. Trust us." Well, I believe in trust, but  
5 verified.

6           And we need to verify that this is de minimis. We  
7 also -- I agree with other speakers. These testing  
8 companies are paid for by the vendors. It's like having  
9 tobacco companies have testing companies that prove that  
10 their product is okay.

11           We need to -- ES&S refused to -- somehow, to  
12 warrant -- another problem with ES&S is that they always  
13 come in so late, at the very last minute with changes,  
14 just before an election. They get things delivered to the  
15 counties just barely in time for an election.  
16 They somehow are not able to meet the timetables to  
17 provide the machines for testing, the top-down testing,  
18 just like Diebold, Hart InterCivic, and Sequoia did. So  
19 since this is a de minimis change, we have -- we are  
20 assured that there's no major changes to the software. So  
21 we have the same untested software that we had before. It  
22 was not tested by the state before and now it's still not

23 tested. So I guess we can relax then because the software  
24 hasn't changed.

25 And if the new version that was provisionally

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1 approved for San Francisco, why did they also provide the  
2 new version to four other counties where there was no  
3 provisional certification?

4 I could go on, but my time is up.

5 MODERATOR BRETSCHNEIDER: You are welcome to  
6 submit written comments.

7 The last person under public comment is Roger  
8 Donaldsen.

9 MR. DONALDSEN: Thank you. Yes, Roger Donaldsen  
10 from San Francisco and San Francisco Voting Integrity  
11 Project.

12 So listening to all the speakers today, I don't  
13 want to belabor, you know, everything that's said. But I  
14 do want to touch on some points that I think deserve some  
15 emphasis and offer some of my own input.

16 Generally, this seems to be about, you know, the  
17 openness of the testing and the testing process. There --  
18 you know, beyond the fact that personally, I think, a lot  
19 of people here are opposed to proprietary software and  
20 proprietary equipment, running our elections, and then  
21 proprietary vendors actually in the election room doing a  
22 lot of the tally work and things like that.

23           In the case where we already have this equipment,  
24   and we're stuck with it, at least for the short term,  
25   there's a problem with the testing openness.  And we know

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1 this through the ITAs. There is a -- there is a  
2 relationship there. There's a supplier and a vendor paid  
3 for on the testing. And I would say that one of the  
4 things that we certainly applaud is the Secretary of State  
5 taking the top-to-bottom review to reveal some of the  
6 these problems.

7           And in this specific case, we have ES&S who's had  
8 a problem with complying with the various requests for  
9 information, both on top-to-bottom reviews as well as with  
10 the AutoMARK equipment. And it takes a hearing like this  
11 in order to get them to come and even disclose some of the  
12 that information, which is just appalling.

13           I would hope that even though it's not in the  
14 enumerated remedies in the law, that any settlement that  
15 comes out of this, that would provide our continued use  
16 and the AutoMARK would be full disclosure. The ECRs would  
17 be full disclosure of the SysTest conclusions, as a result  
18 of these ECRs as well as the NASED certification report.

19           In general, though, is it time for us to move  
20 forward with a publicly funded, publicly disclosed,  
21 publicly developed software system that runs our  
22 elections? Absolutely. And I will hope that the

23 Secretary of State would move rapidly in that direction.

24 Thank you very much.

25 (Applause.)

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1           MODERATOR BRETSCHNEIDER: Thank you.

2           We have now finished our agenda for today. And I  
3 would like to thank the presenters, the panelists, and the  
4 audience for being here to participate in the hearing.

5           As I mentioned at the outset, today's hearing was  
6 conducted on California Elections Code Section 19214.5,  
7 paragraph C. The hearing format is such that the  
8 Secretary of State was not provided an opportunity to  
9 respond to any of the information presented by ES&S during  
10 this hearing. However, again, the absence of such a  
11 response should not be construed as agreement or  
12 acquiescence to any statements ES&S made today.

13           And as noted earlier, there will be no decision  
14 made today regarding whether the Secretary of State will  
15 pursue legal action against ES&S. The Secretary of  
16 State's decision on whether to pursue legal action will be  
17 in writing and will set forth the findings of the  
18 secretary.

19           Finally, as I mentioned earlier, anyone who wishes  
20 to submit written testimony can do so by sending a hard  
21 copy to the Secretary of State or by e-mailing an  
22 electronic copy to [votingsystems@sos.ca.gov](mailto:votingsystems@sos.ca.gov) by

23 October 26th.

24 Thank you very much for your attention. And this  
25 hearing is now adjourned.

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2 (The Secretary of State Public Hearing  
3 adjourned at 12:02 p.m.)

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2 I, KATHRYN S. SWANK, a Certified Shorthand Reporter  
3 of the State of California, do hereby certify:

4 That I am a disinterested person herein; that the  
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8 California, and thereafter transcribed into typewriting.

9 I further certify that I am not of counsel or  
10 attorney for any of the parties to said hearing nor in any  
11 way interested in the outcome of said hearing.

12 IN WITNESS WHEREOF, I have hereunto set my hand this  
13 21st day of October, 2007.

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