http://www.wheresthepaper.org/NYCanKeepLevers_HAVA.pdf
Teresa Hommel, August 4, 2009

New York Can Keep Levers:
Federal Law, HAVA

A. Testimony, Douglas A. Kellner, December 7, 2004
http://www.wheresthepaper.org/TESTIMONYOFDOUGLASAKELLNER.htm

Kellner testified to the New York City Voter Assistance Commission on Dec. 7, 2004. At the time he was the Democratic Election Commissioner of New York County. He is currently Co-Chair of the New York State Board of Elections.

"The federal Help America Vote Act, 42 USC §§15301 et seq., will require substantial changes in election administration for the 2006 elections. In particular, 42 USC § 15481, sets minimum standards for voting machines. Our lever machines satisfy all but one of those standards, that there be at least one machine at each poll site that is 'accessible for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.' 42 USC § 15481(a)(3)."

B. Statement, Ray Martinez, April 8, 2006

Martinez spoke at a conference sponsored by VoteTrustUSA at Catholic University in Washington, D.C. At the time he was Vice-Chair of the federal Election Assistance Commission.

"Any state that does not take Title I funds can choose to keep their antiquated machines - levers or punchcards - as long as they provide voter education to prevent overvotes, and supply one disabled accessible machine per polling place." (transcription of private audio tape)

New York now meets these requirements because (1) lever machines do not allow overvotes and (2) New York counties now own and deploy one or more accessible ballot-marking devices per poll site.

C. Links to the text of the Help America Vote Act (HAVA)

Entire act: http://www.fec.gov/hava/law_ext.txt
§301:   http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00015481----000-.html

D. HAVA Title III, Section 301, Voting Systems Standards -- with explanatory comments.

SEC. 301. VOTING SYSTEMS STANDARDS.

(a) Requirements.--Each voting system used in an election for Federal office shall meet the following requirements:
  (1) In general.--
    (A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall--
      (i)   permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;
      (ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and
      (iii) if the voter selects votes for more than one candidate for a single office--
        (I)   notify the voter that the voter has selected more than one candidate for a single office on the ballot;
        (II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and
        (III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

Comment 1. Levers meet the above requirements.

    (B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), may meet the requirements of subparagraph (A)(iii) by--
      (i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and

Comment 2. Levers do not allow overvotes.

      (ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct

the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

(C) The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.

(2) Audit capacity.--

(A) In general.--The voting system shall produce a record with an audit capacity for such system.

(B) Manual audit capacity.--

(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.

(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

Comment 3. HAVA defines voting systems as equipment and practices in Section 301(b) below.

Comment 4. Lever systems comply with the requirement for "manual audit capacity" by requiring poll workers to record machine tallies from the face of the lever machine onto Return of Canvass paper forms on election night, and by requiring Board of Election technicians and observers to audit (confirm) those tallies when the numbers recorded on paper and on the machine are compared during the 100% recanvass according to EL §9-208. http://www.elections.state.ny.us/NYSBOE/download/law/2009NYElectionLaw.pdf

(3) Accessibility for individuals with disabilities.--The voting system shall--

(A) be accessible for individuals with disabilities, including nonvisual Accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;

(B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place; and

Comment 5. Provision (B) requires at least one accessible system per polling place. NY complied by purchasing and fielding at least one accessible Ballot Marking Device (BMD) per poll site in 2008. There is no HAVA or New York State requirement for all voters to use the same type of machine.

(C) if purchased with funds made available under title II on or after January 1, 2007, meet the voting system standards for disability access (as outlined in this paragraph).

Comment 6. New York used Title II funds to purchase its BMDs. New York accepted funds for lever replacement under Title I, but has not spent that money yet. See "E. HAVA Title I, Section 102, Replacement of Punch Card or Lever Voting Machines" for HAVA provisions for return of lever replacement funds.

However, some counties may be in the process of purchasing their replacement equipment now, despite the fact that it has not been certified by the State Board of Elections, in order to participate in the "pilot" during the 2009 primary and general elections.

> (4) Alternative language accessibility.--The voting system shall provide alternative language accessibility pursuant to the requirements of section 203 of the Voting Rights Act of 1965 (42 U.S.C. 1973aa-1a).

Comment 7. Levers meet this requirement. For example, in New York City they provide up to 4 languages—English and Spanish in all poll sites, with Chinese in addition in over 1800 election districts, and Korean in addition in almost 400 election districts. BMDs can increase the number of languages available to voters.

> (5) Error rates.--The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on the date of the enactment of this Act.

Comment 8. Section 3.2.1 is copied below in "F. Error Rate Standard in the Voting System Standards Volume I."

The error rate standards do not apply to lever machines: "The Standards did not cover paper ballot and mechanical lever systems because paper ballots are sufficiently self-explanatory not to require technical standards and mechanical lever systems are no longer manufactured or sold in the United States." [Volume I, page 1-8]

> (6) Uniform definition of what constitutes a vote.—Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

Comment 9. The NYS Board of Elections wrote a standard for lever machines in the regulations, Part 6210.17, available at:
http://www.elections.state.ny.us/NYSBOE/law/Regulations/Part6210RoutineMaintenanceTestingVotingSystems.pdf

> (b) Voting System Defined.--In this section, the term "voting system" means--
> (1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to

program, control, and support the equipment) that is used--
    (A) to define ballots;
    (B) to cast and count votes;
    (C) to report or display election results; and
    (D) to maintain and produce any audit trail information; and
  (2) the practices and associated documentation used--
    (A) to identify system components and versions of such components;
    (B) to test the system during its development and maintenance;
    (C) to maintain records of system errors and defects;
    (D) to determine specific system changes to be made to a system after the initial qualification of the system; and
    (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

Comment 10. A "voting system" consists of machines, practices and documentation. Paper records such as the election-night Return of Canvass produced by poll workers meet HAVA's audit requirement.

HAVA does not require a software-independent, voter-verified, paper record of every vote. In fact, the EAC has allowed HAVA's audit requirement to be met by post-election printouts of purported cast-vote records stored in computer memory, NOT traceable to the original vote-casting transaction (due to the need for a secret ballot), and NOT witnessed by the voter. Data stored mechanically in a lever machine, along with the paper Return of Canvass, provide superior manual audit capacity.

  (c) Construction.--
    (1) In general.--Nothing in this section shall be construed to prohibit a State or jurisdiction which used a particular type of voting system in the elections for Federal office held in November 2000 from using the same type of system after the effective date of this section, so long as the system meets or is modified to meet the requirements of this section.

Comment 11. Lever machine systems were used in November 2000, and have been modified by being supplemented by accessible BMDs.

    (2) Protection of paper ballot voting systems.--For purposes of subsection (a)(1)(A)(i), the term "verify" may not be defined in a manner that makes it impossible for a paper ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements.

  (d) Effective Date.--Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2006.

E. HAVA Title I, Section 102, Replacement of Punch Card or Lever Voting Machines.

This section allows for the return of lever replacement money.
http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00015302----000-.html

SEC. 102. REPLACEMENT OF PUNCH CARD OR LEVER VOTING MACHINES.

(a) Establishment of Program.--
    (1) In general.--Not later than 45 days after the date of the enactment of this Act, the Administrator shall establish a program under which the Administrator shall make a payment to each State eligible under subsection (b) in which a precinct within that State used a punch card voting system or a lever voting system to administer the regularly scheduled general election for Federal office held in November 2000 (in this section referred to as a "qualifying precinct").
    (2) Use of funds.--A State shall use the funds provided under a payment under this section (either directly or as reimbursement, including as reimbursement for costs incurred on or after January 1, 2001, under multiyear contracts) to replace punch card voting systems or lever voting systems (as the case may be) in qualifying precincts within that State with a voting system (by purchase, lease, or such other arrangement as may be appropriate) that--
        (A) does not use punch cards or levers;
        (B) is not inconsistent with the requirements of the laws described in section 906; and
        (C) meets the requirements of section 301.

[Some portions, not relevant to return of funds, are omitted here.]

(c) Amount of Payment.--
    (1) In general.--Subject to paragraph (2) and section 103(b), the amount of payment made to a State under the program under this section shall be equal to the product of--
        (A) the number of the qualifying precincts within the State; and
        (B) $4,000.

[Bold emphasis added in the next paragraph.]

(d) Repayment of Funds for Failure To Meet Deadlines.--
    (1) In general.--If a State receiving funds under the program under this section fails to meet the deadline applicable to the State under subsection (a)(3), the State shall pay to the Administrator an amount equal to the noncompliant precinct percentage of the amount of the funds provided to the State under the program.
    (2) Noncompliant precinct percentage defined.--In this subsection, the term "noncompliant precinct percentage" means, with respect to a State, the amount (expressed as a percentage) equal to the quotient of--

(A) the number of qualifying precincts within the State for which the State failed to meet the applicable deadline; and

(B) the total number of qualifying precincts in the State.

F. Error Rate Standard in the Voting System Standards Volume I

Error rate standards, called "Accuracy Requirements," are in <u>Voting Systems Standards Volume I Performance Standards</u> posted by the federal Election Assistance Commission (EAC) at <u>http://www.eac.gov/voting%20systems/voluntary-voting-guidelines/docs/voting-systems-standards-volume-i-performance.pdf/attachment_download/file</u>

All volumes are posted at <u>http://www.eac.gov/voting%20systems/voluntary-voting-guidelines/2002-voting-system-standards</u>

The standards do not apply to lever machines: "The Standards did not cover paper ballot and mechanical lever systems because paper ballots are sufficiently self-explanatory not to require technical standards and mechanical lever systems are no longer manufactured or sold in the United States." [page 1-8]

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3.2.1 Accuracy Requirements
Voting system accuracy addresses the accuracy of data for each of the
individual ballot positions that could be selected by a voter,
including the positions that are not selected. For a voting system,
accuracy is defined as the ability of the system to capture, record,
store, consolidate and report the specific selections and absence of
selections, made by the voter for each ballot position without error.
Required accuracy is defined in terms of an error rate that for
testing purposes represents the maximum number of errors allowed while
processing a specified volume of data. This rate is set at a
sufficiently stringent level such that the likelihood of voting system
errors affecting the outcome of an election is exceptionally remote
even in the closest of elections.

The error rate is defined using a convention that recognizes
differences in how vote data is processed by different types of voting
systems. Paper-based and DRE systems have different processing steps.
Some differences also exist between precinct count and central count
systems. Therefore, the acceptable error rate applies separately and
distinctly to each of the following functions:

a. For all paper-based systems:

   1) Scanning ballot positions on paper ballots to detect selections
      for individual candidates and contests;

   2) Conversion of selections detected on paper ballots into digital
      data;
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b. For all DRE systems:

   1) Recording the voter selections of candidates and contests into voting data storage; and

   2) Independently from voting data storage, recording voter selections of candidates and contests into ballot image storage.

c. For precinct-count systems (paper-based and DRE): Consolidation of vote selection data from multiple precinct-based systems to generate jurisdiction-wide vote counts, including storage and reporting of the consolidated vote data; and

d. For central-count systems (paper-based and DRE): Consolidation of vote selection data from multiple counting devices to generate jurisdiction-wide vote counts, including storage and reporting of the consolidated vote data.

For testing purposes, the acceptable error rate is defined using two parameters: the desired error rate to be achieved, and the maximum error rate that should be accepted by the test process.

For each processing function indicated above, the system shall achieve a target error rate of no more than one in 10,000,000 ballot positions, with a maximum acceptable error rate in the test process of one in 500,000 ballot positions.

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