New York: First in Election Integrity, or Muddled Like Everybody Else?

By William Edelstein, Board of Directors, New Yorkers for Verified Voting

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A recent article on VoteTrustUSA and in Election Integrity ("New York: last in HAVA Compliance or First in Election Integrity?", 6/27/06), argues that things are going well in New York, because we have "transparent" mechanical lever voting machines that we can continue to use indefinitely. Author Howard Stanislevic also says that our "bipartisan" voting system officials have produced a fair process for choosing other, new, voting technology, and thus we are well on our way to having high-integrity voting.

New Yorkers for Verified Voting has a different view. First, lever machines are anything but transparent, and they have had numerous breakdowns. Second, New York State election law clearly states that lever machines will not be allowed in New York after September 1, 2007. Finally, our progress toward defining voting system regulations, establishing fair, open and effective testing procedures, and purchasing new voting systems remains uncertain at best.

Problems with Lever Voting Machines

We need reliable voting systems that are understandable to voters and, ultimately, can be audited. With a lever voting machine, the voter flips levers and trusts that the counters corresponding to the chosen candidates are properly incremented. The average voter has little understanding of the workings of these machines. Most important, there is no way to verify a vote once it is cast; the voter cannot look at the counters and see if the machine has correctly counted their vote. There is no way to audit votes or recount them later. And there is no viable way to attach printers to produce a voter-verifiable paper trail, a requirement of New York election law.

Lever machines are certainly not foolproof. In his 2005 report on voting in New York, Attorney General Spitzer said:

On Election Day 2004, as in past elections, there were numerous reports of broken voting machines. When machines break and voters must use emergency ballots, the process slows, lines get longer, and voters become discouraged from voting. New York relies almost entirely on lever machines that are over 40 years old, with close to 20,000 such machines serving some 15,000 election districts state-wide. Because no new lever voting machines are being manufactured, it is increasingly difficult to get the spare parts to fix broken machines.

["Voting Matters II: No Time to Waste," p. 10]

Professor Douglas W. Jones of the University of Iowa mentions another possible failure mode based on lever machine mechanics:

Roy G. Saltman has noted that the number 99 shows up in the vote totals on lever machines significantly more frequently than would be expected if vote totals were randomly distributed -- that is, the number of 99's is noticeably different from the number of 98's or 100's. The probable explanation is that it takes more force to turn the vote counting wheels in a lever machine from 99 to 100, and therefore, if the counter is going to jam, it is more likely to jam at 99. The fact that this is a frequent occurrence in vote totals reported from lever machines is empirical evidence that the lever machines that have been used in real elections are, in fact, inadequately maintained and that this results in the loss of a significant number of votes.

[D. Jones, "A Brief Illustrated History of Voting,"]
Mr. Robert Brehm, Deputy Information Director of the New York State Board of Elections, reported that he is aware of a number of voting machine malfunctions, including cases where gear teeth broke and did not register votes. At the end of the voting day when an error is detected, there is no way to recover lost votes.

Mr. Brehm noted the case of an election in Westchester County in 2001 in which a jammed lever voting machine that undoubtedly lost votes caused a protracted court case that took over two years to settle. (Delgado vs. Sunderland et al.)

Does NY Election Law Allow Lever Voting Machines?

Can New York State retain its lever machines? According to New York’s current laws and regulations, they cannot. Lever machines lack the voter verifiability, auditability, and other new required features for voting systems to qualify for use in the Empire State.

Verifiability and auditability requirements are specified in **Section 7-202(1j) of the New York 2006 Election Law**.

1. A voting machine or system to be approved by the state board of elections shall:

   j. retain all paper ballots cast or produce and retain a voter verified permanent paper record which shall be presented to the voter from behind a window or other device before the ballot is cast, in a manner intended and designed to protect the privacy of the voter; such ballots or record shall allow a manual audit and shall be preserved in accordance with the provisions of section 3-222 of this chapter;

On the basis of the following paragraph from "The Election Reform and Modernization Act of 2005" (ERMA), Mr. Stanislevic asserts that New York’s law allows lever machines after September 1, 2007.

23 Effective September 1, 2007, all lever machines in New York state shall be replaced by voting machines or voting systems which meet the requirements of section 7-202 of the election law, provided, however, that with respect to any board of elections which determines to retain lever machines on or after the effective date of this act and prior to September 1, 2007, the provisions of this act which impose new standards for voting machines which were not required prior to the effective date of this act, including the amendments to section 7-202 of the election law made by section six of this act, shall not be applicable with respect to such lever machines during any period of time during which such lever machines are lawfully utilized. (ERMA 2005, S-7209, S 11).

Mr. Stanislevic interprets this to mean that "the New York State legislature did not intend to ban the levers." However, let's study this paragraph. It begins “Effective September 1, 2007, all lever machines in New York State shall be replaced by voting machines or voting systems which meet the requirements of section 7-202 of the election law…” This says unambiguously that lever machines are banned after September 1, 2007.

The rest of the paragraph ("provided…") is a convoluted way of saying that the standards imposed on new voting technology cannot be applied to lever machines during their lawful use, which includes any time before September 1, 2007. In other words, counties that wish to continue using lever machines up to August 31, 2007 may legally do so without making any changes to their existing lever machines.
Teresa Hommel's comment on the paragraph exemplifies the majority view:

Page 8, Lines 23-33, Prohibits lever machines after 9/1/07, but until then levers can be used and don't need to meet the requirements of section 7-202 (VVPAT, 5 languages, some accessibility, etc). [Teresa Hommel, Comments on ERMA, 7/31/05]

Thus it is very clear that, according to current New York State law, the lever machines may not be used after September 1, 2007.

Ongoing challenges to election integrity in New York

In his article, Mr. Stanislevic calls New York “first in election integrity” because of its "bipartisan" approach to voting issues, e.g., the state Board of Elections has an equal number of Democratic and Republican commissioners and each New York county has one Democratic and one Republican election commissioner. While this arrangement provides some checks and balances, it means that New York election officials gain their positions primarily through party politics, rather than through professional training. There is no question that partisan wrangling played a role in both the legislature and in the state Board of Elections in the long delay on HAVA implementation. And let’s not forget that many independent voters and those that belong to any of New York’s active third parties, such as the Working Families Party, have no representation within the state or local Boards of Elections.

As in most states, New York election officials have not led the battle for election integrity. For the most part, it has been up to volunteer activists to raise the alarm about failings and dangers of DREs and the importance of voter-verification and paper ballots. This has very much been an uphill battle and is far from over.

Unfortunately, there also seems to be a "bipartisan" inclination of election officials to keep the public out of the loop. New Yorkers for Verified Voting has asked numerous times to participate in Election Commissioners' Association of New York meetings, either as presenters or at a table offering information to the commissioners. These requests have been summarily turned down, while bylaws of this organization require that voting system companies hawking their wares be invited to all meetings. The vendors show up in force and are welcomed with open arms.

We agree that we finally have some fairly good regulations -- in no small part thanks to thousands of hours of volunteered work on the part of activists, including Mr. Stanislevic -- but these have taken far too long to put in place. Still missing are details of testing and certification, which are being developed at a glacial pace and beyond public scrutiny.

A key element of certification is open and public testing, but it remains to be seen if the spirit of the regulations calling for openness will be followed. We may see only incomplete compliance, a common problem in many other states. The upcoming certification testing of voting systems will be conducted not by New York State employees but rather by the Testing Lab Ciber (see “The Dirty Little Secrets of Voting System Testing Labs”). Ciber, by the way, is the company that tested and approved the flawed Diebold Accuvote TSX machines which have been revealed to have enormous security holes (see “What’s all the Fuss About Interpreted Code...”).

So while the New York election technology picture has significantly improved, we still have a long way to go to achieve meaningful election integrity. The devil is in the details, and the fight to get those details right is going to be just as hard as the battles we have already fought.