THE 2002 GUBERNATORIAL ELECTION CONTROVERSY: THE LEGALITY OF A PRE-CONTEST RECOUNT IN ALABAMA

I. INTRODUCTION

In recent years, the State of Alabama has been rife with election controversy characterized by political wrangling and legal disputes.[1] In 1994, close elections for the offices of Chief Justice of the Alabama Supreme Court and Treasurer of the State of Alabama were challenged by defeated Republican candidates on the grounds that contested absentee ballots should have been counted.[2] In 1998, the election for the office of sheriff of Jefferson County was the source of dispute, as the defeated Republican candidate's efforts to seek a recount were challenged by the prevailing Democratic candidate.[3] And in 2002, the election for the office of governor was the subject of controversy when the defeated Democratic candidate sought a recount after unofficial returns misreported his victory, and Republican officials attempted to prevent the recount.[4]

The legitimacy of a democratic government hinges on the legitimacy of elections; thus, the election disputes that have characterized Alabama politics for the past decade threaten to weaken the effectiveness of state government. This Comment examines the controversy surrounding the 2002 gubernatorial race and analyzes the legal dispute at issue. In addition, this Comment considers whether a recent bill passed by the Alabama legislature that provides for an automatic recount in close elections will remedy the ambiguity in the law and prevent future controversy akin to the one that occurred in the gubernatorial race.

II. CHRONOLOGY OF EVENTS

The statewide election for governor took place on November 5, 2002.[5] Those seeking the office included incumbent Democratic candidate Don Siegelman, Republican candidate Bob Riley, and Libertarian candidate John

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1. *See infra* notes 2-4 and accompanying text.
2. Roe v. Alabama, 43 F.3d 574, 578-79 (11th Cir. 1995).
3. *Ex parte* Woodward, 738 So. 2d 322, 322-23 (11th Cir. 1998); *see also* Bill Barrow, *Pryor's Office Sought Recount in 1998 Case*, MOBILE REG., Nov. 14, 2002, at 1A.
4. *See* Elaine Monaghan, *Democrats Cling to Disputed Governorship of Alabama*, TIMES (London), Nov. 9, 2002, at 25.
5. Phillip Rawls, *Last Minute Campaigning*, DECATUR DAILY (Nov. 4, 2002), *available at* http://www.decaturdaily.com/decaturdaily/news/021104/camps.shtml.

Sophocleus.[6] On the night of the election, unofficial returns demonstrated that the race between Riley and Siegelman was close.[7] However, when election officials released unofficial returns from Baldwin County that indicated that Siegelman had received 19,070 votes in the Republican-dominated county, the incumbent candidate was shown to have enough votes to ensure a victory.[8] Some time after 11:00 p.m., however, the tallies for Siegelman in Baldwin County were reduced to 12,736, causing Siegelman to fall behind Republican candidate Bob Riley.[9] Election officials attributed the mistake to a computer glitch on the reporting sheriff's computer, which misread the data pack produced by the electronic voting machine at the Magnolia Springs precinct.[10] Printouts from the voting machine at the precinct apparently reflected the lower total for Siegelman.[11]

Interestingly, one news source suggested that there were actually three different tallies from Baldwin County on election night.[12] The *Decatur Daily* reported that the first summary report of votes from Baldwin County, which was not released, showed Libertarian John Sophocleus as receiving the second highest number of votes.[13] Believing the results to be incorrect, Baldwin County election officials contacted their computer specialists.[14] Noticing that the numbers reported from the Magnolia Springs precinct were too high for the small city, the computer specialists determined that there might be a problem with the data pack produced by the voting machine at the Magnolia Springs precinct.[15] The voting systems manager determined that there was no problem with the voting machine itself but that the computer at the sheriff's office had misread the data pack produced by the machine.[16] The data pack was run through the computer a second time, and a summary sheet was printed.[17] In the second summary report, the number of votes received by Sophocleus dropped from 13,000 to 937, and Siegelman was reported as having received 19,070 votes.[18] This second, unofficial report was given to news media and campaign representatives.[19] The third and final tally from the county was posted on the county's website at 11:06 p.m., after all election officials had reportedly left the sheriff's of-

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6. *Id.*
7. *See* Associated Press, *Alabama Gov. Don Siegelman Conceded* (Nov. 18, 2002), *available at* http://www.usatoday.com/news/politicselections/2002-11-18-siegelman-concedes_x.htm [hereinafter *Siegelman Conceded*].
8. *Id.*; *see also* Associated Press, *A Look at Baldwin's Confusion* (Nov. 7, 2002), *available at* http://www.decaturdaily.com/decaturdaily/news/021107/baldwin.shtml [hereinafter *Baldwin's Confusion*].
9. *Baldwin's Confusion*, *supra* note 8.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

fice.[20] This report, which had Siegelman receiving only 12,736 votes, was said to have been taken directly from precinct information.[21] On the Wednesday morning following the election, Baldwin County officials certified the third vote tally, although not required to do so until Friday.[22]

On Thursday, November 7, 2002, Siegelman announced that he would seek a recount of the vote in every Alabama county pursuant to Alabama Administrative Code section 307-X-1-.21.[23] The provision purports to allow any qualified elector in a county to petition the county canvassing authority for a recount, so long as the recount is requested within forty-eight hours of the certification of results and bond is posted by the petitioner to pay for the recount.[24] Siegelman also stated that he would seek a manual recount of ballots cast in Baldwin County.[25] As of the date of Siegelman's announcement, his supporters had filed petitions asking for recounts for the office of governor in every county in the state, and bond had been posted in every county by the Democratic Party.[26]

On November 8, 2002, in response to an inquiry made by then Secretary of State Jim Bennett, Attorney General Bill Pryor issued an opinion indicating that the recount sought by Siegelman was not allowed under the Alabama election laws.[27] Pryor based his assertion on the existence of a mid-twentieth century statute, Alabama Code section 17-9-31, which provided that ballots could only be unsealed in certain circumstances, not including the recount sought.[28] Pryor's opinion indicated that Siegelman's only option was to file an election contest when the legislature convened in January.[29] However, election contests were limited to instances of fraud, misconduct, or corruption,[30] none of which appeared to be present in the gubernatorial election.

On Thursday, November 14, 2002, in opposition to the opinion issued by the Attorney General, the circuit judge of Pike County refused to block a recount.[31] Attorneys for Republican candidate Bob Riley filed an emergency motion with the Alabama Supreme Court, requesting that the court block the recount and declare the recount invalid in accordance with the Attorney General's Opinion.[32] The Alabama Supreme Court ordered the petitioner's

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20. *Id.*
21. *Id.*
22. Associated Press, *Alabama Governor Asks for Statewide Recount* (Nov. 8, 2002), *available at* http://www.foxnews.com/story/0,2933,69391,00.html [hereinafter *Governor Asks for Recount*].
23. *See* Associated Press, *Ala. Governor Concedes Race to GOP Candidate*, WASH. POST, Nov. 19, 2002, at A04; *see also* Ala. Op. Att'y Gen. No. 2003-030, 2002 WL 31537773, at 1 (Nov. 8, 2002) [hereinafter Attorney General Opinion].
24. ALA. ADMIN. CODE r. 307-X-1-.21 (1998).
25. Attorney General Opinion, *supra* note 23, at 1.
26. *Governor Asks for Recount*, *supra* note 22.
27. *See* Attorney General Opinion, *supra* note 23, at 1-8.
28. *See id.* at 6.
29. *See id.* at 7.
30. ALA. CODE § 11-46-69 (1975).
31. Mike Cason, *Riley Goes to Supreme Court*, MONTGOMERY ADVERTISER, Nov. 15, 2002, A1.
32. *Id.*

brief to be submitted on Monday, November 18, and the respondents' brief to be submitted on Tuesday, November 19.[33] Oral arguments were set for Thursday, November 21, 2002.[34] The proceedings before the Alabama Supreme Court were rendered moot when Siegelman conceded the election on Monday, November 18.[35] Siegelman claimed that he could have won the recount after a long, divisive fight but asserted that he had dropped the request for a recount for the good of the state.[36]

Ultimately, because the Alabama Supreme Court was not afforded the opportunity to rule on the legality of a recount in the gubernatorial election, it remained unclear as to whether Alabama law permitted qualified electors to seek a recount absent a formal election contest.

III. APPLICABLE LAW

The provision cited as providing for pre-contest elections is Alabama Administrative Code regulation 301-X-1-.21. Regulation 307-X-1-.21 states in relevant part:

> (1) Any person may petition a county canvassing authority for a recount of any or all precinct returns for offices in the election that the person was a qualified elector. The time period for requesting a recount . . . ends forty-eight (48) hours after the official canvass of county returns . . . . The petitioner must be prepared to pay the cost of the recount and should be required to give security to cover these costs. . . .
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> (2) The recount should be conducted as simply as the type of equipment and local conditions permit . . . . The box or envelope holding the ballots shall be delivered unopened to the supervising official in charge of the re-count. . . . The recount shall consist of reading the ballots through the counter. Any ballot that was counted in the original election but is rejected by the counter in the recount shall be counted by hand. . . .
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> (3) When the recount has been completed, the ballots shall be returned to their container along with a printout of the recount results. . . .
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> (4) If the recount produces a change in precinct totals of sufficient magnitude to alter the result of the election, the outcome shall

33. *Id.*
34. Mike Cason & Mike Sherman, *Siegelman Concedes*, MONTGOMERY ADVERTISER, Nov. 19, 2002, A1.
35. *Id.*
36. *Id.*

> constitute grounds for an election contest as now prescribed by law.[37]

Although this provision applies only to electronic voting machines, all but one county in the state of Alabama use electronic voting systems.[38]

Regulation 301-X-1-.21 was issued pursuant to Alabama Code section 17-24-7(b), which authorizes the Alabama Electronic Voting Committee to promulgate regulations "necessary to achieve and maintain the maximum degree of correctness and impartiality of voting, counting, tabulating, and recording votes, by electronic vote counting systems."[39] Code section 17-24-7(a) provides that "[*s*]*o far as practicable*, the procedures for voting paper ballots and voting machines as prescribed in Chapters 8 and 9 of Title 17, shall apply to procedures followed pursuant to this chapter."[40] This language suggests that when procedures established pursuant to 17-24-7(b) conflict with procedures found in Chapters 8 or 9 of the Election Code, the conflicting code provisions are not applicable to the procedures. Section 17-24-10 adds that "[t]he provisions of this chapter are cumulative and shall not be construed to repeal or supersede any provision of Chapter 9, Title 17, relating to voting equipment, unless in direct conflict herewith."[41] This indicates that where a statutory provision of Chapter 9 conflicts with a statutory provision of Chapter 24, the Chapter 9 code provision is superseded.

The statute relied upon by Attorney General Pryor to disallow pre-contest recounts is Alabama Code section 17-9-31 (1953), which states:

> It shall be unlawful and constitute a misdemeanor for . . . any board of canvass[] to break the seal of a voting machine for any purpose other than the following:
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> (1) For obtaining the results of an election when the election officials have failed to make a return . . . ;
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> (2) For the hearing of a contest conducted in accordance with law;

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37. ALA. ADMIN. CODE r. 307-X-1-.21 (1998).

38. CALTECH-MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS, WHAT COULD BE 19 (2001), *available at* http://www.vote.Caltech.edu/Reports/july01/July01_VTP_Voting_Report_Entire.pdf. ALA. CODE § 17-9-38 (1975) provides for recounts of mechanical voting machines; however, such recounts are limited by ALA. CODE § 17-9-31 (1975). A discussion of the implications of the election dispute in this singular county is not included.

39. ALA. CODE § 17-24-7(b) (1975).

40. ALA. CODE § 17-24-7(a) (1975) (emphasis added).

41. ALA. CODE § 17-24-10 (1975).

(3) For the purpose of a grand jury investigation, upon the order of a court having jurisdiction in the county in which the machines are used.[42]

Regulation 307-X-1-.21 authorizes a recount and contemplates the unsealing of ballots to conduct recounts[43] while section 17-9-31 criminalizes the unsealing of ballots unless one of certain enumerated criteria is met, not including pre-contest recounts.[44] Thus, an ambiguity in the election laws exists.

As to applicable case law, no state or federal court has decided the validity of the recount provision or its effect on section 17-9-31, but there is one Alabama Supreme Court decision enforcing a recount sought under regulation 307-X-1-.21. In *Ex parte Woodward*,[45] the losing Republican candidate in the 1998 election for Jefferson County sheriff petitioned the Alabama Supreme Court for a writ of mandamus directing the Montgomery Circuit Court to vacate a preliminary injunction, which prevented the petitioner from seeking a recount pursuant to regulation 307-X-1-.21 until a formal election contest was filed.[46] The Alabama Supreme Court stated that the regulation "specifically authorize[d]" the pre-contest recount.[47] The court then added that the merits of the respondent's challenge to the validity of the regulation turned on whether section 17-7-24(b), which authorizes the regulation, is sufficiently broad so as to displace code provisions "that expressly prevent the precontest recount allowed by § 307-X-1-.21."[48] The court noted that section 17-24-10 does not save those provisions of Chapter 9 that conflict with the provisions of Chapter 24,[49] but it refrained from deciding the case on the merits. Ultimately, the court reversed the lower court's injunction on the grounds that permitting the recount to go forward would not irreparably harm the integrity of the ballots or the putative winner's legal interests.[50]

Two dissenting justices in *Ex parte Woodward*, both Democrats, interpreted the majority opinion as essentially holding the recount provision to be valid and argued alternatively that the regulation was invalid.[51] The dissent stated that section 17-4-7(b) did not authorize the issuance of a regulation that would "allow[] for the unlimited breaking of the seals of electronic voting machines" but that it merely authorized the establishment of "proce-

42. ALA. CODE § 17-9-31 (1975).
43. ALA. ADMIN. CODE r. 307-X-1-.21 (1998).
44. ALA. CODE § 17-9-31 (1975).
45. 738 So. 2d 322 (Ala. 1998).
46. *Id.* at 322-23.
47. *Id.* at 323.
48. *Id.* Although the court does not discuss which code provisions it is referring to, presumably this statement is meant to refer to section 17-9-31, which the dissent finds to be in conflict with the regulation.
49. *Id.*
50. *Id.* at 323-24.
51. *Id.* at 324-25.

dures for the maintenance or care of electronic voting machines."[52] In addition, the justices argued that even if the regulation could be construed as a valid promulgation under section 17-24-7(b), it could not function to allow a recount absent a formal contest because that would be "in direct conflict with § 17-9-31."[53] In support of this conclusion, the dissent relied on the rule of statutory construction that states: "[P]rovisions of a statute will prevail in any case of conflict between [a] statute and an agency regulation."[54]

IV. ATTORNEY GENERAL BILL PRYOR'S ARGUMENT

In the Attorney General Opinion issued to Secretary of State Jim Bennett on November 8, 2002, Pryor interpreted the Alabama election laws as allowing county canvassing authorities to conduct recounts pursuant to regulation 307-X-1-.21, finding the regulation to be a valid promulgation by the Alabama Electronic Voting Committee under section 17-24-7(b).[55] However, the Attorney General opined that recounts could only be conducted using the unsealed materials available to the canvassing authority unless the circumstances warranted a breaking of the seals pursuant to code section 17-9-31.[56] In explanation of this limitation, the Attorney General asserted that regulation 307-X-1-.21 "need not be interpreted to conflict with section 17-9-31."[57] He stated that "section 307-X-1-.21 provides a mechanism for electors to obtain a recount that comports with the restrictions of section 17-9-31 of the Code of Alabama, as incorporated by section 17-24-7(a)."[58] The Attorney General recognized though that the only circumstance that could conceivably give rise to a recount under section 17-9-31 would be a failure by election officials to make a return.[59] The opinion indicated that unsealed materials should be used to conduct pre-contest recounts when the requirements of section 17-9-31(1) cannot be met, arguing that the canvassing authority could conduct a "recount" by verifying its mathematical computations to ensure that all totals accurately reflected each candidate's vote total.[60]

V. DON SIEGELMAN'S ARGUMENT

Absent any legal brief clearly espousing the candidate's position, it appears that Siegelman's request for pre-contest recounts in every Alabama county was based on the argument that regulation 307-X-1-.21 is a valid

52. *Id.* at 325.
53. *Id.*
54. *Id.* (citing *Ex parte* State Dep't of Human Res., 548 So. 2d 176, 178 (Ala. 1988)).
55. *See* Attorney General Opinion, *supra* note 23, at 3-7.
56. *Id.* at 5.
57. *Id.*
58. *Id.*
59. *Id.* at 6.
60. *Id.* at 6-7.

promulgation under section 17-24-7(b). It follows that the Siegelman camp would have asserted that section 17-9-31 conflicts with the regulation, and therefore, the statute is not applicable in the context of conducting recounts of electronic voting machines since it is not practicable for the limitations to apply—relying on the language of section 17-24-7(a). It is also foreseeable that the candidate would have argued that 17-9-31 is superseded by 17-24-7(b) under section 17-24-10, in that the rulemaking authority granted by 17-24-7(b) is so broad as to displace any such limiting procedures. This argument was suggested by the majority in *Ex parte Woodward*.[61]

As to Siegelman's request for a manual recount in Baldwin County, the legal argument in support of this request is unclear. By its own terms, regulation 307-X-1-.21 provides that recounts are to be conducted by rerunning the ballots through the counter.[62] Ballots are only to be counted by hand if a ballot was counted in the original election but is subsequently rejected by the counter in the recount.[63] Therefore, presumably a hand recount of ballots in Baldwin County would not be permissible.

VI. DISCUSSION

In analyzing the arguments of Attorney General Pryor and gubernatorial candidate Siegelman, the primary distinction between the two rationales hinges on whether section 17-9-31 and regulation 307-X-1-.21 can coexist or whether they are in conflict. The argument that the statute and the regulation should be read as consistent is aided, as the Attorney General Opinion noted,[64] by the Alabama Supreme Court's pronouncement that "a court, whenever possible, should avoid a construction of a regulation that would raise doubt as to the regulation's validity."[65] By arguing that the provisions are not mutually exclusive, the Attorney General avoids making the less favorable argument that the regulation is invalid. Although the majority in *Ex parte Woodward* suggested in dicta that the regulation is in conflict with existing code provisions and although the dissent found that regulation 307-X-1-.21 and section 17-9-31 are in direct conflict,[66] these statements are not in the form of binding authority and therefore do little to weaken the Attorney General's position. The strongest criticism of the Attorney General's

61. The court in *Woodward* explained:

> The merits of [the] challenge to the validity of § 307-X-1-.21 turn on whether § 17-24-7(b), with its reference to 'voting, counting, tabulating, and recording votes,' deals sufficiently with a broader subject-matter than the reference to 'procedures for voting paper ballots and voting machines as prescribed in Chapters 8 and 9 of Title 17' (see § 17-24-7(a)), so as to displace provisions of Chapter 8 and Chapter 9 that expressly prevent the precontest recount allowed by § 307-X-1-.21. While § 17-24-10 saves provisions of Chapter 9 of Title 17 from repeal, it does so only to the extent that the provisions of Chapter 24 do not conflict.

Woodward, 738 So. 2d at 323.

62. ALA. ADMIN. CODE r. 307-X-1-.21(2) (1998).

63. *Id.*

64. *See* Attorney General Opinion, *supra* note 23, at 5.

65. Newsome v. Trans Int'l Airlines, 492 So. 2d 592, 596 (Ala. 1986).

66. *Woodward*, 738 So. 2d at 323, 325.

interpretation is that his reading of the statute and the regulation as consistent renders the recount provision virtually useless by requiring a failure by election officials to make a return in order to exercise the provision.[67] This circumstance is very unlikely to occur.

As to the argument that section 17-9-31 and regulation 307-X-1-.21 are inconsistent and that the regulation displaces the statute, the position is supported by the fact that this interpretation gives the recount provision its intended scope. While it could be argued that the position provides for an overly broad interpretation of the regulation in that it would allow for a recount in any election, this, on the face of the regulation, would appear to be its purpose. In addition, there are limitations on the exercise of the right, such as the requirement that the recount be requested in a timely manner and that bond be posted. That electors are unlikely to bear the risk of the cost of a recount unless there is a strong possibility that the recount will reflect a different result argues against statements that this interpretation is overly broad.

The position that the provisions are in conflict and that the regulation supersedes the statute also is supported by the majority opinion in *Ex parte Woodward*. In *Woodward*, the court noted that the recount provision was in conflict with provisions of Title 9 and ordered a recount conducted pursuant to the regulation to go forward, suggesting to some the court's implicit acceptance of the regulation's validity.[68] Though statements by the court as to the merits of the case are mere dicta, the court's opinion appears to favor Siegelman's position over that of the Attorney General. In addition, to some extent, the dissent in *Ex parte Woodward* supports Siegelman's interpretation of the regulation and section 17-9-31 by finding that the provisions conflict.[69] However, the dissent in *Ex parte Woodward* also suggests the strongest criticism of Siegelman's position—that when a statute and a regulation are in conflict, the statute trumps the regulation according to the rule of statutory construction propounded by the Alabama Supreme Court in *Ex parte State Department of Human Resources*.[70] In defense to this assertion, it should be noted that the rule in *Ex parte State Department of Human Resources* was pronounced in the context of a conflict between a statute giving rulemaking authority and a regulation that did not comport with the authorizing statute,[71] which is not true of the conflict between 17-9-31 and regulation 307-X-1-.21. In addition, the language of the authorizing statute in the instant case, section 17-24-7, seems to contemplate that procedures announced pursuant to the authority given may conflict with existing statutory

67. Attorney General Opinion, *supra* note 23, at 6.
68. *Woodward*, 738 So. 2d at 323-25.
69. *Id.* at 325.
70. *Id.* (citing *Ex parte* State Dep't of Human Res., 548 So. 2d 176, 178 (Ala. 1988)).
71. *See Ex parte State Dep't of Human Res.*, 548 So. 2d at 178.

procedures and suggests that where it is not "practicable," such statutes will not be held to apply.[72]

As to the alternative argument that section 17-24-7(b) supersedes section 17-9-31 pursuant to section 17-24-10 and, therefore, section 17-9-31 is not applicable to electronic voting machines, this position is not subject to attack on statutory construction grounds. Thus, the rationale supports the regulation's validity and avoids arguing against the rule pronounced in *Ex parte State Department of Human Resources*. Nevertheless, since sections 17-24-7 and 17-9-31, by their terms, do not appear to be in direct conflict, this argument is subject to attack.

Each argument has both strengths and weaknesses. Particularly bothersome, though, is the fact that the positions taken by the Attorney General and Siegelman appear subject to political motivations. In the 1998 dispute over the election for the sheriff of Jefferson County, in which a Republican candidate sought the recount, former Republican Attorney General Jim Bennett, who both requested and contributed to the Attorney General's Opinion in the instant case, argued before the U.S. District Court in Montgomery, Alabama, that Alabama law provides for a recount absent a formal election contest, without suggesting that this right was limited by section 17-9-31.[73] In the same dispute, the defeated Democratic candidate, whose arguments were embraced by the Democrats on the Alabama Supreme Court in *Ex parte Woodward*, argued that the recount provision was an invalid promulgation or, in the alternative, that it was superseded by section 17-9-31.[74] Since in the 2002 gubernatorial election Republicans and Democrats switched positions as to the legality of a pre-contest recount, it appears that the political affiliation of the candidate seeking a recount has as much to do with the legal position taken as the law itself.

Ultimately, whether one is more persuaded by the Attorney General's position or Siegelman's, the ambiguity in the law and the apparent influence of partisan considerations demonstrate a need to resolve the issue. Because of the significance of the legitimacy of elections, the disparity in the law is not one that is fit to await judicial resolution. Recognizing this fact, the Alabama legislature recently passed an automatic recount bill. The following section discusses the usefulness of automatic recount provisions generally and then examines whether the specific bill enacted by the state legislature remedies the ambiguity in Alabama's election laws.

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72. *See* ALA. CODE § 17-24-7(a) (1992) ("*So far as practicable*, the procedures for voting paper ballots and voting machines as prescribed in Chapters 8 and 9 of Title 17, shall apply to procedures followed pursuant to this chapter.") (emphasis added).

73. Barrow, *supra* note 3.

74. *Id.*

VII. LEGISLATIVE REMEDY

Because the availability of a recount ensures the validity of election results, providing for recounts by law, even absent an election contest, provides a safeguard against unintentional mistakes in election reporting. However, because recounts are often hotly debated, as demonstrated by the 2000 presidential election, they can have the effect of frustrating rather than reassuring the public at large as to the effectiveness of the electoral process. Several states have sought to remedy this problem by providing for automatic recounts in the event of a close election—thus ensuring the benefits of a recount but preventing the partisan debate that generally follows a request for a recount.[75] These provisions vary as to how close the election must be to qualify for an automatic recount; whether the defeated candidate must submit a request to trigger the provision; whether the defeated candidate can waive the right to a recount; whether the recount is to be conducted manually or in the same manner as the original election; and so forth.[76] Interestingly, under most existing automatic recount provisions, the vote in the 2002 Alabama gubernatorial race would have been subject to a recount since Siegelman was defeated by less than .5% of the total votes cast.

Following the trend in other states, in June 2003, the Alabama legislature adopted an automatic recount bill that provides for an automatic recount in any state or local election where a candidate is defeated by less than .5% of the total votes cast.[77] Although the automatic recount bill is clearly a step in the right direction, the bill does not remedy the ambiguity in the election laws in that it does not repeal or amend regulation 307-X-1-.21 or section 17-9-31. Thus, if a candidate loses by any margin greater than .5% of the votes cast and seeks a recount pursuant to the regulation, the same dispute could arise. In addition, it could be argued that the automatic recount provision is subject to the restrictions of section 17-9-31. The language of the bill, like the regulation, calls for the unsealing of ballots to conduct the recount; however, section 17-9-31 does not provide for the unsealing of ballots absent the presence of one of the enumerated circumstances. It is foreseeable then that the automatic recount provision could be subject to the same attack suffered by regulation 307-X-1-.21. Although it is unlikely that this was the intent of the legislature in enacting the provision, political motivations may again be seen to give rise to a debate as to the legality of a pre-contest recount.

VIII. CONCLUSION

Resolution of the lingering ambiguity in the law merely requires amending section 17-9-31 to provide for the unsealing of ballots in the event of a

75. *See infra* Appendix.
76. *See infra* Appendix.
77. H.R. 113, 2003 Leg., Reg. Sess. (Ala. 2003).

recount conducted pursuant to the new automatic recount statute and in the event of a recount conducted under regulation 307-X-1-.21. If the recount regulation is not supported by the majority of the legislature, the legislature could repeal the regulation via the legislative process.

Although the focus of this Comment is limited to the ambiguity in Alabama's election laws as to the legality of pre-contest recounts, there are many other areas of Alabama's election laws that require attention—ranging from disability access at the polls to third party ballot access. Ultimately, the totality of the Alabama election code is in need of review.

Jennifer A. Harris

APPENDIX
AUTOMATIC RECOUNT PROVISIONS BY STATE

State	State Statute	Description
Alabama	H.R. 113, 2003 Leg., Reg. Sess. (Ala. 2003).	Automatic recount if candidate defeated by .5% of total votes cast.
Alaska	ALASKA STAT. § 15.15.460 (2002).	Automatic recount if there is a tie vote.
Arizona	ARIZ. REV. STAT. ANN. § 16-661 (1996).	Automatic recount if a candidate is defeated by not more than .1% of the votes cast.
Arkansas	None	
California	None	
Colorado	COLO. REV. STAT. ANN. § 1-10.5-101 (2000).	Automatic recount if a candidate is defeated by less than or equal to .5% of the votes cast.
Connecticut	CONN. GEN. STAT. ANN. § 9-311a (2002).	Automatic recount if a candidate is defeated by less than .5% of the votes cast (but not more than 2000 votes) or if a candidate is defeated by less than twenty votes.
Delaware	None	
Florida	FLA. STAT. ANN. § 102.141 (2002).	Automatic recount if a candidate or measure appearing on the ballot is defeated by less than or equal to .5% of the votes cast. Recount need not be made if defeated candidate requests in writing that it not be made.
Georgia	None	
Hawaii	None	
Idaho	IDAHO CODE § 34-2309 (Michie 2001).	Candidate may request recount in writing if he loses by .1% or less of the total votes cast.
Illinois	None	
Indiana	None	
Iowa	None	
Kansas	None	

Kentucky	None	
Louisiana	None	
Maine	ME. REV. STAT. ANN. tit. 21-A, § 737-A (West Supp. 2002-2003).	Automatic recount presumed necessary if the difference between the two candidates receiving the highest number of votes is less than 1% of the total votes cast.
Maryland	None	
Massachusetts	None	
Michigan	MICH. COMP. LAWS ANN. § 168.880a (West 1989).	Automatic recount at any time a statewide primary or general election has been determined by a difference of 2000 votes or less.
Minnesota	MINN. STAT. ANN. § 204C.35 (West Supp. 2002-2003).	Automatic recount if candidate in a statewide primary or general election lost by .5% of total votes cast or if the total number of votes cast in the election is 400 or less, lost by ten votes or less.
Mississippi	None	
Missouri	None	
Montana	None	
Nebraska	NEB. REV. STAT. § 32-1119 (Supp. 2002).	Automatic recount if candidate loses an election by 1% or less of the total vote cast, or if the total number of votes cast in the election is 500 or less, and candidate loses by 2% or less of the total votes cast. Losing candidate may waive automatic recount.
Nevada	None	
New Hampshire	None	
New Jersey	None	
New Mexico	None	
New York	N.Y. ELEC. LAW § 9-208 (1998).	*Automatic recanvass of all voting machine totals.
North Carolina	N.C. GEN. STAT. § 163-182.7 (2001).	Candidate has the right to demand a recount in writing if, in a statewide election, the candidate loses by .5% of the total votes cast, or in a county

		or non-statewide election, candidate loses by 1% or less of the total votes cast.
North Dakota	N.D. CENT. CODE § 16.1-16-01 (1997).	Automatic recount in primary if person failed to be nominated by 1% or less. Automatic recount in general or special election if candidate failed to be elected by .5% or less. Candidate can demand recount in writing within three days of vote canvass primary was lost by more than 1% but less than 2% of total vote, or if lost election by more than .5% but less than 2% of total vote.
Ohio	OHIO REV. CODE ANN. § 3515.011 (1995).	Automatic recount in county, municipal, or district election if candidate lost by .5% or less of total vote. Automatic recount in statewide election if candidate lost by .25% or less of total vote.
Oklahoma	None	
Oregon	OR. REV. STAT. § 258.280 (2001).	Automatic recount if candidate lost by .25% or less.
Pennsylvania	None	
Rhode Island	None	
South Carolina	S.C. CODE ANN. § 7-17-280 (1976).	Automatic recount if candidate loses primary or election by 1% or less.
South Dakota	S.D. CODIFIED LAWS § 12-21-16 (Michie 1995).	Automatic recount in event of tie vote.
Tennessee	None	
Texas	TEX. ELEC. CODE ANN. § 2.002 (2003).	Automatic recount in event of tie vote if candidates do not agree to draw lots or one candidate does not withdraw.
Utah	None	
Vermont	None	

Virginia	None	
Washington	WASH. REV. CODE ANN. § 29.64.015 (2003).	Mandatory recount if candidate loses by less than 2000 votes and .5% or less. Manual recount required if candidate loses by less than 150 votes and .25% or less.
West Virginia	None	
Wisconsin	None	
Wyoming	WYO. STAT. ANN. § 22-16-109 (2003).	Automatic recount if candidate loses election by 1% or less.