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BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Alberta Miller, Secretary of State, State Capitol Building Santa Fe, New Mexico

QUESTION

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What criterion is to be used in determining whether a referendum measure has received the required number of votes to repeal a legislative enactment?

CONCLUSION

A repeal is effected if a majority of those voting on the proposition favor repeal and if the number favoring repeal equals at least forty percent of the total votes cast for governor.

OPINION

ANALYSIS

The procedure for approving or rejecting a legislative enactment by referendum is set forth in Article IV, Section 1 of our State Constitution. This Section provides in pertinent part as follows:

"The question of the approval or rejection of such law shall be submitted by the secretary of state to the electorate at the next general election; **and if a majority of the legal votes cast thereon, and not less than forty percentum of the total number of legal votes cast at such general election,** be cast for the rejection of such law, it shall be annulled and thereby repealed. . . ." (Emphasis added).

It is patently clear that the forty percent figure does not refer to the votes cast for repeal of the act. In the very same sentence, as a first requirement for repeal, it provided that a majority of those voting on the issue must favor repeal. Further, it is not conceivable that the constitution would permit a **minority** of those voting on a referendum issue to repeal a law duly enacted by the legislature and approved by a majority of the persons voting on the proposition. That the forty percent requirement refers to something other than the vote on the specific issue has been at least impliedly recognized by our Supreme Court. In 1950, repeal of the pre-primary convention law was also a referendum measure. Some 54,405 persons voted to repeal the law, while only 14,403 voted to retain the law. Yet the measure was not repealed because as the Court said in Granito v. Grace, 56 N.M. 652, 655, 249 P.2d 210:

"The vote on the matter at the ensuing election failed to show sufficient support to repeal the new act."

Obviously then, since a heavy majority of those voting on the specific proposition in 1950 favored repeal (**even a larger percentage for repeal than in the 1964 election)** the forty percent total vote requirement refers not to the votes cast on the proposition but to the total vote cast for some office or offices.

Let us examine the various possibilities. First, it could be the total vote cast for **all** state and national offices. Clearly the framers of the constitution did not intend this. They would not provide for a referendum and then make it absolutely impossible to operate. And this would be the result if the votes for all offices were totalled. A person could vote for some ten offices, yet he could only vote once for repeal. Under such circumstances the forty percent requirement could never be reached.

Did the framers contemplate the total vote cast for presidential candidates? We think not for two reasons. First, Article IV, Section 1 provides that if the petitions for a referendum carry the required number of signatures the issue will be placed on the ballot at the **"Next General Election."** However, we have a general election every two years, but we have a presidential election only once every four years. Further, we have an absentee ballot law for national offices but none for state offices or state issues. Thus use of the total votes cast for the office of President would make the forty percent requirement even more difficult to reach. An absentee voter's ballot for president would be counted in determining whether the forty percent requirement was reached even though such voter could not vote at all on the issue of repeal or approval of the referred measure.

What we have just said in regard to the absentee ballot matter would also apply if the office of United States senator were used. And again we do not elect a United States senator at every general election.

As to the office of United States representative there are two reasons, in addition to the absentee ballot one, why the vote for this office cannot be used. We presently have two representative positions, and in the future may have more. Which position would be used? In addition, it is likely that at some future date we will have representative districts so that the voters in a district will vote only for a representative for that district.

This brings us to the office of governor which we believe is the determining one insofar as the forty percent requirement is concerned. We elect a governor at every general election and this office is the highest state office. We meet none of the obstacles discussed above when the total vote cast for this office is used in determining if the forty percent requirement has been met. We think of no valid reason why the vote on any of the lesser state offices should be used. But in any event we would point out that based on unofficial returns, the number of votes cast for repeal of the preprimary convention law in the 1964 general election failed to meet the forty percent requirement no matter which office is used as the total vote criterion.