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Elections—Primary Petition Requirements

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ELECTIONS—PRIMARY PETITION REQUIREMENTS*—

> [E]ach political party shall have the right to select its own candidates, and shall have such protection as the law can afford in exercising that right. To this end it was necessary, and no doubt within the power of the legislature, to prescribe certain qualifications.[1]

One of these "qualifications" which the New Mexico Legislature has prescribed is that any person who has not been nominated by his political party or convention may file a declaration of candidacy together with a nominating petition signed by qualified electors who are members of his party in order to have his name placed on the ballot. Section 3-11-7 of the New Mexico Statutes[2] requires that:

> The petition shall be signed by a number of qualified electors resident in one-half [½] of the counties in the state equal to at least three per cent [3%] of the votes cast for the office for which said petition is being circulated, at the last general election held for such office in each of the counties wherein such petition is circulated.

In *State ex rel. Palmer v. Miller*,[3] the petitioner sought to have his name placed on the ballot of the Democratic Party as a candidate for the office of United States Senator pursuant to section 3-11-7. The petitioner was advised that his name would not be placed on the ballot because his petition did not have the required number of signatures. In his writ of mandamus to the supreme court,[4] the petitioner alleged that section 3-11-7 required a number of signatures on the petition equal to or greater than three per cent of the votes cast for the Democratic candidate for the Senate in the 1958 general election, and not three per cent of the votes cast for all candidates for the

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* State *ex rel.* Palmer v. Miller, 391 P.2d 416 (N.M. 1964). N.M. Stat. Ann. § 3-11-7 (Supp. 1963).

1. Roberts v. Cleveland, 48 N.M. 226, 229, 149 P.2d 120, 122 (1944).

2. N.M. Stat. Ann. § 3-11-7 (Supp. 1963).

3. 391 P.2d 416 (N.M. 1964).

4. N.M. Const. art. 6, § 3, grants the supreme court original jurisdiction to issue, hear, and determine mandamus actions. It is the declared policy of the New Mexico Supreme Court "not to exercise its original jurisdiction in the matter of granting the prerogative writs, in the absence of some controlling necessity, of which it is the sole judge . . . ." State *ex rel.* Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 314, 46 P.2d 1097, 1098 (1935), citing State *ex rel.* Owen v. Van Stone, 17 N.M. 41, 121 Pac. 611 (1912). In the *Palmer* decision, the supreme court noted the need for immediate and final litigation on the issues if Palmer were to have his name placed on the ballot, and recognized it as a "controlling necessity" when it said: "[T]he matter has been briefed and argued and is now ripe for decision which, because of the exigencies of time, must not be delayed." 391 P.2d at 416.

Senate in that election. The supreme court found against the petitioner holding that " '3% of the votes cast for the office . . . at the last general election . . .' can mean nothing except 3% of the vote for all candidates."[5]

The petitioner alleged in the alternative that the phrase "the last general election held for such office," contained in section 3-11-7, referred to the 1958 general election, and not the *latest* or 1960 general election; because the office the petitioner sought was last voted upon in the 1958 general election.[6] The petitioner had stipulated, however, that if the total vote was the criteria upon which the percentage was to be figured, his petitions were insufficient. The supreme court found the standard was the total vote. They stated, therefore, that "no discussion of the additional equally interesting and perplexing problem of whether the 1958 or 1960 election controlled, is required."[7] The purpose of this comment is to discuss the issue of which election year is to control and suggest guidelines for future litigants. This issue should be resolved in favor of the general election for the expiring term of office; or, in terms of the *Palmer* case, the 1958 general election.

The respondent argued that "the last general election for such office" is the same as the latest general election for that type of office, such as senator, corporation commissioner, or supreme court justice, on the grounds that "the number of votes cast at the last general election would bear a closer relation to any recent growth or decline in population than would any earlier election."[8] The respondent relied upon *Magoon v. Heath*,[9] a California case, to support his argument. *Magoon* should not be relied upon, however, for three principal reasons: (1) the peculiar circumstances of that case do not apply in New Mexico; (2) the *Magoon* decision con-

5. State *ex rel.* Palmer v. Miller, 391 P.2d 416, 418 (N.M. 1964).

6. Each state of the United States has two senators as provided for in article I, section 3 of the United States Constitution. This section also provides that the Senate "shall be divided as equally as may be into three classes . . . so that one-third may be chosen every second year . . . ." The senators from the same state are not put into the same classes; and the senatorial election for a full term, six years, cannot occur for both senators at the same time. 1 Haynes, The Senate of the United States 5 (1960). The petitioner sought to have his name placed on the ballot for the New Mexico senate seat vacated by the death of Senator Dennis Chavez, who had been reelected in 1958. Senator Clinton Anderson was reelected to the other Senate position in 1960.

7. State *ex rel.* Palmer v. Miller, 391 P.2d 416, 419 (N.M. 1964).

8. Brief for Respondent, p. 14, State *ex rel.* Palmer v. Miller, *supra* note 7.

9. 79 Cal. App. 632, 250 Pac. 583 (2d Dist. Ct. App. 1926). The *Magoon* case was cited as controlling in Lynn v. City Council, 105 Cal. App. 182, 286 Pac. 1082 (2d Dist. Ct. App. 1930).

cerned a petition for recall and not a petition to have a name placed on the primary election ballot; and (3) the policy that the "latest vote" reflects population changes, relied on by the court in *Magoon*, is erroneous.

The *Magoon* decision involved a petition for recall of four city trustees. The applicable California statute stated that the number of signatures required for a recall petition should be based on a percentage "of the entire vote cast . . . for all candidates for the office . . . at the last preceding regular municipal election at which such officer was voted for."[10] An earlier California case[11] had interpreted this statute to mean that the proportion of signatures needed for a recall petition was to be based upon the vote cast in the regular election at which the officer subject to recall was elected.[12] The court in *Magoon,* however, refused to accept this interpretation. The court said that because of the population increase, the vote at the latest regular municipal election would be larger than any previous election; and that the legislature, therefore, must have intended to use the number of votes cast in the latest election for the type of office in question in determining the proportion of signatures needed for a recall petition.[13]

The facts in *Magoon,* however, reveal that one of the officers whom the petition sought to recall had not been elected in a regular city election, but at a special election held in 1923. The standard upon which the required number of signatures for a petition was to be determined, "the regular municipal election at which such officer was voted for," would not have applied to the one officer elected in 1923, since he was not elected at a *regular municipal election.*[14]

10. Cal. Laws Extra Sess. 1911, ch. 32, § 1, at 128:
[The] petition shall be signed by qualified voters equal in number to at least twenty-five per cent of the entire vote cast within such city or town for all candidates for the office which the incumbent sought to be removed occupies, at the last preceding regular municipal election at which such officer was voted for.

11. Robinson v. Anderson, 26 Cal. App. 644, 147 Pac. 1182 (2d Dist. Ct. App. 1915).

12. 147 Pac. at 1183:
[T]he proportion of signatures required which set in motion the recall should be based upon the vote cast at the regular election at which the officer was elected, rather than a subsequent election for other trustee offices . . . .

13. Magoon v. Heath, 79 Cal. App. 632, 250 Pac. 583, 584 (2d Dist. Ct. App. 1926):
[I]n providing that it should be the last general municipal election we think it is apparent that they [the legislature] had in mind that in the rapidly growing incorporated cities and towns the vote cast at the last regular municipal election might be considerably larger than at previous regular municipal elections and that the phrase 'at which such officer was voted for,' in the act, is that office.

14. Cal. Laws Extra Sess. 1911, ch. 32, § 1, at 128.

The petition had been signed by a large number of registered voters which indicated a strong intent to recall these four city trustees; and the court, therefore, was not about to exempt one of them because the statute had not provided for the recall of officers elected in special elections.[15] If the specially elected trustee was to be subject to recall under the California statute, the votes cast in the latest municipal general election for the office in question would have to be the standard upon which the required number of signatures for a petition was to be determined.

A standard based upon the literal interpretation of the California statute also would make it extremely difficult to determine how many signatures would be necessary before there could be a recall. In order to have a recall, the statute required signatures of "twenty-five per cent of the entire vote cast within such city or town for all candidates for the office which the incumbent sought to be removed occupies." In *Magoon,* there were four "incumbents" who had been elected in three different elections.[16] If the court, then, had not used the votes cast at the one election, the *latest* election, but instead had followed the dictates of the statute, the number of signatures would have been based on a percentage of all the votes cast in all the elections for all the candidates who ran for the four trustee positions in question. This method is much more cumbersome than the one applied by the California court, *i.e.,* taking a percentage of the votes cast in the latest election.

The *Magoon* case should also be distinguished from *Palmer* because it involved a *recall* statute. The person seeking to have his name placed on the primary election ballot is only required to show that he has a sufficient number of supporters within his political party, and that it is worthwhile to print his name on the ballot. A person who is being recalled, however, is an elected official. A larger percentage of the entire vote cast must be required in order to demonstrate that there is a substantial demand among the elective body to recall this officer. The proportion of votes required is not simply to test whether a man has a "fighting chance" of being elected by his party, but whether a large enough percentage of *all*

15. If one of the officials could not be subjected to recall, the petition would have to have been severed in order to have it apply only to the other three trustees; and severance would have made the petition ineffectual. This, then, was possibly another reason why the court chose the standard it did—to include all four of the trustees in the petition and avoid having to dismiss the entire action.

16. One of the trustees subject to recall was elected at the 1922 general election; two at the 1924 general election; and one at a special election in 1923.

the voters want to remove an elected official from office. The process used to calculate the number of signatures needed to remove a man from office, therefore, should not be the same as that used where a man is only trying to prove that he has a right to have his name placed on a primary election ballot. In support of this, the court in *Magoon* stated that

> the intent of the Legislature in providing for 25 per cent of the entire vote cast *was to give some assurance that there was a substantial demand for the removal of an elective officer before the recall might be invoked.*[17]

The court's main argument in *Magoon* is that the latest election should be used to reflect the larger vote of the growing cities. This might hold true for an election in the city, even though this presumes constant growth, and also presumes that the election turnout will always reflect this change. Whether or not it is true for a municipal election, statistics[18] show that the last general election for a state office does not necessarily reflect a change in population; and for this reason, the court's argument in *Magoon* and the respondent's argument in *Palmer* are without merit.

The population of New Mexico, from 1950 to 1960, increased from 681,187 to 951,023.[19] All of the state elections during that period, however, do not reflect the change. For example, in the 1958 gubernatorial election, the total number of votes cast was 205,048;[20] while in1956, a presidential election year, the total number of votes cast for the gubernatorial position was 251,751.[21] In the 1962 gubernatorial election, 247,135 votes were cast for the two candidates,[22] as compared to 305,542 votes cast for the two candidates for governor in the earlier 1960 election,[23] which was also a presidential election year. The voting statistics of the congressional elections in New Mexico further support the fact that a

17. Magoon v. Heath, 79 Cal. App. 632, 250 Pac. 583, 584 (2d Dist. Ct. App. 1926). (Emphasis added.)

18. See *Part A* of 1 U.S. Bureau of Census, Dep't of Commerce, 1960 Census of Population (1961); State of New Mexico, Official Election Returns (N.M. Secretary of State 1942-1960).

19. *Chart 33-5* in 1960 Census of Population, *op. cit. supra* note 18.

20. 5 Governmental Affairs Institute, American Votes, 1962, at 265 (1964). In the 1958 gubernatorial election, Edwin L. Mechem received 101,567 votes, and the Democratic candidate, John Burroughs, received 103,481 votes.

21. *Ibid.* In the 1956 gubernatorial election Edwin L. Mechem received 131,488 votes, and John F. Simms received 120,263 votes.

22. *Ibid.* Edwin L. Mechem—116,184 votes; Jack M. Campbell—130,933 votes.

23. *Ibid.* Edwin L. Mechem—153,765 votes; John Burroughs—151,777 votes.

change in population is not necessarily reflected by the number of votes cast in the latest election.[24] The legislature, therefore, could not have meant that "the last general election for such office" should be the latest general election for that type of office in order to reflect the growth in population; because, as the facts show, the latest general election in many instances does not reflect the change.

An even greater problem would arise if the standard used in section 3-11-7 were the latest general election for a general type of office instead of the last election for the expiring term of the particular office. Some state offices have staggered terms. For example, one of the senators from New Mexico, Senator Clinton P. Anderson, was reelected in 1960 and will serve until 1966, while the other senator was elected in 1964, and will serve until 1970. Staggered terms are also used in the State Corporation Commission[25] and the supreme court.[26] The following hypothetical is set out to show the problems which might arise with respect to staggered term positions if the standard used in section 3-11-7 is the latest election held for that general type of office: In 1970, two justices will be elected to the supreme court.[27] In 1972, one justice will be elected. If, in the latter election, a person attempted to have his name placed on the ballot pursuant to section 3-11-7, and the votes cast for all candidates in the latest general election for that general type of office was the standard used, the person seeking to have his name placed on the ballot would have to obtain a number of signatures based on the votes cast for all the candidates who ran for the *two* supreme

24. In one congressional position in 1962, 244,913 votes were cast for the congressional candidates. Jack C. Redman polled 116,262 votes, and Joseph M. Montoya, the Democratic candidate, received 128,651. In 1960, however, 301,048 votes were cast for the members of Congress running for that same congressional position; Edward V. Balcomb received 123,683 votes, and Joseph M. Montoya, 176,514. 197,846 votes were cast for all four congressional candidates in 1958; and in the earlier congressional election of 1956, another presidential election year, 244,344 votes were cast for the four candidates for Congress. In 1958, William A. Thompson received 72,922 votes, and his opponent, Joseph M. Montoya, polled 124,924 votes. George W. McKim received 70,925 votes, and the Democratic candidate, Thomas G. Morris, received 115,928 votes. The four candidates who polled 244,344 votes in 1956 were: Dudley Cornell, 114,719 and John J. Dempsey, 129,625; Forrest S. Atchley, 112,531 and Antonio Fernandez, 128,330. 5 Governmental Affairs Institute, *op. cit. supra* note 20, at 269.

25. N.M. Const. art. 11, § 2.

26. N.M. Const. art. 4, § 4.

27. N.M. Stat. Ann. § 16-2-1 (1953), increased the number of supreme court justices from three to five, each serving an eight-year term. N.M. Laws 1929, ch. 9, § 2, provided that in order to make this increase, two justices would be elected at the 1930 general election and every eight years thereafter. Two were elected in 1962, and one will be elected in the next three general elections beginning with the 1964 general election.

court positions in 1970. This would not be the case, however, if a person sought to have his name placed on the ballot for supreme court justice in the 1974 election, since the latest general election for that type of office was the 1972 election in which only one supreme court justice was elected. Therefore, if the standard employed in section 3-11-7 is the *latest* general election for the general type of office for which the candidate is running, an impossible burden may be placed on a candidate who tries to get his name on the ballot at the wrong time.[28] This result will not occur if the last general election for the term of office to be filled is the standard; since this can refer only to the election of a single person, the person whose term of office is expiring, which in the hypothetical would be the 1966 election for supreme court justice.

On the other hand, if the standard were the latest general election for the particular type of office in question, and if it were held that only the number of votes cast for one position could be used, there would still be a problem for the candidate who tried to have his name placed on the ballot under section 3-11-7. For instance, if there had been more than one office of his type in the last election (like the person in the hypothetical above who sought to have his name placed on the ballot in 1972), there would be no way to determine which candidates' votes to use in obtaining the required percentage. No problem would arise, however, if the general election for that term of office which is expiring was the standard determining the required number of signatures since the candidate could refer to the definite number of votes cast for the candidates who ran for the office he is seeking. The burden of all candidates

28. Situations have occurred throughout New Mexico's election history which might have led to the same problem as that raised in the hypothetical, *i.e.*, where a man seeks to have his name placed on the ballot for an office which had two positions filled in the last general election. In 1948, and again in 1952, two candidates ran for corporation commissioner, one to fill a four-year term due to a vacancy in office, while the other ran for the regularly elected office due to the expiration of a six-year term. State of New Mexico, Official Returns of the 1948 Elections, at 12; State of New Mexico, Official Returns of the 1952 Elections, at 2.

A candidate's burden might even be triple that of a later candidate if "the last general election for such office" in § 3-11-7 meant all the votes cast for all the candidates in the latest election for the general type of office in question. If a candidate were to try and have his name placed on the ballot, under § 3-11-7, for the office of supreme court justice in the general election which followed the election of two justices and a third election to fill the vacancy of another supreme court justice (as provided in N.M. Const. art. 6, § 4), then this candidate would have to have a number of signatures based on a percentage of all the votes cast for all the candidates running for the *three* offices in that earlier election.

in the future would be equalized because the last general election for that term of office designates one position, and only the votes cast for that position.

Another argument in favor of using the last general election for the expiring term of office as the standard is that the word "office" means "term of office." This argument is supported by several cases in which an elected official was either removed or resigned from his office, and was later reappointed or reelected to that same office for the remaining term of office. In each of these cases, the courts refused to uphold the reinstatement of the officer. They held that reelection could not apply to a new term of office which could not come about until the old term of office had expired, since removal from office was removal from that term of office.

In one situation,[29] a borough president in New York, was removed from office by the governor in 1907 for malfeasance. Ahearn's term was to run from 1906 to 1910. He was appointed to the office only a few days after removal by the Board of Aldermen of the City of New York, who were designated by statute to fill such vacancies by appointment. The New York Court of Appeals denied the appointment stating that "such removal barred him [Ahearn] from immediate appointment to fill the vacancy for the unexpired term . . . ."[30] The court said, however, that Ahearn could be elected to "some other office or . . . be elected to a new term of the same office, neither of which were in any way involved in his trial and from neither of which he was removed."[31] The court held, then, that removal from office is removal from that term of office, thereby equating the word "office" to "term of office."

In *State ex rel. Thompson v. Crump*,[32] Edward H. ("Boss") Crump had been ousted from the office of mayor of Memphis under an act which declared in part "that any municipal officer who shall become intoxicated, engage in gambling or violate any penal statute involving moral turpitude, shall forfeit his office and be ousted."[33] The term of office from which Crump had been ousted ran from 1912 to 1916. In 1916, Crump was reelected as mayor of Memphis, and it was alleged that because he had been ousted from the office, Crump could not be reelected. The court held that:

29. People v. Ahearn, 196 N.Y. 221, 89 N.E. 930 (1909).
30. *Id.* at 234, 89 N.E. at 934.
31. *Ibid.*
32. 134 Tenn. 121, 183 S.W. 505 (1916).
33. Tenn. Laws 1915, ch. 11, § 1.

> A removal from office extends to the limit of the current term, but such removal, unless a statute gives it greater effect, cannot go beyond the current term *because the office itself is limited by the term.* If we go beyond the current term, then we have to deal with another office.[34]

The requirement in section 3-11-7 of the New Mexico statutes which says that a candidate may have his name placed on the ballot if he has a petition signed by a number of persons equal to three per cent of the votes cast in one half of the counties "at the last general election held of such office," should mean, therefore, that the number be based on the last general election *for that term of office.*

Section 3-11-7 places a burden on the person who has not been chosen at the pre-primary election or party convention to represent the party as a candidate for the office which he is seeking; but who, nevertheless, is trying to have his name placed on the primary ballot. The "burden" placed on this person by section 3-11-7 is necessary if the number of names on the ballot is to be kept within reason. The purpose of section 3-11-7, then, is not to make the candidate who is seeking to have his name placed on the ballot show what his chances of election are, but only to show a sufficient number of supporters to make it worthwhile printing his name on the ballot; and, also, to see if he would have had a chance of being nominated if his candidacy had been declared before the pre-primary or the convention. The only reasonable criteria that can be used is the vote cast at the last election for the man who is to be succeeded. This is certainly more reasonable than linking this requirement to the votes cast for another office which is in no way connected with the office the candidate is seeking.

One question remains to be answered before it can be determined which election is meant by "the last general election for such office"

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34. State *ex rel.* Thompson v. Crump, 134 Tenn. 121, 183 S.W. 505, 507 (1916). (Emphasis added.) *Accord,* State *ex rel.* Howell v. Sensing, 188 Tenn. 684, 222 S.W.2d 13, 15 (1949), where the court cited the *Crump* case in holding that "[T]he word 'office' connotes 'office for a term', and that term is an entity and indivisible." The equality of these terms is further supported by the New Mexico statutes. For example, N.M. Stat. Ann. § 3-10-19 (1953), which prescribes the manner for filling a vacancy in the office of United States Senator, reads as follows:

> In the event that such vacancy shall occur within thirty [30] days next preceding a general election, the person appointed by the governor to fill such vacancy shall hold *office* until the next general election occurring more than thirty [30] days subsequent to the happening of such vacancy *unless the term of office of such senator shall sooner expire.*" (Emphasis added.)

in section 3-11-7: What was the legislative intent?[35] In a New York case,[36] the court was called upon to interpret a constitutional section which authorized the legislature to give the power of appointment of municipal officers to village authorities. The court defined legislative intent as "the intent as gathered from the act itself, and sometimes considered in the light of our knowledge, in common with the public at large of well-known conditions which may seem to have led up to it."[37] A recent New Mexico decision has gone even further in holding that "an interpretation of a statute will never be adopted which will render the application thereof absurd or unreasonable."[38]

If this New Mexico precedent on statutory construction is to be followed, then section 3-11-7 must be interpreted to refer to the number of votes cast for the candidates in the last election for the expiring term of office and *not* the latest election for the type of office for which the candidate is seeking election. Using the latter standard would not only be inconsistent with the fact that office connotes "term of office"; but it would also be unreasonable and indefinite because of the possible double or triple burden it might place on some candidate using the same procedure in a later election.

One attempting to have his name placed on the ballot pursuant to section 3-11-7 must realize, however, that the problem of which election "the last election for such office" refers to has not been decided. A candidate, in order to assure that his name will be placed on the ballot, therefore, should use the largest number of votes cast in the election based on either standard, *i.e.*, the votes cast for all the candidates in the latest election for that type of office for which he is seeking election, or the last election for the expiring term of office.

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35. "In construing statutes, the intent of the legislature must be given effect . . . ." Montoya v. McManus, 68 N.M. 381, 389, 362 P.2d 771, 776 (1961). See Reese v. Dempsey, 48 N.M. 417, 424, 152 P.2d 157, 161 (1944), where the court said, "[T]he intention of the legislature, in passing a statute, is the primary and controlling consideration in determining its proper construction."

36. People *ex rel.* Mitchell v. Sturges, 27 App. Div. 387, 50 N.Y. Supp. 5 (1898).

37. *Id.* at 390, 50 N.Y. Supp. at 7.

38. Montoya v. McManus, 68 N.M. 381, 389, 362 P.2d 771, 776 (1961). See note 35 *supra*. *Cf.* Nye v. Board of Comm'rs, 36 N.M. 169, 9 P.2d 1023 (1932); Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1946).