



Massachusetts

MEMORANDUM

TO: Joint Committee on Election Laws

FROM: David Sullivan¹

RE: The Massachusetts Constitution allows the Legislature to provide no-excuse mail voting

DATE: May 15, 2021

This memorandum argues that the Massachusetts Constitution currently allows the Legislature to pass a statute allowing any voter to vote by mail for any reason ("no-excuse mail voting," now the law in about [two-thirds of the states](#)). It rebuts a contrary, traditional, restrictive view that [Amendment Article 105](#) limits the Legislature's authority to three reasons only: absence, physical disability, religious reasons; those are the three permissible reasons under present statute, [G.L. c. 54, § 86](#).

The Legislature's plenary lawmaking power authorizes it to provide for no-excuse mail voting. Mass. Const. part 2, c. 1, § 1, art. 4 ("full power and authority are hereby given and granted to the . . . general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof"). The history of Article 105, including the Debates in the 1917-1918 Constitutional Convention, explains why that Article does not limit this pre-existing legislative power.

Article 105 derives from [Amendment Article 45](#), proposed by the Convention and ratified by the Commonwealth's voters in 1917. The Convention had before it a legal analysis about absentee voting, prepared as Bulletin No. 23 [see [here](#), Vol. 2 (left side, underneath the image), at 205]. The key paragraph of that analysis (at 211) reads:

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The Constitution of Massachusetts as it now stands provides that the members of the House of Representatives "shall be chosen by written votes," [Const 2:1:3:3] but that the Senators are to be chosen at a "meeting" and that "the selectmen of the several towns shall preside at such meetings impartially; and shall receive the votes of all the inhabitants of such towns present and qualified to vote for Senators." [Const. 2:1:2:2] The Governor and all other State officers elected under the Constitution are to be elected at a "meeting" where the voters shall "give in their votes for a Governor, to the selectmen, who shall preside at such meetings." [Const 2:2:1:3] The language of the Constitution is explicit as to the election of Senators by voters who are "present," and the provision for the election of the Governor and other State officers seems also to imply the presence of the voter. It seems probable, therefore, that the General Court is not authorized to enact a general law providing for absent voting. This was apparently the view taken by the Legislature of 1916, which made provision whereby the Massachusetts troops on the Mexican border could vote for Presidential electors, United States Senators and members of the Federal House of Representatives, but not for any State officers. [bracketed citations to 1780 Constitution inserted -- DS]

Delegates referred to this analysis several times in the debate proposing what became Article 45. (See attached excerpts) They cited its requirement for electing state officers at "meetings" at which voters must be "present" as necessitating a constitutional amendment dispensing with this requirement for physical presence at a meeting -- although they perceived no obstacle to absentee voting for federal offices. Article 45 resulted. To the same effect, see [Report of the Secretary of the Commonwealth and the Attorney General Relative to the Feasibility and Desirability of Permitting Absentee Voting in the Elections of the Commonwealth](#), House Document No. 1537 (1917).

But the very next year, the same Convention proposed what became [Amendment Article 64](#), providing for biennial "elections" rather than "meetings" for electing state officers, ratified by the voters in 1918.² Since then, there has been no constitutional

² It may be argued that Article 64 did not repeal the 1780 Constitution's requirements that voters be present at "meetings." Amendments to the Constitution used the term "meetings" to refer to the election of state officers as late as 1885. Mass. Const. [amend. art. 29](#) (authorizing Legislature to "provide . . . more than one place of public meeting within the limits of each town for the election of officers under the constitution, and to prescribe the manner of calling, holding and conducting such meetings"). But the many amendments to the Constitution after the ratification of Article 64 in 1918 never again use the term "meeting" to refer to the event at which voters elect state officers; rather, numerous such amendments consistently use the term "election" or "biennial state election" for this purpose. Mass. Const. amend. arts. 74, 76, 81, 82, 86, 89, 91, 92, 100, 101, 105. (Other Amendments proposed before Article 64 by the 1917-1918 Convention begin to use the term "election" for this purpose. See amend. art. 48 and of course amend. art. 45 itself. But Article 64 represents the decisive culmination of this significant language change.) For many decades now, such state "elections" have been held at polling places during extensive polling hours, without any deliberation that would characterize a meeting. See

requirement for voters to be physically present at a meeting, hence no need for the exemption that Article 45 provided. Article 64 thus rendered Article 45 superfluous and no longer necessary. What is there about the term "election" that restricts the Legislature's otherwise plenary power to allow voting before election day (see [St. 1916, c. 312](#), authorizing absentee voting for federal offices, noted above by the 1917 Convention) -- especially in view of the [near-universal](#) practice today in other states of "early" voting, in person and/or by mail?³

Admittedly, the Legislature has proposed, and the voters have ratified, two further amendments to Article 45 since then: [Article 76](#) (authorizing legislation for voting by voters with physical disabilities, ratified in 1944) and [Article 105](#) (authorizing legislation for alternative voting for religious reasons, ratified in 1976). But these further amendments indicate only that their proponents simply had doubts about the extent of

G.L. c. 54, §§ 24, 64 and their predecessors.

Indeed, while Article 29 continued to use the term "meetings" to describe state elections, it may provide another source of authority for no-excuse mail voting, because it authorized the Legislature to "prescribe the manner of calling, holding and conducting such meetings." It then clearly stated: "All the provisions of the existing constitution inconsistent with the provisions herein contained are hereby annulled." Presumably, the annulled constitutional provisions could include those requiring in-person meetings. Because the 1917-1918 Convention delegates plainly did not adopt that view, this memorandum does not place primary reliance on it.

³ It may also be argued that, by providing for a biennial state election "on the Tuesday next after the first Monday in November", Article 64 (and its successor, [Amendment Article 82](#)) prevents voting before election day, either by mail or in person, except as the Constitution otherwise expressly allows. But there is no indication in the Debates on Article 45 or 64 that their framers had any such purpose; the Article 45 framers said only that they were concerned about the in-person "meeting" requirement.

Furthermore, such a reading would invalidate (as to federal elections) in-person early voting in [43 states](#) (including Massachusetts), as violating [2 U.S.C. § 7](#) ("The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives . . .") and [3 U.S.C. § 1](#) ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November . . .") (emphasis supplied). Rather, the obvious purpose of these requirements is to prevent voters from knowing how others have voted before they cast their own votes. So the proper reading is to require votes to be cast on or before election day, so long as they are not counted until after the polls close on election day. Courts have recently so held with respect to the Pennsylvania Supreme Court's decision requiring ballots mailed by election day to be counted if received until three days later. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 n.23 (Pa. 2020) ("allowing the tabulation of ballots received after Election Day does not undermine the existence of a federal Election Day, where the [court's decision] requires that ballots be cast by Election Day"), *cert. denied*, Nos. 20-542 & 20-574 (Feb. 22, 2021); *Bognet v. Secretary Commonwealth of Pa.*, 980 F.3d 336 (3d Cir. 2020) ("The Deadline Extension and federal laws setting the date for federal elections can, and indeed do, operate harmoniously. At least 19 other States and the District of Columbia have post-Election Day absentee ballot receipt deadlines"), *cert. granted and dismissed as moot*, No. 20-740 (Apr. 19, 2021).

this legislative power. Those amendments are phrased as conferring legislative power, and it seems very odd to read them as limiting legislative authority, especially against the historical background above. Thus, the Attorney General's official ballot summaries for both proposals said that they "authorize the Legislature"; they do not speak of or imply any limit. See [Recommendations of the Secretary](#), House No. 164 (1941) (renewing the Secretary's prior recommendations of what would become art. 76 because of his "conviction that this privilege should be extended to unfortunates deprived of the right to vote because of physical disability"). These constitutional provisions do not so much as mention voting by mail, since their purpose was not to restrict it.⁴

Certainly there are other examples of "belt and suspenders" constitutional provisions -- like [Amendment Article 60](#), proposed by the same Convention, and conferring explicit legislative zoning power, in language that everyone today would see as unnecessary. See *Opinion of the Justices*, 234 Mass. 597, 601, 607–11 (1920) (concluding that art. 60 did not violate the federal Constitution since the authority it granted fell within the general police powers, implying that existing state constitutional police powers provided ample authority for the Legislature to impose zoning regulations even without the specific language of art. 60); Martin R. Healy, *Historical Development of Massachusetts Zoning Law* § 1.3.1 (6th ed. 2017) ("Amendment Article 60 was a call for action by the legislature on the issue of zoning controls, not a prerequisite to such action").

In 1971, the Justices of the Supreme Judicial Court recognized that no specific constitutional authority was needed for the Legislature to provide absentee voting in primaries and preliminary elections, but did not answer this question about general elections for state officers. *Opinion of the Justices*, 359 Mass. 775 (1971). At the very least, that must mean that the Legislature could clearly provide for no-excuse mail voting in primaries today.

Indeed, it seems beyond dispute that, without Article 105 and its predecessors, the Legislature could provide for no-excuse mail voting for local elections, federal offices (see the 1916 statute), state primaries, and presumably ballot questions. It seems very unlikely that Article 105 and its predecessors -- which apply to "any officer to be elected [presumably including local and federal officers] or upon any question submitted at an election" -- were intended to limit this pre-existing legislative power. Therefore, they should also not be read as limiting legislative power over mail voting for state officers, but rather as confirming it.

⁴ Because the Constitution bestows plenary legislative power, a statute is valid if it is not "repugnant or contrary" to another constitutional provision. Mass. Const. part 2, c. 1, § 1, art. 4. The analysis is thus similar to whether federal law preempts a state statute or state law preempts a local ordinance or by-law (under Section 6 of the Home Rule Amendment, Mass. Const. amend. art. 2, as appearing in amend. art. 89). So the "intent" of the more-specific constitutional provision -- here Article 105 -- must be to preclude legislative action -- here a no-excuse mail voting statute -- either by "an explicit indication of its intention in this respect" or by a clear intention "to preempt the field." *Roma, III, Ltd. v. Board of Appeals of Rockport*, 478 Mass. 580, 588 (2018) (citing cases). As the text of this memorandum demonstrates, neither intention is present here.

If the traditional, restrictive view is adopted, then not only is no-excuse mail voting unconstitutional, but so is "early voting" -- at least by mail -- as it has now been used in three statewide elections under [G.L. c. 54, § 25B](#). Given the history above, calling something "early voting" cannot mysteriously authorize what the Constitution does not otherwise allow.

See also *Gangemi v. Berry*, 25 N.J. 1, 134 A.2d 1 (1957) (New Jersey Legislature could provide for civilian absentee voting, although N.J. Const. authorized only military absentee voting); and the recent briefs of the Pennsylvania [Commonwealth](#) (at 19-29) and (Republican-led) [Legislature](#) (at 7-13) defending the Pennsylvania no-excuse mail voting statute against a similar state constitutional attack. (The Pennsylvania Supreme Court dismissed for laches without reaching the merits. [Kelly v. Commonwealth](#), No. 68 MAP 2020, 2020 Pa. LEXIS 6071, 2020 WL 7018314 [Pa. Nov. 28, 2020]. The United States Supreme Court first denied the plaintiffs' requested injunctive relief, [Kelly v. Pennsylvania](#), No. 20A98, 592 U.S. ____, 2020 U.S. LEXIS 5986, 2020 WL 7221757 [Dec. 8, 2020], and then denied certiorari. No. 20-810 [Feb. 22, 2021].)

An allegory may help explain this memorandum's argument. Imagine a hungry crowd (voters who want to vote by mail and the legislators who represent them) separated from a free banquet (full electoral participation) by an impassable raging torrent (the state constitution's in-person "meetings" requirement that banned mail voting). Some engineers (constitutional amendment framers) in the crowd build a narrow footbridge over the torrent (art. 45), and a few people successfully cross over to the banquet ("absent" mail voters). But soon, some unknown engineers upstream happen to construct a dam (art. 64), to form a lake for their own unrelated recreational purposes (biennial state "elections"), yet the effect downstream is to stop the torrent entirely (eliminating the in-person "meetings" requirement). Sometime later -- perhaps not realizing this important change in circumstances, or perhaps unsure whether the dam will hold -- the crowd's engineers decide to widen the footbridge (arts. 76 and 105) so more people can cross (mail voters for disability and religious reasons). Finally, a few enterprising crowd members (our VOTES Act sponsors) discover that they can simply walk across the dry stream bed; they no longer need the bridge, even though it has been widened. The rest of the crowd follows them and enjoys the banquet.

Excerpts from Debates in the 1917 Constitutional Convention (on what became amend. art. 45)

(3 Debates 6)

Mr. Kneil of Westfield:

The proposition is one providing that the Legislature may have an increase of a certain power it now has. Under the United States Constitution the Legislature now may prescribe the manner, way, and terms in which the votes of absentees, — in which the votes of anybody, — may be polled and counted, with reference to Presidential electors, members of the United States Senate and members of the United States House of Representatives. The Legislature now can do any one of those three things in any way, shape or manner that it pleases under the United States Constitution. And it has done so, particularly in 1916 when it gave the right to the soldiers who were on the Mexican border to vote for those three classes of officers. But the Legislature lacks power to give to the voter who is absent the right to vote for State and municipal officers. It may be possible that under the power of the Legislature to create cities and municipalities it may prescribe as to those who vote in municipal and city elections; but that is doubtful, to say the least. It stands therefore thus: Under the United States Constitution the Legislature may provide for absentee voting for Presidential electors, for Senators, and for Representatives of Congress; but beyond that it cannot provide. Now, that is the power which it is asked should be provided. What further power should the Legislature have? That is a matter for you and me to consider. Should it extend to the right to vote for State officers? I say "Yes." It should go so far as the Legislature in its wisdom sees fit to grant the right, — by giving the general right to vote, or the right to vote for certain officers. That we lack; that, I think, we should give.

(3 Debates 12-13)

Mr. Newton of Everett:

As a member of the committee on Suffrage I desire to take a few moments to explain this proposed constitutional amendment and the reasons for it, and to speak, in regard to the suggested amendments. The situation that confronts the Commonwealth of Massachusetts is this: Under the Constitution of the United States provision can be made by the Legislature for the voting of qualified voters absent from the Commonwealth, for President of the United States or Congressman or any United States officer, but, strange to say, under our Constitution the same provisions cannot be made for the elective officers of the Commonwealth of Massachusetts. That is, a voter undoubtedly could be given the right by the General Court to vote for a Representative if he were not present upon election day because the Constitution simply provides that a Representative to the General Court shall be elected by written ballot, but a Senator cannot be elected except by a person who is present and voting at a meeting regularly and duly called for that purpose. Likewise a Governor of the Commonwealth cannot be voted for unless the party voting is present at the proper place to vote. Now, the Legislature was troubled by this situation and has been trying for some years to have that cleared up so that it could have a right to provide that people who were absent from their community and absent from their State on public business should have the privilege of voting for Governor and State officers and Senators and Representatives, as well as having the privilege to vote for President and Representatives to Congress. Therefore I find that the public are somewhat embarrassed because they have not clearly in mind that

for years the Legislature by statute has provided for soldiers and sailors voting who were absent from the Commonwealth, for President or for a Representative to Congress, while it could not provide constitutionally for their voting for the Governor or for their local Representatives and Senators. Now, I assume that we all accept it as a fact that a great number of voters, because of their vocations, are prevented from voting on election day, our election days coming always on Tuesday, as you know, the first Tuesday after the first Monday of November, and there has been a very strong demand made by the traveling men and salesmen, by railroad men, by other men who, because of their vocations, are kept away from voting, or are put to tremendous expense to come home and vote on a particular election day. Therefore the committee felt that the Convention would be justified in so changing the Constitution that the Legislature could enact laws so that men who were absolutely and unquestionably detained or kept away from their city or their town on election day should have the right to vote. That includes of course the soldiers, the traveling men, and the laboring man who may be kept away, or the railroad man who is kept away, and we drew the amendment with that idea, making it just as broad as we could make it, but not at the same time making it so broad that it would open the door that might lead to fraud and wrong when, attempts were made to make it easier for the person who was at home to vote. In other words, the committee did not believe that the person who was at home should be given any privilege beyond that which he now has, namely, to go to the polls and vote, but that if a person was detained by his vocation away from the community, that he ought to have the right, if the Legislature saw fit to. give him that right, to cast his ballot for State officers as well as for United States officers. . . .

Now, in regard to the amendments. One amendment offered by the gentleman from Chelsea (Mr. Finn), Mr. President, suggests a constitutional provision in regard to nominations to office. Well, of course that is not a constitutional question. I do not assume that I need to make any other statement than that. The Legislature makes provision for primaries and nominations, and they have a right to do it, and they can make any provision they have a mind to, but there is no constitutional question here at all, and therefore this is not an amendment that we should adopt.