



Massachusetts Election Law Relevant to the 2010 Special Senate Election

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SUMMARY

Under Massachusetts election law, while the interim senator from Massachusetts would likely serve until Senator-elect Brown is sworn in or ‘qualified,’ Senator-elect Brown’s seating should not be delayed. Senator-elect Brown should be seated immediately. Senator-elect Brown’s 5% margin of victory, not to mention Martha Coakley’s concession, precludes any recount. Under Massachusetts law, a recount will only be conducted if the margin of victory is within one half of one percent (0.5%) and Brown’s margin clearly surpasses this mark. Moreover, in an election of candidates for office, any petition for recount must be signed by a candidate receiving votes in that election. Given Martha Coakley’s concession it appears highly unlikely that she would sign a petition for recount. The only other issue would be overseas absentee ballots, since the law provides a ten-day post election window for counting them, but, presumably, there are not enough to overcome the vote deficit.

Because Brown is the clear winner, he should be seated in the United States Senate immediately. The Constitution empowers the Senate to judge the qualifications of its own members. While, under Massachusetts law, a certificate of election in a special election may not be issued to the winner until the seventh day after the election, there is no requirement that Brown possess his certificate to take his seat. No Senate rule or federal law requires the presentation of a certificate of election for a senator to be seated. In fact, the Minnesota Supreme Court reiterated just last year that the Senate can seat its members without certification, a

sentiment echoed in recent interviews with the Secretary of the Commonwealth of Massachusetts. Indeed, Senator Ted Kennedy himself was elected in a special election on November 6, 1962 and was seated the following day, but not certified the winner until much later. Any attempt to delay the seating of Senator Brown would ignore the will and clear voice of the people of Massachusetts for absolutely no reason other than political gamesmanship.

I. POWER OF THE INTERIM SENATOR AFTER THE SPECIAL ELECTION AND THE SEATING OF THE SENATOR-ELECT

Massachusetts law provides that when there is a vacancy in the office of senator in congress, “the governor shall make a temporary appointment to fill the vacancy.” This appointee “shall serve until the *election and qualification* of the person *duly elected* to fill the vacancy”¹ The Massachusetts election laws do not define what is meant by “duly elected” or provide when “election and qualification” is satisfied. Thus, it is unclear, by the language alone, at what point the powers of Senator Kirk, the Senator appointed to fill the vacancy created by the death of Senator Kennedy, expire and the powers of winner of the special election begin.

While these important terms are left undefined, their usage in similar contexts is instructive. The terms do not seem to have been the subject of any recent litigation, but a Massachusetts Supreme Court case from 1843 uses the terms to discuss whether less than a full board of assessors could assign a tax.² The case described three assessors who were “duly elected” and “that two of them were forthwith sworn, and thereby became qualified to act.” Further, the court noted that each of the three was an assessor at their election “[b]ut, until qualified, by taking the oath, he [was] not legally competent to act.”³ Similarly, a 1922 state Supreme Court case involved a Suffolk District Attorney who, according to the arguments of

¹ Mass. Gen. Laws Ann. ch. 54 § 140 (LexisNexis 2010).

² *George vs. Inhabitants of the Second Sch. Dist. in Mendon*, 47 Mass. 497, 511 (1843).

³ *Id.*

counsel in the case, was elected “on the fourth day of November, 1919, and duly qualified by taking the oaths required by law on the eighth day of January, 1920.”⁴

While not specifically defining either the term “election” or the phrase “duly elected,” these excerpts shed some light on the usage of the term “qualification.” It would appear that qualification somehow refers to the process of taking the necessary oaths required to assume one’s elected position. In one sense, this is in line with the Black’s Law Dictionary definition of the term as “[t]he possession of qualities . . . legally necessary to make one eligible for a position or office,”⁵ as it could be argued that the swearing of any necessary oath is, in fact, a necessary qualification. This argument does not offend the Constitution, because such an oath is constitutionally required.⁶ Given this likely construction of the meaning of the Massachusetts statute, it is likely that Senator Kirk would continue to serve until the winner of the special election takes his seat, on whatever date that occurs.

Even though it is reasonable to conclude that Senator Kirk could vote until Senator-elect Brown is seated, Brown’s victory could produce a thorny political problem for the Democratic majority. There is no published Senate rule requiring that a newly-elected Senator possess his certificate of election before he is seated.⁷ In fact, the Minnesota Supreme Court recently recognized Senate’s power to seat a member without such a certificate during a challenge to the certification of Senator Al Franken. The court concluded that “the Senate has authority to seat a Senator without a state-issued certificate of election”⁸ The only relevant Senate rule requires

⁴ *Attorney General v. Pelletier*, 240 Mass. 264, 134 N.E. 407, 1922 Mass. LEXIS 827, at *30 (1922).

⁵ BLACK’S LAW DICTIONARY 1275 (8th ed. 2004).

⁶ U.S. Const. art. IV.

⁷ See United States Senate Committee on Rules and Administration, Rules of the Senate, <http://rules.senate.gov/public/index.cfm?p=RulesOfSenateHome> (last visited Jan. 19, 2010).

⁸ *Franken v. Pawlenty*, 762 N.w.2d 558, 566 (Minn. 2009).

the Secretary to “keep a record of certificates of election and certificates of appointment”⁹ but does not require that those certificates be presented or on file when a Senator is seated. With no such provision, it would seem the Constitution’s provision that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members”¹⁰ would control. The Massachusetts Secretary of the Commonwealth, in a recent interview to CNN, noted the Senate’s power to determine when to seat Brown.¹¹ Thus, because Brown’s 5% margin of victory forecloses a recount and the number of outstanding overseas ballots is presumably insufficient to overturn the election, failure to seat Brown immediately could prove a costly political decision for the Senate. Ironically, Senator Kennedy himself was elected in a special state election to replace his brother, who resigned to be the president. Kennedy was elected November 6, 1962 and took his seat the following day,¹² weeks before he was certified the actual winner.¹³

In sum, even though Kirk could likely still vote on healthcare, failure to seat Brown quickly in the face of his overwhelming victory could prove catastrophic for the Democratic majority. With public anger over health care, to once again demonstrate their lack of concern for the will of the electorate would be a daring act of arrogance.

⁹ United States Senate Committee on Rules and Administration, Rules of the Senate, Presentation of Credentials and Questions of Privilege, <http://rules.senate.gov/public/index.cfm?p=RuleII> (last visited Jan. 19, 2010).

¹⁰ U.S. Const. art. I § 5.

¹¹ CNN Politics.com, *Galvin: Decision to seat MA winner ultimately rests with Senate*, [http://politicalticker.blogs.cnn.com/2010/01/19/galvin-decision-to-seat-ma-winner-ultimately-rests-with-senate/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+rss/cnn_politicalticker+\(Blog:+Political+Ticker\)&utm_content=Google+Reader](http://politicalticker.blogs.cnn.com/2010/01/19/galvin-decision-to-seat-ma-winner-ultimately-rests-with-senate/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+rss/cnn_politicalticker+(Blog:+Political+Ticker)&utm_content=Google+Reader) (last visited Jan. 20, 2010).

¹² Biographical Directory of the United States Congress, Kennedy, Edward Moore, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=K000105> (last visited January 19, 2010).

¹³ The Boston Channel.com, *Galvin: I Won’t Slow Process if Brown Wins*, Jan. 19, 2010, <http://www.thebostonchannel.com/politics/22273554/detail.html>.

II. VOTE TALLYING, REPORTING, and CERTIFICATION

Though certain portions of Massachusetts election law do not address special elections, the law requires that in “elections held . . . to fill vacancies, the proceedings shall be the same, so far as applicable, as in elections to the same office at the biennial state election.”¹⁴ Therefore, where provisions do not specifically provide special procedures, general provisions should control.

On election day, as soon as the polls close, ballots are counted and totals “immediate[ly] transmit[ted] to central tabulation facilities . . . by telephone or telegraph”¹⁵ These results are “considered unofficial and shall be in addition to [other] returns required,” but these returns “shall be disseminated as received by the state secretary from the central tabulation facilities”¹⁶ City and town clerks retain possession of the sealed records, including ballots cast, for a prescribed time and then must destroy them.¹⁷ The various clerks or election commissioners must transmit sealed copies of these records to the state secretary within fifteen days.¹⁸

In state-wide elections or recounts, the “state secretary shall lay before the governor and council the copies of the votes cast.” The governor and five or more “councillors, shall examine the copies . . . [and] tabulate said votes to determine who appear[s] to be elected” An abstract of the count must be transmitted immediately to the state secretary, who shall provide copies to newspapers.¹⁹

¹⁴ Mass. Gen. Laws Ann. ch. 54 § 147 (LexisNexis 2010).

¹⁵ *Id.* § 105.

¹⁶ *Id.* § 110A.

¹⁷ *Id.* § 109.

¹⁸ *Id.* § 112.

¹⁹ *Id.* § 115.

Regarding the election of United States Senators, Massachusetts law provides that “[t]he governor shall issue certificates of election to such persons as appear to be chosen to the offices of senator in congress . . . , which shall be countersigned and transmitted by the state secretary.” Normally, no certificate shall be issued until after 5pm on the fifteenth day after a state election or until tabulation and determination of a district or state-wide recount. Nevertheless, a certificate may be issued “on or after the seventh day following a special state election, unless a candidate who received votes at that election files with the state secretary, not later than five o'clock in the afternoon of the sixth day following the election, a written statement of intention to seek a recount or otherwise to contest the election.”²⁰

In regard to Brown’s election, it seems that, as long as there is no recount petition or other challenge petition filed by 5pm on the sixth day, Brown could be issued his certificate of election as early as seven days after election day. However, because of the 15-day window for delivering the record copies to the secretary and the wording of the provision as permitting, but not requiring the issuance of a certificate of election on the seventh day post election, it seems possible that the certificate of election may not be issued for at least 15 days.

III. ABSENTEE VOTING PROVISIONS

A person may vote using an absentee ballot if:

- he will be physically absent from his city or town on election day
- he has a physical disability that prevents him from getting to the polls on election day
- he cannot vote at the polls due to religious belief.²¹

Family members may request an absentee ballot for an individual who qualifies.²² The deadline for applying to vote using an absentee ballot is noon of the day before the election.²³ However, if

²⁰ *Id.* § 116.

²¹ Mass. Gen. Laws Ann. ch. 54 § 86.

²² *Id.* § 89.

the day before the election is a Sunday or holiday, the deadline for applying for an absentee ballot is by 5 pm on the preceding business day.²⁴ (Therefore, due to Martin Luther King, Jr. Day, the deadline for application for an absentee ballot for this special election was Friday, January 15, 2009 at 5:00 pm.) If an absentee ballot is received after the close of the polls on election day, those ballots are retained, unopened, and then destroyed with the rest of the ballots at a designated time after the election.²⁵ Ordinarily, all absentee ballots must be received by the office of the city or the town clerk, before the close of the polls on election day.²⁶ If mailed from a location outside the United States, absentee ballots must be postmarked by election day and returned to the local election office no later than ten days following the election.²⁷

A “specially qualified voter” need not register in order to vote.

A “specially qualified voter, is a person:

- (a) who is otherwise eligible to register as a voter; and
- (b) (1) whose present domicile is outside the United States and whose last domicile in the United States was Massachusetts; or
- (2) whose present domicile is Massachusetts and who is:
 - (i) absent from the city or town of residence and in the active service of the armed forces or in the merchant marine of the United States, or a spouse or dependent of such person;
 - (ii) absent from the commonwealth; or
 - (iii) confined in a correctional facility or a jail, except if by reason of a felony conviction.²⁸

In sum, the one issue that could arise in the 2010 special election is, in the event that there are enough overseas absentee votes (probably military votes) outstanding on election day to have an effect on the outcome of the election, it is possible that this could provide a 10-day delay

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* § 99.

²⁶ *Id.* § 93.

²⁷ *Id.*

²⁸ *Id.* ch. 50 § 1.

in certification. Given Brown’s five percent margin of victory on election day, this seems highly unlikely.

IV. RECOUNT PROVISIONS²⁹

Generally, in an election a petition for recount must be filed by 5pm “on the tenth day following an election.”³⁰ However, in special elections, this period is shortened to 5pm on the sixth day following the election.³¹

Election recounts may be local, state-wide, or district-wide. Recall petitions in elections involving candidates for office must be on a form “furnished by the state secretary,” “accompanied by a written *request for a recount signed by the candidate on whose behalf the recount is being conducted.*”³² For local recounts, the petition must be signed by the necessary number of voters from the particular locale where the recount is requested, as provided in Chapter 54 § 135. In addition, one of the subscribers must swear to the petition before a notary public, stating the reason and belief “that the records, or copies of records made by the election officers” . . . are erroneous,” and the petition must specify the types of errors committed or challenging votes as fraudulent, and also the candidate who has benefited.³³

The clerk will then transmit the petition to the registrar along with the voting record and materials.³⁴ The registrar, “without unnecessary delay, but not before the last hour for filing petitions for recounts” will examine the disputed records.³⁵ The recount must be held within “ten

²⁹ The Mass. Secretary of State’s website has a outline for the specific procedures for election recounts. See Elections Division, How to Request a Recount, <http://www.sec.state.ma.us/ele/elerct/rctidx.htm> (last visited Jan. 19, 2010) for more information.

³⁰ MASS. ANN. LAWS ch. 54, § 135 (LexisNexis 2009).

³¹ *Id.* § 116.

³² *Id.* § 135.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

days of the filing deadline”³⁶ and the examination must be limited to the problems specifically asserted.³⁷

In addition to the above form requirement, state and district-wide recounts must be on a form “approved and furnished by the secretary of state” and signed by at least one thousand voters.³⁸ The voters must then submit the form “to the registrars of voters of the city or town in which the signers appear to be voters.”³⁹ Each registrar must then certify the number of signers from his city or town and submit it to the state secretary by the fifteenth day following the election.⁴⁰ Such petitions must then be “held for recount until after the official tabulation of votes by the governor and council and” a recount will only be conducted if the difference is less than or equal to “one half of one per cent of the total number of votes cast.”⁴¹ If the difference is within that range, the secretary must then order the town and city clerks to “transmit[] the [sealed] envelopes or containers containing the ballots.”⁴² The registrars of the cities and towns will then, “without unnecessary delay,” recount.⁴³ The registrars’ determinations will then also be “subject to protest,” and the municipalities will be required to hold the ballots “until the expiration of sixty days after” the election.⁴⁴ Further, although some district-wide recount procedures can have different provisions from state-wide recount procedures, the differences only occur in primaries; thus, they would be the same for this election.⁴⁵ Finally, the state

³⁶ William Francis Galvin, Sec’y of the Commonwealth, *Elections: How to Request a Recount*, <http://www.sec.state.ma.us/ele/elerct/rctidx.htm> (last visited Jan. 18, 2010).

³⁷ MASS. ANN. LAWS ch. 54, § 135.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.* (“District-wide recounts in cases of offices to be filled or questions to be voted upon at state elections, except by all the voters of the commonwealth, may be requested in the same manner as state-wide recounts, except that the petition shall be signed by one-fourth the number of voters required to sign nomination papers for state primary candidates in the appropriate district under section forty-four of chapter fifty-three and provided that the

secretary must order recounting to stop before completion if every candidate who is within one half of one percent agrees and files a written request to do so.⁴⁶

Though the Massachusetts provisions are somewhat convoluted, the practical effect of these provisions on the present election is that a recount petition can only begin in accord with a candidate's request and can only be filed until 5pm on the 6th day after the election.

difference in the numbers of votes cast for any candidate seeking an office or nomination and the candidate who is the apparent winner of that office or nomination, or in the number of affirmative and negative votes on a question, for which the recount is desired is not more than one-half of one per cent of the total number of votes cast for such office or nomination or on such question.”).

⁴⁶ *Id.*