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## A Dead Senator on the Ballot: Should the Successor's Appointment be Preordained?

The 2000 presidential election revealed glaring improprieties in the methods available to Americans for choosing their leaders.<sup>1</sup> With attention focused on Florida's confusing ballot, the variety of standards used to count "hanging chads," and claims of disenfranchisement, the presidential election's irregularities overshadowed other election problems entirely.<sup>2</sup> Before the tumultuous contest to determine the winners of the electoral college vote even began, however, the death of United States Senate candidate and Missouri Governor Mel Carnahan<sup>3</sup> raised the question of whether a deceased person could be elected to the Senate.<sup>4</sup> For some observers, concerns mounted when the newly elevated Governor<sup>5</sup> announced that he would appoint Carnahan's widow, Jean

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1. See generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000*, at 1-4 (2001) (describing the significant practical difficulties inherent in elections, including their potential for "mistake, ineptitude, and outright fraud").

2. See *id.*; see also Steve Ehlmann, Editorial, *You Don't Have to Look South to Find Flaws in the Process*, ST. LOUIS POST-DISPATCH, Nov. 24, 2000, at C19 (noting that Missourians, absorbed with the Florida debacle, failed to focus on the irregularities in their own statewide election).

3. At his death, Mel Carnahan was serving his second term as Missouri's Governor. During this term, he embarked on a campaign for Missouri's Senate seat. Dan Balz & Mike Allen, *Missouri Governor Missing, Feared Dead in a Plane Crash*, WASH. POST, Oct. 17, 2000, at A8.

4. See Elizabeth Becker et al., *The 2000 Elections: State by State: Midwest*, N.Y. TIMES, Nov. 9, 2000, at B16; John W. Fountain, *The 2000 Elections: Congress: Senator Refuses to Challenge Loss*, N.Y. TIMES, Nov. 9, 2000, at B11; cf. Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 217-19 (1995) (raising a host of questions regarding the presidency and death, including the conundrum created when a presidential candidate dies after garnering a majority of the popular vote on election day but prior to the electoral college's formal meeting and vote). Although dead candidates previously have been elected to the House, Mel Carnahan was the first dead candidate elected to the Senate. Jon Frandsen, *Democrats Pin Hopes on Carnahan's Widow*, USA TODAY, Oct. 25, 2000, at 7A.

5. Roger Wilson served as Lieutenant Governor during Mel Carnahan's administration. In accordance with state law, see MO. CONST. art. IV, § 11(a), Wilson succeeded to the office of Governor after Carnahan's death. He took the oath of office on Wednesday, October 18, 2000. Associated Press, *Wilson Takes Oath as New Governor*, POST-TRIBUNE (Jefferson City, Mo.), Oct. 18, 2000, at 1.

Carnahan, to the contested Senate seat if Governor Carnahan received the most votes in the Missouri election.<sup>6</sup>

This Recent Development examines Jean Carnahan's appointment in light of Missouri election law's traditional treatment of dead, disqualified, and ineligible candidates. It assesses the predetermined appointment's inconsistency with Missouri's codification of the American Rule,<sup>7</sup> which states that votes for a deceased candidate can serve to create a "vacancy" in office and thereby defeat that candidate's living opponent. This Recent Development argues that Governor Wilson took advantage of ill-defined election procedures by making an early appointment that amounted to an alteration of the ballot. It proposes that Missouri lawmakers pass legislation establishing stricter standards for proper gubernatorial action when faced with a vacancy on the ballot.<sup>8</sup> Although advocates of Carnahan's appointment express valid concerns for voter rights and the integrity of democratic principles, validating the procedure Missouri followed condones gross unfairness to the opposing candidate, denies legislative control over ballot access, and infringes on the political parties' ability to choose their own candidates.<sup>9</sup>

On October 16, 2000, barely three weeks before election day, Missouri Governor and United States Senate candidate Mel Carnahan died in a plane crash.<sup>10</sup> Governor Carnahan had challenged incumbent Senator John Ashcroft,<sup>11</sup> and was embroiled in a "neck-

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6. See Fountain, *supra* note 4; Libby Quaid, *Breaking New Political Ground for Widow of Missouri Governor*, ASSOCIATED PRESS NEWSWIREs, Oct. 24, 2000, LEXIS, Nexis Academic Universe [hereinafter Quaid, *Political Ground*] (on file with the North Carolina Law Review).

7. MO. ANN. STAT. § 115.379.1 (West Supp. 2001).

8. This suggestion is not limited to Missouri lawmakers. In the wake of the 2000 presidential election, state lawmakers seeking to overhaul their own election laws should evaluate the need for more elaborate procedures pertaining to deceased, disqualified, or ineligible candidates.

9. Fraud in the appointment process represents another less probable, but equally harmful, result. See *infra* note 82.

10. David Von Drehle & Helen Dewar, *Missouri Mourns Its Governor; Democrats' Senate Hopes Dealt Blow*, WASH. POST, Oct. 18, 2000, at A1. At the time of his death, Governor Carnahan was engaged in a tight race with incumbent Republican Senator John Ashcroft. Frandsen, *supra* note 4.

11. For detailed information on John Ashcroft's political career and the controversy surrounding his appointment and confirmation hearings as United States Attorney General, see John Sawyer, *Senate Approves Ashcroft; Divided Chamber Confirms Bush's Pick for Attorney General*, 58-42: All 50 Republican Senators and 8 Democrats Vote for Confirmation, ST. LOUIS POST-DISPATCH, Feb. 2, 2001, at A1. Senator Jean Carnahan has been criticized sharply for casting an early vote against John Ashcroft's confirmation

and-neck" race.<sup>12</sup> Because the window for ballot alterations or substitutions had closed at 5:00 p.m. on October 10, 2000, six days before his death, Missouri election law mandated that Mel Carnahan's name remain on the ballot.<sup>13</sup> If the deceased candidate won a majority of votes, this result would serve to create a vacancy in office.<sup>14</sup> Once vacancies exist, Missouri statutes authorize the governor to appoint successors to Missouri's United States Senate seats.<sup>15</sup>

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for attorney general. Deirdre Shesgreen, *Carnahan Says She Was Guided by Her Heart in Voting Against Ashcroft*, ST. LOUIS POST-DISPATCH, Feb. 2, 2001, at A1.

12. Frandsen, *supra* note 4; see also Terry Ganey, *Behind the Scenes Players Saw Only One Option for Senate: Jean Carnahan*, ST. LOUIS POST-DISPATCH, Dec. 31, 2000, at A1 (noting GOP polls claimed Ashcroft was leading the race by a ten percent margin prior to Mel Carnahan's death). But see Stephanie Simon, *Mo. Governor Feared Dead in Plane Crash*, L.A. TIMES, Oct. 17, 2000, at A18 (noting that polls taken shortly before Carnahan's death showed that he held a slight advantage).

13. See MO. ANN. STAT. § 115.379.1 (West Supp. 2001). Section 115.379.1, in conjunction with section 115.363.3, requires that the ballot be finalized by 5:00 p.m. on the fourth Tuesday before the election. See *id.*; *id.* § 115.363.3 (West Supp. 2001). Section 115.379.1 provides in part: "Whenever the only candidate of a party for nomination or election to an office at a primary election, general election or special election to fill a vacancy dies after the filing deadline and before the election, his name shall be printed on the primary, general or special election ballot." *Id.* § 115.379.1 (West Supp. 2001). When any candidate dies at or before 5:00 p.m. on the fourth Tuesday before the general election, section 115.363.3 provides for candidate substitution by a party nominating committee. See *id.* § 115.363.3(1) (West Supp. 2001); Secretary of State Rebecca McDowell Cook, Election Questions Resulting from Carnahan's Death 1 (Oct. 25, 2000) [hereinafter *Election Questions*], available at <http://mosl.sos.state.mo.us/newsrsl/nwslrsl.html> (on file with the North Carolina Law Review). The Missouri General Assembly thoroughly reviewed this statute in 1997 after United States Congressman Bill Emerson died while campaigning for reelection. *Id.* According to Rebecca Cook, then-Missouri Secretary of State, this amended law represents the legislature's attempt to find the proper balance between "ballot access and ballot finality." *Id.* Ironically, Governor Carnahan signed this amendment into law. See Laura Scott, *Missouri Election Changes; Some Problems Were Corrected, Another Looms*, KAN. CITY STAR (Kansas City, Mo.), July 7, 1997, at B4.

14. See MO. ANN. STAT. § 115.379.1 (West Supp. 2001). The statute provides in part: The election and canvass shall proceed, and, if a sufficient number of votes are cast for the deceased candidate to entitle the candidate to nomination or election had the candidate not died, a vacancy shall exist on the general election ballot or in the office to be filled in the manner provided by law.

*Id.* Missouri statutes are modeled after what is commonly referred to as the American Rule. See *infra* notes 29–32 and accompanying text (describing the American Rule with respect to deceased, disqualified, or ineligible candidates). Courts describe this rule as allowing voters the opportunity to vote against one candidate while simultaneously expressing their desire to have the position filled in the manner set forth by the state's law. See *Evans v. State Elections Bd.*, 804 P.2d 1125, 1129 (Okla. 1990); *Derringer v. Donovan*, 162 A. 439, 441 (Pa. 1932).

15. See MO. ANN. STAT. § 105.040 (West 1997). The text of section 105.040 gives the governor the power to fill such a vacancy: "[w]henever a vacancy in the office of senator of the United States from this state exists, the governor . . . shall appoint a person to fill such

Just over one week after Carnahan's death, Governor Roger Wilson announced that he intended to appoint Governor Carnahan's widow, Jean Carnahan, to a two-year term, lasting until Missouri's next general election in 2002.<sup>16</sup> With a week remaining before election day, Jean Carnahan announced that she would continue to "fight for his [her husband's] ideals" by agreeing to accept a Senate appointment if Mel Carnahan were elected posthumously.<sup>17</sup> To many observers' surprise,<sup>18</sup> the deceased candidate won.<sup>19</sup> Consistent with

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vacancy, who shall continue in office until a successor shall have been duly elected and qualified according to law." *Id.* Questions arose as to who would be entitled to make the appointment—the current governor serving the remainder of Mel Carnahan's term or the governor who would be elected to serve the next term. See *Election Questions*, *supra* note 13, at 4–5. Missouri's then-Secretary of State asserted that Governor Wilson was entitled to make the appointment, because the next governor's term would not commence until January 8, 2001. See *id.*; MO. ANN. STAT. § 26.015 (West 2001).

16. Frandsen, *supra* note 4. Governor Wilson, recently elevated from Lieutenant Governor as a result of Governor Carnahan's death, informed reporters that "[t]here is a responsibility in a democracy to let voters know what their choices are." *Excerpts from Gov. Wilson's Statement Tuesday About the U.S. Senate Race*, ST. LOUIS POST-DISPATCH, Oct. 25, 2000, at A12. Then-Missouri Secretary of State Rebecca Cook noted that Governor Wilson was entitled, but not obligated, to announce his intentions prior to the election provided that such an announcement is in the public's best interest. See *Election Questions*, *supra* note 13, at 5. Missouri law enables the governor's appointee to "continue in office until a successor shall have been duly elected and qualified according to law." MO. ANN. STAT. § 105.040 (West 1997).

17. William Claiborne, *Widow Says She'd Accept Senate Seat*, WASH. POST, Oct. 31, 2000, at A1. Prior to Mrs. Carnahan's announcement from the family farmhouse in Rolla, Missouri, supporters refused to abandon the possibility of unseating John Ashcroft. Instead, they distributed bumper stickers throughout the state that read: "Don't let the fire go out" and "I'm still with Mel" to encourage Missouri voters to mark their ballots for Carnahan. Neil A. Lewis, *The 2000 Campaign: The Missouri Senate Race; In Missouri, Campaign Flourishes After the Death of the Candidate*, N.Y. TIMES, Oct. 31, 2000, at A1.

18. See James Dao, *The 2000 Campaign: The Outlook; Senate Candidate's Death Hurts Democrats' Chances*, N.Y. TIMES, Oct. 18, 2000, at A21 (stating that Carnahan's death not only made it likely that Ashcroft would be elected but also hurt the Democrats' chance for control of the Senate); Fountain, *supra* note 4 (indicating that once Governor Carnahan died, both Democrats and Republicans believed the race was over); Lewis, *supra* note 17 (noting surprise that the deceased candidate was still holding on in the polls).

19. See Fountain, *supra* note 4 (noting that Governor Carnahan claimed fifty percent of the vote while Senator Ashcroft lagged behind with forty-eight percent). These results are not entirely unchallenged. On election day, a state judge, responding to St. Louis Democrats' complaints of long lines and heavy turnout, ordered officials to hold open the polls in St. Louis for an additional three hours. *Id.* Missouri law sets a mandatory 7:00 p.m. closing time, but permits those waiting in line at that time to cast their votes. MO. ANN. STAT. § 115.407 (West 1997). Within one hour, the Republicans won an appeal to close the heavily Democratic St. Louis polls. Adam Clymer & Eric Schmitt, *The 2000 Elections: The Battle for Control; G.O.P. in Position to Retain Senate*, N.Y. TIMES, Nov. 8, 2000, at A1. Republicans have suggested that the decision to keep the polls open amounted to fraud and may have impacted the election results. See Fountain, *supra* note 4.

Governor Wilson's well-publicized promise to Missouri voters, Jean Carnahan's appointment became official on January 3, 2001, when she was sworn into the seat won under her late husband's name.<sup>20</sup>

Critics raised a number of potential objections to the ballot procedures and subsequent appointment of Jean Carnahan.<sup>21</sup> First, a candidate's ability to remain on the ballot when the candidate no longer meets the constitutional requirements for the office raises federal constitutional issues.<sup>22</sup> Second, they suggested that a Republican-dominated Senate could prevent her from assuming her

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20. Associated Press, *Mrs. Carnahan Takes Her Seat in U.S. Senate*, POST-TRIBUNE (Jefferson City, Mo.), Jan. 4, 2001, at 1. The Senate makes the final decision on whether members meet its qualifications. See U.S. CONST. art. I, § 5, cl. 1. The United States Senate approved her seat despite its ultimate authority to reject an appointee. Becker et al., *supra* note 4.

21. See, e.g., Fountain, *supra* note 4 (noting Republican concern over the extended poll hours in St. Louis and the federal constitutionality of a dead person on the ballot); Walter Shapiro, *Carnahan Campaign Is About More Than Missouri*, USA TODAY, Nov. 1, 2000, at 8A (commenting on a potential challenge based on the deceased candidate's failure to meet the inhabitant requirement of the Constitution).

22. Article I, section 3, clause 3 of the United States Constitution defines the qualifications of a Senator: "[N]o Person shall be a Senator who shall not have attained to the Age of thirty years . . . and who shall not, *when elected*, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. III, § 3, cl. 3 (emphasis added). Republicans argued that a deceased candidate does not meet the age or inhabitant requirements of the Constitution. See Libby Quaid, *GOPs Consider Carnahan Challenge*, ASSOCIATED PRESS NEWSWIREs, Nov. 2, 2000, 2000 WL 29037074 [hereinafter Quaid, *GOPs Consider*] (on file with the North Carolina Law Review). This argument rests in the plain language of the section which requires that these qualifications be determined at election time. See U.S. CONST. art. III, § 3, cl. 3. The counter-argument asserts that the inhabitant and age requirements need only be satisfied when the candidate qualifies for the ballot. See generally P.H. Vartanian, Annotation, *Time As of Which Eligibility or Ineligibility to Office Is to Be Determined*, 88 A.L.R. 812, 813 (1934) (noting that jurisdictions making eligibility determinations at the time a candidate qualifies for the ballot are in the minority). Regardless of the law in Missouri, the U.S. Constitution's explicit mention of Senator qualifications at the time of election would control according to the Supremacy Clause. See U.S. CONST. art. VI, cl. 2; see also *State ex rel. Ryors v. Breuer*, 138 S.W. 515, 517 (Mo. 1911) (noting that although most courts construe the term "eligible" as used in a constitution or statute to mean "capacity to be chosen," implying that the qualification must exist when the candidate is elected, there are several decisions to the contrary). In direct response to Republicans' federal constitutional arguments, Yale University law professor and constitutional scholar Akhil Reed Amar denounced their position. See Quaid, *GOPs Consider*, *supra* ("Republicans are saying: 'You, the voters, only have one day in six years when you can actually make your choice, and here are your choices—Ashcroft or Ashcroft.'"). Although under a plain text reading the constitutional argument appears strongly stacked in the Republicans' favor, the Senate failed to assert its power to refuse to seat Jean Carnahan. See Brooks Jackson, *Republicans Could Block Carnahan's Widow if She Wins Senate Seat*, at <http://www.cnn.com/2000/ALLPOLITICS/stories/10/31/widows.seat/index.html> (Oct. 31, 2000) (on file with the North Carolina Law Review). An analysis of a potential federal constitutional challenge to the Missouri Senate election is beyond the scope of this Recent Development.

seat by asserting that the people of Missouri did not elect her.<sup>23</sup> Third, Republicans considered contesting the effect of the judge-ordered poll hour extension in the highly Democratic city of St. Louis.<sup>24</sup> Although the peculiar appointment procedure Missouri's Governor employed went unchallenged in the courts and the Senate, the precise timing of his exercise of his appointment power and the limited scope of Missouri election law warrant examination.<sup>25</sup>

Despite concerns about Mel Carnahan's posthumous election, Missouri's constitution and statutes support many of the formalities Governor Wilson followed.<sup>26</sup> As previously noted, state law required Carnahan's name to remain on the ballot after 5:00 p.m. on October 10, 2000.<sup>27</sup> Because Governor Carnahan died after that date, election officials could not replace his name on the ballot.<sup>28</sup>

With respect to tallying the votes, Missouri follows the American Rule, which deems votes cast for a deceased, disqualified, or ineligible candidate valid for determining the outcome of the election.<sup>29</sup> The American Rule's underlying rationale establishes that

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23. Jackson, *supra* note 22. According to one reporter, Republicans quickly abandoned their initial challenge to the legality of Wilson's announcement of Jean Carnahan as his appointee. Ganey, *supra* note 12. Whether they dropped this line of attack because they believed it unfounded, or in an effort to save Ashcroft's campaign is unclear.

24. See Fountain, *supra* note 4; *supra* note 19 and accompanying text.

25. See Fountain, *supra* note 4. One potential reason for the Republicans' failure to oppose Governor Wilson's appointment procedure aggressively is that Ashcroft's campaign could not afford to have its actions perceived as an attack on Carnahan's widow. See generally Ganey, *supra* note 12 (explaining that after his opponent's death, Ashcroft's campaign was effectively halted).

26. See MO. CONST. art. IV, § 4 (stating that the governor "shall fill all vacancies in public office"); MO. ANN. STAT. § 105.040 (West 1997) (providing that the governor shall appoint a successor to fill a vacancy in the office of Senator of the United States); *id.* § 115.379 (West Supp. 2001) (enabling a deceased candidate's name to remain on the ballot).

27. See MO. ANN. STAT. § 115.379 (West Supp. 2001). In the event that sufficient time remains to change the ballot, state statutes permit election officials to cover the previous candidate's name with pasters bearing the new candidate's name. See *id.* § 115.383 (West 1997).

28. See *id.* §§ 115.363, 379 (West Supp. 2001). In fact, retaining the name of the beloved, deceased Governor on the ticket may have been to the Democrats' advantage to ensure that people cast votes in his memory. See Ganey, *supra* note 12. Sympathy votes should not be underestimated. See Frandsen, *supra* note 4. One friend of Ashcroft suggested that prior to his death, Carnahan's disapproval rating stood at forty percent, yet after the plane crash this rating diminished to five percent. Ganey, *supra* note 12. Although it cannot be assumed that if Jean's name actually replaced Mel's name on the ballot the results would have been identical, one poll indicates that Jean would have still prevailed. See Becker et al., *supra* note 4.

29. See, e.g., *State ex rel. McKittrick v. Cameron*, 117 S.W.2d 1078, 1082 (Mo. 1938) (noting that the respondent, holding the next highest number of votes for election to the

considering these votes a nullity, and declaring the candidate who received only a minority of votes the winner, "is 'repugnant to the principle of majority rule, which is the cornerstone of orderly government.'"<sup>30</sup> Although these votes cannot be used to elect a deceased candidate, they serve as votes against the living candidate, and express the voters' desire to defeat that candidate.<sup>31</sup> If cast in sufficient numbers, the votes can create a vacancy in office.<sup>32</sup> The fact

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board of education, is not entitled to take office based on the winning candidate's disqualification); *Sheridan v. City of St. Louis*, 81 S.W. 1082, 1086 (Mo. 1904) (holding that when an ineligible candidate was elected to the House of Delegates, the House of Delegates has the authority to oust him from office but not to fill the vacancy with the candidate receiving the next highest vote); *State ex rel. Atty. Gen. v. Vail*, 1873 WL 7944, at \*11-12 (Mo. July 1873) (holding that the governor, although entrusted with the power of appointment, cannot disregard returns for the disqualified winner by issuing a commission for elective office to the second-place finisher). See generally P.V. Smith, Annotation, *Result of Election as Affected by Votes Cast for a Deceased or Disqualified Person*, 133 A.L.R. 319, 321 (1941) (discussing the American Rule's premise that when ineligible, dead, or disqualified candidates are on the ballot, the votes cast in their favor count to determine the result). The majority of states adhere to the American Rule. See *id.* at 320-33 (discussing the two contrasting rules that govern the result of an election where a disqualified, deceased, or otherwise ineligible candidate receives the majority or plurality of the votes needed to be elected to office). The alternative rule, the English Rule, provides, in its simplest form, that officials must not consider votes cast for an ineligible candidate when determining the winner of the election or the number of votes needed to assess pluralities and majorities. See *id.* at 324; see, e.g., *Bowring v. Dominguez*, 44 P.2d 299 (Cal. 1935) (holding that the petitioner was entitled to have his name printed on the ballot for judge of the municipal court when the primary election winner was ineligible); *State ex rel. Wolff v. Geurkind*, 109 P.2d 1094 (Mont. 1941) (holding that one who has died is no longer a person and therefore votes cast for the deceased are an absolute nullity).

30. *Evans v. State Elections Bd.*, 804 P.2d 1125, 1130-31 (Okla. 1990) (quoting *Derringer v. Donovan*, 162 A. 439, 441 (Pa. 1932)); see also *State ex rel. Herget v. Walsh*, 1879 WL 8071, at \*2 (Mo. App. Apr. 22, 1879) ("The majority are not obliged to fold their hands, nor are the minority entitled, because of the [candidate's] death, to prevail over the majority; yet this would be the result if the majority vote is not to be counted against the minority candidate."). States that adhere to the English Rule generally require voters to know that the candidate is ineligible. See Smith, *supra* note 29, at 324 (quoting *Regina v. Hiorns*, 7 Ad & El 960, 112 Eng. Reprint 732 (1838)) ("[N]otice of disqualification ought to be given; for, if that were not done, a party might be slipped in at the last moment, and be returned by a single vote on account of some objection to another candidate, not disclosed during the election."). But see *Evans*, 804 P.2d at 1130 (arguing that to consider votes cast for the decedent a nullity deprives the voters of any real choice after a candidate dies).

31. See *Sheridan*, 81 S.W. at 1085 ("It is not the accidental death of his opponent, but the votes of the electors, which should give the certificate to a candidate.").

32. See *Evans*, 804 P.2d at 1130. According to the English Rule, voters who cast their ballots in favor of a candidate knowing that the candidate fails to qualify for the ballot have discarded their votes. See Smith, *supra* note 29, at 329. The widely publicized death of a candidate would charge the voters with knowledge. See *State ex rel. Bancroft v. Frear*, 128 N.W. 1068, 1073-74 (Wis. 1910) (per curiam) (noting that the court could assume a plurality of voters had knowledge when the death of the candidate was published in



that most, if not all, Missouri voters knew that Mel Carnahan died in a plane crash should not impact the outcome of the election because under a strict construction of the American Rule votes cast for Carnahan counted as votes cast in opposition to Ashcroft and in favor of a vacancy in office. Following the letter of the American Rule, Missouri officials conformed to the law's requirements by keeping Carnahan's name on the ballot and creating a vacancy in office when Carnahan received the majority of votes.<sup>33</sup>

At first glance, the appointment procedure Governor Wilson followed also seems to comply with federal and state law.<sup>34</sup> When a member of the Senate dies, the United States Constitution provides that the vacancy should be filled by a temporary appointment, usually made by the governor, until the next federal election.<sup>35</sup> As directed by the Constitution, Governor Wilson relied on state law that permitted him to fill the vacancy by appointment until voters could elect a qualified successor.<sup>36</sup> Furthermore, the Missouri statutes' specific prohibitions extend only to physical changes to the ballot.<sup>37</sup> The ballot, both before Carnahan's death and after, consisted of only two candidates: Mel Carnahan and incumbent Senator John

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newspapers, telegrams, and letters, encouraging voters to vote for him in order to create a vacancy in office).

33. See MO. ANN. STAT. § 115.379 (West Supp. 2001); Smith, *supra* note 29, at 321.

34. See MO. CONST. art. IV, § 4 ("The governor *shall* fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified.") (emphasis added). *But see* Kevin McDermott, 7 *Other Political Widows Have Inherited U.S. Senate Careers: Three Currently Serve in House, Including One From Missouri*, ST. LOUIS POST-DISPATCH, Oct. 25, 2000, at A12 (noting that in most instances when a wife has been appointed to fill the remainder of her husband's term, the deceased was elected while alive). McDermott further points out that although on past occasions a candidate for the House of Representatives has died before winning the congressional seat, sufficient time normally remained to replace the decedent's name on the ballot with that of his widow. *See id.*

35. The Seventeenth Amendment to the Constitution states in part: "[w]hen vacancies happen in the representation of any State in the Senate . . . the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." U.S. CONST. amend. XVII. The procedure followed for succession in the House is different. *See* Quaid, *Political Ground*, *supra* note 6. When a House member dies, the Constitution calls for a special election to fill the vacancy. *See* U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.").

36. See MO. ANN. STAT. § 105.040 (West 1997).

37. *See id.* § 115.379.1 (West Supp. 2001) (requiring the name of the deceased to remain on the ballot). This same statute requires the ballot vacancy to be filled following the election, if the deceased candidate prevails. *See id.*

Ashcroft.<sup>38</sup> Therefore, a plausible argument exists that Wilson's actions not only fell within his constitutional and statutory appointment power,<sup>39</sup> but also that Wilson obeyed the laws regarding ballot finality. Moreover, Wilson's supporters' assertion that Missouri voters deserve to know for whom they are voting is compelling.<sup>40</sup>

Beyond the Governor's actions' apparent consistency with federal and state procedure, history and tradition also support them.<sup>41</sup> Sometimes referred to as the "widow's mandate," wives have succeeded their deceased husbands in elected positions throughout

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38. See Steve Kraske, *Ashcroft, Carnahan Lead in Senate Races*, KAN. CITY STAR (Kansas City, Mo.), Aug. 9, 2000, at B1.

39. See *Democrats Tap Carnahan's Widow in Missouri Senate Race*, at <http://www.cnn.com/2000/ALLPOLITICS/stories/10/24/missouri.senate/index.html> (Oct. 24, 2000) [hereinafter *Democrats Tap*] (on file with the North Carolina Law Review). If the legislature chose this arbitrary cutoff date to prevent the confusion that would flow from a hasty selection of a replacement candidate and last minute ballot alterations, the Governor might use this intent to defend his actions. He could reconcile his announcement of an appointee two weeks prior to the election by asserting the value of his compliance with the statutory formalities. See generally *Jenness v. Fortson*, 403 U.S. 431, 441 (1971) (holding that the Georgia laws requiring certain nonparty nominating petitions to contain signatures from five percent of the eligible voters are constitutional on free speech and equal protection grounds).

40. Governor Wilson in fact made this exact assertion. *Democrats Tap*, *supra* note 39. The concept that voters have a right to know for whom they are voting has been raised previously in the context of fraud. See *Moseley-Braun: A Name That Won't Be On This Ballot*, CHI. TRIB., Jan. 20, 1999, at N3. The Chicago Election Board sought to remove a young alderman candidate from the ballot who legally changed her name to Carol Moseley-Braun, allegedly in order to benefit from the real Carol Moseley-Braun's reputation. See *id.* The Election Board was able to remove her name because she had failed to register as a voter under her new name. See *id.* Upon exclusion from the ballot, the imitator organized a write-in campaign. See Ellen Warren & Teresa Wiltz, *New Moseley-Braun Finds it Takes More Than Just a Big Name*, CHI. TRIB., Feb. 26, 1999, at N2. Although she received only one write-in vote, see *id.*, she did mislead some people regarding her true identity. See Richard Roeper, *Temporary Celebrity Gets Ridiculously Easy*, CHI. SUN-TIMES, Feb. 17, 1999, at 11.

41. McDermott, *supra* note 34 (listing the widows that served in the Senate: (1) Hattie Wyatt Caraway from 1931-1945; (2) Rose McConnell Long from 1936-1937; (3) Vera Cahalan Bushfield in 1948; (4) Maurine Brown Neuberger from 1960-1967; (5) Maryon Pittman Allen from 1978-1979; (6) Muriel Buck Humphrey from 1978-1979; and (7) Jocelyn Birch Burdick in 1992); see also IRWIN N. GERTZOG, CONGRESSIONAL WOMEN: THEIR RECRUITMENT, INTEGRATION, AND BEHAVIOR 19-22 (1995) (noting that the incidence of widow succession is about one in seven); cf. Mark Schlinkmann, *In This Contest, You Get to Vote Twice; That's Just One Confusing Aspect of the Race to Succeed the Late U.S. Rep. Bill Emerson*, ST. LOUIS POST-DISPATCH, Nov. 3, 1996, at B1 (noting that after her husband's death, Jo Ann Emerson ran for Congress in her own name as an independent candidate).

American history.<sup>42</sup> Jean Carnahan, for example, is the eighth woman to succeed a deceased spouse in the Senate.<sup>43</sup>

Although provisions in the Missouri Constitution and statutes authorize the governor to make appointments to fill Senate vacancies, both are silent regarding the appropriate time to announce such

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42. McDermott, *supra* note 34 (noting that widows have replaced their husbands often enough to constitute a bona fide tradition). The statistics are as follows: seven of the twenty-six female senators in American history were widows, while thirty-seven of 165 female representatives in the House secured their seats as widows of former congressmen. *Id.* Furthermore, widows who agreed to continue their husbands' legacies in the House won eighty-four percent of the time from 1916–1993 as compared with other non-incumbent female candidates, who prevailed only fourteen percent of the time. GERTZOG, *supra* note 41, at 20; McDermott, *supra* note 34. Gertzog notes, however, that comparing these two groups is of limited utility because a greater number of widows likely had the advantage of running in special elections, as opposed to biennial elections, in districts where their name was well known. *See* GERTZOG, *supra* note 41, at 20.

Notably, Maria McHugh might follow this trend in the Westchester County Legislature in New York. *See* Greg Wilson, *Wife Seeks Ballot Slot of Pol Hubby Who Died at WTC*, DAILY NEWS (New York, NY), Oct. 19, 2001, at 39. Mrs. McHugh's husband Michael was running for a county legislative seat when he died in the attacks on the World Trade Center. *Id.* She has sued to have her name placed on the ballot. *Id.* The issue in Mrs. McHugh's case is not whether a deceased person can remain on the ballot, but whether she submitted her name within the time permitted by New York election law. *See id.* Mrs. McHugh withdrew her husband's name from the ballot one month after the attacks. *Id.* Five days later, she informed the election officials that she wished to replace him. *Id.* The Elections Commissioner, however, denied her request for failure to submit her name within ten days of her husband's death, in accordance with state law. *Id.* Mrs. McHugh will assert as her primary issue that the date of her husband's death is uncertain. *Id.*

43. McDermott, *supra* note 34. This phenomenon is gender specific; a widower has never succeeded to his wife's political seat. *Id.* Widow succession has occurred even more frequently in the House, where three widows who have replaced their deceased husbands currently serve. Lewis, *supra* note 17. Congressman Sonny Bono was succeeded by his wife, Mary, who initially won a special election and subsequently won a second and third term in the general elections of 1998 and 2000. *See id.* Two additional widows of deceased Congressmen currently serve in the House: Lois Capps, a Democrat from California, whose husband, Walter Capps, died of a sudden heart attack ten months into his term, *see* Lorraine Adams, *Keepers of the Flame*, GOOD HOUSEKEEPING, Nov. 1, 1998, at 136, 137–38, and Jo Ann Emerson, a Republican from Missouri, whose husband, Bill Emerson, died of cancer just five months before the 1996 election, *see* Jo Mannies, *Emerson's Wife Considers Run for Husband's Seat in Congress; Missouri Republican Leaders Pushing Her Candidacy*, ST. LOUIS POST-DISPATCH, July 4, 1996, at B1; *see also* Quaid, *Political Ground*, *supra* note 6 (expressing Representative Jo Ann Emerson's view that a significant difference exists between the succession of Jean Carnahan after Governor Carnahan's death and her own election after the death of her husband: Mel Carnahan's name remained on the ballot, whereas Jo Ann Emerson ran under her own name). Likewise, these two widows won special elections to succeed their husbands and subsequently were reelected in 1998 and 2000. *Id.* However, significant procedural differences distinguish these House widow successors and a Senate widow successor; when a House member dies a special election is called, while gubernatorial appointments generally fill Senate vacancies. *See id.*

appointments.<sup>44</sup> In the absence of statutory language to the contrary, the Governor apparently assumed that he had unrestricted authority to name his preferred appointee publicly at any time before or after the election.<sup>45</sup>

Interestingly, the Missouri legislature scrutinized and substantially revised the statutes setting forth the deadline for ballot changes as recently as 1997.<sup>46</sup> The legislature, faced with the death of incumbent Congressman Bill Emerson during his campaign for reelection, carefully considered how a candidate's death impacts the ballot.<sup>47</sup> The reformed statutory design balances ballot finality and ballot flexibility by selecting a date close to the election when the ballot is fixed.<sup>48</sup> All the benefits of finality, however, entail the inherent cost of possibly retaining an ineligible or deceased candidate's name in order to provide voters with a choice between a living candidate and a vacancy. To complicate matters further, Missouri lawmakers failed to provide any procedural guidelines for announcing successors to replace Senate candidates who die in the interim between ballot finalization and the election. This lack of legislative guidance leaves an uncontrolled time period when executives responsible for filling vacancies have no proper protocol for timing appointment announcements.<sup>49</sup>

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44. See MO. CONST. art. IV, § 4; MO. ANN. STAT. § 105.040 (West 1997).

45. See *supra* note 26 and accompanying text.

46. See *supra* note 13 and accompanying text.

47. See *Election Questions*, *supra* note 13, at 2-5 (noting then-Secretary of State Rebecca Cook's understanding of the legislature's intended purposes); Scott, *supra* note 13 (noting that the new law calls for a final ballot four weeks before the election, whereas the old version allowed for changes as late as the Friday immediately preceding the election). Before the 1997 amendments, the statute's text provided for the deceased candidate's removal from the ballot if he died before "9:00 a.m. on the Friday immediately prior to the election." MO. ANN. STAT. § 115.379 (West 1997), *amended by* MO. ANN. STAT. § 115.379 (West Supp. 2001).

48. See *Election Questions*, *supra* note 13, at 1; Scott, *supra* note 13.

49. The legislature's failure to define proper protocol may have resulted from its inexperience with Senators dying shortly before the election. In fact, Mel Carnahan was America's first deceased person to be elected to the Senate. Quaid, *Political Ground*, *supra* note 6 (quoting a Senate historian). One Senator, Key Pittman of Nevada, narrowly missed this distinction when he died immediately after winning reelection. *Id.* On at least two occasions, however, voters elected incumbent House members who died weeks before their reelection: Representatives Clem Miller, a Democrat from California in 1962, and Nick Begich, a Democrat from Alaska in 1972. *Id.* Quaid further comments that according to Irwin Gertzog, a political scientist at Rutgers University, in the past, only spouses of incumbent Senators who died during campaigns have succeeded their husbands. *Id.* The phenomenon had not occurred with respect to challengers' spouses before Jean Carnahan. *Id.*

Even though Governor Wilson did not violate any existing laws when he announced Jean Carnahan's appointment before the election, indeed before a vacancy existed in the office, his announcement arguably exceeded the bounds of his appointment power and infringed on the integrity of Missouri's election process.<sup>50</sup> Allowing the Governor wide latitude in the timing of appointment announcements bypasses laws requiring ballot finality by essentially permitting him to "remove" Mel Carnahan from the ballot and "replace" the ballot entry with Carnahan's widow.<sup>51</sup> Permitting the Governor's announcement also violated Missouri ballot access laws that protect the integrity of the candidate qualification process.<sup>52</sup> Even though Missouri followed accepted state procedures for retaining a deceased candidate's name on the ballot, and counting the votes to establish a vacancy, Governor Wilson's actions contravened the spirit of Missouri's election laws by obstructing the political parties' right to nominate their own candidates.<sup>53</sup> Furthermore, under the United States Constitution, no vacancy existed in the Senate until Carnahan's victory and incumbent Senator John Ashcroft's term expired on January 3, 2001,<sup>54</sup> so arguably any earlier appointment was a deliberate attempt by the Governor to expand his own appointment power.<sup>55</sup> This overzealous appointment process necessarily infringes on the opposing candidate's right to a fair election. By inserting his

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50. Although Republicans initially challenged a number of the Governor's actions, they failed to address his preelection announcement. *See supra* notes 23–25 and accompanying text (suggesting that Republicans failed to challenge the integrity of the preelection appointment sufficiently); *see, e.g.*, Scott Charton, *Ashcroft Says Challenge of Senate Loss Could 'Bog the State Down'—So He Didn't*, ASSOCIATED PRESS NEWSWIRE, Nov. 30, 2000, LEXIS, Nexis Academic Universe (quoting Ashcroft: "[T]he outpouring of effusive support which changed the polls around and resulted in the election that supported the deceased [G]overnor—[is] another good value that I find in the culture of Missouri.") (on file with the North Carolina Law Review). Not only did Ashcroft refrain from challenging this appointment, he encouraged the Republican Party to follow his lead. *See* Fountain, *supra* note 4. Furthermore, Missouri's adherence to the American Rule prevented Republicans from challenging either Carnahan's name remaining on the ballot or the policy of counting votes for him to determine the election outcome. *See supra* notes 29–33 and accompanying text.

51. *See* MO. ANN. STAT. § 115.363.3(1) (West Supp. 2001) (providing that a party nominating committee could select a candidate for the general election ballot if the person nominated as the party candidate dies before 5:00 p.m. on the fourth Tuesday before the general election).

52. *See id.* §§ 115.343, .347, .353 (West 1997).

53. *See infra* notes 65–69 and accompanying text.

54. U.S. CONST. amend. XX, § 1, 2 ("[T]he terms of Senators and Representatives [shall end] at noon on the 3rd day of January . . . and the terms of their successors shall begin.").

55. *See infra* notes 72–75 and accompanying text.

self-enlarged appointment power directly into a traditionally democratic process, the Governor's actions were inconsistent with the American Rule's underlying purpose.<sup>56</sup>

Among these difficulties, the ballot's unalterable nature coupled with the premature announcement raises the issue of whether the Governor's conduct constituted a ballot alteration.<sup>57</sup> On election day 2000, the voters of Missouri knew they were not voting for Mel Carnahan.<sup>58</sup> Indeed, the vast majority of the voters knew that their votes were being tallied for Jean Carnahan, even though her name did not appear on the ballot.<sup>59</sup> Governor Wilson's premature announcement served as a vehicle for effectively changing the candidate on the ballot after the time for such changes had passed.<sup>60</sup>

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56. Missouri statutes, which follow the American Rule, provide that upon the death or ineligibility of a candidate on the general election ballot, the candidate shall remain on the ballot, and if enough votes are cast to entitle such candidate to office, a vacancy is thereby created. See MO. ANN. STAT. § 115.379.1 (West Supp. 2001). By implication, a vacancy can only exist after a candidate has won an election, and the victor is unable to assume the seat. See *id.*; see generally *State ex rel. Van Buskirk v. Boecker*, 1874 WL 8195, at \*3 (Mo. 1874) (refusing to acknowledge a Clerk of Court appointment that was made fifty days before the present Clerk of Court's resignation was to take effect). Furthermore, the text of the Constitution providing for the filling of vacancies indicates that this power originates with the death of a *current* representative in the Senate. See U.S. CONST. amend. XVII (emphasis added).

57. See MO. ANN. STAT. § 115.379.1 (West Supp. 2001).

58. Mel Carnahan's death was widely publicized throughout the state and nation. See, e.g., Balz & Allen, *supra* note 3; Jo Mannies, *Mourners Show Their Sadness in Gathering at Forest Park*, ST. LOUIS POST-DISPATCH, Oct. 18, 2000, at A1; Simon, *supra* note 12; Michael Tackett, *Governor of Missouri Missing After Plane Crash*, CHI. TRIB., Oct. 17, 2000, § 1, at 3. Furthermore, the Governor's decision to appoint his widow and her public acceptance before the election were extremely newsworthy items. See, e.g., Frandsen, *supra* note 4; Lewis, *supra* note 17. Commentators suggested that voter sympathy and commemoration combined to increase Mel Carnahan's popularity in the weeks immediately following his death. See Ganey, *supra* note 12. One commentator noted that women as a group voted for Mel because they knew Jean would replace him in office. See *id.* The aforementioned publicity implies voter knowledge of his death. But see Evans v. State Elections Bd., 804 P.2d 1125, 1129 (Okla. 1990) (holding that votes cast for the deceased candidate, with knowledge of his death, were not votes for the deceased but votes against the living opponent). Evans supports the contention that even though the voters were knowledgeable of Carnahan's death, they were not voting for him but were using their votes solely to defeat Ashcroft. See *id.*

59. After Jean's public acceptance, the voters rightfully assumed that both she and Governor Wilson would follow through on their promises. See Lewis, *supra* note 17.

60. See Scott, *supra* note 13 (noting the legislature's attempt to remedy an ineffective procedure in 1997). Even if the time had not elapsed for ballot alterations, state procedure does not allow the governor to determine the substitute candidates listed on the ballot. See MO. ANN. STAT. § 115.363.3(1) (West Supp. 2001) (providing for a political party nominating committee, not the governor, to name a candidate to the general election ballot when a candidate dies before 5:00 p.m. on the fourth Tuesday before the election).

Furthermore, by virtually appointing a new candidate to the ballot, Governor Wilson enabled Jean Carnahan to circumvent the entire ballot qualification process. Missouri statutes establish detailed procedures a potential candidate must follow in order to qualify for candidacy in the general election.<sup>61</sup> Jean Carnahan avoided all safeguards designed to guarantee that ballots contain candidates with popular support.<sup>62</sup> Although in this case, Jean Carnahan apparently would have garnered the support necessary to meet the ballot requirements, the legislature designed the statutory process as the sole means by which candidates could be qualified as possessing sufficient support for inclusion on the ballot—not gubernatorial discretion, nor public opinion polls.<sup>63</sup> By ignoring the ballot access laws and essentially substituting a new candidate on the

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61. See MO. ANN. STAT. §§ 115.343, .347, .353 (West 1997). Under Missouri law, in order to be considered a major party candidate on the general election ballot for United States Senator, a potential candidate must: (1) secure a nomination at the primary election by receiving the greatest number of votes; and (2) file a signed and sworn declaration of candidacy with the secretary of state. See *id.* §§ 115.343, .347, .353 (West 1997). Alternatively, write-in candidates can circumvent the primary election nomination process by petitioning for nomination after obtaining signatures from ten thousand voters registered in the state. See *id.* § 115.321 (West 1997). With the assistance of Governor Wilson, Jean effectively skipped both of the hurdles to ballot access and proceeded to assume the seat won under her husband's name.

62. See, e.g., *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (noting a substantial state interest in “requiring some preliminary showing of a significant modicum of support [for a candidate] . . . the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election”); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (“Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters.”). In *Williams*, the court balanced the State's interest in controlling ballot qualifications against individuals' right to associate to advance their political beliefs and qualified voters' right to cast their votes effectively. See *id.* at 30. Although Jean's success may indicate that she indeed had Missourians' popular support, see McDermott, *supra* note 34, this support likely rested on voters' assumptions that she would reflect her husband's values. Voters might think they are getting an extension of the decedent by electing his widow, yet others believe this assumption is mistaken because it suggests that a husband and wife will agree on all issues. *Id.* Furthermore, sympathy plays an important role in the election of newly widowed candidates, as evidenced by their relatively short-lived victories. See Adams, *supra* note 43, at 137 (noting that almost two-thirds of the widows in the House that sought reelection lost).

63. See Fountain, *supra* note 4 (quoting Aschroft: “I believe the will of the people has been expressed with compassion. The people should be respected and heard.”). The legislature determined in 1997 that ballot finality was necessary to avoid the timing difficulties inherent in the previous statutory scheme. See MO. ANN. STAT. § 115.379 (West Supp. 2001). The popular will is expressed not only by voting, but also by the actions of elected members of the legislature. When the legislature determined that ballot finality was essential, this decision, too, reflects the popular sentiment.

ballot, Governor Wilson ran afoul of the Missouri law that protects the finality of the ballot.<sup>64</sup>

Under the United States Constitution and Missouri statutes, the governor's executive appointment power only should come to fruition when a vacancy exists in the Senate, not on the ballot.<sup>65</sup> Missouri law grants political parties control over the candidates listed under their names.<sup>66</sup> Although Governor Wilson may have asserted that he was simply promising to appoint Jean *if* Mel Carnahan won the election,<sup>67</sup> this argument is suspect because his pre-election announcement evinces a motivation to impact the election results as well.<sup>68</sup> Under these circumstances, the Governor's decision to announce Carnahan's

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64. See MO. ANN. STAT. § 115.379 (West Supp. 2001).

65. See *id.* § 105.040 (West 1997). If the legislature wanted to give the governor this authority, it could have passed a statute providing that the governor fill vacancies on the ballot by publication after the time period for ballot alterations had closed; instead, the legislature left the handling of ballot alterations to the political party while maintaining a final date for any changes. See MO. ANN. STAT. §§ 115.363–377 (West 1997 & Supp. 2001). Cf. WA. REV. CODE ANN. § 29.18.160 (West 1993) (allowing the state central committee or a comparable governing body of a political party to fill a vacancy at any time up to and including the day prior to the election).

66. See *supra* note 60 and accompanying text (outlining a party nominating committee's role in substituting names on the ballot); see also MO. ANN. STAT. § 115.307 (West 1997) (dictating that political parties and groups of voters may nominate candidates).

67. One question arising from this assertion relates to its enforceability. See *infra* note 82 and accompanying text. If no remedy exists for a governor's failure to keep a promise, the voters' intentions are destroyed and their only recourse—failing to reelect the governor or the candidate—is delayed until the next election. See generally ISSACHAROFF, KARLAN & PILDES, *supra* note 1, at 2 (concluding that “if the ‘wrong’ candidate is declared the winner, the voters can certainly cure the problem by voting her out of office the next time around”). The Senate's ability to refuse to seat the appointee provides another potential remedy for the Governor's abuse of power. See generally *supra* note 20 (noting the Senate control over whether members meet its qualifications).

68. Missouri presented an opportunity for the Democrats to regain a majority in the Republican-controlled Senate. The Democrats anticipated that they could recapture anywhere from two to five Senate seats with the battles in Missouri, Delaware, Michigan, Minnesota, Montana, and Washington. Dao, *supra* note 18. Because the Republicans had a fifty-four to forty-six seat advantage over the Democrats, the race in each state was essential to the Democrats' effort to alter the Senate power structure. See *id.*; Lewis, *supra* note 17. After Governor Carnahan's death, Democrats and political analysts believed the chance for a change in control of the Senate had diminished considerably. See *id.*

On an even more extreme level, commentators expressed concern that Carnahan's death would affect registered Democrats' turnout on election day, impacting Party candidates as a whole, including Al Gore. See *id.* These political circumstances might have motivated Governor Wilson to utilize his appointment power to sway the election results. See, e.g., Becker et al., *supra* note 4 (asserting that a New York Times poll indicating that Jean Carnahan would have fared just as well under her own name provides fuel for the conjecture that the voters utilized the information that she would be his successor when voting for Mel Carnahan).



successor before Carnahan won the Senate seat was a "virtual" alteration in the ballot, which impeded the Democratic Party's ability to control its own ballot.<sup>69</sup>

Further issues arise from the Governor's decision to announce Jean Carnahan as Mel Carnahan's successor prematurely. The legislature did not intend for the governor's appointment power to impact election results by controlling the candidates.<sup>70</sup> In keeping with this premise, the governor may appoint only when a vacancy exists *in office*.<sup>71</sup> If Missouri voters failed to elect Mel Carnahan, then the Governor's appointment power never would have arisen.<sup>72</sup> By presenting Carnahan's widow as the successor shortly after Mel's death, the Governor single-handedly changed the tide of the election, which in turn precipitated his appointment power.<sup>73</sup> In effect, Governor Wilson took pieces of the election process and pieces of the appointment process and shrewdly strung them together. He neglected the notion that the seat should be filled by either a vote of the people or a gubernatorial appointment, not some combination of

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69. See MO. ANN. STAT. §§ 115.379; .363–377 (West 1997 & Supp. 2001). Although in this instance the Democrats were unable to nominate their own candidate due to the finalized ballot and may have been pleased with the Governor's choice, this fact does not alter the reality that allowing the Governor unrestrained appointment power has the potential to contravene the interests of political parties.

70. The Missouri statutes contain no provision authorizing the governor to alter the candidates for election. Rather, such power rests exclusively with the political parties. With respect to the office of United States Senator, a party nominating committee can select a new candidate for the general election ballot if that party's candidate dies before the ballot is finalized. See MO. ANN. STAT. § 115.363.3(1) (West Supp. 2001). Once the ballot is finalized, alterations must cease. See *id.* State law specifically authorizes the governor to make appointments only when election results are tallied. See *id.* § 105.040 (West 1997).

71. See MO. ANN. STAT. § 105.040 (West 1997) (stating that "[w]henver a vacancy in the office of senator . . . exists, the governor . . . shall appoint" a replacement); see also *State ex rel. Buskirk v. Boecker*, 1874 WL 8195, at \*3 (Mo. 1874) ("There is no technical nor peculiar meaning to the word 'vacant' as used in the Constitution. It means empty, unoccupied, as applied to an office without an incumbent.").

72. See MO. ANN. STAT. § 105.040 (West 1997).

73. See Lewis, *supra* note 17 (noting that before Governor Carnahan's death, Senator Ashcroft generally led in the polls). When news of the accident spread, most analysts, Republicans and Democrats alike, conceded the election to Ashcroft. See Dao, *supra* note 18; Lewis, *supra* note 17. Once Governor Wilson announced Jean Carnahan as the successor, a significant change emerged in the polls. See Lewis, *supra* note 17 (noting that after Carnahan's death, polls showed the competitors in a tied race, but after voters learned that Jean Carnahan would serve in her husband's stead the margin in her favor increased by five points). The fact that more votes were cast in Missouri for the Senate race than were cast for the offices of President or governor provides further evidence that the Governor's announcement influenced the election results. See Ganey, *supra* note 12.

the two.<sup>74</sup> In sum, the impact of his announcement cannot be ignored—it created an early opportunity to exercise his executive appointment power before the law entitled him.<sup>75</sup>

Governor Wilson's aggrandizement of his appointment power not only usurped the legislature's control over the ballot, but also compromised John Ashcroft's right to a fair election.<sup>76</sup> Carnahan's death left Ashcroft with a number of difficult campaign choices: whether he should continue campaigning, how he should address the sympathy vote, and how to handle his new opponent.<sup>77</sup> Because Ashcroft held the contested seat, Carnahan's death did not cause a vacancy in office until, at the very earliest, Carnahan beat Ashcroft.<sup>78</sup> By announcing that he would appoint Jean Carnahan if Ashcroft lost to her deceased husband, Governor Wilson created a losing campaign situation for Ashcroft.<sup>79</sup>

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74. Section 115.363 gives the political parties control over the ballot until 5:00 p.m. on the fourth Tuesday before the election, MO. ANN. STAT. § 115.363 (West Supp. 2001), whereas the governor has control to fill vacancies in Senate offices. *Id.* § 105.040 (West 1997).

75. See Dao, *supra* note 18 (noting the consequences Carnahan's death would have on this swing state's Senate race).

76. One political scientist stated it best: "The short, tough bumper sticker could be: 'Widows Win!' How do you run against them?" McDermott, *supra* note 34 (quoting Washington University political scientist Jim Davis).

77. During the week immediately after Governor Carnahan's death, Ashcroft suspended his campaign. See Ganey, *supra* note 12. Former United States Senator John Danforth described a local newspaper's frontpage coverage of Ashcroft's return to the campaign as "trash[ing] [Ashcroft] . . . for daring to be a candidate." *Id.* With respect to sympathy and commemoration, one commentator suggested: "[Jean's] standing in for her husband could be as poignant and powerful as any political image ever shown, and it has to leave Ashcroft wondering how to respond." Scott Charton, *After Week of Mourning, New Governor Discussing Missouri Senate Race*, ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 24, 2000, LEXIS, Nexis Academic Universe (on file with the North Carolina Law Review). Ashcroft himself recognized that his hands were tied. See Ganey, *supra* note 12. He had the undesirable choice of campaigning against a dead man's values or campaigning against the deceased's widow. See *id.*

78. Although the office would not have been vacant under the Constitution until Senator Ashcroft stepped down in early January, announcing the appointee after the election but prior to January 3, 2001, would not have been objectionable because it would have avoided the inherent ballot access and excessive executive power concerns stemming from a pre-election appointment. See U.S. CONST. art. IV, §§ 1, 2.

79. See William Claiborne, *Carnahan Apparent Winner in Missouri*, WASH. POST, Nov. 8, 2000, at A37 (noting that Carnahan's death likely had a detrimental effect on Ashcroft's campaign). Not only is the remaining candidate faced with a newly widowed opponent who garners the sympathy vote, but he must also handle this new opponent during the final stages of the election campaign. See Ganey, *supra* note 12; see also Shapiro, *supra* note 21 (quoting a political commentator: "John Ashcroft is in a political straitjacket. He's running against three candidates: the memory of Mel Carnahan, his widow and the media").

Moreover, allowing the Governor this unchecked ability to announce appointments before election results create a vacancy presents fundamental problems for compliance with the policy underlying the American Rule.<sup>80</sup> Voting with knowledge of the deceased candidate's replacement does not equate with voting for the deceased candidate in an effort to defeat the live opponent and create a vacancy.<sup>81</sup> Although voters were marking their ballots for Mel Carnahan, they knew they were truly casting votes for his widow.<sup>82</sup> The main distinction, however, is that the artificially manufactured appointment power undermines the rationale on which the American Rule rests—that voters prefer anyone to the living opposition.<sup>83</sup> Because of the Governor's actions, Missouri voters did not encounter the inherent risk associated with voting for a dead candidate.<sup>84</sup> Instead of casting their votes for some unknown identity later chosen

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80. See *McKittrick v. Cameron*, 117 S.W.2d 1078, 1082 (Mo. 1938); *Sheridan v. City of St. Louis*, 81 S.W. 1082, 1086 (Mo. 1904); *State ex rel. Atty. Gen. v. Vail*, 1873 WL 7944, at \*11 (Mo. July 1873).

81. Missouri followed the American Rule in designing its statutes for situations when ballot candidates die before the election. See MO. ANN. STAT. §§ 115.363–379 (West 1997 & Supp. 2001). Under this rule, a vacancy is established when votes are cast for the deceased—a new candidate is not part of the equation. See *supra* note 29 and accompanying text; see also *Evans v. State Elections Bd.*, 804 P.2d 1125, 1129 (Okla. 1990) (suggesting that voters who voted for a deceased candidate were truly casting their votes against the live candidate, not for the creation of a vacancy in the office).

82. See *supra* note 58 and accompanying text (noting that Jean Carnahan's pre-appointment acceptance received wide publicity). Although the Governor delivered on his promise, the voters could not be absolutely certain that Jean would succeed to her husband's seat if their votes were cast for him. A change in circumstances could have altered the actual appointment: Jean Carnahan could have changed her mind or Governor Wilson might have used Jean as a ploy only to slip in a different candidate at the time of appointment. One might argue that the political process protects against this kind of behavior through the election process, namely the people's failure to reelect the governor in the next term. See ISSACHAROFF, KARLAN & PILDES, *supra* note 1, at 2. This election process might not be a sufficient check if, as in this case, the Governor had no intention of running again. See Paul Sloca, *Maxwell Sworn in as Lieutenant Governor*, ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 15, 2000, LEXIS, Nexis Academic Universe (on file with the North Carolina Law Review). Furthermore, this process is entirely unfair to the adverse political party. See Ganey, *supra* note 12 (quoting Ashcroft as saying, "I don't know who my opponent is, or if I have an opponent"); cf. Mannies, *supra* note 43 (discussing Jo Ann Emerson's intention to run in her late husband's stead and state Republican leaders' beliefs that name recognition and her husband's popularity make her the strongest candidate); Quaid, *Political Ground*, *supra* note 6 (explaining that widows often enjoy success in elections).

83. See *supra* note 29 and accompanying text.

84. See generally Smith, *supra* note 29, at 333 (noting that when voters with knowledge choose a deceased candidate, they are truly voting to establish a vacancy in office to be filled as the law prescribes). Democrats were concerned that they could not convince Missouri voters to vote for a dead man. See Dao, *supra* note 18; see also Fountain, *supra* note 4 (referring to Ashcroft's opponents: both Mel and Jean Carnahan).

by the Governor, the voters were able to cast their votes effectively for Jean Carnahan.<sup>85</sup> Hence, the voters faced a different choice than the American Rule predicts. They were not obliged to choose between the incumbent Ashcroft and an unknown candidate to be announced after the election. Instead they had new options, Ashcroft or Jean Carnahan.<sup>86</sup>

This analysis demonstrates that the Missouri legislature overlooked a number of potential difficulties when it evaluated the election laws in 1997.<sup>87</sup> The legislature provided ample recourse for instances when a dead, disqualified, or ineligible candidate surfaced before the ballot was finalized.<sup>88</sup> Yet it failed to announce a protocol for the interim between ballot finality and a true vacancy in office.<sup>89</sup> Although the time to contest Jean Carnahan's appointment has passed<sup>90</sup> the legislature should nevertheless provide guidelines to prevent these occurrences from marring future elections.

Depending on the authority the legislature wishes to vest in the governor, two potential options exist. First, the legislature can expand the governor's authority by providing that office with the power to fill ballot vacancies.<sup>91</sup> By inserting an expansive appointment provision within the Missouri Statutes, the legislature

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85. See generally Dao, *supra* note 18 (noting the Democrats' pessimism that they could encourage voters to vote for Mel Carnahan on the grounds that some other Democrat would be appointed).

86. See Fountain, *supra* note 4 (commenting that the incumbent Senator Ashcroft was running against both a dead man and his widow); see also *supra* notes 29-32 (discussing the foundation of the American Rule).

87. See generally *Election Questions*, *supra* note 13, at 2-3 (noting the legislature's evaluation of the law to provide better solutions for the situation when a deceased candidate dies before the election).

88. See MO. ANN. STAT. § 115.363.3 (West Supp. 2001) (providing the nominating committee's ability to alter the ballot before 5:00 p.m. on the fourth Tuesday before the election).

89. See *supra* note 74 (identifying the enacted statutes' failure to address the entire time period).

90. See MO. ANN. STAT. § 115.526 (West 1997) (noting that any candidate in a general election may challenge the candidacy or qualifications of another candidate not later than five days after the latest date for certification or if the disqualifying event occurs after this deadline, then no later than five days after such event).

91. The legislature could implement this change in one of two existing statutes. It might expand section 105.040, which provides the governor with the authority to fill vacancies in the office of Senator, to include filling Senate vacancies on the ballot in the four weeks preceding the election. See MO. ANN. STAT. § 105.040 (West 1997). Alternatively, the legislature may choose to add a section to those statutes governing candidate substitutions (sections 115.363 through 115.377), providing that between the period of ballot finality and the completion of the election, the governor is vested with the power of announcing his intended appointee. See *id.* §§ 115.363-.377 (West 1997 & Supp. 2001).

could easily enable the governor to deal legitimately with election irregularities of this nature.<sup>92</sup> On the other hand, the legislature might choose to limit the governor's ability to impact the election results. Passing new legislation directly stating that the appointment power does not arise until after the election would accomplish this result.<sup>93</sup> Either way, the legislature must address the resultant election problems stemming from a candidate's loss of eligibility during the four-week period between the ballot's fixed date and election day.

Fairness to candidates and political parties seems to favor limiting the governor's power to influence election results. To remain consistent with the political processes of this nation, campaign strategy rather than executive maneuvering should characterize the weeks prior to election day.<sup>94</sup> Any other solution would greatly impede a political party's ability to choose its own candidates, and a candidate's ability to run an effective campaign. Although the governor is elected by the people and granted the ability to appoint a successor to a vacant office, permitting an early exercise of the appointment power essentially removes political parties' power to serve as their constituents' agents and vests it in one elected official.<sup>95</sup> This same early appointment power negatively affects candidates by changing not only the rules of the game, but the players. Establishing coherent guidelines for the proper timing of the governor's appointment power provides a first step toward protecting against impropriety in the election process.

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92. The revised provision would need to detail the desired timing and scope of the governor's announcement authority.

93. See *supra* note 44 (noting that the Missouri constitution and statutes are silent as to appropriate time to announce the appointee).

94. Both the judiciary and executive branches traditionally have remained outside the sphere of influence over elections, primarily political events overseen by the legislature. See generally *Bush v. Gore*, 121 S. Ct. 525, 542 (2000) (Souter, J., dissenting) (commenting that the Court should have declined to review the Florida Supreme Court's decisions with the knowledge that Congress could resolve any political difficulties in an electoral vote dispute).

95. See generally MO. ANN. STAT. § 105.040 (West 1997) (investing appointment authority in the governor); *Id.* § 115.363 (West Supp. 2001) (providing political parties with the ability to affect the ballot entries).

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