

Dead Men Can't Win
By Viet Dinh
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Missouri Sen. John Ashcroft has graciously conceded defeat to the late Gov. Mel Carnahan and has said he will not challenge the planned appointment of Jean Carnahan to fill the seat her husband appears to have won. But the matter remains unresolved because the Senate may constitutionally refuse to seat her.

True, Missouri law provides that a candidate who dies within six weeks of an election, as Carnahan did, remains on the ballot. Should he win, as Carnahan did, then "a vacancy shall exist" in the office to be filled by appointment of the governor. But federal constitutional law trumps conflicting state law.

The Constitution requires that a senator be a "person," a "citizen of the United States," and "when elected, be an inhabitant of that state for which he shall be chosen." Obviously a person must be living to "inhabit" a place.

Until 1913, moreover, senators were appointed by the government of each state. The 17th Amendment changed that and guaranteed that senators would be "elected by the people." The only exception is that governors may make temporary appointments when "vacancies happen." But by defining the election of a disqualified candidate as a vacancy, the Missouri statute has subverted the entire meaning of the 17th Amendment. A state may not create a prospective vacancy and, through that mechanism, return to the old days of back-room appointments.

The Constitution does give states the power to set the "times, places, and manner" for holding Senate elections. This power, however, does not extend to amending the qualifications for senators. It is perfectly fine for Missouri to leave Mr. Carnahan's name on the ballot. What the Constitution prohibits is for him to qualify as a senator and, upon the recognition that he is unable to serve, for the governor to appoint another person to fill the vacancy.

These difficult questions of constitutional law, fortunately, have never arisen until now. The closest analogies are the deaths and posthumous election of Rep. Clement Miller in 1962 and of Reps. Nick Begich and Hale Boggs in 1972. However, there is no constitutional provision for temporary appointments for House vacancies, and each of those seats was filled by immediate special elections. These cases, therefore, do not provide a clear roadmap for today.

What path, then, are we to follow? The Constitution provides that the Senate "shall be the judge of the elections, returns, and qualifications of its own members." But should the Senate determine that Gov. Carnahan was not qualified to be elected and that Mrs.

Carnahan was therefore not a valid vacancy appointment, then there is yet another confusion in filling the seat.

A number of states follow what the Oklahoma Supreme Court called the American Rule, by which a vote for a deceased candidate is counted as a vote against other candidates. If the deceased is elected, then "the election is rendered nugatory." By this logic, it seems that a special election would be necessary to replace the nugatory election. Other states follow the so-called English Rule, by which votes for a disqualified candidate are not counted. Under this rule, John Ashcroft, the next highest vote getter, would fill the seat.

If the courts step in here, they will be guided by Supreme Court dicta that federal elections are "meant to make a final selection of an officeholder" and do not serve "a more generalized expressive function" such as voicing disapproval of qualified candidates. Whether such statements might prompt the adoption of a federal English Rule is unclear.

Mr. Ashcroft's admirable restraint may provide resolution and closure, but does nothing to answer these troubling constitutional questions.