

After the Veep, Redraw the Line

+ Add to list

By Akhil Reed Amar
September 14, 2003

Life and art (or at least television) converge this month as both the U.S. Senate and NBC's "The West Wing" focus on America's bizarre presidential-succession rules.

On Wednesday, Sept. 24, fans of the fictional President Josiah "Jed" Bartlet will learn whether he regains his office after having temporarily abandoned it. At the end of last season, terrorists kidnapped Bartlet's daughter, exposing him and the country to possible political extortion. With his vice president having recently resigned, Bartlet, a staunch Democrat, found himself obliged for the good of the nation to hand over power to the Republican speaker of the House, played by John Goodman.

Now flash back to the real world. On Tuesday, the Senate will hold hearings to consider whether our law should indeed put the speaker in the West Wing if both the president and vice president resigned, died or became disabled. Of course, such a double disaster is a low-probability event -- but then, so was the electoral train wreck of 2000. Wise lawmakers must plan for highly destabilizing contingencies -- earthquakes, blackouts, voting-machine foul-ups, terror attacks, assassinations -- before they happen. This week's hearings are part of a broader process of post-9/11 reassessment now underway, aimed at maximizing continuity of government in the event of crisis.

The proper starting point for planning is the Constitution, which

says that if both the president and the vice president are unavailable, presidential power should flow to some other federal "Officer" named by law. The framers clearly had in mind a Cabinet officer -- presumably, one who had been picked by the president himself before tragedy struck. In fact, no less an authority than James Madison insisted that the constitutionally mandated separation of executive and legislative powers made congressional leaders ineligible. Yet the current succession statute, enacted in 1947, puts the House speaker and then the Senate president pro tempore -- historically the majority party's oldest senator, who presides over the Senate in the vice president's absence -- ahead of Cabinet officers, in plain disregard of Madison's careful constitutional analysis.

In truth, 1947 was not the first time Congress chose to ignore Madison. In the early years of George Washington's presidency, then-congressman Madison's argument for Cabinet succession stumbled into a political minefield. Which Cabinet position should head the list? Secretary of State Thomas Jefferson thought his office deserved top billing, but Treasury Secretary Alexander Hamilton had other ideas. Eventually, in 1792, Congress detoured around the minefield by placing the Senate president pro tem at the top of the line of succession, followed by the House speaker. Though the 1947 law flips this order, it suffers from the same constitutional flaws that Madison identified two centuries ago.

Constitutionality aside, the 1947 law defies common sense. Suppose that a president is not dead but briefly disabled, and the vice president is also unavailable, for whatever reason. Because separation-of-powers principles prohibit a sitting legislator from serving even temporarily in the executive branch, the statute says that a House speaker must quit Congress before moving into the Oval Office, as happened on "West Wing." But if the disabled

president then recovers and reclaims power, the former speaker will have no job to return to. That hardly seems a fitting reward for faithful public service in a crisis. A more sensible law would let a Cabinet officer step up for the duration of the disability and then step down whenever the president recovered.

In another wrinkle, the 1947 law allows the speaker to play an ugly wait-and-see game. If he thinks a disability will not last long -- and, again, if the vice president is out of the picture -- he can allow a Cabinet officer to act as president. If the disability then worsens, the speaker can, with a snap of his fingers, bump the Cabinet secretary out of the Oval Office and put himself in. But bumping would only encourage political gamesmanship, weaken the presidency itself and increase instability at a moment when tranquillity should be the nation's top priority.

Current law may even encourage a more disruptive sort of bumping. Whenever legislative leaders help impeach and remove the president or vice president, they themselves move up one notch in the succession order. Might this conflict of interest compromise their roles as impeachment judges and jurors?

In fact, when President Andrew Johnson was impeached in 1868, Senate leader Ben Wade stood at the top of the succession list, thanks to the 1792 law. (There was no vice president in 1868; Johnson himself had been elected to this post in 1864 but left it vacant when he became president upon Lincoln's assassination in 1865.) Even as Wade sat in supposedly impartial judgment over Johnson, he had already begun making plans to move into the White House. Though Johnson ultimately was acquitted, the Wade affair prompted reformers in 1886 to remove all legislative leaders from the line of succession. But in 1947, the lessons of 1868 were forgotten, and legislators returned to the top of the succession list.

Other conflicts of interest under the current law arise when a president seeks to fill a vacant No. 2 spot by nominating a new vice president to be confirmed by Congress. Such vacancies should be filled quickly, but the statute gives congressional leaders perverse incentives to delay confirmation. In 1974, it took a Democratic Congress four months to confirm Republican President Gerald Ford's nominee, Nelson A. Rockefeller. Had something happened to Ford in the meantime, Democratic Speaker Carl Albert would have assumed power.

Which highlights perhaps the biggest problem: If Americans elect a president of one party, why should we get stuck with a president of the opposite party -- perhaps (as in the fictional "West Wing") a sworn foe of the person we chose? Cabinet succession would avoid this oddity.

Supporters of the 1947 law say that presidential powers should go to an elected leader, not an appointed underling. But congressmen are elected locally, not nationally. Legislators often lack the national vision that characterizes the president and his Cabinet team. Historically, only one House speaker, James K. Polk, has ever been elected president, compared with six secretaries of state.

Some have suggested that, if existing Cabinet slots are deemed unsuitable to head the succession list, Congress could create a new Cabinet post of "second" or "assistant" vice president, to be nominated by the president and confirmed by the Senate in a high-visibility process. This officer's sole responsibilities would be to receive regular briefings preparing him or her to serve at a moment's notice and to lie low until needed: in the line of succession but out of the line of fire. The democratic mandate of this assistant vice president might be further enhanced if presidential candidates announced their prospective nominees for the job well before the November election. In casting ballots for

their preferred presidential candidate, American voters would also be endorsing that candidate's announced succession team.

If the proposed assistant vice president's job description seems rather quirky -- doing almost nothing while remaining ready to do everything -- this is of course also true of the vice presidency itself. And because, despite every precaution, mishap might befall the assistant vice president, a new statute would, like the current one, need to put existing Cabinet officers on the next rungs of the succession ladder.

However the details are resolved, America needs to address the anomalies in the current law, and to do it quickly. At present, any shift from congressional to Cabinet succession would be a partisan wash -- from one set of Republicans to another. But if a divided government returns after the 2004 elections, reform will be much harder to achieve. Although any statutory fix will come too late to help President Bartlet next week, now is the perfect time to enact reforms that might assist President Bush and his successors in the real West Wing.

Author's e-mail: akhil.amar@yale.edu

Akhil Reed Amar teaches law and political science at Yale University and is the author of several books on the Constitution. He will testify before the Senate Rules and Judiciary committees Tuesday on revising the rules of presidential succession.

 **0 Comments**