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Opinion

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OPINIONS AND COMMENTARY

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Who's on first in the White House?

By John Cornyn
Special to the Star-Telegram

Fans of *The West Wing* television series have been treated to a dramatic lesson on presidential succession. But if life were to imitate art, much more than Nielsen ratings would be at stake.

On the show, fictional President Jed Bartlet (played by Martin Sheen) temporarily stepped down from office after his daughter was kidnapped by terrorists, out of concern that he might otherwise make military decisions motivated by parental desperation rather than national security. Because the vice president had previously resigned, Speaker of the House Glen Walken (played by John Goodman) became acting president. Viewers watched as the president's top political opponent in Congress took control of the White House -- by statute, not election.

The shift in party control of the executive branch created tensions and gave viewers pause. But the crisis lasted less than 100 hours, and the presidency was restored to its original occupant without incident.

In the end, the show taught the audience a helpful civics lesson. What viewers may not have learned, however, is that under current law, things could have been far worse and far more complicated.

The presidential succession law has long troubled the nation's top legal scholars across the political spectrum as both unconstitutional and unworkable. This leaves the American people in a dangerous and intolerable situation. It must always be clear who the president is,



NBC

A recent episode of *The West Wing* pointed out the confusing issues of presidential succession.

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especially in times of national crisis. Yet current law badly fails that standard.

Imagine if things had played out a little differently on *The West Wing*.

Let's say that Democrat Bartlet steps down from office, and Republican Walken claims the presidency. This time, out of party loyalty, the secretary of state asserts a competing claim to be acting president. The Cabinet member argues that members of Congress are legislators and thus are not "officer(s)" who are constitutionally eligible to act as president.

Believe it or not, the secretary has a strong case -- in fact, he can cite for support the views of James Madison, who argued this very point in 1792. Many legal scholars on the left and right agree.

Who is the president? Whose orders should be followed by our armed forces, by our intelligence agencies and by our domestic law enforcement bureaus? If lawsuits are filed, will courts take the case? How long will they take to rule, how will they rule, and will their rulings be respected?

Or imagine that both Speaker Walken and the Senate president pro tempore decline the presidency -- perhaps in a public-minded effort to prevent a terrorist attack from effecting a change in party control of the White House. The secretary of state thus becomes acting president.

But then the secretary takes a series of actions that upset Walken, who then asserts his right under the statute to take over the job as acting president. The secretary of state counters that he cannot constitutionally be kicked out of the White House by anyone other than a president or vice president because, under the Constitution, he is entitled to act as president "until the disability [of the president or vice president] be removed, or a President shall be elected."

Confusion and litigation ensue. Who is the president?

Or imagine that, as the result of a terrorist attack, the president, speaker and Senate president pro tempore are killed. The secretary of state is traveling abroad and cannot be reached for a few hours.

Under current law, it is unclear whether the secretary of state is therefore legally unable to act as president. The next in line, the Treasury secretary, decides that he is acting president and orders the defense secretary to conduct a military strike.

Who is the president? Who controls the military? Should the Pentagon obey or ignore the Treasury secretary's orders?

In every one of these scenarios, we do not know for sure who the president is. That must change.



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In an age of terrorism and a time of war, this is no longer mere fodder for Tom Clancy novels and TV dramas.

President Bush and Vice President Dick Cheney were constantly kept separate for months after 9-11, precisely out of a considered concern that continuity of the presidency might otherwise be in serious jeopardy.

We must fix the presidential succession statute, and do so now. We have had two years since 9-11 to do this. Two years is too long, and the time to plan for the unthinkable is now.

Online resources

- www.usconstitution.net/consttop_succ.html
- www.senate.gov/~judiciary (click "HEARINGS" and look for Sept. 16)

U.S. Sen. John Cornyn, R-Texas, is chairman of the Senate subcommittee on the Constitution, Civil Rights and Property Rights. He recently co-chaired a joint hearing to examine needed reforms of the presidential succession statute.



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