

CHAOS THEORY

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Worst-case scenario number one: It's the night before Election Day. Across America, voters turn on their televisions hoping to catch the final hours of the presidential campaign and instead hear the awful news. In coordinated attacks, terrorists have killed their favored candidates for both president and vice president. Now what?

Worst-case scenario number two: It's the day after Election Day and voters have clearly chosen the next president. Across America, local party members are making plans to travel to their state capitals and cast their usually ceremonial Electoral College votes when both members of the winning ticket are assassinated. What happens next?

The answer in both cases -- and several equally unpleasant variants: Nobody knows.

In recent weeks FBI Director Robert Mueller, Homeland Security Secretary Tom Ridge, and National Security Adviser Condoleezza Rice have all warned that they expect Al Qaeda to try to time a strike inside the United States with the upcoming presidential election. Since the March bombings in Madrid, speculation about the impact of an attack on the outcome of the November election has become something of a whispered brain-teaser in Washington. And late last month, the House of Representatives passed a bill that would provide for quick special elections in the event that 100 or more of its members are killed in a catastrophic event.

A small but growing group of constitutional scholars, election specialists, and lawmakers argue that we need to extend that sober conversation to include the almost unspeakable: a direct attack on the candidates themselves.

Thanks to gaps in election rules, they say, the double assassination of a presidential ticket just before Election Day would create chaos, with voters unsure who they were actually voting for. If terrorists killed the winners just afterward, the Electoral College would be left without any clear directive. Either scenario could lead to a crisis of democratic legitimacy that would make the 2000 Florida recount pale in comparison.

So far, warnings about this problem have been largely ignored by national leaders. Neither Republican National Committee chairman Ed Gillespie nor Democratic National Chairman Terry McAuliffe would agree to talk about how their party would handle the death or incapacitation of both their nominees. A spokeswoman for Gillespie explained that he simply found the topic too "morbid" to discuss.

But the attacks in Madrid and the still mysterious shooting of the incumbent president of Taiwan on the eve of that country's election, some say, show that we can no longer ignore the problem.

"This is an accident waiting to happen," said Yale constitutional law professor Akil Amar. "How close to complete meltdown do we have to get before we start taking this seriously? Spain and Taiwan were wakeup calls. Two incidents in election week, and they happened within seven days of each

other. It could happen here. It has happened here."

Amar has been thinking and writing about this problem for a decade, since he was recruited in 1994 by the late Senator Paul Simon, Democrat of Illinois, to study how deaths could create gaps in the scheme of presidential succession. As he told the Senate Judiciary Subcommittee on the Constitution, the window of vulnerability around the election was "a time-bomb ticking away in our Constitution." He offered suggestions for correcting these "major glitches," but his testimony was received with polite inaction.

Amar tried again in writings and testimony after the election-eve deaths of Democratic Senate candidates Mel Carnahan of Missouri in 2000 and Paul Wellstone of Minnesota in 2002. But "otherwise really sensible" people, he said, continue to "act as though there was no problem" because the topic of dead leaders is taboo.

The issue gained new prominence after Sept. 11, 2001. In the months after the attacks, the Brookings Institution and the American Enterprise Institute set up a bipartisan panel, co-chaired by former Clinton and Carter White House counsel Lloyd Cutler and former Republican senator Alan Simpson of Wyoming, to study the problem of ensuring continuity of leadership in the wake of a terrorist attempt to decapitate the government.

The commission's first two proposals have dealt with the problems of quickly reconstituting Congress after a catastrophic blow and dealing with the truncated succession line on Inauguration Day -- when an attack on

the dais could take out the first four people in line for the presidency before a new cabinet has been sworn in to continue the line. (Their suggestions: Amend the Constitution to allow governors to appoint replacement House members instead of waiting for special elections, and have the outgoing president nominate his successor's cabinet as a courtesy before he leaves office.)

John Fortier, the commission's executive director and a political scientist who formerly taught at Harvard and Boston College, said the commission is also deeply worried about how to ensure "confidence and legitimacy (in) the electoral process if the worst happens" during the larger window of vulnerability.

Both Republican and Democratic party bylaws allow their national committee members to fill vacant nominations for president and vice president. But if there is not time enough for party leaders to pick a replacement before the election, they would have to ask supporters to vote for the dead men and trust them later to pick an acceptable replacement.

"Legally, that would be fine, but whether it would fly with the American people is another question because here are two new people," Fortier said.

Yale's Amar said the problems posed by a double assassination of a winning ticket could be even worse for several reasons -- especially if Congress, the final arbiter, is controlled by the party that lost the White House.

Some state laws bind their electors to vote for the popular election winner. But

under a precedent from 1872, when losing candidate Horace Greeley died after the election, Congress could decide to throw out these votes for dead men rather than giving the votes to the party's replacement candidates, effectively shutting those states out of the election.

Electors could rebel against party boss instructions and choose their own favorite candidates, scattering support. In the end, the losing party's nominee could end up with the largest pile of electoral votes and become president despite clearly losing the popular election -- particularly with the help of partisan mischief from Congress.

In the wake of a devastating terrorist attack, this could lead to a crippling crisis of legitimacy. "There is no doubt in my mind that without an ironclad (process) there would be lawsuits," said Don Stewart, a spokesman for Senator John Cornyn, Republican of Texas. "It would be Bush v. Gore on steroids. We'd be paralyzed at a time when we don't need to be paralyzed."

Cornyn is one of the few in Congress who has pushed the Continuity of Government Commission's suggestions for immediately reconstituting the legislative branch and putting the new cabinet in place by Inauguration Day. His bills have gone nowhere so far, although the House last month approved a bill by Judiciary Chairman James Sensenbrenner, Republican of Wisconsin, requiring special House elections just 45 days after an catastrophic attack on Congress.

Despite the reluctance to address the issue, there are precedents for changing

the rules to fix a potential problem before it happens.

Before 1933, for example, the newly elected Congress took office after the newly elected president. That meant in a disputed election, it would be the lame-duck Congress deciding how to count the votes even if the election had caused a major shift in power. The 20th Amendment, ratified that year, has Congress take office before the president, avoiding that scenario.

The Presidential Succession Act of 1946, which for the first time added the Speaker of the House and the Senate Pro Temp to the succession line, just behind the vice president, also made clear the order in which federal officials followed all the way to number 15, the Secretary of Labor. More recently, the 25th Amendment, ratified in 1967, allows the vice president to temporarily assume power in case the president were to become disabled to such a degree that he could not fulfill his responsibilities.

Some say these rules are still not good enough. Congressman Brad Sherman, Democrat of California, has sponsored a bill that would allow the sitting president to pick senior members of his own party in the House and Senate to be third and fourth in line for the presidency if the White House and Congress are controlled by different parties.

In a recent interview, Sherman suggested that George W. Bush and John Kerry should similarly name third- and fourth-in-line successors at the party conventions. In the case of an election-eve tragedy, he said, having a successor already chosen would make the public feel more comfortable casting votes for

the name of a dead candidate. In the case of a post-election attack, this legitimacy would also help minimize the problem of rogue Electoral College voters.

"I certainly think Democrats would respect the candidate's choice more than they would respect a DNC position and certainly more than a party chairman's instructions," Sherman said.

Yale's Amar has further proposed that Congress pass a law allowing Election Day to be moved back four weeks in the case of the death or incapacitation of a major party candidate just before the public vote, so there would be time for the replacement to be named and studied by the public. That idea has found no support on Capitol Hill so far.

Indeed, few in Washington are optimistic that laws will be adjusted to prevent potential chaos in this election cycle. The problem isn't just the taboo on talking about assassination, but a lack of political incentive.

Said Sherman: "This doesn't help Kerry beat Bush. It doesn't help Bush beat Kerry. It doesn't help a single lobbyist in the entire city. What advantage is there to either party or any of the individual members of Congress to deal with this issue?"