

Gregory F. Jacob

IT WAS GRATIFYING this past television season to see Hollywood take a serious interest in constitutional law. The two pilot Supreme Court series that were launched by Hollywood over a year ago – *First Monday* and *The Court* – proved to be miserable flops and were quickly cancelled. But last season two tried-and-true hit shows, *The West Wing* and *24*, prominently featured the Constitution’s 25th Amendment as part of their gripping end-of-season sequences. *The West Wing* – unsurprisingly, in light of the raft of lawyers the show employs to massage its plot lines – got the law mostly (but not entirely) right. *24*, on the other hand, made a hash of it.

I.

In last season’s *24*, the President’s Chief of Staff and the Vice President conspired to invoke the 25th Amendment to strip the President of the powers of his office and transfer them to the Vice President. The conspiracy was born when

the President decided to call off a military strike against several Middle Eastern countries designed to retaliate for the detonation of a nuclear device on United States soil. The President, based on information he received from the show’s hero, never-play-by-the-rules counter-terrorism agent Jack Bauer, had come to doubt the authenticity of the CIA’s evidence linking the countries in question to the detonation of the bomb, and thus made the unbelievably rash and irresponsible decision to wait a few hours to make sure the evidence was good before launching World War III. So rash, in fact, that for the good of the American people, the Vice President surreptitiously assembled the Cabinet with an eye toward convincing them to vote *posthaste* (we are informed that if the war does not start in approximately one hour, the element of surprise will be utterly lost, likely leading to tens of thousands of American casualties and turning the military campaign into a disaster) to make him Acting President so that he can

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reinstate the attack order. As the President's Chief of Staff pluckily (or should it perhaps be "Puckily" – Lord, what fools these mortals be!) explains, the American people expect and demand decisive action from their leaders in times of crisis: a nuclear bomb having obliterated untold thousands of cacti and buzzards in an uninhabited stretch of Californian desert, someone really has got to pay, and pay fast. Whether the right actor pays, apparently, is a matter of secondary concern.

To return to the legal aspects of the plot, Section 4 of the 25th Amendment provides, in relevant part, that "[w]henver the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President."¹ The Vice President and the assembled "principal officers of the executive departments," which are 15 in number according to 24, initiate a teleconference with the President, who is located in a secure facility on the West Coast.² They demand that the President explain what has

caused him to delay the obliteration of half the Middle East, and inform him that, if his explanation isn't up to snuff, he's out and the Veep's in.

The President is not afforded the opportunity to consult with counsel, yet he responds by launching into a fine legal argument, explaining that the 25th Amendment is meant to redress presidential death and disability, and that issuing an unpopular military order as Commander in Chief does not constitute being "unable to discharge the powers and duties of his office," as the 25th Amendment requires. But the Vice President is unimpressed. He asserts that the pattern of rash and erratic behavior exhibited by the President over the preceding several hours is sufficient to justify an inquiry under the Amendment, and he notes that the Attorney General supports this interpretation. Armed with the unimpeachable imprimatur of the Department of Justice – and perhaps, one might speculate, with a gold-standard legal opinion from the Office of Legal Counsel – the Vice President and Cabinet proceed to a vote.

Who was right? Probably neither side. The correct answer lies somewhere in between. It is certainly true, as the President argued, that the drafters of the Amendment did not intend for it to be used to overrule the President's policy

¹ U.S. CONST. amend. XXV, § 4, cl. 1.

² Congress has never by law provided for an alternate body to render a decision with respect to the President's inability, so the power remains vested in "the principal officers of the executive departments." It is relatively clear from the legislative history of the 25th Amendment that the phrase is meant to refer to the Cabinet. See, e.g., H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 887 (1991). The executive departments are now listed by statute in 5 U.S.C. § 101, but that list contains only 14 executive departments – not the 15 portrayed in 24. The missing department is the Department of Homeland Security. When Congress created the Department, it neglected to amend 5 U.S.C. § 101, but 6 U.S.C. § 111 specifies that "there is established a Department of Homeland Security, as an executive department within the meaning of Title 5." 24 appears to have assumed, correctly in my view, that the four officers who have been accorded Cabinet-level rank by the present administration but that do not head executive departments – namely, the head of the EPA, the director of OMB, the director of National Drug Control Policy, and the United States Trade Representative, see <http://www.whitehouse.gov/government/cabinet.html> – do not constitute "principal officers of the executive departments" within the meaning of the 25th Amendment. Cf. *Freytag*, 501 U.S. at 885-87.

choices.³ The President probably overstated his case, however, in asserting that only death or disability constitutes “inability” within the meaning of the Amendment. The Amendment’s drafters made a deliberate decision not to further define the word so as to allow for flexibility in its application,⁴ and several Senators commented on its potential breadth during the congressional debates.⁵ Indeed, Dwight Eisenhower – whose uncertain health while President triggered adoption of the 25th Amendment – remarked that the notion of presidential disability should be read to encompass such pedestrian situations as a President on an airplane “flying across the ocean [when] his telephonic communications with the West [are] less than satisfactory.”⁶ Thus, the precise line between permissible and impermissible invocation of the Amendment is probably impossible to draw. But the blatant policy maneuvering engaged in by the Vice President and the Cabinet in 24 clearly runs

afoul of the Amendment – although the Vice President might, in the proud tradition of a Vice President who went before him, be able to claim in his defense that there is “no controlling legal authority” on the point.⁷ All of this legal analysis is undoubtedly of cold comfort to the beleaguered President, however, as being right is of little moment when the matter at issue is almost certainly a political question allowing for no recourse to the courts.⁸

Up until the time of the vote, the President was doing a fine, if futile, job of representing himself *pro se*. It was probably inevitable, however, that the absence of the White House Counsel would come to haunt him. In a moment of grip-the-arms-of-your-chair drama, the Cabinet vote ties at 7–7, with the deciding vote to be cast by the Secretary of State. If only a good lawyer were present, he could have informed the President that Cabinet officers serve purely at the President’s pleasure;⁹ thus, the President

3 The following colloquy between Senator Hart and Senator Bayh, the sponsor of the joint resolution in the Senate that approved the text of the 25th Amendment, confirms this understanding:

Mr. Hart: Is it clear that [“inability”] means far more than disagreement with respect to a judgment he may make ... ?

Mr. Bayh: The Senator from Indiana agrees with the Senator from Michigan that we are not dealing with an unpopular decision that must be made in time of trial and which might render the President unpopular. We are talking about a President who is unable to perform the powers and duties of his office.

111 Cong. Rec. 3283–83. See also *id.* at 15381 (remarks of Senator Bayh).

4 See 111 Cong. Rec. 7941 (remarks of Rep. Poff) (“a definition within the framework of the Constitution ... would give the definition adopted a rigidity which, in application, might sometimes be unrealistic”).

5 See, e.g., *id.* at 3282 (remarks of Senator Pastore, quoting Senator Bayh) (“the record shows that the intention of this legislation is to deal with any type of disability, whether it is from traveling from one nation to another, a breakdown of communication, capture by the enemy, or anything that is imaginable”).

6 Remarks of former President Dwight D. Eisenhower at the American Bar Association’s Conference on Presidential Inability and Vice Presidential Vacancy, May 25, 1964, as reported in Birch Bayh, *One Heartbeat Away* 122 (1968).

7 See Charles Krauthammer, *Gore’s Meltdown*, Wash. Post, Mar. 7, 1997, at A21.

8 The 25th Amendment clearly commits the presidential disability decision to various political actors, a factor relied on heavily by the judiciary in refusing to intervene in such cases. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962). See also 111 Cong. Rec. at 15588 (remarks of Senator Ervin) (stating that “whether or not the President is capable of performing the duties of his office” would be “a political question and for that reason the Court would not be called upon to pass upon it”).

9 See, e.g., *Myers v. United States*, 272 U.S. 52 (1926).

presumably could have dismissed the Secretary of State before he cast his deciding vote, leaving the vote at a tie.¹⁰ Indeed, this would not have been the first time in history that a President dismissed a Secretary of State because the Secretary questioned his ability to serve: President Woodrow Wilson forced Secretary of State Robert Lansing to resign after Lansing suggested to the Cabinet that Wilson was effectively disabled and that they ought to take charge of the affairs of government.¹¹ By dismissing the Secretary, the President could have avoided being stripped of his powers under the 25th Amendment, which requires that a *majority* of the principal officers join the Vice President in declaring the President unable to perform his duties.¹² An opportunity lost, but an important reminder that it's always a good idea to have your lawyer handy.

It is at this point in the show, however, that the wheels really come off the legal cart. The Vice President informs the President that the Cabinet's vote has stripped him of all presidential authority, and that he will be given an opportunity to appeal the decision before Congress in four days. But that's not what the Constitution provides at all! Section 4, clause 2 of the 25th Amendment allows the President to "resume the powers and duties of his office"

when he "transmits to the President *pro tempore* of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists." Only if the Vice President and a majority of the principal officers of the executive department again vote to remove the President is the issue sent to Congress for decision – with the presumption heavily in favor of the President retaining his office, which he does unless two-thirds of both Houses of Congress vote to remove him. (To briefly make note of another legal quibble, Congress is constitutionally required to assemble in 48 hours to begin deliberating on its determination, not the four days mentioned in 24.)

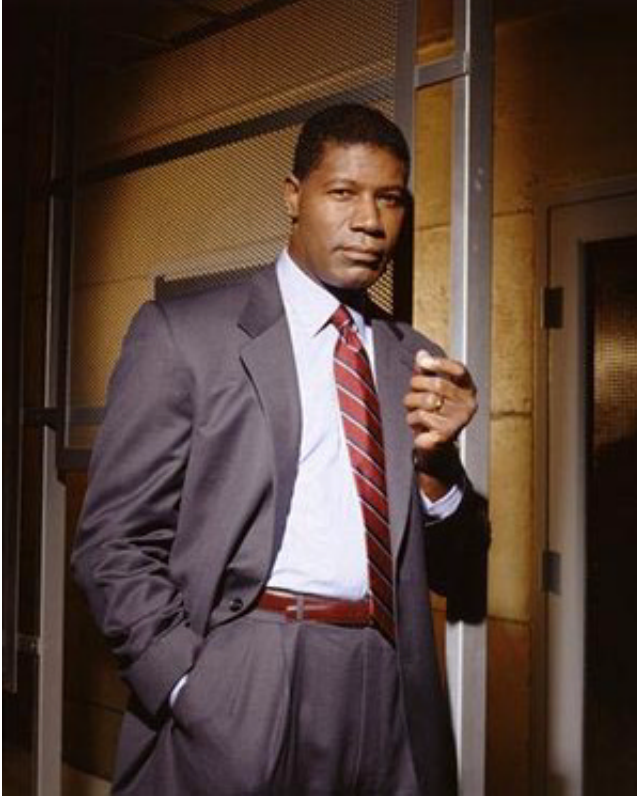
The reason that the writers of 24 felt compelled to engage in a bit of constitutional revisionism seems relatively clear: the Cabinet's voting scene would have been considerably less dramatic if the audience was informed that the President could nullify the Cabinet's decision and reinstate himself simply by declaring himself fit to resume his duties. But in my view a travesty was committed here – not so much in that 24 showed disrespect for the Constitution by revising it to fit the needs of its plot, but rather because a golden opportunity was missed to use the *actual* text of the Constitution to make the plot even better. The keys to the revised scenario are geography and timing.

¹⁰ It might seem that firing Cabinet members to avoid being declared "unable" to perform is a bad-faith use of the removal power, but Congress was well aware of the President's constitutional authority to take such action. See, e.g., 111 Cong. Rec. 15380-87; *id.* at 3284 (remarks of Sen. Hart). It was for precisely this reason that language was inserted into the Amendment allowing Congress to designate an alternate body to render the disability decision, as that body could be composed of individuals not subject to removal by the President. *Id.* at 15380 (remarks of Sen. Kennedy).

¹¹ See John D. Feerick, *From Failing Hands* 176-79 (1965); 111 Cong. Rec. 15380 (remarks of Sen. Kennedy).

¹² It is possible that removal of the Secretary of State would have had the effect of promoting the Deputy Secretary of State into the role of a principal officer within the meaning of the Amendment, although the legislative history is ambiguous on this point. Compare H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965) ("In case of the death, resignation, absence or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential disability determination.") with 111 Cong. Rec. 3284 (remarks of Senators Hart & Bayh) (Under Secretaries cannot serve). At any rate, within the context of 24, the time that it would have taken to track down the Deputy Secretary of State and bring him or her up to speed would probably have rendered the point moot given the tight time-frame for the military attack.

Under the actual text of the 25th Amendment, to reinstate himself the President would have had to get his written declaration that “no inability exists” into the hands of the President *pro tempore* of the Senate and the Speaker of the House of Representatives. But the President



President David Palmer

was on the West Coast, and the military attack that was the subject of the tussle between him and the Cabinet was scheduled to take place in just over one hour. It would have been impossible for the President to fly a written declaration of fitness to resume office from California to the constitutionally designated recipients in Washington, D.C. in time to call off the war. And even if it might be thought that a fax or e-mail, though lacking an original presidential signature, could be used to satisfy the constitutional requirement, it would be exceedingly difficult to contact the relevant officials at 4:00 a.m. (the time of the

teleconference), especially with the Vice President (now Acting President) controlling all the communications facilities within the executive branch.

The scene could have played as follows. As the Secretary of State casts his decisive vote removing the President from office, a young White House lawyer bursts excitedly into the room in which the President is teleconferencing, a pocket Constitution in hand. He informs the President in triumphant tones that the Cabinet’s decision amounts to naught because the President can reinstate himself by declaring himself fit to serve. No harm done! The President, with renewed vigor, spins to face the Vice President on the television screen ... only to find, disturbingly, that the Vice President appears to be smirking. “It is true, Mr. President, that the Constitution so provides,” the Vice President intones coldly. “But the Attorney General here informs me that in order to resume the powers of your office, you must first get a written declaration into the hands of the President *pro*

tempore of the Senate and the Speaker of the House of Representatives. By the time you manage to do that, of course, my orders will have been carried out and we will already be at war. But if you wish to be in a position to preside over that war, Mr. President, by all means, file away.” And then, with the press of a button, he cuts the teleconference. The crestfallen White House lawyer stares down at his shoes, convinced that he has just lost the Article III appointment he had felt certain he had garnered with his legal acumen. The President, defeated, slumps back in his chair, helplessly watching the bombs drop to great

fanfare on Fox News.

Who ever said that obscure constitutional provisions can't produce great drama, just as they are written?

II.

I was rather annoyed last season when *The West Wing* devoted only a single episode to writing my favorite character, Vice President John Hoynes, off the show. It seemed to me that a major scandal forcing the resignation of the Vice President deserved at least a two- or three-episode plot arc. Indeed, it wasn't until the season finale that I realized the episode was anything more than a vehicle to allow guest star Matthew Perry, stepping out of his role on *Friends* to play a mild-mannered Republican hired into the Democratic administration's White House Counsel's Office, to succeed in doing what Republicans on *The West Wing* are always trying to do: bring down a member of the Bartlet Administration. As it turns out, Vice President Hoynes was not unceremoniously whisked away by the show's writers just to avoid having to pay actor Tim Matheson's no-doubt hefty salary; rather, the Vice President was sacrificed for the noble purpose of setting up a fascinating and legally torturous presidential succession scenario.¹³

In the season finale, President Bartlet learns that his youngest daughter, affectionately referred to by the Secret Service as "book bag," has been kidnapped by terrorists on the eve of her college graduation. The President understandably takes the news hard, and as the day wears on he begins to realize that he is having trouble focusing and remembering information. When he proves unable to make an

important judgment call as to whether to order the Air Force to shoot down an uncommunicative airplane headed toward a nuclear power facility, he does some soul-searching and instructs the Chief of Staff to assemble the Cabinet.

Meanwhile, curmudgeonly Communications Director Toby Ziegler, who has been away from the White House tending to the birth of his first children, barges into the White House and declares that "The President's got to get out of the West Wing – I don't know what we were thinking!" He explains that his first few hours of fatherhood have made him realize that no parent whose child has been kidnapped should be permitted to exercise the vast powers of the Presidency. The Chief of Staff informs Toby that the President has already decided to invoke Section 3 of the 25th Amendment, which authorizes the President temporarily to strip himself of his presidential powers by declaring in writing that he is unable to perform his duties.¹⁴ Toby might have been contemplating invoking Section 4 of the 25th Amendment (*à la* 24) if the President hadn't voluntarily stepped aside, but if he had tried to do so he would have found himself fresh out of luck. The text of Section 4 clearly requires that both the Vice President *and* a majority of the Cabinet vote to declare the President unable to perform his duties before he can be involuntarily stripped of his powers. Without a Vice President around to cast a vote, there simply is no mechanism by which Section 4 of the 25th Amendment could possibly be invoked¹⁵ – a particularly sobering thought when it is considered that the Vice Presidency has been vacated on 18

13 A slightly different take on the legal issues raised by *The West Wing's* season finale can be found at John C. Fortier, "The West Wing" and Presidential Succession: Fact or Fiction?, Roll Call, Sept. 24, 2003, available at http://www.aei.org/news/newsID.19238/news_detail.asp.

14 U.S. CONST. amend. XXV, § 3.

15 The legislative history indicates that Congress was well aware of this drawback. See 111 Cong. Rec. 7963 (remarks of Reps. Edwards, Celler, and Poff).

separate occasions and has remained vacant for almost 20 percent of the nation's constitutional history.¹⁶

But could the President invoke even Section 3 of the 25th Amendment in the absence of a Vice President? Section 3 provides:

Whenever the President transmits to the President *pro tempore* of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.¹⁷

The text of the Amendment is structured in the logical form "if X, then Y," with X being the President's self-declaration of inability and Y being the Vice President's accession to the office of Acting President. If Y is impossible, can X still happen? Three members of the House expressed the view during the congressional debates on the Amendment that Section 3 cannot be invoked when the office of the Vice President is vacant.¹⁸ On the

other hand, the text does not on its face compel such a conclusion, and it would not be unreasonable to read the provision as allowing such a self-declaration to have the effect of leaving both offices functionally vacant.

Even if we give the *West Wing* writers the benefit of the doubt on this point, though, several related legal problems surface in quick succession at this point in the episode. Once

the Cabinet members have assembled, the President informs them of his intention to invoke Section 3. He then states that, while the Constitution "doesn't require the unanimous consent of the Cabinet" for a Section 3 declaration to be made, he nevertheless wants a



President Josiah Bartlet

unanimous vote as a demonstration of solidarity with the Acting President. This technically is a correct statement of constitutional law, but the President's intonation, combined with the fact that the President initially signaled his intention to invoke the 25th Amendment by ordering the Chief of Staff to assemble the Cabinet, seems to imply that the Constitution does contemplate *some* role for the Cabinet in

16 See William F. Brown @ Americo R. Cinquegrana, *The Realities of Presidential Succession: 'The Emperor Has No Clones'*, 75 Geo. L.J. 1389, 1394-95 (1987).

17 U.S. CONST. amend. XXV, § 3.

18 See 111 Cong. Rec. 7963 (remarks of Reps. Edwards, Celler, and Poff).

the Section 3 process, perhaps approval of the President's declaration by a bare majority. That is not in fact the case. The President's unilateral declaration is alone sufficient to invoke Section 3 of the 25th Amendment, and the Cabinet is assigned no constitutional role in the process whatsoever. Even if the Cabinet were to vote unanimously against President Bartlet's Section 3 declaration, he would merely need to advert to President Lincoln's famous statement to achieve the constitutionally prescribed result: "The vote has been taken. [Fourteen]¹⁹ noes, one aye – the ayes have it."²⁰

It was during this Cabinet meeting that I, at least, was finally clued in to the key mistake made by the *West Wing* writers: They misnamed the entire episode. President Bartlet explains to the Cabinet that under Section 3, the President's self-declaration of inability has the effect of transferring the powers of the presidency "to the next in the constitutional line of succession." But that is not what the 25th Amendment provides. The Amendment specifies that the President's powers shall be transferred to the Vice President, who then becomes Acting President; no provision is made for an alternate officer to assume the role

of Acting President if the Vice Presidency is vacant. This doesn't mean that the President is without constitutional recourse in such a situation; it merely means that the episode should not have been named "Twenty Five," but rather should have been dubbed either "II" or "19," or perhaps, as one of my colleagues suggested to me, "II; cf. 25."²¹

Allow me to explain. Article II, § 1, cl. 6 states that "the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."²² In the absence of a Vice President, the President needs to invoke not the 25th Amendment, which is effectively a dead-end in the face of a vice-presidential vacancy, but rather the statutory line of succession that is set forth in 3 U.S.C. § 19. Exercising its powers under Article II to determine who will act as President when both the Presidency and Vice Presidency are vacant, Congress has designated the Speaker of the House as first in line.²³ In *The West Wing's* defense, a President faced with the need to

19 There are actually only 14 Cabinet members sitting around President Bartlet's table. Did the writers, perhaps, merely refer to 5 U.S.C. § 101 as it is now written to determine the number of Cabinet members and accidentally leave out the Secretary of Homeland Security? That mistake would be more easily forgivable than the actual gaffe in question. The show seems to have combined two of the presently existing Secretaries into one, for in polling the Cabinet the President calls upon the "Secretary of Health and Education" for his vote. Such an office has never existed. A Department of "Health, Education, and Welfare" was created by a presidential reorganization plan in 1953, see 5 U.S.C. app. 1; 18 F.R. 2053 (1953), but Congress split that Department into the present Departments of Education and of Health and Human Services in 1979, see Pub. L. No. 96-88, § 509 (1979).

20 *Meyer v. Bush*, 981 F.2d 1288, 1297 n.9 (D.C. Cir. 1993) (citing Richard F. Fenno, Jr., *The President's Cabinet* 29 (1963)).

21 Thanks to Curtis Gannon.

22 U.S. CONST. art. II, § 1, cl. 6.

23 Placing a member of Congress in the line of succession may actually be unconstitutional. Article II, § 2 specifies that Congress shall provide "what Officer shall then act as President" (emphasis added). Members of Congress are not "Officers" of the United States and indeed are constitutionally forbidden to hold such offices. See note 24, *infra*. This issue was recently raised by Senator Cornyn at a joint hearing before the Senate Judiciary and Rules Committees, considering whether the presidential succession statute should be revised. See Hearing Before the Senate Comm. on the

resort to the statutory line of succession would likely draw upon the text of the 25th Amendment, because the Amendment establishes a defined mechanism for declaring the President unable to serve, as well as a defined mechanism whereby the President can resume the powers of his office at will. 3 U.S.C. § 19, on the other hand, merely states who shall assume power during the period of the President's inability and does not address how the beginning or the end of that period shall be determined. Nevertheless, the show was clearly wrong in stating that the Speaker of the House would become Acting President under the 25th Amendment, and the episode should have been renamed accordingly.

The show's punch line, of course, is that the Speaker of the House at the time is a Republican, rendering the relinquishment of authority to him particularly distasteful to the Democratic President and his staff. And, in accordance with *West Wing* cardinal rule #1 (which states that any Republican on the show who is not of active dating interest to a cast member must be portrayed as a greedy, soulless, and inhumane ogre), we are left with no doubt as to why this should be distasteful to all of us in the viewing audience as well. First, the Speaker launches into an arcane speech that oddly seems to assert he could have prevented World War I if only he had been the Emperor of Austria-Hungary at the time. Next, his first order as Acting President, curiously (and probably unconstitutionally) given before the President has finished signing his declaration of inability, is that in the future, unresponsive planes heading toward nuclear facilities "get

one warning and I don't care if my mother's on that plane going to visit *her* mother." We've known the man for ten minutes and already he's ordering the Air Force to shoot down his mother.

Setting the Speaker's bloodthirsty tendencies and delusions of grandeur aside for the moment, let us wrap up the final legal issues raised by *The West Wing's* plot. We are told that two things must occur before the Speaker can actually assume the office of Acting President. First, the Speaker is required to resign his seat in the House of Representatives, assertedly because "it's against the law to work for two branches of government at the same time." Here the show is correct on the law, but wrong on the reasoning. It is not, as a general matter, against the law to work for two branches of the government at the same time; for example, the first Chief Justice, John Jay, served in an executive capacity by negotiating a treaty with Great Britain on behalf of the Washington Administration, John Marshall served simultaneously as Chief Justice and Secretary of State during both the Adams and Jefferson Administrations, and more recently Chief Justice Earl Warren headed the United States Commission to Report upon the Assassination of President John F. Kennedy. It is, however, unconstitutional for a member of Congress to hold "any Office of the United States,"²⁴ and it is further specified in 3 U.S.C. § 19 that the Speaker must resign before he can assume the role of Acting President.²⁵ So while *The West Wing* is guilty of misstating the law here, at least it gets the law right in its application. And in defense of the writers, since it is the Speaker himself who

Judiciary, *Ensuring the Continuity of the United States Government: The Presidency*, Sept. 16, 2003, available at http://judiciary.senate.gov/member_statement.cfm?id=914&wit_id=2047. See also John Cornyn, *Who's on first in the White House?*, Ft. Worth Star-Telegram, Oct. 8, 2003, available at <http://www.dfw.com/mld/dfw/news/opinion/6961377.htm>

²⁴ U.S. CONST. art. I, § 6, cl. 2 ("no Person holding any Office of the United States, shall be a Member of either House during his Continuance in Office").

²⁵ 3 U.S.C. § 19(a)(1) ("the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President").



misstates the relevant legal principles, perhaps the mistake was deliberately written into the script to reaffirm for the cognoscenti Congress's general level of awareness with respect to matters of constitutional law.

Second, we are told that the Speaker is required to take an oath of office before he can become Acting President. It is generally accepted that the Vice President is not constitutionally required to take the oath of office before assuming the Acting Presidency or Presidency,²⁶ but the situation is considerably murkier with respect to other officials. 3 U.S.C. § 19 specifies that the Cabinet-level officials in the line of succession become Acting President upon their taking of an oath of office, which then also qualifies as their resignation from their Cabinet post. It provides that the Speaker of the House and the President *pro tempore* of the Senate, however, become Acting President merely upon their resignation from office, and with respect to them it makes no mention of any oath of office.²⁷ At least one leading commentary includes an argument that the legislature intended for the oath requirement to apply to the Speaker and the President *pro tempore* as well.²⁸ Whatever the applicable rule is here, however, *The West Wing* clearly errs in having the Speaker take an oath "that I shall faithfully execute the Office of the President of the United States," an office that is still occupied by the disabled President Bartlet. The oath should be geared toward assuming the office of *Acting* President, regardless of whether the succession is occurring under the 25th Amendment, as the show incorrectly asserts, or under 3 U.S.C. § 19.²⁹

Just before this article went to press, I was surprised to learn that presidential succession issues had managed to make it to the very mecca of popular culture. In Atlantic City, New Jersey – no, that's not the mecca I'm referring to – the final contestants in the Miss America Pageant – ah, yes, that would be the one – were asked the following question: "Who becomes President if the current President and Vice President are unable to fulfill their duties?"³⁰ All five contestants were awarded full credit when they answered "Speaker of the House." (Lest you be too amazed, it should be noted that the contestants *were* choosing from a multiple-choice list.) But just imagine if one of the contestants who was "in the know" – perhaps Miss California, well versed in our nation's succession laws because of her own state's recent succession woes – had given the truly correct answer. "Actually, the most correct answer would have been ... none of the above. Congress has by statute provided that the Speaker of the House shall serve as *Acting* President if the President and Vice President are both unable to fulfill their duties, but the Speaker would not actually become the *President*. Moreover, it is likely that the Constitution does not permit the Speaker to become even *Acting* President, as Article II specifies that the functions of the President must devolve on an 'Officer' of the United States, which the Speaker is not."³¹ The first person in the statutory line of succession under 3 U.S.C. § 19 who is an officer of the United States is the Secretary of State, and it is therefore the Secretary, and not the Speaker, who should legally

26 See discussion in Brown *et* Cinquegrana, 75 Geo. L.J. at 1401 n.47.

27 See 3 U.S.C. §§ 19(a)(1), (a)(2)(b), (d)(3).

28 See Brown *et* Cinquegrana, 75 Geo. L.J. at 1433-34.

29 For a discussion of the differences between the offices of President and Acting President, see James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 Const. Commentary 575, 583-85 (2000).

30 As read to me over the phone by a member of the Miss America Pageant's production team.

31 For a fuller explanation, see note 23, *supra*.

assume the role of Acting President.”

Jaws would surely drop. Would they have crowned her Miss America on the spot? Probably not. But the possibility does suggest that the *Green Bag* may one day become mandatory reading for beauty pageant contestants.



It was great fun to see the Constitution play such a prominent role during the last television season. And with the apparent assassination of

President Palmer in the season finale of 24, coupled with the legal issues that will undoubtedly be given play on *The West Wing* when President Bartlet attempts to resume the powers and duties of his office, there is sure to be more to come next season. As I look forward to the season premieres of both shows this fall, I must admit that I am torn between a desire to see them truly get the law right this time around, and the hope that the writers will provide further grist for a sequel of my own. 