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Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment

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Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment

Daniel J.T. Schuker[♦]

ABSTRACT

This Article offers a new approach to understanding, classifying, and assessing cases of presidential disability. In constitutional terms, "presidential disability" refers to any condition that renders the President of the United States "unable to discharge the powers and duties" of the office. Remarkably, the existing legal infrastructure under the Twenty-Fifth Amendment provides no guidance for determining when a President has become constitutionally disabled. Nor does it explain when the President (under Section 3) should initiate the succession process, and when the Vice President and other senior officials (under Section 4) should take the lead instead. During crises of presidential disability, administrations have felt obliged to devise ad hoc solutions. The framework developed here poses three basic questions to formulate a legal diagnosis of a President's condition: How severe is the disability? When is the disability expected to end? Where is the disability located? The new framework indicates, based on a given diagnosis, who—either the President or the Vice President with other designated officials—would be best positioned to determine whether to invoke the Twenty-Fifth Amendment. This systematic approach, grounded in historical experience, should mitigate the uncertainties of what has so often proved a politically charged and disorderly process.

[♦] Law Clerk, Judge J. Harvie Wilkinson III, United States Court of Appeals for the Fourth Circuit. Yale Law School, J.D. 2013; Harvard University, A.B. 2008. Many thanks to Akhil Amar, Kathryn Cherry, Heather Gerken, Ernest May, Christopher Michel, Roger Porter, Robert Post, and John Witt for their insights. I am also grateful to the staff at the National Archives and the editors of the *Journal of Law & Politics*. Lauren Schuker Blum, Stephen Schuker, and Maria Tatar provided generous support throughout the writing process. And, as always, thanks to Giselle Barcia.

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> *We give the President more work than a man can do, more responsibility than a man should take, more pressure than a man can bear. . . . We wear him out, use him up, eat him up.*[1]
>
> —*John Steinbeck*

INTRODUCTION

One evening in October 1973, as war raged in the Middle East, Henry Kissinger answered a telephone call from his deputy at the National Security Council. British Prime Minister Edward Heath wanted to speak with President Nixon within the next half hour.[2] "Can we tell them no?" Kissinger asked the deputy, Brent Scowcroft. "When I talked to the President he was loaded."[3]

President Nixon was already embroiled in the Watergate scandal, and Spiro Agnew had just resigned the vice presidency after pleading no contest to criminal charges of tax evasion.[4] Another evening two weeks later, the White House received a message from the Kremlin threatening to intervene with Soviet forces in the Middle East. Kissinger quickly prepared to meet with the Administration's top national security officials to formulate a response: a worldwide military alert of all American forces, conventional and nuclear.[5] President Nixon, however, did not attend the meeting.[6] Kissinger and Alexander Haig, the White House Chief of Staff, agreed that the President was "too distraught to participate."[7]

At moments during that Middle East crisis, President Nixon was not only psychologically distraught from political events, but also apparently physiologically impaired by alcohol consumption.[8] Was he ever—in the Constitution's words—"unable to discharge the powers and duties of his

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[1] John Steinbeck, *Government of the People*, *in* *AMERICA AND AMERICANS* AND SELECTED NONFICTION 339, 343 (Susan Shillinglaw & Jackson J. Benson eds., 2002).

[2] Telephone Conversation, Brent Scowcroft and Henry Kissinger (Oct. 11, 1973, 7:55 PM) [hereinafter Scowcroft & Kissinger Oct. 11 Telecon], *reprinted in* THE KISSINGER TELECONS: NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 123 (Thomas Blanton & William Burr eds., 2004), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB123/Box%2022,%20File%2010,%20Scowcroft%20%20Kissinger%20oct%2011%2073%205,55%20pm%20089.pdf.

[3] *Id.*

[4] *See, e.g.*, STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 397–98 (1990); JULES WITCOVER, VERY STRANGE BEDFELLOWS: THE SHORT AND UNHAPPY MARRIAGE OF RICHARD NIXON AND SPIRO AGNEW 340–44 (2008).

[5] *See infra* text accompanying notes 74–78.

[6] Nor did a Vice President attend; the office stood vacant at the time. *See infra* note 40.

[7] HENRY KISSINGER, YEARS OF UPHEAVAL 585 (1982).

[8] *See infra* text accompanying notes 81–87.

office"?[9] Although the President or other top officials could have invoked the Twenty-Fifth Amendment, apparently they never considered it.[10]

President Nixon's tangled situation entailed a remarkable confluence of events, but it hardly stands as a historical singularity. In crises of presidential disability,[11] administrations have often operated in the shadow of the law[12]—namely, the Twenty-Fifth Amendment and the Presidential Succession Act of 1947.[13] They have also, in some instances, misunderstood or disregarded the law on the books. The Twenty-Fifth Amendment empowers either the President or the Vice President and a group of senior officials to initiate the succession process. To transfer powers to the next officer in line, the Amendment requires a "written declaration" of the President's disability, either from the President—under Section 3[14]—or from "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"—under Section 4.[15] But the Amendment does not say which constitutional actor, under what circumstances, should make that decision. When the line of succession runs to officials of the opposite party, administrations possess a particularly strong incentive to circumvent the statutory stipulations and devise ad hoc solutions.

This Article responds to that analytic shortfall. It seeks to bring clarity to such tempestuous events by sharpening the contours of what presidential disability means—in a legal area as overlooked by scholars as it has been by government officials. Specifically, the Article scrutinizes the historical record and proposes a disciplined decision-making strategy. Scholars can use this approach to reexamine past events, and future administrations can deploy it in confronting the next crisis. The framework forms a critical step toward constructing a sound foundation for understanding the legal dynamics of presidential succession. In turn, the framework offers a means to mobilize the Amendment's own terms and to determine *where* to place

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[9] U.S. CONST. amend. XXV; *see also id.* art. II, § 1, cl. 6 (addressing cases of a President's "Inability to discharge the Powers and Duties of the said Office").

[10] *See* Interview by Robert Dallek with Alexander Haig (2006), *quoted in* ROBERT DALLEK, NIXON AND KISSINGER: PARTNERS IN POWER 527–28 & 687 n. (2007). Haig's claim refers to the tense days throughout late October 1973, but not specifically to the events surrounding the military alert.

[11] Although the word "disability" generally refers to physical or mental conditions, "presidential disability" is the constitutional term of art most commonly used by both government and academic authorities in this area.

[12] For the canonical application of this phrase, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[13] 3 U.S.C. § 19 (2012).

[14] U.S. CONST. amend. XXV, § 3.

[15] *Id.* amend. XXV, § 4.

the burden of decision. This Article's proposals fill, for the first time, a critical gap that has persisted in the literature as well as in practice.

The classificatory framework proposed in this Article offers a bottom-up solution. It identifies a means to assess the President's condition, and that "diagnosis" in turn indicates who is best positioned to make the decision. The resulting prescription need not be absolute. But it provides a presumption for determining where to allocate this decisional authority—either with the President, under Section 3, or with the Vice President and the Cabinet (or another designated body), under Section 4. Crucially, this approach would enable an administration to develop workable rules before a crisis of presidential disability develops. This Article strives to remodel the historically ad hoc decision-making process about presidential disability into a structured framework that establishes a presumption for the relevant constitutional provision and the decisive constitutional actor.

By analogy to the proliferation of judicial tools of statutory interpretation, the framework proposed here creates an "interpretive regime"[16] for the Twenty-Fifth Amendment: it sets the terms of the debate and establishes a common language to evaluate constitutional questions that often demand answers on short notice and amid a crisis atmosphere. Yet judging cases of presidential disability under the Twenty-Fifth Amendment is an unusual task because the questions lie almost exclusively within executive discretion.[17] The language of Sections 3 and 4 expressly calls for action by the President or other members of the executive branch—an instance of what the Supreme Court, in the context of nonjusticiable political questions, has called "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[18] Although the Twenty-Fifth Amendment requires no particular framework to be followed, this approach provides a commonsense, practical, and constitutionally consistent means for

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[16] *See* William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* NOMOS XXXVI: THE RULE OF LAW 265, 268 (Ian Shapiro ed., 1994) (developing the notion of an interpretive regime as "a set of conventions that restrain and regulate judicial action"); *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 355–60 (2d ed. 2006) (discussing various policy-based justifications for canons of statutory interpretation).

[17] Substantive judicial challenges under the Twenty-Fifth Amendment have not yet arisen, even if they remain theoretically possible. For a rare reference to the Twenty-Fifth Amendment within the pages of U.S. Reports, see *Freytag v. Commissioner*, 501 U.S. 868 (1991). The *Freytag* Court declined, *id.* at 886–87 & n.4, to interpret the Twenty-Fifth Amendment's reference to "executive departments" as limiting the meaning of the term "Heads of Departments" in the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2.

[18] Baker v. Carr, 369 U.S. 186, 217 (1962).

allocating the burden of decision in these difficult and otherwise ambiguous cases.

The prospect of presidential disability should come as no surprise for an office that visits untold stress upon its occupant—and a branch that centers on the status of a single human being.[19] The President's wellbeing holds what the Supreme Court has deemed a place of "overwhelming" importance in the American constitutional system.[20] Yet successive presidential administrations have continued to wrestle with this conundrum: under what circumstances does a President become constitutionally disabled? The first inclination has sometimes been, if possible, to conceal the disability. The past century, both before and after adoption of the Twenty-Fifth Amendment, provides various historical examples.[21] Even for disabilities that receive widespread attention, administrations have often felt obliged to work around the disability rather than formally engage the constitutional and statutory machinery. The diversity of possible disabilities, combined with the lack of an effective classificatory framework, has thickened the atmosphere of uncertainty.

Surprisingly, scholars have not sought to develop a systematic approach that responds to a legal quandary that has recurred across so many administrations. The ambiguities in evaluating presidential disability have persisted not only since the ratification of the Twenty-Fifth Amendment, but since the Founding. At the Constitutional Convention, John Dickinson of Delaware asked, "What is the extent of the term 'disability' & who is to be the judge of it?"[22] His question was left unresolved in Philadelphia.[23]

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[19] *See infra* text accompanying notes 218–223; *see also* ROBERT E. GILBERT, THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE 18 (1998) ("[T]he often-stated belief that the presidency is a punishing and even a killing job is dramatically substantiated by the medical histories of many of our presidents and also in the frequency of premature visits to presidents and former presidents by the proverbial angel of death.").

[20] Wood v. Moss, 134 S. Ct. 2056, 2061 (2014) ("[S]afeguarding the President is . . . of overwhelming importance in our constitutional system."); Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence."); *see also* Rubin v. United States, 525 U.S. 990, 990–91 (1998) (Breyer, J., dissenting from the denial of certiorari) ("The physical security of the President of the United States has a special legal role to play in our constitutional system. . . . [O]ne could reasonably believe that the law should take special account of the obvious fact that serious physical harm to the President is a national calamity . . . .").

[21] For a forceful exposition of this view as a historical matter, see ROBERT H. FERRELL, ILL-ADVISED: PRESIDENTIAL HEALTH AND PUBLIC TRUST, at ix (1992), which examines several moments from President Cleveland's Administration onward that exhibit "the willingness of presidents of the United States or their physicians, and sometimes presidents in collaboration with their physicians, to cover up their illnesses."

[22] James Madison, Journal (Aug. 27, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 427 (Max Farrand ed., 1911).

Today, the modern legal literature on presidential disability focuses predominantly on the order of presidential succession, rather than the nature of a constitutional "disability."[24] Historical accounts of specific episodes of presidential disability have attracted attention, but they have not tried to categorize past and future cases of presidential disability in a systematic way.[25] This Article innovatively applies legal analysis to the

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[23] FOUNDING THE AMERICAN PRESIDENCY 243 n.9 (Richard J. Ellis ed., 1999) ("The delegates never returned to the subject and so never returned Dickinson's charge.").

[24] In particular, academic debates since the ratification of the Twenty-Fifth Amendment have centered on the applicability of the 1947 statute, which places the Speaker of the House and the President Pro Tempore of the Senate next in the line of succession after the Vice President. That provision has encountered strong criticism on constitutional and prudential grounds. For constitutional criticism, see *infra* note 27. For prudential criticism, see *infra* note 28. For other works in this vein beyond those discussed in detail in the two aforementioned notes, see William F. Baker & Beth A. FitzPatrick, *Presidential Succession Scenarios in Popular Culture and History and the Need for Reform*, 79 FORDHAM L. REV. 835 (2010); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones,"* 75 GEO. L.J. 1389 (1987); John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993 (2004); Robert E. Gilbert, *Coping with Presidential Disability: The Proposal for a Standing Medical Commission*, 22 POL. & LIFE SCI. 2 (2003); and Nancy Kassop, The Law: *When Law and Politics Collide: Presidents and the Use of the Twenty-Fifth Amendment*, 35 PRESIDENTIAL STUD. Q. 147 (2005). For criticism in journalistic form, see Bruce Ackerman, *Take Your Paws off the Presidency!*, SLATE (July 15, 2008, 3:35 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/07/take_your_paws_off_the_presidency.html; Akhil Reed Amar, *Take Five*, NEW REPUBLIC, Feb. 8, 1999, at 15 [hereinafter Amar, *Take Five*]; Akhil Reed Amar, *Why Speakers of the House Should Never Be President*, NEW REPUBLIC (Jan. 12, 2012), http://www.newrepublic.com/article/politics/99509/presidential-succession-speaker-house; Birch Bayh, *The White House Safety Net*, N.Y. TIMES, Apr. 8, 1995, http://www.nytimes.com/1995/04/08/opinion/the-white-house-safety-net.html; and John D. Feerick, *The Way of the 25th*, N.Y. TIMES, Dec. 13, 1973, at 47, *available at* http://query.nytimes.com/mem/archive/pdf?res=FA0B11FF385D127A93C1A81789D95F478785F9. One academic work has examined whether or not the constitutional standard for disability varies under Section 3 of the Twenty-Fifth Amendment (when the President decides) and Section 4 (when the Vice President and the Cabinet decide). Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459 (2009). And a few works by trained physicians have tried to give medical specificity to the term "disability." *E.g.*, MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT (Robert E. Gilbert ed., 2000); PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES (Kenneth W. Thompson ed., 1988); PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY AMONG PRESIDENTS OF THE UNITED STATES (James F. Toole & Robert J. Joynt eds., 2001); Herbert L. Abrams, *Can the Twenty-Fifth Amendment Deal with a Disabled President? Preventing Future White House Cover-Ups*, 29 PRESIDENTIAL STUD. Q. 115 (1999). But no work that this author has encountered establishes a systematic approach to classifying the full variety of cases of presidential disability.

[25] *See, e.g.*, BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION (1968); JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION (1965) [hereinafter FEERICK, FROM FAILING HANDS]; JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS (1976) [hereinafter FEERICK, THE TWENTY-FIFTH AMENDMENT]; ROBERT H. FERRELL, ILL-ADVISED: PRESIDENTIAL HEALTH AND PUBLIC TRUST (1992); ROBERT E. GILBERT, THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE (1998). John Feerick, a leading scholar of presidential succession who played a central role in developing the Twenty-Fifth Amendment, authored a seminal analysis of the Amendment's four

historical record in order to develop such a framework for presidential disabilities across the spectrum.

The prevailing practical difficulties have emanated partly from the nature of politics. Presidential succession is a deeply political issue. Across American history, political instincts and anxieties have driven many apparent disabilities into the shadows. But political considerations, such as how a temporary transfer of power might reflect on the President and which person will hold the office in the interim, offer only a baseline for responding to a potential disability. Those elements may even loom large. The inquiry "has to be a question of degree," Senator Birch Bayh, a leading figure in shaping the Twenty-Fifth Amendment, has remarked, "because it is only natural for the president's men to say, 'He's in bad shape, but compared to whom? Look who's going to succeed him.'"[26] Still, political considerations alone do not necessarily offer sensible solutions.

In the case of a "double vacancy" of both the President and the Vice President, moreover, the governing 1947 statute—a provision that has encountered strong criticism on constitutional grounds[27]—places the

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sections in his 1976 work on the subject. FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra*, at 193–207. He underscored the broad range of circumstances in which the Amendment's Framers intended the provisions to apply. Still, he did not attempt to formulate a systematic framework of the kind proposed here.

[26] Interview by Herbert L. Abrams with Birch Bayh (June 7, 1990), *quoted in* HERBERT L. ABRAMS, "THE PRESIDENT HAS BEEN SHOT": CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 217 (1992). Bayh was the Amendment's principal sponsor in the Senate.

[27] The textual debate turns in large part on the meaning of the word "Officer" in the constitutional clause addressing a double vacancy. U.S. CONST. art. II, § 1, cl. 6 ("[T]he 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 . . . ."); *see* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114 (1995) ("[T]he best reading of the Constitution's text, history, and structure excludes federal legislators from the line of presidential succession."); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 156 (1995) ("[A] close textual and structural analysis suggests that the Amars are probably right . . . ."); Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 476 (1949) (arguing that with the 1947 statute Congress "exceeded its power in designating legislative officers" in the line of succession because "Congress may designate only 'officers of the United States'"); *see also* John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L.J. 907, 944 (2010) ("A serious question undoubtedly exists regarding whether legislative leaders are 'Officers' as intended by the Constitution. Still, the Constitution is not without its ambiguities in this area."). *But see* John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 142 (1995) (offering "reasons to hesitate before declaring unconstitutional Congress'[s] longstanding (but not unbroken) practice of having legislative 'Officers' in the line of succession"). For a constitutional perspective claiming that the statute violates the separation of powers, see Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers: "If at First You Don't Succeed, Try, Try Again,"* 20 HASTINGS CONST. L.Q. 105, 138–41 (1992), which maintains, inter alia, that placing members of Congress in the line of succession transgresses the principle against legislative self-delegation expressed in *Bowsher v. Synar*, 478 U.S. 714 (1986).

Speaker of the House and the President Pro Tempore of the Senate next in the line of succession. In practice, that dynamic may deter administrations from choosing a judicious course of action.[28] Even when the relevant officials have cleared the first hurdle of classifying the disability, the prospect of ceding the presidency to the other party may well keep administrations from acting on the appropriate diagnosis. The 1947 Act sought to address one potential issue of democratic legitimacy (an "appointed" President)[29] and yet apparently created another (a potential party switch).

Although no law can cover every conceivable case,[30] a robust legal framework can help with classifying and assessing many seemingly ambiguous cases of presidential disability. The modern legal infrastructure provides no guidance for determining *when* a President has become constitutionally disabled. The dearth of legal indicators is perhaps all the more surprising given that issues in presidential succession have been addressed in an article of the Constitution,[31] three constitutional amendments,[32] and three major statutory alterations.[33] Yet particularly in "borderline" cases, the lack of clarity has both obfuscated the nature of the problem and discouraged prudent reactions. The framework proposed in this Article, developed through close study of historical cases, offers a structured approach for understanding past crises and evaluating future

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[28] *See, e.g.*, Amar & Amar, *supra* note 27, at 114 ("If legislators are in line to fill a vacant Oval Office, a pervasive conflict of interest will warp their judicial roles in presidential and vice-presidential impeachment proceedings . . . ."); Feerick, *supra* note 27, at 945 ("[T]he principal reason for removing legislative officers from the line of succession is to ensure continuity of policy and administration at a time of crisis—an objective that cannot be ensured with legislative officers in the line."); *see also* Continuity of Gov't Comm'n, *Preserving Our Institutions: The Continuity of the Presidency*, AM. ENTER. INST. & BROOKINGS INST. 39 (June 2009), http://www.brookings.edu/~/media/research/files/reports/2009/7/06%20continuity%20of%20government/06_continuity_of_government.pdf (outlining a range of "serious policy and constitutional objections to having Congressional leaders in the line of succession"). More broadly, Akhil Amar contends that the 1947 law is "a disastrous statute, an accident waiting to happen." *Ensuring the Continuity of the United States Government: The Presidency: Joint Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Rules & Admin.*, 108th Cong. 7 (2003) (statement of Akhil Reed Amar, Professor, Yale Law School).

[29] *See, e.g.*, FEERICK, FROM FAILING HANDS, *supra* note 25, at 204–06.

[30] *See, e.g.*, Birch E. Bayh, Jr., *The Twenty-Fifth Amendment: Its History and Meaning*, *in* PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES, *supra* note 24, at 1, 29 ("We looked at our mission as more of a political one as how to design and create a structure that would permit a system to go forward and take advantage of medical expertise at the time it would be needed.").

[31] U.S. CONST. art. II, § 1.

[32] *Id.* amend. XII; *id.* amend. XX; *id.* amend. XXV. Notably, the Twelfth and Twenty-Fifth Amendments are respectively the second- and third-longest constitutional amendments, after the Fourteenth Amendment.

[33] For background on the 1792 succession law, see FEERICK, FROM FAILING HANDS, *supra* note 25, at 57–62. For the 1886 law, see *id.* at 140–46. For the 1947 law, see *id.* at 204–10.

ones. A typology derived from historical analysis should also promote sound administrative practice, even within the finite direction of the Twenty-Fifth Amendment and the confines of the 1947 Act. If implemented, this approach should mitigate the uncertainties of what has so often proved a politically charged and disorderly process.

Part I of this Article scrutinizes a "perfect storm" for the conceptual difficulties of analyzing presidential disability. On the night of October 24, 1973, the problems of a temporarily disabled President and a potential double vacancy coincided with an urgent national security decision. Yet the episode is virtually absent from the legal literature, and it has been largely overlooked in the historical literature as well.[34] This Article offers the first significant effort to examine the case from a legal perspective. The analysis deploys original primary research that advances significantly beyond existing published accounts of the crisis.

The central case study underscores the need for a more systematic approach to ascertain when a President has become disabled. Importantly, it also reveals the rough texture of the White House decision-making process—infused with uncertainty, interlinked with many exogenous concerns, and often developed ad hoc—when a President's status appears to straddle the threshold of disability. Part I thus serves both justificatory and demonstrative functions that undergird the subsequent analysis. Indeed, it suggests the urgency of developing a more systematic approach to ride out the next storm.

Part II sets out the proposed interpretive framework for classifying cases of presidential disability. Part III then gives content to the framework

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[34] Key participants have discussed the events (with varying degrees of directness and completeness) in their respective memoirs. *E.g.*, WILLIAM COLBY & PETER FORBATH, HONORABLE MEN: MY LIFE IN THE CIA (1978); ANATOLY DOBRYNIN, IN CONFIDENCE: MOSCOW'S AMBASSADOR TO SIX COLD WAR PRESIDENTS (1995); ALEXANDER M. HAIG, JR., WITH CHARLES MCCARRY, INNER CIRCLES: HOW AMERICA CHANGED THE WORLD (1994); HENRY KISSINGER, CRISIS: THE ANATOMY OF TWO MAJOR FOREIGN POLICY CRISES (2003); KISSINGER, *supra* note 7; RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON (1978); WILLIAM B. QUANDT, PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967 (3d ed. 2005). In addition, a handful of historical works on the Nixon Administration and its foreign policy have striven to examine the circumstances inside the White House. *E.g.*, DALLEK, *supra* note 10; RAYMOND L. GARTHOFF, DÉTENTE AND CONFRONTATION: AMERICAN-SOVIET RELATIONS FROM NIXON TO REAGAN (rev. ed. 1994); WALTER ISAACSON, KISSINGER: A BIOGRAPHY (1992); RICHARD NED LEBOW & JANICE GROSS STEIN, WE ALL LOST THE COLD WAR (1994). Despite the apparent significance of President Nixon's condition as his Administration issued the DEFCON 3 alert and the perfect storm that those events formed, no legal work that this author has encountered addresses the implications of this case for the law of presidential succession and disability. Indeed, the only evident reference to the possibility of invoking the Twenty-Fifth Amendment during this crisis appears in Robert Dallek's account. DALLEK, *supra* note 10, at 527–28 & 687 n. And even Dallek's account, which is historical rather than legal, refers generally to the late October 1973 period, but not specifically to the military alert.

by applying it to an array of historical cases and identifying which provision, Section 3 or Section 4, would merit a presumption in each instance. This approach breaks the inquiry into three questions. Each dimension of responses operates along a spectrum. First, how severe is the disability? The *severity dimension* ranges from "impairment" to "incapacity." Second, when is the disability expected to end? The *temporal dimension* extends from "temporary" to "persistent." Finally, where is the disability located? The *spatial dimension* runs from "logistical" to "physiological."

This three-part classificatory framework is intended to be simple enough to prove both analytically and practically useful. It offers a response plan that can be implemented before a new storm hits. By establishing workable rules in advance, Presidents and their administrations can enhance the predictability and legitimacy of these difficult choices. In moments of crisis, confusion, or uncertainty, such an approach should help administration officials make sense of a President's condition and come to an orderly decision.

I. A PERFECT STORM? PRESIDENT NIXON AND THE 1973 MILITARY ALERT

If a "perfect storm" of succession problems has formed since the Twenty-Fifth Amendment's ratification, it reached the White House on the night of October 24, 1973. By the fall of 1973, the travails of Watergate had so distracted President Nixon from his policymaking duties and so severely affected his mood that Henry Kissinger no longer considered him "a functioning President."[35] Indeed, Kissinger and Alexander Haig decided to leave a distraught President Nixon out of the late-night meeting in the Situation Room where they and five other senior officials would order the worldwide military alert.[36] The following analysis examines this episode with such care because it is instructive for understanding how cases of presidential disability operate. The core conceptual problems raised here remain unresolved, and the texture of the Nixon Administration officials' decision-making process brings the overarching legal ambiguities into sharp focus.

The case highlights two contentious facets of the law governing presidential succession. First, it raises difficult classificatory questions

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[35] Telephone Conversation, Alexander Haig and Henry Kissinger (Oct. 24, 1973, 10:20 PM) [hereinafter Haig & Kissinger Oct. 24 Telecon], *available at* http://foia.state.gov/searchapp/documents/kissinger/0000C86B.pdf.

[36] *See infra* text accompanying notes 74–80.

about deciding when a President has become constitutionally disabled under the Twenty-Fifth Amendment. On the night of October 24, President Nixon faced a temporary impairment that was both psychological and, according to the historical record, also physiological. Yet the President and his advisors reportedly did not consider the legal avenues for presidential succession.[37] Still, the Constitution and the 1947 Act offer little guidance on whether the Administration officials should have taken legal action or what particular route they should have pursued.

Second, the crisis underscores issues of practicality in the established order of succession. If the political fallout of even a temporary relinquishment of power seemed unpalatable to President Nixon[38] or his Cabinet,[39] the practical impact may have troubled them further. Because the Vice President's office remained vacant (Gerald Ford would not fill the position until December),[40] the next person in line for the presidency was Speaker of the House Carl Albert, a Democrat.[41] Moreover, the person who chaired the critical meeting on the night the White House issued the military alert was Kissinger. Although as Secretary of State[42] he would otherwise have stood third in line for the office,[43] the foreign-born Kissinger was constitutionally ineligible to succeed to the presidency.[44]

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[37] *See supra* note 10 and accompanying text.

[38] *See, e.g.*, Telephone Conversation, Richard Nixon and Henry Kissinger (Oct. 24, 1973, 7:10 PM) [hereinafter Nixon & Kissinger Oct. 24 Telecon], *available at* http://foia.state.gov/searchapp/documents/kissinger/0000C85D.pdf ("The real tragedy is if I move out everything we have done will crumble." (President Nixon)).

[39] *See, e.g.*, DALLEK, *supra* note 10, at 528.

[40] President Nixon had nominated Gerald Ford for the vice presidency twelve days earlier, on October 12, and Ford was awaiting confirmation at this time. He was sworn in as Vice President on December 6. Ford, it so happens, was also the first person to become Vice President through the procedures provided by Section 2 of the Twenty-Fifth Amendment. *See* U.S. CONST. amend. XXV, § 2 ("Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.").

[41] *See* 3 U.S.C. § 19(a)(1) (2012) ("If . . . there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall . . . act as President."); *see also* Nixon & Kissinger Oct. 24 Telecon, *supra* note 38 ("Can you see Carl Albert in this crisis[?] He would be running it from Walter Reed. And Gerry Ford, fond as I am of him, just doesn't have it." (Kissinger)).

[42] Kissinger was concurrently serving as National Security Advisor.

[43] A vacancy in the vice presidency generally places the Secretary of State third in line, after the Speaker of the House and the President Pro Tempore of the Senate. *See* 3 U.S.C. § 19(d)(1) (2012).

[44] *See* U.S. CONST. art. II, § 1, cl. 5 ("No person except a natural born Citizen . . . shall be eligible to the Office of President . . . ."). If the order of succession had run directly to the Cabinet rather than to Congress, as it did before the 1947 Act, *see* FEERICK, FROM FAILING HANDS, *supra* note 25, at 143, and as some reformers have suggested, *see supra* notes 27–28 and accompanying text, the Secretary of the Treasury would have stood next in line to assume the powers and duties of the office, *see* 3 U.S.C. § 19(d)(1) (2012). Opportunely, the Treasury Secretary at the time was George Shultz, who would later serve as President Reagan's Secretary of State during the twilight years of the Cold War.

This case thus conjures a perfect storm of conceptual challenges: (1) an apparent yet complex presidential disability, (2) the prospect of a double vacancy, (3) a Speaker hailing from the opposite party, (4) a pressing national security crisis requiring immediate action, (5) a presidential-level decision made by the President's advisors, and (6) a Cabinet member, foreign born and thus constitutionally ineligible for the presidency, apparently leading those deliberations. The analysis of the episode proceeds in three steps. It explores how the crisis came about (Section I.A), how the succession problems converged amid a major international crisis (Section I.B), and how the powers and duties of the office were exercised during President Nixon's temporary physiological impairment (Section I.C). This account illustrates the acute nature of President Nixon's condition on the night of October 24. It also reveals a critical event for testing the legal bounds of presidential disability.

Much of the historical account was constructed through archival sources—recorded telephone conversations, diplomatic cables, and internal documents—stored in the State Department's collection, the Nixon Presidential Library at the National Archives, and National Security Archive.[45] Remarkably, an examination of President Nixon's condition during the night of the global military alert seems to have been essentially overlooked in the legal literature. For that reason, the original primary research used here is particularly important. Primarily, it vividly presents the rough texture and difficult ambiguities of the decision-making process. But it brings the additional benefit of making an independent and much-needed contribution to the legal literature's understanding of the leading historical cases of presidential disability.

A. A Storm Is Brewing: Development of the Crisis

This case study in presidential disability has deep roots, and the key moments fall within an intertwined narrative with international, domestic, and personal elements. Internationally, the crisis began in the early hours of October 6, 1973, when Egypt and Syria launched a coordinated attack on Israel. Within a matter of days, the Soviet Union and the United States became entangled in the conflict not only through diplomatic forays, but

[45] Parts of this account draw on Daniel J.T. Schuker, Lifting the Fog: Presidential Decision-Making in National Security Crises (Mar. 20, 2008) (unpublished A.B. thesis, Harvard University) (on file with author).

also through competing airlifts.[46] By the evening of October 23, the conflict in the Middle East seemed to be subsiding.[47]

Internally, however, the Nixon Administration had not yet reached the depths of a political and perhaps constitutional crisis. The most troublesome messages that evening came not from the Sinai Peninsula, but from inside the Beltway—where Haig reported that President Nixon was "[v]ery down, very down."[48] On the heels of Spiro Agnew's resignation, the President now confronted the political fallout from the "Saturday Night Massacre."[49] On October 20, President Nixon had ordered the dismissal of Special Prosecutor Archibald Cox; Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned after refusing to carry out the dismissal order.[50] Already, Kissinger felt that "Nixon no longer had the time or nervous energy to give consistent leadership."[51] Then, on October 23, members of Congress submitted eight impeachment motions to the House Judiciary Committee.[52] Waiving executive privilege, the President also agreed to release several subpoenaed tapes of his conversations with White House staffers.[53] Although President Nixon often took an active hand in his Administration's foreign policy,[54] his domestic troubles had scarcely left him time to monitor Kissinger's exchanges since the beginning of the war in the Middle East.[55]

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[46] *See, e.g.*, KISSINGER, *supra* note 7, at 501–02, 513–46; LEBOW & STEIN, *supra* note 34, at 182–97; ABRAHAM RABINOVICH, THE YOM KIPPUR WAR: THE EPIC ENCOUNTER THAT TRANSFORMED THE MIDDLE EAST 324, 491 (2004).

[47] The calm that accompanied the passage of a renewed U.N. Security Council ceasefire agreement appeared to augur an end to the fighting and the avoidance of a direct superpower confrontation. *See* S.C. Res. 339, U.N. Doc. S/RES/339 (Oct. 23, 1973); RABINOVICH, *supra* note 46, at 465; *see also* KISSINGER, *supra* note 7, at 575 (providing Kissinger's perspective on the status of the crisis that evening).

[48] Telephone Conversation, Alexander Haig and Henry Kissinger (Oct. 23, 1973, 8:00 PM), *available at* http://foia.state.gov/searchapp/DOCUMENTS/kissinger/0000C83C.pdf.

[49] *See, e.g.*, KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 361–62 (1997).

[50] *See, e.g.*, *id.* at 356–57; KUTLER, *supra* note 4, at 406.

[51] KISSINGER, *supra* note 7, at 535.

[52] *See* 119 CONG. REC. 34,873 (1973); *see also* BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 15 (1976) (noting that, on October 23 and 24, "44 Watergate-related bills [were] introduced in the Congress, including 22 that call[ed] for an impeachment investigation").

[53] *See, e.g.*, WOODWARD & BERNSTEIN, *supra* note 52, at 26. "This is a hell of a concession," he remarked to Kissinger about the potentially "embarrassing" tapes. Telephone Conversation, Richard Nixon and Henry Kissinger (Oct. 23, 1973, 6:50 PM), *available at* http://foia.state.gov/searchapp/documents/kissinger/0000C837.pdf.

[54] *See generally* DALLEK, *supra* note 10 (examining President Nixon's role in his Administration's foreign policy and his relationship with Kissinger).

[55] *See, e.g.*, *id.* at 531.

The calm of the previous evening proved ephemeral.[56] A message from Egyptian President Anwar Sadat on the afternoon of October 24 would set the superpowers on a precarious course. First privately and then publicly, Sadat asked both U.S. and Soviet "forces" to intervene jointly in the conflict.[57] The Nixon Administration deemed such a prospect unacceptable.[58] In a message later that evening—after the President had retired to his upstairs quarters in the White House[59]—General Secretary Leonid Brezhnev posed the matter more starkly: "I will say it straight that if you find it impossible to act jointly with us in this matter, we should be faced with the necessity urgently to consider the question of taking appropriate steps unilaterally."[60]

White House officials could not be sure how seriously Brezhnev intended his threat of unilateral intervention.[61] Yet even if Brezhnev's threat constituted a bluff,[62] U.S. officials could scarcely afford to gamble about Soviet intentions, particularly without the President's involvement in the decision-making process.[63] As Kissinger prepared to convene a meeting of the Administration's top national security officials, he placed a call to Soviet Ambassador Anatoly Dobrynin in hopes of staving off hasty decisions in Moscow. "This is a matter of great concern," he urged. "Don't

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[56] When Kissinger returned to his White House office the next morning, new reports of ceasefire violations awaited him on his desk. *See* KISSINGER, *supra* note 7, at 575; RABINOVICH, *supra* note 46, at 465.

[57] *See* KISSINGER, *supra* note 34, at 330–31. Sadat had also asked Moscow to act unilaterally if the United States balked at the proposal.

[58] *See, e.g.*, KISSINGER, *supra* note 7, at 580; *see also id.* at 508 (recounting an October 12 luncheon at which Kissinger warned Soviet Ambassador Anatoly Dobrynin that "any Soviet military intervention would be resisted and wreck the entire fabric of US-Soviet relations"). Contingency plans for U.S. troop deployments had apparently been prepared, although only to provide a "matching demonstration" and facilitate a drawdown after a ceasefire. *See* GARTHOFF, *supra* note 34, at 423 n.70 (rev. ed. 1994).

[59] *See infra* text accompanying notes 81–87.

[60] Message from Leonid Brezhnev to Richard Nixon (Oct. 24, 1973), *reprinted in* THE OCTOBER WAR AND U.S. POLICY (William Burr ed., 2003), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB98/octwar-71.pdf.

[61] Haig, at least initially, thought the Soviets were "playing chicken." Telephone Conversation, Henry Kissinger and Alexander Haig (Oct. 24, 1973, 9:50 PM) [hereinafter Kissinger & Haig Oct. 24 Telecon], *available at* http://foia.state.gov/searchapp/DOCUMENTS/kissinger/0000C868.pdf. But Kissinger read the message as an "ultimatum" and considered it "one of the most serious challenges to an American President by a Soviet leader." KISSINGER, *supra* note 7, at 583. He told Haig, "I think we have to go to the mat on this one." Kissinger & Haig Oct. 24 Telecon, *supra*.

[62] The available accounts from the Kremlin suggest that the Soviet leadership probably did not seriously contemplate unilateral invention. *See* VICTOR ISRAELYAN, INSIDE THE KREMLIN DURING THE YOM KIPPUR WAR 164–70 (1997); LEBOW & STEIN, *supra* note 34, at 237–38.

[63] In Kissinger's view, the White House could not simply hope that the Soviets were just posturing, and he thought passivity might even spur the Soviets into unilateral action. KISSINGER, *supra* note 7, at 585. The Soviets could have flown in a paratroop division, for instance, with minimal mobilization delays. *See* Kissinger & Haig Oct. 24 Telecon, *supra* note 61.

you pressure us. I want to repeat again, don't pressure us!"[64] Dobrynin noticed that Kissinger sounded uncharacteristically "nervous."[65] With neither a President nor a Vice President available that night—at least in practical terms, a double vacancy—Kissinger had reason to feel anxious.

B. In the Eye: Ordering the Worldwide Military Alert

On the night of October 24, the twin problems of classifying a President's condition and managing a potential double vacancy confronted the urgencies of security and diplomacy. Circumstances might have allowed Administration officials on prior occasions to await the clarity of the following day, when the President might again be available to participate. But the imperatives of the Middle East conflict compounded the acute legal problems. The specter of Soviet intervention required a prompt response from the highest levels. The decision seemingly could not be postponed for the morning.

As the crisis approached its most critical stage on the evening of October 24, President Nixon was distraught. Kissinger found him "as agitated and emotional as I had ever heard him."[66] Commenting on his plans to hold a press conference on his Watergate dealings, the President remarked about the journalists, "It is really pushing the President to go on and get kicked around by those bastards."[67] Before Kissinger could finish his reply, President Nixon interjected, "They are doing it because of their desire to kill the President. And they may succeed. I may physically die."[68] The two continued to discuss Watergate, but Kissinger made no mention of recent developments in the Middle East.[69]

More than two hours before the White House received Brezhnev's ultimatum, Kissinger apparently understood that the Commander-in-Chief would not be able to participate in further deliberations that evening.[70] By the time Dobrynin called to relay the message, President Nixon had gone

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[64] Telephone Conversation, Henry Kissinger and Anatoly Dobrynin (Oct. 24, 1973, 10:15 PM), *available at* http://foia.state.gov/searchapp/documents/kissinger/0000C86A.pdf.

[65] DOBRYNIN, *supra* note 34, at 296.

[66] KISSINGER, *supra* note 7, at 581.

[67] Nixon & Kissinger Oct. 24 Telecon, *supra* note 38.

[68] *Id.* Kissinger tried to reassure President Nixon: "You are at your best in adversity." *Id.*

[69] *Id.*

[70] *See* KISSINGER, *supra* note 7, at 582; Nixon & Kissinger Oct. 24 Telecon, *supra* note 38, at 2; Telephone Conversation, Anatoly Dobrynin and Henry Kissinger (Oct. 24, 1973, 7:15 PM), *available at* http://foia.state.gov/searchapp/documents /kissinger/0000C85E.pdf.

to sleep.[71] Kissinger and Haig decided not to awaken him.[72] "He would just start charging around," Kissinger remarked.[73]

An hour later, Kissinger and a handful of senior national security aides[74] convened in the White House Situation Room.[75] By the time the meeting adjourned,[76] the group had decided to raise the worldwide U.S. military alert level to DEFCON 3, the highest defense readiness condition short of war.[77] Because the meeting's proceedings remain classified, it remains unclear precisely how the deliberations flowed and how vigorously some of the participants opposed raising the DEFCON level.[78] Fortunately for the United States, the gambit paid off: Brezhnev decided not to respond in kind to the American alert.[79] Within twenty-four hours, the crisis was over.[80] The superpowers had dodged the prospect of a military confrontation.

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[71] *See* KISSINGER, *supra* note 7, at 583 ("The President had retired for the night."); Kissinger & Haig Oct. 24 Telecon, *supra* note 61.

[72] Kissinger and Haig discussed the matter at least twice before the meeting. *See* Kissinger & Haig Oct. 24 Telecon, *supra* note 61 (9:50 PM conversation); Haig & Kissinger Oct. 24 Telecon, *supra* note 35 (10:20 PM conversation).

[73] Haig & Kissinger Oct. 24 Telecon, *supra* note 35.

[74] The officials in attendance included Kissinger, Haig, Scowcroft, Secretary of Defense James Schlesinger, Director of Central Intelligence William Colby, Joint Chiefs of Staff Chairman Thomas Moorer, and Jonathan Howe, Kissinger's military assistant at the National Security Council. *See* KISSINGER, *supra* note 7, at 586.

[75] *Id.*

[76] *See* KISSINGER, *supra* note 7, at 586; *see also* QUANDT, *supra* note 34, at 123 ("Around midnight the first orders for the alert were issued, and at 1:30 a.m. on October 25 its scope was widened.").

[77] *See, e.g.*, ALISTAIR HORNE, KISSINGER: 1973, THE CRUCIAL YEAR 300 (2009) (explaining the implications of changing DEFCON gradations); KISSINGER, *supra* note 34, at 350 (same).

[78] CIA Director Colby later maintained that "nobody had any problems" with the decision, including Defense Secretary Schlesinger and Admiral Moorer. Interview by Richard Ned LeBow & Janice Gross Stein with William Colby (Jan. 11, 1992), *quoted in* LEBOW & STEIN, *supra* note 34, at 482 n.141. Yet in a conversation with Haig the following day, Kissinger voiced a different impression: "[Y]ou and I were the only ones for it. These other guys were wailing all over the place this morning." Telephone Conversation, Alexander Haig and Henry Kissinger (Oct. 25, 1973, 2:35 PM) [hereinafter Haig & Kissinger Oct. 25 Telecon], *available at* http://foia.state.gov/searchapp/documents/kissinger/0000C877.pdf.

[79] Brezhnev's message the next day made no mention of unilateral intervention or of a U.S. military alert. *See* Message from Leonid Brezhnev to Richard Nixon (Oct. 25, 1973), *reprinted in* THE OCTOBER WAR AND U.S. POLICY, *supra* note 60, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB98/octwar-76.pdf. "It was written," Kissinger remarked, "as if the crisis of the night before had never occurred." KISSINGER, *supra* note 7, at 597; *see also* ISRAELYAN, *supra* note 62, at 178–84 (noting that some voices inside the Kremlin advocated taking limited action to demonstrate Soviet resolve).

[80] Diplomacy in the days ahead would center on determining the size and composition of the U.N. observer force, as well as instituting talks between Israel and Egypt. *See, e.g.*, KISSINGER, *supra* note 7, at 599–613.

C. President Nixon's Status

Where was the President all this time? The available evidence suggests that President Nixon, who reportedly had a low alcohol tolerance,[81] was intoxicated and remained on the upper floors of the White House.[82] Kissinger had kept the President out of the loop on previous occasions in October, under similar circumstances.[83] During the critical deliberations on the night of October 24, Haig and Kissinger recognized that the President would be unable to participate.

At the same time, it is difficult to discern the precise degree of President Nixon's intoxication. Well before the crisis, he had gained a reputation among presidential aides for consuming late-night drinks and slurring his words in conversation after drinking only a moderate amount of alcohol.[84] Nixon advisor John Ehrlichman later recounted: "Physiologically, this fellow has a *disability*. One drink can knock him galley-west if he is tired. Even if he is not tired about two and a half drinks will do it."[85] Some

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[81] *See, e.g.*, ISAACSON, *supra* note 34, at 263 ("Nixon was less tolerant than normal people. It didn't take a whole lot of gin to get him sloshed." (quoting John Ehrlichman, President Nixon's advisor for domestic affairs)); *id*. (noting that Kissinger would often say that President Nixon, when "tired and under strain, . . . would begin slurring his words after just one or two drinks, even if he wasn't really drunk"); Interview by Alistair Horne with Brent Scowcroft (May 26, 2005), *quoted in* HORNE, *supra* note 77, at 302 ("Two martinis and he changed . . . he couldn't hold his liquor . . . how he held up over all those months of Watergate, I just don't know." (alterations in original)).

[82] *See, e.g.*, ROGER MORRIS, HAIG: THE GENERAL'S PROGRESS 257–59 (1982) (recounting Kissinger aide Lawrence Eagleburger's recollection of hearing from his boss about an "appalling night in the White House," with President Nixon "slurring his words and barely roused when Haig and Kissinger tried to deal with him in the first moment of the crisis"). When asked directly in a 1991 interview whether President Nixon was drunk that night, Kissinger declined to comment. LEBOW & STEIN, *supra* note 34, at 480–81 n.125. By Scowcroft's account, President Nixon was "off the wall. . . . He had had a very bad day." Interview by Alistair Horne with Brent Scowcroft (May 26, 2005), *quoted in* HORNE, *supra* note 77, at 302. When asked whether President Nixon was drunk, Scowcroft replied, "I can't rule it out." *Id.*

[83] *See, e.g.*, text accompanying notes 2–3. Another instance of exclusion occurred on October 20. While Kissinger was conducting negotiations in Moscow, he disregarded the President's instructions to "use whatever pressures may be required" to secure a "reasonable" settlement so that the two superpowers could "get our clients in line." Message from Richard Nixon to Henry Kissinger (Oct. 20, 1973), *reprinted in* THE OCTOBER WAR AND U.S. POLICY, *supra* note 60, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB98/octwar-47.pdf. Kissinger, "shocked" at the message, believed that "carry[ing] out the letter of the President'[s] instructions [would] totally wreck what little bargaining leverage I still have." Message from Henry Kissinger to Brent Scowcroft (Oct. 20, 1973), *reprinted in* THE OCTOBER WAR AND U.S. POLICY, *supra* note 60, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB98/octwar-48.pdf.

[84] *See, e.g.*, H.R. HALDEMAN WITH JOSEPH DIMONA, THE ENDS OF POWER 45 (1978) ("One beer would transform his normal speech into the rambling elocution of a Bowery wino."); ISAACSON, *supra* note 34, at 145, 263 (stating that Kissinger variously referred to President Nixon as "our drunken friend").

[85] John Ehrlichman, *The White House and Policy-Making*, *in* 6 PORTRAITS OF AMERICAN PRESIDENTS: THE NIXON PRESIDENCY, TWENTY-TWO INTIMATE PERSPECTIVES OF RICHARD M. NIXON

former aides have also recounted that President Nixon would sometimes take a sleeping pill as well.[86] Such accounts underscore the intricate task of judging President Nixon's state of mind on October 24—or that of other Presidents in analogous situations, for that matter. Various Nixon advisors have attributed the President's slurred diction and other symptoms to different combinations of alcohol, stress, fatigue, or other sources.[87] His status on that night involved a complex but potent mix of emotional stress and physiological impairment.

With a double vacancy—in the President's absence and without a sitting Vice President—who held ultimate responsibility for the decision to order the DEFCON 3 alert? The available accounts offer ambiguous and even conflicting evidence, but the decision probably emerged more from group consensus than from a single individual's final authority.

Internal White House records from the period called the gathering a Washington Special Actions Group (WSAG) "meeting of principals," and not a National Security Council meeting.[88] As Kissinger affirms, the group that convened in the Situation Room that night "was in effect the statutory membership of the National Security Council minus [the President and the Vice President]."[89] But the alternative classification was legally necessary. By statute, only President Nixon could chair a Council meeting, unless he chose to "designate" a Council member such as Kissinger or Secretary of Defense James Schlesinger "to preside in his place."[90] In their respective

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119, 122 (Kenneth W. Thompson ed., 1987) (emphasis added), *available at* http://web1.millercenter.org/publications/mcpapers/portrait6.pdf.

[86] *See, e.g.*, LEONARD GARMENT, CRAZY RHYTHM: MY JOURNEY FROM BROOKLYN, JAZZ, AND WALL STREET TO NIXON'S WHITE HOUSE, WATERGATE, AND BEYOND 144 (1997); TOM WICKER, ONE OF US: RICHARD NIXON AND THE AMERICAN DREAM 393 (1991) (citing longtime Nixon speechwriter Ray Price).

[87] *See, e.g.*, HALDEMAN, *supra* note 84, at 45; WICKER, *supra* note 86, at 393.

[88] KISSINGER, *supra* note 7, at 587. Since the start of the Nixon Administration, Kissinger had chaired the WSAG in his capacity as National Security Advisor and invited the Deputy Secretaries of State and Defense, among other officials, to attend. *Id.* at 316 n.*. Now that he was concurrently serving as Secretary of State, Kissinger continued to chair the meetings, and at least on October 24 he also invited Secretary of Defense Schlesinger to join. Perhaps understanding the optics of the situation, Kissinger had also agreed, at Haig's request, to move the meeting from the State Department to the White House. "He has to be a part of everything you are doing," Haig asserted, seeking to defend the President's authority. Kissinger asked again, "Should I get him up?" Haig did not answer directly, replying only, "I wish you would hold it at the White House." Haig & Kissinger Oct. 24 Telecon, *supra* note 35.

[89] *Id.* at 586.

[90] 50 U.S.C. § 402(a) (2012) ("The President of the United States shall preside over meetings of the Council: *Provided*, That in his absence he may designate a member of the Council to preside in his place."). The current language also stood in 1973 and has gone without amendment since its 1947 enactment. *See* National Security Act of 1947, ch. 343, § 101(a), 61 Stat. 495, 496.

memoirs, both Haig[91] and President Nixon[92] say that they *did* speak before the WSAG meeting,[93] although historians have questioned their accounts.[94] If the President did "designate" anyone to serve in his stead, his words (as reported by Haig[95]) suggest it would have been Haig himself. But, as Chief of Staff, Haig was not a statutory Council member. Treating the gathering instead as a WSAG meeting obviated any such requirement.[96]

Although Kissinger chaired the meeting and likely played an outsized role in the deliberations,[97] no participants seemed to have attributed the decision directly to him.[98] The diversity of accounts[99] from the meeting suggests that, without a President or Vice President in the room, no single person "made" the decision. It was instead a "collective decision"[100] to exercise presidential-level authority. The decision did not pass, of course, to the person standing next in the line of succession: Speaker of the House Carl Albert—whose fellow House Democrats had been clamoring during

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[91] HAIG, *supra* note 34, at 415–16.

[92] NIXON, *supra* note 34, at 938.

[93] According to William Quandt, a Council staffer at the time, presidential records show that President Nixon "spoke to Haig for about twenty minutes around 10:30 p.m." QUANDT, *supra* note 34, at 121. Although the duration may be an estimate, that timing seems to overlap with the 10:40 p.m. start of the WSAG meeting.

[94] *See, e.g.*, GARTHOFF, *supra* note 34, at 426; HORNE, *supra* note 77, at 301–02; ISAACSON, *supra* note 34, at 532.

[95] According to Haig, President Nixon waved his hand and said, "You know what I want, Al; you handle the meeting." HAIG, *supra* note 34, at 415–16.

[96] In this context, Kissinger remarks that "the composition and agenda of an NSC meeting—or whether it was an NSC meeting at all—has over the practice of a generation been left to Presidential discretion and is an issue of no practical or legal consequence." KISSINGER, *supra* note 7, at 586 n.*.

[97] By the end of October 25, as it became clear that the Soviets had backed down and prospects for a sustained ceasefire began to materialize, Haig and the President had each congratulated Kissinger on doing "a hell of a job." Haig & Kissinger Oct. 25 Telecon, *supra* note 78; Telephone Conversation, Richard Nixon and Henry Kissinger (Oct. 25, 1973, 7:15 PM) [hereinafter Nixon & Kissinger Oct. 25 Telecon], *available at* http://foia.state.gov/searchapp/documents/kissinger/0000C883.pdf.

[98] In his memoirs, Kissinger does not call himself the decision-maker. KISSINGER, *supra* note 7, at 588 (stating that "*we* instituted DefCon III" (emphasis added), but noting that Admiral Moorer, the Joint Chiefs Chairman, relayed the DEFCON 3 orders to military commanders). In conversation with Kissinger the next day, however, Haig commented of the other participants, "Last night it seemed someone had taken their shoes away from them. You really handled that thing magnificently." Haig & Kissinger Oct. 25 Telecon, *supra* note 78.

[99] Schlesinger, in an interview, supposed that, as Secretary of Defense, he "gave the order" and "presumed that I had the presidential say-so." Interview by Alistair Horne with James Schlesinger (May 16, 2005), *quoted in* HORNE, *supra* note 77, at 302. Scowcroft was ambivalent: "It should have been Schlesinger, but I am not sure who it was." Interview by Alistair Horne with Brent Scowcroft (May 26, 2005), *quoted in* HORNE, *supra* note 77, at 302. Haig insists that "[w]e all knew what [the President] wanted." HAIG, *supra* note 34, at 416. But President Nixon seems only to have learned of the alert the following morning. *See, e.g.*, GARTHOFF, *supra* note 34, at 426; ISAACSON, *supra* note 34, at 532.

[100] Interviews by Alistair Horne with Henry Kissinger (Oct. 28–30, 2005), *quoted in* HORNE, *supra* note 77, at 303.

the previous two days to impeach the President.[101] President Nixon's advisors devised a practical, if ad hoc, solution on the night of October 24, and their decision achieved the desired outcome. Yet if the gambit had backfired and the Soviets had launched a military intervention, would the same group have made the next fateful choice? This collective determination, in any event, was not an arrangement guided by the Twenty-Fifth Amendment or the 1947 Act, but rather a move that (deliberately or inadvertently) sidestepped the constitutional and statutory scheme. No individual at the meeting took formal responsibility for a decision of presidential import, and the person who led the deliberations, Kissinger, was not part of the line of succession. If Administration officials could not plausibly conceive of delegating the decision to Speaker Albert, should the law have provided some guidance for this exercise of presidential authority?

II. A PROPOSED CLASSIFICATORY FRAMEWORK

The White House lacked a crucial analytic tool on the night of October 24, 1973, and both prior and subsequent administrations have struggled with the same fundamental quandary. This Part suggests a framework for analyzing and classifying cases of presidential disability. An inquiry into the extent of a President's condition poses three basic questions: *How* severe is the disability? *When* is it expected to end? And *where* is it located? The approach offered here, accordingly, organizes cases of presidential disability into three dimensions. In practice, each of the three axes operates along a spectrum, but it is critical to delineate degrees along each axis in order to formulate a functional diagnosis.[102] (The framework is represented in Figure 1, below.)

A. Severity Dimension

The first analytic dimension assesses the severity of a President's disability, which ranges from *impairment* (i.e., partial weakening of or damage to normal functions) to *incapacity* (i.e., complete inability to

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[101] *See supra* note 52 and accompanying text. In fact, the next day President Nixon urged Kissinger to tell the press to imagine what would have happened "if Albert had been faced with it." Nixon & Kissinger Oct. 25 Telecon, *supra* note 97.

[102] These categories could be conceptualized as following in the tradition of Max Weber's "ideal types." *See, e.g.*, MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 55 (Stephen Kalberg trans., 3d Roxbury ed. 2002) (1905) ("Precisely *because* of the impossibility of drawing sharp boundaries in historical reality, our only hope of identifying the particular effects . . . must come through an investigation of their *most consistent* [or 'ideal'] forms." (second alteration in original)).

perform such functions).[103] Cases of incapacity often provide clear grounds for invoking the Twenty-Fifth Amendment, since the provision turns on whether the President is "*unable* to discharge the powers and duties of his office."[104] Cases of impairment may substantiate an invocation of the presidential-succession laws as well. As noted above, to transfer powers to the Vice President, the Twenty-Fifth Amendment requires a "written declaration" of the President's disability, made either by the President, under Section 3,[105] or by "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," under Section 4.[106] Article II of the Constitution,[107] as well as the Twelfth Amendment,[108] explicitly contemplates the prospect of presidential "disability," without specifying what such a disability might entail.[109] Although an impairment may

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[103] The terms "impairment" and "incapacity" have some statutory grounding. For "impairment," see, for example, 28 U.S.C. § 596(a)(1) (2012), which allows removal of an independent counsel for "physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties." For "incapacity," see, for example, 22 U.S.C. § 4106(e) (2012), which allows removal of a Foreign Service Labor Relations Board member for, inter alia, "demonstrated incapacity to perform his or her functions." *See also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994) (noting that the Supreme Court has not defined, for removal purposes, the meaning of either "good cause" or "inefficiency, neglect of duty, or malfeasance in office," which is the typical standard for presidential removal of members of independent commissions).

[104] U.S. CONST. amend. XXV (emphasis added). Article II also speaks of presidential "Inability." *Id.* art. II, § 1, cl. 6.

[105] *Id.* amend. XXV, § 3.

[106] *Id.* amend. XXV, § 4. For an effort to distinguish Sections 3 and 4 on textual grounds, see Gustafson, *supra* note 24. Examining constitutional structure and the legislative history, that article suggests that the phrase "unable to discharge the powers and duties of his office"—which appears in both sections—may nevertheless be interpreted differently, despite the identical language. Specifically, the article maintains that the President should hold "absolute discretion" under Section 3, whereas Section 4 deserves "a much narrower construction." *Id.* at 461–62. This Article's conclusions do not necessarily conflict with that textual distinction, but the framework proposed here provides a more precise means for identifying the President's condition and allocating decisional authority.

[107] U.S. CONST. art. II, § 1, cl. 6 ("[S]uch Officer shall act accordingly, until the Disability be removed, or a President shall be elected.").

[108] *Id.* amend. XII (stating that the Vice President may need to "act as President, as in the case of the death or other constitutional disability of the President"); *see also id.* amend. XX, § 3 (specifying the Vice President's role where "the President elect shall have died" by the start of the expected term, where "a President shall not have been chosen," or where "the President elect shall have failed to qualify"); *id.* amend. XXII, § 1 (addressing the prospect of presidential succession in stipulating that "no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once").

[109] *See* FOUNDING THE AMERICAN PRESIDENCY, *supra* note 23, at 243 n.9 ("The framers gave surprisingly little attention to the problem of presidential incapacity (they might have paid closer attention to this problem had King George III had his first bout of insanity in 1786 rather than 1788)."); *see also* Madison, *supra* note 22 (noting the ambiguity at the Constitutional Convention about the term "disability").

engender problems in effectively executing the President's responsibilities, the boundaries of when the succession machinery is necessary or appropriate are generally less clear than with incapacity.

B. Temporal Dimension

The second criterion is the temporal dimension of the disability, which ranges from *temporary* (i.e., lasting only a short, foreseeably limited time) to *persistent* (i.e., extending over a long or practically indeterminate period of time).[110] Some disabilities may also be anticipated (certain medical procedures, for example) and subject to prior planning by an administration, including an invocation of the Twenty-Fifth Amendment. Many other disabilities, whether temporary or persistent, are unanticipated and occur without warning.

C. Spatial Dimension

The third and final element is the spatial dimension of the disability, which ranges from *logistical* (i.e., involving the President's physical location) to *physiological* (i.e., involving bodily functions, either mental or physical). Logistical disabilities are exogenous: the President may be personally able, yet be in a location that makes him or her unable to communicate with administration officials or the outside world (as might occur, for example, if the President is aboard *Air Force One* and the communications technology malfunctions). Physiological disabilities, by contrast, are endogenous to the actual person of the President. They can implicate the full panoply of medical issues.[111]

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One further interpretive note: the proposed framework may also prove useful for those who consider the 1947 Act unconstitutional, as well as those who nurture doubts but would stop short of passing judgment on the statute's constitutionality.[112] If, on the one hand, there are "reasons to hesitate" before deeming the law unconstitutional,[113] then the framework

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[110] A "persistent" disability also encompasses a permanent condition.

[111] For a proposed list of medical conditions causing physiological disability, see David A. Drachman et al., *Subcommittee Report: Criteria for Disability and Impairment*, *in* PRESIDENTIAL DISABILITY, *supra* note 24, at 276, 278–80. *But see id.* at 278 ("A complete catalog of such conditions would approximate a textbook of medicine . . . .").

[112] For competing perspectives on the constitutionality question, which centers on the meaning of the word "Officer" in the Constitution, see sources cited *supra* note 27.

[113] Manning, *supra* note 27, at 142.

may serve a function akin to the judicial canon of constitutional avoidance.[114] If, on the other hand, the statute should be considered flatly unconstitutional, then the framework may at least serve as a temporary coping mechanism until Congress alters the existing law. Because the statute may discourage executive officials from allowing the office to pass to a member of Congress,[115] a classificatory framework may offer a substantive means to determine the nature of a disability, rather than leaving the decision solely to pragmatic concerns. Modern presidential administrations have developed various contingency plans for sudden incapacitation,[116] as well as arrangements with presidential physicians.[117] This framework, by contrast, offers a tool for discerning when a President has become constitutionally disabled and what kind of disability afflicts the President—and then using that assessment to allocate the burden of decision under either Section 3 or Section 4 of the Twenty-Fifth Amendment.

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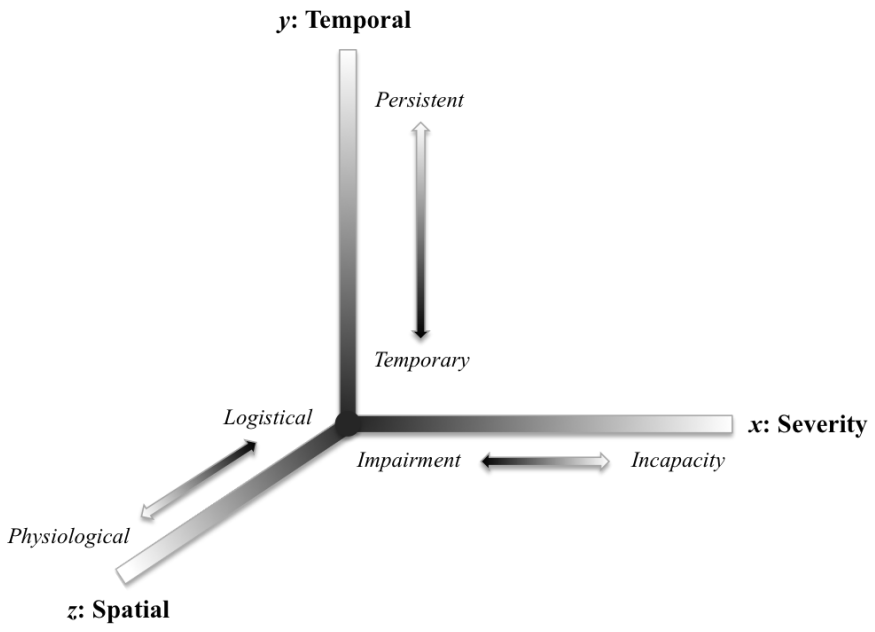
[114] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))).

[115] *See* 3 U.S.C. § 19(a)(1) (2012) (providing that the Speaker of the House or the President Pro Tempore of the Senate must resign from their respective congressional positions before acting as President); *id.* § 19(d)(2) (providing that, if a Cabinet member is acting as President, either the Speaker of the House or the President Pro Tempore of the Senate may displace the Cabinet member from the office and act as President instead); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 452 & 625 n.38 (2005) (arguing that the statute "makes back-and-forth handoffs to legislative leaders nearly impossible" for a temporary disability); Continuity of Gov't Comm'n, *supra* note 28, at 39–40 (criticizing the "bumping procedure" of § 19(d)(2)).

[116] For a discussion of the agreement between President Eisenhower and Vice President Nixon, see FEERICK, FROM FAILING HANDS, *supra* note 25, at 228–29. The Eisenhower-Nixon agreement, which preceded the Twenty-Fifth Amendment, was probably "the first act of real significance in meeting the inability problem" and served as the model for the agreements in the Kennedy and Johnson Administrations. *Id.* For a report on the Reagan Administration's preparations for more extreme scenarios, see JAMES MANN, RISE OF THE VULCANS: THE HISTORY OF BUSH'S WAR CABINET 138–44 (2004).

[117] President George H.W. Bush's Administration was apparently the first since the ratification of the Twenty-Fifth Amendment to develop a detailed contingency plan for particular situations. *See* Lawrence C. Mohr, *Medical Consideration in the Determination of Presidential Disability*, *in* MANAGING CRISIS, *supra* note 24, at 97, 104–05.

Figure 1. A Proposed Framework for Classifying Presidential Disability



III. APPLYING THE FRAMEWORK: HISTORY AND PRACTICE

How does the proposed framework apply to the array of historical experiences with presidential disability? This Part proceeds through eight categories to explore the dynamics of each kind of disability and to suggest how administration officials could have classified those cases. A few episodes precede the 1967 ratification of the Twenty-Fifth Amendment, or even the passage of the 1947 statute, but nevertheless prove helpful for heuristic purposes. Occasionally, the analysis also resorts to hypothetical scenarios—consistent with the Amendment's intended scope[118]—to fill the analytical gaps where no evident historical precedent exists.

[118] Statements by influential figures in the development of the Twenty-Fifth Amendment indicate that the Amendment was meant to be available even in the sorts of hypothetical situations discussed below. *See, e.g.*, *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 240 (1965) (statement of Herbert Brownell, Chairman, Special Comm. on Presidential Inability and Vice-Presidential Vacancy, Am. Bar Ass'n) ("A typical situation that is covered by [Section 3] is one in which the President is physically ill and his doctors recommend temporary suspension of his normal governmental activities, to facilitate his recovery. Other situations that have been visualized are those where the President might be going to have an operation, or where

A President's precise condition—in constitutional terms, the President's ability "to discharge the powers and duties of his office"[119]—is not simply an intellectual construct, but rather a matter of great practical consequence. As Herbert Brownell, President Eisenhower's Attorney General, observed, "There is a substantial difference between the President being able to wave to the crowd from a hospital window and his being able to govern."[120] The applications below offer a method for understanding that difference, as well as the many other gradations of presidential disability.

A. Persistent Physiological Incapacity

In a case of persistent physiological incapacity, a President has completely lost the physical ability to discharge the powers and duties of the office—with no end to that disability in sight. For the most part, a persistent physiological incapacity would be expected ultimately to prove fatal. The hard question is often to predict how long the condition might last. The concern that such a dreadful scenario might materialize played a significant role in spurring the development of the Twenty-Fifth Amendment.[121] As the journalist James Reston noted in the wake of President Kennedy's assassination: "For an all too brief hour today, it was not clear again what would have happened if the young President, instead of being mortally wounded, had lingered for a long time between life and death, strong enough to survive but too weak to govern."[122]

The country had confronted such a situation, to take one poignant example, after Charles Guiteau shot President Garfield in 1881. Until his death eighty days later, President Garfield endured brutal treatment and was unable to fulfill virtually any of his presidential duties.[123] His doctors probed the bullet wound with unsterilized fingers and instruments

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he was going abroad and might be out of reliable communication with the White House for a short period."); *Presidential Inability and Vacancies in the Office of Vice President: Hearing on S.J. Res. 1 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 20 (1965) (statement of Sen. Birch Bayh) ("[T]he intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason[,] is inability under the terms that we are discussing.").

[119] U.S. CONST. amend. XXV; *see also id.* art. II, § 1, cl. 6 (addressing cases of a President's "Inability to discharge the Powers and Duties of the said Office").

[120] Bayh, *supra* note 24.

[121] *See, e.g.*, BAYH, *supra* note 25, at 6.

[122] James Reston, *Why America Weeps*, N.Y. TIMES, Nov. 23, 1963, at 1, *available at* http://www.nytimes.com/packages/html/national/kennedy1.pdf.

[123] *See* FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 8 (stating that Garfield "wavered between life and death" and "experienced periods of hallucinations"); *id.* at 9 (noting that "Garfield's only official act during the eighty days was the signing of an extradition paper" and that "[h]e was prevented from discharging his powers and duties by his doctors").

immediately after the attack;[124] they repeatedly fed him rich foods and alcohol, which resulted in severe vomiting;[125] and, to ward off malaria, they gave him large doses of quinine, which further damaged his digestive system.[126] Finally, in the ensuing weeks, as the doctors continued to probe the wound without antisepsis, cavities of pus developed throughout the President's body.[127] During those eighty days, Chester Arthur, then the Vice President but more a political rival than ally, waited uneasily as the President's condition continued to worsen.[128] Not only had the Twenty-Fifth Amendment's allocation of decision-making authority not yet been developed, but the dynamics of presidential succession remained untested for any event short of death.[129] Reluctant to wrest power from a slowly dying chief executive, Vice President Arthur refused to assume presidential duties during that time.[130] Today, under Section 4, a Vice President would be able to work with the Cabinet (or another designated body) to undertake such a transition.

B. Temporary Physiological Incapacity

In a case of temporary physiological incapacity, a bodily ailment or wound fully compromises a President's ability to carry out the office's responsibilities, but only for a limited time. In some scenarios a President's condition could potentially worsen and become a persistent, rather than temporary, disability. In other instances temporary physiological incapacity may result when a President undergoes elective or semi-elective surgery. When President Reagan underwent surgery in 1985 to have cancerous polyps removed from his colon, he applied the requirements of Section 3 of the Twenty-Fifth Amendment (without explicitly invoking the provision) to transfer his powers briefly to Vice President George H.W. Bush.[131] The delegation lasted approximately eight hours, first while the President was under anesthesia and then as he recuperated after the

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[124] *See* CANDICE MILLARD, DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE, AND THE MURDER OF A PRESIDENT 141–42, 157–58 (2011).

[125] *Id.* at 175.

[126] *Id.* at 177.

[127] *Id.* at 195–97.

[128] ALLAN PESKIN, GARFIELD: A BIOGRAPHY 599 (1978).

[129] *See also* AMAR, *supra* note 115, at 447–49 (discussing the "precedent," established by John Tyler after the death of President Harrison, that the Vice President legally and factually became the President, and not merely an "acting" President); FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 5–7 (same).

[130] AMAR, *supra* note 115, at 447–49.

[131] *See, e.g.*, ABRAMS, *supra* note 26, at 197–214.

surgery.[132] President George W. Bush formally invoked Section 3 and transferred his powers to Vice President Dick Cheney during two colonoscopies, first in 2002[133] and again in 2007.[134] (President Lyndon Johnson underwent gallbladder surgery in 1965, before the ratification of the Twenty-Fifth Amendment,[135] but he made a functionally comparable preemptive arrangement with Vice President Hubert Humphrey.[136])

Not all historical cases of temporary physiological incapacity, however, have unfolded so simply. When President Cleveland had an operation to remove a cancerous growth on the roof of his mouth, almost no one in government besides a single Cabinet member knew about it at the time—not even Vice President Adlai Stevenson I.[137] To maintain secrecy, doctors performed the procedure on a yacht in Long Island Sound.[138] With the aid of a prosthetic jaw, President Cleveland was able to address Congress some five weeks after the surgery.[139] The events, which occurred amid the Panic of 1893, were not publicly confirmed until 1917.[140]

Administrations may not always be able to anticipate instances of temporary physiological incapacity either. While in office, President Eisenhower suffered a heart attack, underwent an operation for ileitis, and sustained a stroke.[141] Eventually he and Vice President Nixon established an agreement to manage prospective disabilities.[142] President Eisenhower was acutely attuned to the vulnerabilities.[143] He later remarked that "in each of these three instances there was some gap that could have been

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[132] *See, e.g.*, GILBERT, *supra* note 19, at 233–36.

[133] *See, e.g.*, Lawrence K. Altman, *Bush Procedure Is Routine for Age and History*, N.Y. TIMES, June 29, 2002, http://www.nytimes.com/2002/06/29/us/bush-procedure-is-routine-for-age-and-history.html.

[134] *See, e.g.*, Jim Rutenberg, *Bush Has 5 Polyps Removed in Colon Cancer Test*, N.Y. TIMES, July 22, 2007, http://www.nytimes.com/2007/07/22/washington/22bush.html.

[135] *See, e.g.*, JOSEPH A. CALIFANO, JR., THE TRIUMPH & TRAGEDY OF LYNDON JOHNSON: THE WHITE HOUSE YEARS 98 (1991).

[136] *See, e.g.*, GILBERT, *supra* note 19, at 193–94.

[137] *See* FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 11.

[138] *See id.*

[139] *See id.* at 11–12; Hoat M. Hoang & Patrick O'Leary, *President Grover Cleveland's Secret Operation*, 63 AM. SURGEON 758, 759 (1997).

[140] *See* FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 11–12; Hoang & O'Leary, *supra* note 139, at 759.

[141] *See, e.g.*, SHERMAN ADAMS, FIRSTHAND REPORT: THE STORY OF THE EISENHOWER ADMINISTRATION 180–201 (1961); FEERICK, FROM FAILING HANDS, *supra* note 25, at 211–29.

[142] *See* FEERICK, FROM FAILING HANDS, *supra* note 25, at 228–29.

[143] *See id.* at 227–28.

significant" in an emergency.[144] "I was fortunate," he added, "that no crisis arose."[145]

Although the Twenty-Fifth Amendment provides a useful procedure for some cases of temporary physiological incapacity, its ratification did not resolve the accompanying problems entirely. The attempt on President Reagan's life, sixty-nine days into his Administration, dramatically demonstrated the continuing ambiguities. For personal, political, and prudential reasons, Administration officials decided during the hours after John Hinckley's attack not to pursue options under the Twenty-Fifth Amendment to transfer power to Vice President Bush.[146] (In 1981, neither Section 3 nor Section 4 had ever been invoked.) They agreed to revisit the decision if the President's condition deteriorated.[147] Publicly, however, Administration officials could not articulate an answer when reporters asked, "Who is making the decisions for the government right now?"[148] As he was wheeled into the operating room, President Reagan wondered about the same question. With a wink, from beneath his oxygen mask, the President said to his advisors, "Who's minding the store?"[149]

C. Persistent Logistical Incapacity

Persistent logistical incapacity involves a President who has lost the ability to perform his or her responsibilities on account of location, with no foreseeable endpoint. There is no apparent historical example of this type of disability. Such a situation is conceivable, if outlandish: a case of persistent logistical incapacity would arise, for instance, if a President were stranded incommunicado on the proverbial "desert island," and the airplane transponder and other location and communications devices failed to

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[144] Dwight D. Eisenhower, Remarks at the National Forum on Presidential Inability and Succession (May 25, 1964), *available at* http://www.eisenhower.archives.gov/all_about_ike/speeches/post_presidential_speeches.pdf.

[145] *Id.*

[146] *See* DEL QUENTIN WILBER, RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN 164–67 (2011); *see also* GILBERT, *supra* note 19, at 224 ("Despite the gravity of the President's condition and the fact that he was under anesthesia for three hours, no serious thought was given to invoking the Twenty-fifth Amendment."). Theodore Olson, then the Assistant Attorney General for the Office of Legal Counsel, was unfamiliar with the dynamics of the Twenty-Fifth Amendment and first consulted his pocket copy of the Constitution—only to find that it had been printed before 1967. *See* WILBER, *supra*, at 165. For a critical assessment of the Administration's failure to apply the Amendment, see ABRAMS, *supra* note 26, at 178–96.

[147] *See* WILBER, *supra* note 146, at 165.

[148] JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS, at xii (2d ed. 1992). Deputy Press Secretary Larry Speakes responded, "I cannot answer that question at this time." *Id.* at xii n.*. Secretary of State Alexander Haig's famous response to a nearly identical question did not prove reassuring. *See infra* note 210 and accompanying text.

[149] WILBER, *supra* note 146, at 144.

operate. The Vice President and a majority of the Cabinet (or another designated body) could then choose to apply Section 4 of the Twenty-Fifth Amendment to declare the President formally disabled.

D. Temporary Logistical Incapacity

Under temporary logistical incapacity, a President briefly but fully loses the ability to carry out the office's responsibilities, by virtue of physical location.[150] There are evidently no significant modern historical instances of this type of disability.[151] But potential scenarios in a contemporary context are conceivable: for instance, a President aboard *Air Force One* could completely lose contact with the outside world, either because of technological failures or for other reasons.[152] Here too, if pressed, the Vice President and a majority of the Cabinet (or another designated body) could choose to invoke Section 4 of the Twenty-Fifth Amendment.

E. Persistent Physiological Impairment

In a case of persistent physiological impairment, a President has lost part of his or her physical capacity to discharge the powers and duties of the office, with no end in sight. Broadly speaking, this type of disability covers chronic conditions. Historical instances span a broad array of physical states, some having seemingly little effect on presidential performance and others bordering on incapacity. Less than a year into his Administration, President Arthur was diagnosed with a severe kidney condition, then classified as Bright's disease.[153] Although the illness was largely kept secret, President Arthur worked on a substantially reduced

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[150] One could envision these situations as relatively commonplace—potentially whenever the President traveled away from Washington—before the advent of modern telecommunications, and certainly before the invention of the telegraph (as well as the Twenty-Fifth Amendment and the 1947 statute).

[151] On a blustery day in 1905, in the midst of mediating an end to the Russo-Japanese War, however, President Theodore Roosevelt disappeared into the waters of Long Island Sound for almost an hour—aboard the *U.S.S. Plunger*, one of the Navy's first submarines. *See President Takes the Plunge*, N.Y. TIMES, Aug. 26, 1905, at 1, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9C06E1DA103AE733A25755C2A96E9C946497D6CF. Although divers were standing by as a precaution, the exploit sparked some criticism, albeit more for the physical risks involved than for the President's logistical isolation. *Id.* The *New York Times* registered "regret and disapproval" at the "stunt." Editorial, *Our Submerged President*, N.Y. TIMES, Aug. 27, 1905, at 6, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9C07E0D6133EE733A25754C2A96E9C946497D6CF; *see also id.* ("[T]he President ought to remember that his life is not his own; that eighty millions of people, to speak only of his countrymen, have an interest in its prolongation, and that these millions are seriously concerned when they hear that the President has been intrusting 'CAESAR and his fortunes' to some new-fangled, submersible, collapsible, or otherwise dangerous device.").

[152] A vivid scenario of this kind—hijackers taking the passengers of *Air Force One* hostage—has been dramatized on film. *See* AIR FORCE ONE (Columbia Pictures 1997).

[153] *See, e.g.*, ZACHARY KARABELL, CHESTER ALAN ARTHUR 91–92 (2004).

schedule and did not energetically pursue the 1884 Republican nomination.[154] President Arthur, moreover, occupied a precarious political position. Under the governing 1792 presidential-succession statute, he initially lacked *any* lawful successor,[155] until the Senate finally chose a President Pro Tempore—a Democrat.[156]

Cases of persistent physiological impairment may manifest themselves in disparate ways. For much of his lifetime, President Lincoln suffered from what would now potentially be considered clinical depression.[157] But his "melancholy" hardly prevented him from ably discharging the powers and duties of the presidency—by one account, he managed to channel his depression in ways that helped him weather his stormy years in the White House.[158] By contrast, after President Coolidge's sixteen-year-old son died in 1924, eleven months into his Administration, the President fell into a state of despair.[159] Already temperamentally reserved, he became increasingly withdrawn.[160] As President Coolidge later mournfully recalled of his son's death, "When he went the power and glory of the Presidency went with him."[161] Nevertheless, according to the President's physician, President Coolidge continued to fulfill his official obligations.[162] Presidents may cope with depression and grief differently, and the nature of those

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[154] *See* FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 10–11.

[155] His succession after President Garfield's death had left the vice presidency vacant, and Congress had not filled the offices for the only other two designated successors, the President Pro Tempore of the Senate and the Speaker of the House. *See* BAYH, *supra* note 25, at 17–18; Brown & Cinquegrana, *supra* note 24, at 1418 & 1419 nn.105–06.

[156] *See* BAYH, *supra* note 25, at 17.

[157] *See, e.g.*, JOSHUA WOLF SHENK, LINCOLN'S MELANCHOLY: HOW DEPRESSION CHALLENGED A PRESIDENT AND FUELED HIS GREATNESS 23 (2005).

[158] *See id.* at 159–210.

[159] *See, e.g.*, GILBERT, *supra* note 19, at 32–34. President Lincoln also lost a son during his presidency. Willie Lincoln died in 1862, at age eleven. An English journalist who came to Washington shortly afterward observed the "look of depression" in President Lincoln, "which, I am told by those who see him daily, was habitual to him, even before the then recent death of his child, whose loss he felt acutely." SHENK, *supra* note 157, at 178 (quoting Edward Dicey).

[160] *See, e.g.*, GILBERT, *supra* note 19, at 33–42; DAVID GREENBERG, CALVIN COOLIDGE 98–99 (2006). For a detailed assessment, see ROBERT E. GILBERT, THE TORMENTED PRESIDENT: CALVIN COOLIDGE, DEATH, AND CLINICAL DEPRESSION (2003).

[161] CALVIN COOLIDGE, THE AUTOBIOGRAPHY OF CALVIN COOLIDGE 190 (1929). "I do not know why such a price was exacted for occupying the White House," he added. *Id.*

[162] Joel T. Boone, Memoirs 227 (1963) (unpublished manuscript) (on file with Joel T. Boone Papers, Library of Cong.) (stating that the President and the First Lady "were dedicating themselves with the greatest devotion to carry on their respective responsibilities"), *available at* http://memory.loc.gov/mss/amrlm/lmb/mb01/mb010346.tif. For a defense of President Coolidge's performance during this period, see Robert H. Ferrell, *Calvin Coolidge: The Man and the President*, *in* CALVIN COOLIDGE AND THE COOLIDGE ERA 132 (John Earl Haynes ed., 1998).

conditions may vary tremendously.[163] In some cases, what is disabling for one may prove ultimately empowering for another. That is precisely why, particularly in cases such as President Lincoln's or President Coolidge's, Section 3 would provide the appropriate presumption: the burden of decision generally would rest with the President to make the constitutional assessment.

The classificatory categories in the proposed framework, as noted above, extend along a spectrum. Some cases may straddle between categories, and the course of a President's condition may change, for better or for worse, and alter the classificatory diagnosis. During the final chapter of his Administration, President Wilson experienced a decline in health that was at least a severe impairment and probably proved tantamount to incapacity.[164] In late 1919, he suffered a massive stroke.[165] For at least a couple of months, the President was bedridden and completely unable to handle governance matters.[166] For several more months, he saw almost no one—even top officials in his Administration—besides his physician, his private secretary, and the First Lady, Edith Bolling Galt Wilson.[167] This triumvirate, led by Mrs. Wilson, controlled access to the President and in effect largely assumed his duties.[168] The prospect of the President's resignation was rebuffed within this inner circle.[169] Secretary of State Robert Lansing, who believed the President to be constitutionally disabled,[170] frequently convened the Cabinet during these early months to

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[163] The 1914 death of President Wilson's first wife, Ellen Axson Wilson, provides another historical example. *See, e.g.*, EDWIN A. WEINSTEIN, WOODROW WILSON: A MEDICAL AND PSYCHOLOGICAL BIOGRAPHY 259 & n.65 (1981) (discussing President Wilson's "severe reactive depression" after his wife's death and citing his remark to his close advisor Colonel Edward M. House that he considered himself "unfit to be President because he could not think straight").

[164] Depending on the decisional frame, this case could alternatively be classified as a severe instance of persistent physiological incapacity. *See infra* Section III.A.

[165] Even before taking office, Wilson had endured a difficult history of strokes and arteriosclerosis. *See* FERRELL, *supra* note 21, at 12–13. For a thorough account of President Wilson's lifetime medical history, see WEINSTEIN, *supra* note 163.

[166] *See, e.g.*, FERRELL, *supra* note 21, at 11; PHYLLIS LEE LEVIN, EDITH AND WOODROW: THE WILSON WHITE HOUSE 350–51 (2001).

[167] *See, e.g.*, FEERICK, FROM FAILING HANDS, *supra* note 25, at 173–76; FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 13; FERRELL, *supra* note 21, at 11.

[168] *See, e.g.*, FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 14; LEVIN, *supra* note 166, at 352; EDITH BOLLING WILSON, MY MEMOIR 289 (1939). Each of the three wrote an account of the period. *See* CARY T. GRAYSON, WOODROW WILSON: AN INTIMATE MEMOIR (1961); JOSEPH P. TUMULTY, WOODROW WILSON AS I KNOW HIM (1921); WILSON, *supra*.

[169] *See, e.g.*, FEERICK, FROM FAILING HANDS, *supra* note 25, at 172–73; MARGARET TRUMAN, FIRST LADIES: AN INTIMATE GROUP PORTRAIT OF WHITE HOUSE WIVES 126–27 (1995); ROBERT P. WATSON, THE PRESIDENTS' WIVES: REASSESSING THE OFFICE OF FIRST LADY 1–2 (2000).

[170] *See* FERRELL, *supra* note 21, at 16.

discuss governmental matters.[171] Distressed at the Secretary's "assumption of Presidential authority," President Wilson eventually dismissed Lansing.[172] During the rest of his term—as American participation in the League of Nations foundered in the Senate—President Wilson regained quite limited involvement in governance, if only for short spurts, but he did not substantially recover.[173] Vice President Thomas Marshall, meanwhile, did not see President Wilson until the final day of the Administration.[174]

Still, the connection between apparent disability and performance may not be straightforward, even for a serious illness. As President Franklin Delano Roosevelt looked toward running for a fourth term, he was diagnosed in early 1944 with advanced cardiovascular disease.[175] His condition continued to decline through 1944 and into the early months of 1945,[176] and it became increasingly arduous for him to summon the energy to concentrate for long periods.[177] In the final weeks of his life, his ability to take part in affairs of state waxed and waned.[178] The President's particular management style, moreover, may have compounded the challenges of his declining health. Throughout his presidency, he would set his aides in competition with one another and provide them with incomplete information, thereby centering the final decision in himself.[179] Toward the end, however, he sometimes struggled with that balancing act.[180] Still, although President Roosevelt likely would have conducted some final acts during the Second World War differently had he been

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[171] *See, e.g.*, FEERICK, FROM FAILING HANDS, *supra* note 25, at 176.

[172] Letter from Woodrow Wilson to Robert Lansing (Feb. 11, 1920), *reprinted in* FEERICK, FROM FAILING HANDS, *supra* note 25, at 177.

[173] *See, e.g.*, FEERICK, FROM FAILING HANDS, *supra* note 25, at 179–80; FERRELL, *supra* note 21, at 11, 17–18. Several months after his stroke, he told his physician, "It would probably have been better if I had died last fall." RAY STANNARD BAKER, AMERICAN CHRONICLE: THE AUTOBIOGRAPHY OF RAY STANNARD BAKER 469 (1945). Some historical research suggests that President Wilson's behavior had become "more irrational" during the months prior to his incapacitating stroke in late 1919, a development attributed to a cerebrovascular dysfunction. *See* RICHARD STRINER, WOODROW WILSON AND WORLD WAR I: A BURDEN TOO GREAT TO BEAR 209 (2014).

[174] *See, e.g.*, FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 13; FERRELL, *supra* note 21, at 17.

[175] The President's personal physician, the otolaryngologist Ross McIntyre, had failed to make a proper diagnosis for some time, until a cardiologist, Howard Bruenn, was finally invited for a consultation in March 1944. *See, e.g.*, ROBERT H. FERRELL, THE DYING PRESIDENT: FRANKLIN D. ROOSEVELT, 1944-1945, at 27–46 (1998).

[176] *See, e.g.*, FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 16–17; GILBERT, *supra* note 19, at 55–69.

[177] *See* FERRELL, *supra* note 175, at 4.

[178] *See, e.g.*, FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at 16–17; FERRELL, *supra* note 175, at 110–19; FERRELL, *supra* note 21, at 45–48; GILBERT, *supra* note 19, at 69–72.

[179] *See, e.g.*, RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 131–33, 135–37 (rev. ed. 1990).

[180] *See* FERRELL, *supra* note 175, at 141–42.

well,[181] he proved able to discharge many of his duties, even at the Yalta Conference two months before his death.[182] In the depths of the war, President Roosevelt also retained a very important symbolic function as national leader, despite his physiological struggles. Just as cases of persistent physiological impairment vary tremendously, so too do Presidents' capacities to manage and respond to those disabilities.

In still other instances, an assessment may be formed more readily in retrospect than in real time. Following President Reagan's 1994 announcement of his diagnosis with Alzheimer's disease, questions arose whether early manifestations of the disease had affected his performance in the Oval Office.[183] The President's four primary White House doctors stated that they had detected no evidence of the disease at the time,[184] aside from sporadic short-term memory lapses that they had considered to fall short of any chronic condition.[185] One second-term doctor subsequently denied observing "anything that would raise a question about his ability to function as President" and maintained that the President's "cognitive function, belief structure, judgment, ability to choose between options, behavior and ability to communicate were totally and completely intact."[186] By at least one account, some White House officials had tentatively broached the prospect of invoking Section 4 of the Twenty-Fifth Amendment in early 1987, but after an internal review they chose not to pursue the matter.[187] President Reagan's youngest son, Ron, retrospectively

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[181] *See id.* at 147–52; *see also id.* at 152 ("Roosevelt's physical decline meant that he removed himself from government, that policy was being made without his making the big decisions, that momentum and bureaucratic battles determined final outcomes.").

[182] *See* FERRELL, *supra* note 175, at 106; GILBERT, *supra* note 19, at 73.

[183] *See, e.g.*, Lawrence K. Altman, *While Known for Being Forgetful, Reagan Was Mentally Sound in Office, Doctors Say*, N.Y. TIMES, Oct. 5, 1997, http://www.nytimes.com/1997/10/05/us/while-known-for-being-forgetful-reagan-was-mentally-sound-in-office-doctors-say.html; Michael R. Gordon, *In Poignant Public Letter, Reagan Reveals That He Has Alzheimer's*, N.Y. TIMES, Nov. 6, 1994, http://www.nytimes.com/1994/11/06/us/in-poignant-public-letter-reagan-reveals-that-he-has-alzheimer-s.html; Jane Mayer, *Worrying About Reagan*, NEW YORKER, Feb. 24, 2011, http://www.newyorker.com/news/news-desk/worrying-about-reagan.

[184] *See* Altman, *supra* note 183; *see also* Lawrence K. Altman, *Reagan's Twilight—A Special Report: A President Fades into a World Apart*, N.Y. TIMES, Oct. 5, 1997, http://www.nytimes.com/1997/10/05/us/reagan-s-twilight-a-special-report-a-president-fades-into-a-world-apart.html (quoting John Hutton, a Reagan family friend and the chief White House physician during the President's final two years in office, as saying that President Reagan "absolutely" did not "show any signs of dementia or Alzheimer's").

[185] Altman, *supra* note 183; *see also* M.J. Zuckerman, *Bush: Reagan Wasn't Ill as President*, USA TODAY, Nov. 29, 1996, at 2A (quoting White House physician Burton Lee as saying that "[i]t was noticeable that there was something wrong there, but we figured it was just the natural aging process").

[186] Altman, *supra* note 183 (quoting White House physician Lawrence Mohr).

[187] *See, e.g.*, ABRAMS, *supra* note 26, at 218–19; JANE MAYER & DOYLE MCMANUS, THE UNMAKING OF THE PRESIDENT, 1984-1988, at xii–xiv, 111 (1988); Mayer, *supra* note 183.

referred to memory lapses during his father's presidency that, he speculated, might have signaled the "beginning stages" of Alzheimer's.[188] He recalled feeling that "something was amiss."[189] President Reagan's physicians apparently did not conduct formal tests before the end of his Administration.[190] Even for highly attentive observers who lack formal training, it may sometimes prove difficult to judge certain medical conditions, such as distinguishing when the fuzzy line beyond mere forgetfulness has been crossed.[191]

A President's condition can change gradually, and physiological developments can manifest themselves in subtle and complex ways. Evaluations may depend on not only close personal observation and practical considerations, but also the extent of contemporary medical knowledge. A President or administration officials weighing the soundest course must make decisions in the moment, without the benefit of hindsight. In such cases of persistent physiological impairment, the presumption typically would rest with the President, under Section 3, except in extreme cases—such as a President's inability to reach such a determination in the first place—where the presumption would shift to the Vice President and the Cabinet, under Section 4.

F. Temporary Physiological Impairment

In a case of temporary physiological impairment, a President suffers a partial loss of the ability to perform his or her duties, but only for a limited period. President Nixon's condition during the deliberations over the

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[188] RON REAGAN, MY FATHER AT 100, at 218 (2011). The younger Reagan noted that he had seen "no evidence" that President Reagan, "or anyone else," had been "aware of his medical condition while he was in office." *Id.* at 217. The President's son added: "Had the diagnosis been made in, say 1987, would he have stepped down? I believe he would have." *Id.* An alternative hypothetical situation could involve a President who has indeed received such a medical diagnosis while in office. *See 24: Day 9: 6:00PM-7:00PM* (FOX television broadcast June 16, 2014).

[189] REAGAN, *supra* note 188, at 218.

[190] *See* Altman, *supra* note 184 ("Any mental lapses, [the President's doctors] maintained, were not frequent enough to document in a medical chart and were never significant enough to consult experts, take CAT-scan X-rays of the brain or order a formal battery of mental status tests beyond the standard ones used in annual check-ups. . . . It was not until the summer of 1990, the year after he left office, that Mr. Reagan underwent his first battery of formal mental and psychological tests.").

[191] *See* DANIEL KUHN, ALZHEIMER'S EARLY STAGES 30 (2d ed. 2003) ("[I]t is safe to assume that [President Reagan's] early symptoms began to make sense only after a pattern emerged and a diagnosis was made. In hindsight, little episodes of forgetfulness that meant nothing when they occurred now take on new meaning. This is the classic pattern of the disease in its early stages."); Altman, *supra* note 184 ("Just when the Alzheimer's began can never be known."). *But see* ABRAMS, *supra* note 26, at 220 (noting cautionary arguments such as Eisenhower Attorney General Herbert Brownell's warning that "to establish formal legal machinery for giving a President physical and mental examinations" would effectively place the chief executive "constantly on trial as to his health" and "give a hostile [medical] commission the power to harass him at all times").

DEFCON 3 alert was of this kind.[192] Indeed, the most evident type of scenario in this category involves a President who has been seriously affected by alcohol or a prescribed drug. These cases, accordingly, may be subjectively difficult to assess, both for participants and especially for historians.

Such questions arguably may have arisen when President Kennedy visited Vienna in 1961 to meet with Soviet leader Nikita Khrushchev. President Kennedy suffered from Addison's disease, recurrent back problems, and other medical conditions.[193] His personal physician, Janet Travell, regularly administered a variety of therapeutic shots and pills.[194] But he also received separate treatments from Max Jacobson, who in one assessment "may have been the worst of all doctors who saw presidents of the United States, even from the beginning in Washington's time."[195] President Kennedy's back problems had grown particularly severe in the days before the summit.[196] Jacobson (whose medical license was revoked in 1975[197]) allegedly gave him injections that may have included amphetamines and possibly other substances.[198] President Kennedy fared poorly in his meeting with Khrushchev, who later recalled him as "very gloomy."[199] Just after the encounter, President Kennedy offered a bleak assessment: "Worst thing in my life. He savaged me."[200] Still, whatever role Jacobson did or did not play, countless other factors ranging from geopolitics to personalities influenced the President's actions and reactions during the summit. Evaluating disability in potential cases of temporary physiological impairment involving medicinal drugs can be exceedingly complex. And in President Kennedy's situation, the summit inherently required his participation; sending a surrogate or canceling the meeting could have brought adverse diplomatic consequences.

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[192] *See supra* Part I.

[193] *See, e.g.*, FERRELL, *supra* note 21, at 151–56; FREDERICK KEMPE, BERLIN 1961: KENNEDY, KHRUSHCHEV, AND THE MOST DANGEROUS PLACE ON EARTH 212 (2011); *see also* Lee R. Mandel, *Endocrine and Autoimmune Aspects of the Health History of John F. Kennedy*, 151 ANNALS INTERNAL MED. 350, 350 (2009) (arguing, based on an archival review of President Kennedy's medical records, that his medical diagnoses could be explained by autoimmune polyendocrine syndrome type 2).

[194] *See, e.g.*, FERRELL, *supra* note 21, at 154, 156; KEMPE, *supra* note 193, at 212.

[195] FERRELL, *supra* note 21, at 156.

[196] *See* KEMPE, *supra* note 193, at 212.

[197] *See* FERRELL, *supra* note 21, at 156. Jacobson lost his license for manufacturing "adulterated drugs consisting in whole or in part of filthy, putrid and/or decomposed substances." *Id.*

[198] *See, e.g.*, ROBERT DALLEK, AN UNFINISHED LIFE: JOHN F. KENNEDY, 1917-1963, at 398–99 (2003); FERRELL, *supra* note 21, at 156–57; KEMPE, *supra* note 193, at 212–14.

[199] 3 N.S. KHRUSHCHEV, MEMOIRS OF NIKITA KHRUSHCHEV: STATESMAN, 1953-1964, at 306 (Sergei Khrushchev ed., George Shriver trans., Penn. State Univ. Press 2007) (1999).

[200] *See* JOHN F. STACKS, SCOTTY: JAMES B. RESTON AND THE RISE AND FALL OF AMERICAN JOURNALISM 4 (2003).

Some scholars have suggested that Presidents ought to invoke Section 3 during moments of extraordinary political or personal strain—effectively, for temporary physiological impairment that is essentially psychological rather than manifestly physical. During impeachment inquiries[201] or proceedings,[202] for instance, a President could potentially declare himself or herself temporarily unable to execute the office's duties.[203] A President could hypothetically do the same during a trying personal experience.[204] Theoretically, in extreme cases, the Vice President and the Cabinet could take action under Section 4,[205] although the marginal and subjective character of such an assessment (not to speak of prudential or political considerations) would likely limit the scope of such a move.[206] But Presidents may also exhibit markedly different reactions to intense psychological pressures. President Clinton, to take one example, showed remarkable emotional resilience under the trying circumstances surrounding his impeachment proceedings.[207]

G. Persistent Logistical Impairment

Persistent logistical impairment involves a President who has partially lost the capacity to discharge the office's responsibilities, by virtue of location and without a foreseeable endpoint. No apparent historical examples exist for this category of disability. Such a situation could hypothetically arise, for instance, if a President were trapped in hostile foreign territory, but managed to maintain certain avenues of communication. As in other areas, the Vice President and a majority of the Cabinet (or another designated body) could respond by invoking Section 4 of the Twenty-Fifth Amendment.

H. Temporary Logistical Impairment

Finally, under temporary logistical impairment, a President's ability to carry out his or her official duties is partially compromised by virtue of location, and only for a short time. This type of disability may often prove

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[201] *See* Feerick, *supra* note 24 (President Nixon).

[202] *See* Amar, *Take Five*, *supra* note 24, at 13–14 (President Clinton).

[203] Neither President Nixon nor President Clinton accepted the suggestion, of course.

[204] *See The West Wing: 7A WF 83429* (NBC television broadcast Sept. 24, 2003); *The West Wing: The Dogs of War* (NBC television broadcast Oct. 1, 2003).

[205] *See* FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 25, at xi.

[206] *See* Gustafson, *supra* note 24, at 491–93.

[207] *See, e.g.*, JOHN F. HARRIS, THE SURVIVOR: BILL CLINTON IN THE WHITE HOUSE 334–61, 431–33 (2005); *see also* Akhil Reed Amar, Address, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 6 (2010) ("For some strange reason, President Clinton declined to take my unsolicited and unconventional advice . . . ." (citing Amar, *Take Five*, *supra* note 24)).

unproblematic—say, when communications technology operates suboptimally—but it can hold significance in time-pressured circumstances. When President Reagan was shot, George H.W. Bush was returning from a trip to Texas. Administration officials placed a call to the Vice President aboard *Air Force Two*, but struggled with a poor connection.[208] Both sides heard little more than static.[209] Had this been an instance of a double vacancy, the next in line under the 1947 statute would have been Tip O'Neill, the Democratic Speaker of the House. Yet Alexander Haig, now the Secretary of State, erroneously asserted in the Press Room that he "[c]onstitutionally" followed the Vice President and that he was "in control here, in the White House, pending return of the vice president."[210] Although Vice President Bush soon learned the news by Teletype and managed to reestablish communications,[211] he did not reach the White House until more than four hours after the shooting.[212] To White House officials during that time, the technological difficulties (along with larger prudential considerations) weighed against transferring power to the Vice President.[213]

Advances in telecommunications technology have not, of course, wholly obviated such problems. In the moments after the September 11 terrorist attacks, a "frustrated" President George W. Bush, departing from Florida and initially diverting to Louisiana, struggled with "poor communications."[214] The President was unable to reach Secretary of Defense Donald Rumsfeld for a time and was repeatedly disconnected from the line to Vice President Cheney in the White House shelter conference room.[215] The need for clear lines of communication grew

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[208] *See* WILBER, *supra* note 146, at 131.

[209] *See id.* at 131–32.

[210] *See id.* at 175; *see also* LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 199 (1991) ("The printed words do not begin to convey the frenetic impression made by Haig at this moment."); WILBER, *supra* note 146, at 167 (discussing Haig's stated views immediately prior to his public remarks). As some Reagan advisors realized at the time, Haig's misapprehension was all the more surprising from the person who had served as Chief as Staff during President Nixon's second term. *See id.* at 167; *supra* Part I.

[211] *See* WILBER, *supra* note 146, at 132.

[212] *See id.* at 82 (stating that the shooting occurred at 2:27 p.m.); *id.* at 193 (noting that the Vice President entered the Situation Room at 7 p.m.).

[213] *See id.* at 164.

[214] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 40 (2004) [hereinafter 9/11 COMMISSION REPORT]; *see also* GEORGE W. BUSH, DECISION POINTS 130 (2010) ("One of my greatest frustrations on September 11 was the woeful communications technology on Air Force One.").

[215] *See* BUSH, *supra* note 214, at 131; 9/11 COMMISSION REPORT, *supra* note 214, at 40.

particularly acute as military pilots awaited authorization to shoot down a commercial airliner if necessary.[216]

In situations of temporary logistical impairment, administrations will often be disinclined to invoke Section 4 of the Twenty-Fifth Amendment or may simply not even consider it. They may well find that the establishment of a clear and firm chain of command offers a more palatable and practical solution.[217]

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The findings of Part III are encapsulated, with some simplification, in Figure 2, below. Although questions of presidential succession are fact-bound determinations not readily reducible to simple formulas, this chart offers a basic summary of (1) each type of condition in the proposed framework, (2) selected examples, (3) the presumption for which section of the Twenty-Fifth Amendment typically applies, and (4) the relevant constitutional actor triggered by the invocation of that section. The foregoing analysis, in Part I as well as Part III, provides a textured examination of each scenario. The detailed studies give a sense of the dynamics under which these difficult, value-laden, intensely personal decisions must be made. The framework presents a means for approaching those decisions with a much-needed measure of objectivity.

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[216] 9/11 COMMISSION REPORT, *supra* note 214, at 40–44. For firsthand accounts, see BUSH, *supra* note 214, at 129, which states, "I told [Cheney] that I would make decisions from the air and count on him to implement them on the ground"; and DICK CHENEY WITH LIZ CHENEY, IN MY TIME: A PERSONAL AND POLITICAL MEMOIR 3 (2011).

[217] *See, e.g.*, 9/11 COMMISSION REPORT, *supra* note 214, at 43 ("In most cases, the chain of command authorizing the use of force runs from the president to the secretary of defense and from the secretary to the combatant commander.").

Figure 2. Applications of the Proposed Framework

Presidential Condition	Historical (or Hypothetical) Example	Resulting Presumption	Decisive Actor
A. Persistent Physiological Incapacity	Aftermath of eventually fatal shooting of James Garfield	Section 4	Vice President and Cabinet
B. Temporary Physiological Incapacity	Planned surgeries of Grover Cleveland, Lyndon Johnson, Ronald Reagan, and George W. Bush; heart attack of Dwight Eisenhower; shooting of Ronald Reagan	Section 3 if expected; Section 4 if unexpected	President if expected; Vice President and Cabinet if unexpected
C. Persistent Logistical Incapacity	"Desert island" hypothetical	Section 4	Vice President and Cabinet
D. Temporary Logistical Incapacity	"*Air Force One* isolation" hypothetical	Section 4	Vice President and Cabinet
E. Persistent Physiological Impairment	Chester Arthur's kidney ailment; Woodrow Wilson's stroke	Section 3; in extreme cases, Section 4	President; Vice President and Cabinet
F. Temporary Physiological Impairment	Richard Nixon's alcohol consumption during the Middle East crisis	Section 3; in extreme cases, Section 4	President; Vice President and Cabinet
G. Persistent Logistical Impairment	"Hostile foreign territory" hypothetical	Section 4	Vice President and Cabinet
H. Temporary Logistical Impairment	Technological difficulties immediately after attempted assassination of Ronald Reagan and after September 11 terrorist attacks	Section 4	Vice President and Cabinet

Note: The temporary and nondebilitating nature of certain conditions may sometimes make invoking Section 4 seem undesirable or impractical. In such circumstances, following the existing chain of command may prove to be a preferable solution.

CONCLUSION

It seems remarkable that scholars and practitioners have left open, under the existing legal framework, so many ambiguities about the most human element in the American governmental structure—the branch that centers on a single person,[218] rather than a bench of nine or two houses of 535.[219] Executive power, as Justice Jackson observed, is concentrated "in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude, and finality, his decisions so far overshadow any others that almost alone he fills the public eye and ear."[220] On any given day in office, a President will almost certainly operate under significant strain.[221] As Lyndon Johnson recalled about his tenure: "Of all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 A.M., and there were few mornings when I didn't wake up by 6 or 6:30."[222] Not only stress, but also emotions and countless other factors can influence individual behavior and decision-making.[223] Those sources tend to resist quantification. In so many historical cases, assessing presidential disability has proved a highly contingent, tightly entwined, politically fraught undertaking.

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[218] *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982) (stating that the provision "establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity"); *see also* AMAR, *supra* note 115, at 169 ("[T]he core Article II idea of transferring executive power in the event of executive inability drew strength from both republican principles and national-security practicalities. As a matter of principle, no man had a private right to rule in a manner that disserved the larger public interest."); PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) (calling the President the "sole indispensable man in government"), *quoted in* Clinton v. Jones, 520 U.S. 681, 713 (1997) (Breyer, J., concurring in the judgment).

[219] *See also* Rubin v. United States, 525 U.S. 990, 991 (1998) (Breyer, J., dissenting from the denial of certiorari) ("[The President] is responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch or the entire Judiciary for those of the Judicial Branch."); *Fitzgerald*, 457 U.S. at 749, 751 (noting the President's "unique position in the constitutional scheme" and "the singular importance of the President's duties"); THE FEDERALIST NO. 70, at 342 (Alexander Hamilton) (Terence Ball ed., 2003) ("Those politicians and statesmen, who have been the most celebrated for the soundness of their principles, and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand . . . .").

[220] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

[221] *See Jones*, 520 U.S. at 698 ("Former Presidents, from George Washington to George Bush, have consistently endorsed [this] characterization of the office.").

[222] LYNDON BAINES JOHNSON, THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963-1969, at 425 (1971), *quoted in Jones*, 520 U.S. at 698.

[223] *See, e.g.*, STEPHEN PETER ROSEN, WAR AND HUMAN NATURE 27–70 (2005).

Nevertheless, the classificatory framework that emerges from historical experience can bring some order to the subjective assessments of *when* a President has become disabled. By applying a framework that identifies the severity of the disability, along with its temporal and spatial dimensions, administrations may properly and forthrightly diagnose a potential disability. Classification offers a foundation for prudent action, although it is no substitute for sound judgment. The questions acquire deeper complications because the President's role in American governance is not only functional but also representational. Presidents who cannot fully execute each daily function, such as Franklin Roosevelt in the final months of his life,[224] may still play an important role as head of state. Presidents such as Abraham Lincoln,[225] moreover, may seem by some standards "impaired," yet achieve spectacularly high performance. Presidential disability can be a subjective matter. It has constitutional, medical, personal, and political elements.

In his memoirs, President Nixon recalled a 1954 encounter with Winston Churchill. Then eighty-three years old, Churchill had recently suffered another stroke and appeared frail. But once Churchill downed a glass of brandy, President Nixon recounted, "[i]t was like lighting a match to dry leaves. . . . Doctors and moralists may cringe at the thought, but alcohol was just what Churchill had needed."[226] President Nixon did not, of course, endorse Churchill's approach as a prescription for other people. But neither did he view alcohol consumption in a Manichean light. "Based on my experience," he wrote, "I would recommend that people in public life should bear in mind that alcohol will affect them in different ways under different circumstances."[227] Perhaps in an oblique nod to nights such as October 24, 1973, the former President noted, "A drink when you are tired or tense can have an explosive effect."[228]

President Nixon's perspective may be distinctly influenced by his own political career, but it nevertheless testifies to the complexity of assessing some of the most difficult classificatory cases of presidential disability. Another inferential step is required (as Judge Learned Hand observed in another context[229]) to assess how external symptoms may or may not

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[224] *See supra* text accompanying notes 175–182.
[225] *See supra* text accompanying notes 157–158.
[226] RICHARD NIXON, IN THE ARENA: A MEMOIR OF VICTORY, DEFEAT, AND RENEWAL 127 (1990).
[227] *Id.* at 128.
[228] *Id.*
[229] Nelson v. Am.-W. Afr. Line, Inc., 86 F.2d 730, 732 (2d Cir. 1936) (Hand, J.) ("The inquiry into the tangled mazes of a drunken boatswain's mind may be beyond the powers of a jury, but it is the fact upon which the case turns . . . .").

reflect impairment of a person's judgment. An administration's considerations, moreover, may extend beyond the body of the President to the person standing next in line.[230] In the eye of the storm, hard cases of presidential disability—without other guidance—may be in the eye of the beholder.

And yet, as the historical account of President Nixon's situation during the crisis suggests, holding the burden of decision may not result in an actual choice to invoke the Twenty-Fifth Amendment. Even if a President's condition places the presumption on the Vice President and the Cabinet (or another designated body) under Section 4, other pressing considerations may interfere. In President Nixon's case, those considerations may have included an evident yet also complex and evolving disability, an imminent national security decision, the prospect of succession by a Speaker from the opposite party, and political concern for the publicity around the underlying incident as well as an invocation of the Twenty-Fifth Amendment. The Nixon Administration faced another encumbrance as well: at the time, there was no sitting Vice President who could have participated in the Section 4 succession process in the first place, and the Amendment does not indicate who, if anyone, can substitute for the Vice President in such a case.[231] Had President Nixon's advisors not faced that final wrinkle, however, the location of the presumption may have depended on the exact degree of his impairment—which the available historical record indicates with only limited precision. If President Nixon was incapable of making a competent decision under Section 3, the burden of decision may have shifted to the other actors under Section 4. The constitutional requirements, in any event, should have factored into the calculus inside the White House. Still, holding the burden does not require the relevant actors to initiate the succession process: they have the presumptive power to decide *whether* succession is warranted. The approach put forward in this Article could be process-determinative, but it is not necessarily outcome-determinative.

The proposed framework offers a toolkit to prepare for the next "perfect storm." President Nixon's advisors confronted the uncertainties of presidential disability with particular urgency, but the basic conceptual questions persist. The range of cases examined here illustrates the factors to be weighed and the intricate balance to be struck. Time and again, the

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[230] *See supra* text accompanying note 26.

[231] The Presidential Succession Act of 1947 predates the Twenty-Fifth Amendment, which was ratified in 1967, and does not address this issue.

administrative arrangements for presidential disability have been made in the shadow of the law, or perhaps beyond its shadow. For exceptionally close cases, there may be no viable alternative but to afford substantial discretion to the executive branch.[232] Indeed, the texture of the White House decision-making process is often central to understanding the underlying dynamics of presidential disability. Difficulties may deepen on account of personal histories, political dependencies, and rivalries among the Vice President, the Cabinet, or other senior administration officials. But this analytic framework—built from the array of past experiences with presidential disability—should add some structure and order to these turbulent moments in history.

[232] *See also* Letter from Dwight D. Eisenhower to the Senate Comm. on the Judiciary (Mar. 2, 1964), *reprinted in Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 232, 233 (1964) ("There is, of course, no completely foolproof method covering every contingency and every possibility that could arise in the circumstances now under discussion. We must trust that men of good will and common-sense, operating within constitutional guidelines governing these matters, will make such decisions that their actions will gain and hold approval of the mainstream American thinking.").