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STATE CRIMINAL PROSECUTION OF A FORMER PRESIDENT: ACCOUNTABILITY THROUGH COMPLEMENTARITY UNDER AMERICAN FEDERALISM

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I. INTRODUCTION

With the end of the War in Iraq announced by sitting President Barack Obama in 2011[1] and the withdrawal of American troops by the end of December 2011,[2] another opportunity arises for accountability for former President George W. Bush for instigating that war. Accountability can be imagined in many forms—international or foreign tribunal, domestic political accountability, or domestic criminal prosecution. Achieving accountability abroad or domestically for a former U.S. President has its challenges.

An unexplored avenue for accountability through complementarity in American federalism is the state criminal prosecution of a former President. This alternative path conducted in appropriate circumstances appears to be foreseen in our constitutional structure, assuring the double protection of the rights of the People as was envisioned by Alexander Hamilton and James Madison.

Based on a research report originally prepared at the invitation of Vincent Bugliosi,[3] this Article explores the opportunities and hurdles for a state criminal prosecution of former President George W. Bush for ordinary state crimes of conspiracy to commit murder and murder for the deaths of American soldiers in the War in Iraq.

This Article examines such a criminal prosecution through the lenses of international law, federal law and state law. We conclude that, while recognizing the difficulties, such a state criminal prosecution can be done and, as a normative matter with regard to the deaths of American soldiers in the War in Iraq, should be done.

This Article is organized in the following manner. Part II develops the generic theory of the case for a prosecution of former President Bush for conspiracy to commit murder or murder. Part III describes how such a prosecution is consistent with U.S. international legal obligations. Part IV describes how such a prosecution is consistent with Presidential War Powers. Part V describes how such a prosecution is

1. *Remarks by the President on Ending the War in Iraq*, THE WHITE HOUSE (Oct. 21, 2011, 12:55 PM), http://www.whitehouse.gov/the-press-office/2011/10/21/remarks-president-ending-war-iraq.

2. *Remarks by the President and First Lady on the End of the War in Iraq*, THE WHITE HOUSE (Dec. 14, 2011, 12:26 PM), http://www.whitehouse.gov/the-press-office/2011/12/14/remarks-president-and-first-lady-end-war-iraq.

3. *See generally* VINCENT BUGLIOSI, THE PROSECUTION OF GEORGE W. BUSH FOR MURDER (2008). The theory of the case is also consistent with the 2008 findings of the Select Committee on Intelligence of the U.S. Senate. *See* SELECT COMMITTEE ON INTELLIGENCE, REPORT ON WHETHER PUBLIC STATEMENTS REGARDING IRAQ BY U.S. GOVERNMENT OFFICIALS WERE SUBSTANTIATED BY INTELLIGENCE INFORMATION TOGETHER WITH ADDITIONAL AND MINORITY VIEWS, S. REP. 110-345, at 91 (2008), *available at* http://intelligence.senate.gov/pdfs/110345.pdf.

consistent with complementarity. Part VI describes the state criminal prosecution and defenses. Part VII addresses the normative question as to whether such a prosecution should be undertaken. Part VIII concludes the discussion.

II. THE FALSE PRETENSES THEORY OF THE CASE

It is so unnatural for Americans to contemplate the criminal prosecution of a former President at all, yet alone with regard to deaths in an armed conflict and in a state criminal prosecution, that we thought it best to start with the theory of the case. The factual predicate for the theory of the case for the prosecution of former President George W. Bush[4] is:

> [The Bush Administration made deliberately false statements] . . . that were *directly* responsible for the majority of Americans finally becoming convinced that invading Iraq was the right thing for America to do.
>
> Without the approval of this majority of Americans, there is a decent chance that Bush would not have gone to war. Indeed, that was the very reason why Bush and his people made the statements – to get the support of the American people.
>
> Because of the war induced by these statements, over 100,000 American soldiers and Iraqi civilians lost their lives, and many thousands of others have been physically or mentally disabled for life.[5]

The theory of the case is that the making of severely misleading statements by a President to lead the country into the war *does not* form part of the President's or the federal government's express, implied or inherent powers. Moreover, the severely misleading statements demonstrate sufficient *mens rea* which, when coupled with the relevant *actus reus*, lead to criminal liability of the individual serving as President.

Such criminal prosecution in a state court as opposed to a federal

4. While the focus of the analysis is on the former President, the analysis would operate *mutatis mutandis* for other members at an appropriate level of the former Administration.

5. BUGLIOSI, *supra* note 3, at 20-21; Benjamin G. Davis et al., *Research Report on Criminal Prosecution in California Courts of Former President George Bush for Conspiracy to Commit Murder and Murder*, University of Toledo Legal Studies Research Paper No. 2012-12 (July 25, 2011), *available at* http://ssrn.com/abstract=1981275.

court goes to the question of the nature of the double security provided under our Constitution to the rights of the people. The essence of the state and federal roles in our federalism that form the backdrop for this prosecution was expressed early on by Alexander Hamilton:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, *and these will have the same disposition towards the general government.* The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress. How wise will it be in them by cherishing the union to preserve to themselves an advantage which can never be too highly prized![6]

And James Madison:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. *Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.*[7]

This "different governments will control each other"[8] function is at its most significant when a state is seeking to exercise its police powers through a criminal prosecution in a state court (as contrasted to civil process or regulatory authority) as acknowledged, if somewhat obliquely, in *Willingham v. Morgan* where the Supreme Court states: "Were this a criminal case, a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts."[9]

The state court criminal prosecution essentially forces the issue because of the strong state interest in not having its citizens and residents murdered. Provided the state sovereign has established the proper legal basis for its jurisdiction and prosecution, and even if the matter is in a federal forum under removal, the autonomy of the state prosecutor *vis-à-vis* the federal prosecutor serves as a true double security for the people against being sent to war under false pretenses.

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6. THE FEDERALIST NO. 28 (Alexander Hamilton) (emphasis added).

7. THE FEDERALIST NO. 51 (James Madison) (emphasis added).

8. *Id.*

9. Willingham v. Morgan, 395 U.S. 402, 409 n.4 (1969). The civil context is discussed below in the Federal Officer Removal Act part of this Article.

Whether the country is willing to face this type of discussion on basic aspects of how its separation of powers and federalism work is uncertain. The lack of action since President Polk in the Mexican American War[10] (with exception of the congressional ratification of Lincoln's excesses in the Civil War) suggests acquiescence to actions of the President in taking the country to war through misleading statements.

Yet a distinction should be made between acquiescence or passivity in the face of the enormous power of the President and the legality of those actions under our Constitution and laws. The mere fact that citizens or Congress have acquiesced in the past in this arena does not, of course, mean that former President Bush acted legally and that a criminal prosecution cannot be contemplated. It obviously is no defense to conspiracy to commit murder or murder that a prior President engaged in conduct similar to Bush and *he* got by with it. Such an argument would not only be unavailing, but would induce derision, even laughter. We call this theory of the case "the false pretenses theory."

III. A STATE CRIMINAL PROSECUTION IS CONSISTENT WITH U.S. OBLIGATIONS UNDER INTERNATIONAL LAW

In this part we analyze the U.S. obligations under international law

10. Louis Fisher, *When Wars Begin: Misleading Statements by Presidents*, 40 PRESIDENTIAL STUDS. Q. 171, 173-74 (2010) (providing an analysis of misleading statements inducing the country into war going back to President James Polk and the Mexican-American War). Of the examples cited in that work, the statements of James Polk appear to be closest to the kind of falsity that would have to be proved in this type of criminal case. In a message to Congress on May 11, 1846, President Polk asserted that Mexico, "after a long-continued series of menaces [has] at last invaded our territory and shed the blood of our fellow-citizens on our own soil[,]" and claimed that "war exists." *Id.* at 173. Both of these assertions were false as neither the invasion of American territory nor war (as opposed to hostilities) existed. *Id.* After much effort by the Whig Party denouncing executive usurpation and deceptions (and Abraham Lincoln's famous Spot Resolutions seeking the indication of what spot of American territory had been invaded by Mexico), the House of Representatives, on January 3, 1848, passed an amendment censuring Polk for "unnecessarily and unconstitutionally" beginning the Mexican-American War (passing by a vote of 85 to 81). *Id.* at 174. In all other cases of alleged misleading statements discussed in Fisher's article, no particular consequence in Congress was noted. In none of these cases was a criminal prosecution at the federal or state level noted. *Id.* at 173-74. Of course, former President Bush might use the political solution of a censure of Polk in the House of Representatives and the absence of similar action in other settings to argue that issues of misleading statements by a President that lead the country into war form part of the federal government's express, implied or inherent powers that are solely subject to review in a political process such as censure or impeachment. However, whether they occur and whatever their outcome, these political processes for political accountability do not preclude criminal prosecution for criminal accountability.

to ascertain to what extent a prosecution under the false pretenses theory would be consistent with international law. The U.S. obligations under international law are outlined in 48 C.J.S International Law § 63 which states:

> The United States has a continuing obligation to observe with entire good faith and scrupulous care all of its undertakings under the Charter of the United Nations, including support of the resolutions adopted by the Security Council, and the courts of the United States are bound to accept, enforce, and protect the powers conferred on the United Nations . . . however, the United States Congress possesses the power to enact a statute abrogating an aspect of treaty obligations under the United Nations Charter . . . . A United Nations Security Council Resolution is not self-executing and does not confer rights on citizens of the United States that are enforceable in a court in the absence of implementing legislation.[11]

A. *The Charter of the United Nations*

The Charter of the United Nations is comprised of nineteen chapters and 111 articles.[12] The most pertinent to the subject of President George W. Bush's war waged on Iraq in March of 2003 are U.N. Charter art. 2, paras. 4 and 7; and U.N. Charter arts. 41, 42 and 51.[13]

In the "Purposes and Principles" chapter of the Charter, Article 2, paragraph 4 states "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[14] The U.N.'s purposes are to promote and maintain global peace, to encourage friendly relations and international cooperation, and to solve international problems.[15] Thus, the U.S. attack of Iraq in March of 2003 falls in violation of Article 2, paragraph 4 as evidenced by a statement from the United Nations on March 26th, 2003 which reads: "The Security Council, holding its first debate on Iraq since hostilities began on 19 March, was called on to end the illegal aggression and demand the immediate withdrawal of invading forces, by an overwhelming majority of this afternoon's 45 speakers."[16] However, the Charter also states, "[n]othing contained in

11. 48 C.J.S *International Law* § 63 (2011).
12. U.N. Charter, *available at* http://www.un.org/en/documents/ charter/.
13. U.N. Charter art. 2, paras. 4, 7; arts. 41, 42, 51.
14. *Id.* art. 2, para. 4.
15. *Id.* art. 1, paras. 1-4.
16. Press Release, Security Council, Security Council Holds First Debate on Iraq Since

the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[.]"[17]

Under Chapter VII of the Charter, titled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," Article 41 describes the Security Council's authority to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."[18] Then in Article 42, the Charter states "[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate . . . it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[19] Essentially, the United Nations intends to decide when military force is or is not necessary in solving global conflict. Many Members of the United Nations emphasized in the March 26th, 2003 press release that the attack in Iraq was "carried out without Council authorization [and] was a violation of international law."[20]

The U.N. Charter does, however, make an exception for force used in self-defense. Article 51 states, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[21] This may be one of the reasons then President George W. Bush insisted or let be strongly implied that Saddam Hussein was connected to the terrorist attacks on New York, Pennsylvania, and Washington D.C. on September 11, 2001. Absent involvement in those attacks, Saddam Hussein and Iraq had not made an armed attack on the United States, strengthening the argument that the U.S. attack on Iraq in March 2003 was in violation of the U.N. Charter.

B. *U.N. Security Council Resolutions*

The Security Council's resolutions are the instructions the Member States are to follow. Failure to comply with a demand set forth in a resolution is a breach, and the United Nations may impose

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Start of Military Action; Speakers Call For Halt to Aggression, Immediate Withdrawal, U.N. Press Release SC/7705 (Mar. 26, 2003) [hereinafter U.N. Press Release 7705].

17. U.N. Charter art. 2, para. 7.
18. *Id.* art. 41.
19. *Id.* art. 42.
20. U.N. Press Release 7705, *supra* note 16.
21. U.N. Charter art. 51.

consequences for the breach.[22] The resolution that much of the March 2003 attacks on Iraq are based on is Security Council Resolution 1441.[23] Resolution 1441 was a follow up to Resolution 687 from April 3, 1991.[24] Resolution 687 recognized the threat of chemical, nuclear, and biological weapons emanating from Iraq and demanded that the sale, purchase, production and trade of any and all weapons of mass destruction, including any substances related to the production of weapons of mass destruction, cease immediately and any and all parts of weapons or weapons currently in existence there be destroyed.[25] Further, Resolution 687 demanded that Iraq submit a declaration of all such weapons and production facilities and declarations of their destruction.[26]

Eleven years later, Resolution 1441 was created, "[r]ecognizing the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction . . . poses to international security" and declaring that "Iraq has not provided an accurate, full, final, and complete disclosure, as required by resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction[.]"[27] The solution to Iraq's non-compliance was to afford Iraq one last chance to become compliant with resolution 687 or to face the consequences, which were not described.[28]

In contrast, Security Council Resolution 678 from November 29, 1990 was created to afford Iraq one last chance to comply with a demand to withdraw from Kuwait (demanded by Resolution 660 from August 2, 1990) and authorized Member States to "use all necessary means to uphold and implement" the order to withdraw.[29] The U.N. authorization for Member States to "use all necessary means"[30] is usually interpreted as the U.N. authorization of military force, an authorization and a consequence absent from Resolution 1441.

Resolution 1441 did not authorize Member States of the United Nations to use military force against Iraq for its failure to fully, accurately and completely declare the ceased production and destruction of all weapons of mass destruction and their kin. On March 28, 2003, the United Nations created Resolution 1472, the first paragraph of which refers to the United States and the United Kingdom as the

22. *See* S.C. Res. 1441, ¶¶ 1, 4, 13, U.N. Doc. S/RES/1441 (Nov. 8, 2002).
23. *Id.*
24. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).
25. *Id.* ¶ 8.
26. *Id.* ¶ 9.
27. S.C. Res. 1441, *supra* note 22, introduction.
28. *Id.* ¶¶ 2, 4, 13.
29. S.C. Res. 678 ¶¶ 1, 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).
30. *Id.* ¶ 2.

"Occupying Power" of Iraq.[31] This resolution was the first resolution issued following the "illegal attack" on Iraq. The United Nations never authorized the attack, but by acknowledging the United States and the United Kingdom as the "Occupying Power," some might see the United Nations as having impliedly consented to the war post-hoc.

However, it would be imprudent to ascribe a post-hoc ratification by the United Nations of the Iraq War. At most, one might speak of a form of acquiescence to the reality of the facts on the ground. This issue is further addressed by Members of the United Nations in its press releases.

C. *The U.N. Security Council Press Releases*

The press releases dated the 11th, 12th, and 26th of March 2003 provide much insight on the division over how to handle Iraq's noncompliance with Resolution 1441. The press releases dated the 11th and 12th were the results of a two-day debate specifically assigned to the situation in Iraq.[32] On the first day, 28 speakers made arguments supporting their view of whether to allow Iraq additional time to comply with Resolution 1441 or to initiate military force and go to war.[33] During this meeting, Hans Blix, Executive Chairman of the U.N. Monitoring, Verification and Inspection Commission (UNMOVIC), reported that "after a period of somewhat reluctant cooperation, there had been an acceleration of initiatives by Iraq . . . [a]t the same time, such initiatives . . . did not constitute 'immediate' cooperation" as required by resolution 1441.[34]

Following this report, Members in turn stated their positions. The Malaysian representative spoke on behalf of the Non-Aligned Movement and pleaded for the Council to strive for a peaceful solution.[35] The Permanent Observer for the League of Arab States asked "[w]hat present and looming threat existed to wage war [in Iraq] at a time when the inspections were proceeding vigorously" and that "[e]verything should be done to avoid that 'hideous and uneven' war, which would devastate, destroy and destabilize the Arab region and the entire world."[36]

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31. S.C. Res. 1472, introduction, U.N. Doc. S/RES/1472 (Mar. 28, 2003).

32. Press Release, Security Council, Security Council Hears From 53 Speakers in Two Days on Iraq's Disarmament; Some Stress Iraq Has Not Cooperated, Most Say Inspectors Need More Time, U.N. Press Release SC/7687 (Mar. 12, 2003).

33. Press Release, Security Council, At Request of Non-Aligned Countries, Security Council Hears Views of Larger UN Membership on Disarmament of Iraq, U.N. Press Release SC/7685 (Mar. 11, 2003) [hereinafter U.N. Press Release SC/7685].

34. *Id.*

35. *Id.*

36. *Id.*

Iran and Canada also joined in the sentiment to strive for peace.[37] Canada proposed "set[ting] a deadline of three weeks for Iraq to demonstrate conclusively that it was implementing [the required] tasks and was cooperating actively and effectively on substance," then repeating the deadlines so long as Iraq remained compliant.[38] Iran sympathized that the disarmament should not have taken twelve years, and that it "underst[ands] the international community's frustration[]" but cautioned that another war in that region "should not easily or hurriedly be decided."[39]

On the other hand, and in favor of hastened military action, "the representative [from] Turkey called upon [the] Council members for cohesion, which would not only serve to legitimize any action, but would reinforce United Nations credibility and ensure the decision reached by that body would be heard 'loud and clear' around the globe."[40] Additionally, the representative from Kuwait urged the United Nations to "chang[e] its behaviour and actively cooperat[e], instead of just pretending to do so[,]" stressing that the only winner to the U.N. division on the matter was Iraq.[41]

The following day's meeting heard from several more speakers.[42] Japan, Latvia, Georgia, and the Dominican Republic joined in support of a draft resolution co-sponsored by the United States, the United Kingdom, and Spain which would "set a clear deadline for Iraq to comply with its obligations or face military action."[43] Japan added that the recent Iraqi cooperation was insufficient and that "[t]he proposed draft resolution was truly a 'final effort' to place the consolidated pressure of the international community on Iraq." It also stressed that failure to adopt the draft and the continued division of the U.N. members would not only "benefit Iraq, but it would also raise grave doubts about the authority and effectiveness of the United Nations."[44] Conversely, the representatives from the European Union and from the African Group spoke of their desire to avoid a war as it was not inevitable, and urged that Iraq needed the time to comply with their "last chance" and that a war almost definitely would destroy the "nascent industrial base and economic development" of Africa.[45]

The U.N. Members remained divided on the solution to Iraq's

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. U.N. Press Release SC/7687, *supra* note 32.
43. *Id.*
44. *Id.*
45. *Id.*

noncompliance. On March 19, 2003, the United States invaded Iraq. Then, on March 26, 2003, the United Nations held its first debate on Iraq "since [the] hostilities began."[46] Speakers at the debate demanded a "halt to the aggression" and an "immediate withdrawal" of U.S. forces in Iraq.[47] "Many stressed [how] they could not understand how the Council could remain silent in the face of the aggression by two of its permanent members against another United Nations Member State."[48] In response, Secretary-General Kofi Annan stated "'[w]e all want to see this war brought to an end as soon as possible,'" and he explained that "while it continued, it was essential that everything be done to protect the civilian population, as well as the wounded prisoners of war, on both sides, and to bring relief to the victims."[49]

Somewhat baffled by this statement, the Iraq representative found it "peculiar that, instead of considering the aggression itself, the Council had been busy discussing the humanitarian aspects of the problem. [. . .] Shouldn't the Council pay attention to the cessation of the aggression first?"[50] Consistent with Iraq's concerns, the Observer for the League of Arab States recognized that the United States and the United Kingdom had started a war "at a time when Iraq was positively cooperating with United Nations inspectors," and that "[t]he only party authorized to disarm Iraq was the [UNMOVIC]."[51]

In defense of U.S. and U.K. actions, Australia, who had also joined in the military action, said "it was time for Council members to go beyond [] acrimony, narrow political ambitions and separate agendas which [] hamstrung the Council in recent months, and seize the opportunity to make good on their responsibilities."[52]

D. *Discussion*

An examination of the U.N. Charter, resolutions and press releases suggest a persuasive argument that the United States was in violation of its obligations under International Law and the U.N. Charter when it invaded Iraq on March 19, 2003. In the absence of Article 51's self-defense settings, the U.N. Charter articulates the United Nations' decisive role in authorizing the use of military force by a Member State against another Member State of the United Nations. However, there is a large divide among the collective Members on the solution to Iraq's

46. U.N. Press Release SC/7705, *supra* note 16.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

non-compliance with U.N. Resolutions. It is perhaps this division, and the fear that more waves may divide the "United" Nations beyond repair, that is responsible for the United Nations somewhat "mum" attitude toward the U.S. violation. What is clear is that the U.N. Security Council declined to provide authorization in 2002 for the United States to start the armed conflict with Iraq in which American soldiers met their deaths.[53]

The principal cause of the U.S. violation of its obligations under International Law and the U.N. Charter were former President Bush's false pretenses in inducing the United States to go to war with Iraq. These false pretenses, directed at the American people, directly caused each step of the process of the placement of American soldiers in harm's way and of the untimely death of too many of them in Iraq. These deaths were the direct result of former President Bush's false pretenses that amount to the crimes of conspiracy to commit murder and murder. Nothing in the international law obligations of the United States is inconsistent with such a criminal prosecution.

IV. A STATE CRIMINAL PROSECUTION IS CONSISTENT WITH PRESIDENTIAL WAR POWER

While there appears to be no impediment in the international obligations of the United States to such a prosecution, we also examine U.S. foreign relations law. In this part, we conclude that such a prosecution is consistent with the limitations on Presidential War Powers. We examine below the nature and extent of the President's powers under the Constitution and pursuant to express or implied grants of power from Congress. *Nixon v. Fitzgerald*,[54] through its discussion of the idea of the outer perimeter of Presidential powers, provides a useful image of the limits on presidential power while carefully avoiding to define those limits.[55]

In the limited context of a private civil suit, the Court has recognized the central government's interest in preserving Presidential Absolute Immunity (and federal official Qualified Immunity) for acts done in office, noting:

53. Even if the United Nations was to have authorized the use of force in Iraq, former President Bush would still be held criminally liable under the false pretenses theory, for the U.N. authorization would be another (even lawful) act brought about by the co-conspirators in the conspiracy to commit murder and another innocent agent or instrumentality in the charge for murder.

54. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

55. *Id.* at 749-50.

> The President occupies a unique position in the constitutional scheme. Article II, § 1, of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law -- it is the President who is charged constitutionally to "take Care that the Laws be faithfully executed"; the conduct of foreign affairs -- a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret"; and management of the Executive Branch -- a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[56]

At the same time, there is no text in the Constitution of the United States that prohibits the prosecution of, or expressly provides any immunity to, the President of the United States.[57] In fact, Article I, Section 3, Clause 7, known as the Impeachment Judgment Clause, indicates quite the opposite. It states:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.[58]

This lack of any immunity for the President of the United States was emphasized by Alexander Hamilton in the Federalist Paper Number 69 in the setting of an impeachment, noting that once removed from office the President would be liable to prosecution and punishment in the ordinary course of the law.[59] Hamilton went on to distinguish the status of a President from that of a King and to argue that *the President's status was more comparable to that of the governor of a state.*[60]

The President of the United States would be liable to be

56. *Id.* (internal quotations omitted).
57. *See generally* U.S. CONST.
58. U.S. CONST. art. I, § 3, cl. 7.
59. THE FEDERALIST No. 69 (Alexander Hamilton).
60. *Id.*

> impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.[61]

The Impeachment Judgment Clause permits officials, including the President, who have been convicted of the charges for which they have been impeached to also face civil and criminal proceedings.[62] This clause, however, should not be interpreted to mean that impeachment is a precondition to the criminal prosecution of the President. "Impeachment and criminal prosecution serve entirely distinct goals."[63] Indeed, the Office of Legal Counsel (OLC) concluded in a 2000 Memorandum for the Attorney General that a President may be subject to "prosecution once . . . [his] term is over or he is otherwise removed from office by resignation or impeachment."[64]

The idea of an outer perimeter to presidential power coupled with the recognition of the risk of presidential criminality suggest an underexplored but discernible dimension of our constitutional structure. In this discernible dimension, a sitting President acting with the kind of *mens rea* associated with criminality is operating outside the realm permitted by constitutional and congressional grants of power. The traditional structures used to analyze or punish such presidential actions fail to grasp effectively how to address these lawless actions in anything but a political way through impeachment.

Characterizing these actions as criminal actions by the sitting President helps to reflect their actual character and begins to suggest the need for a response to such lawlessness. Once such criminality by a sitting President is imagined, the question of what is the appropriate remedy for said criminality arises. Once the sitting President leaves office and is a former president, then the possibility of criminal

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61. *Id.*

62. U.S. CONST. art. I, § 3, cl. 7.

63. RANDOLPH D. MOSS, WHETHER A FORMER PRESIDENT MAY BE INDICTED AND TRIED FOR THE SAME OFFENSES FOR WHICH HE WAS IMPEACHED BY THE HOUSE AND ACQUITTED BY THE SENATE (2000), *available at* http://www.justice.gov/olc/ex president.htm.

64. RANDOLPH D. MOSS, A SITTING PRESIDENT'S AMENABILITY TO INDICTMENT AND CRIMINAL PROSECUTION (2000), *available at* http://www.justice.gov/olc/sitting_president.htm.

prosecution as a means to provide accountability for criminal actions done while in office becomes a more obvious feature of our constitutional structure. As Vincent Bugliosi eloquently noted:

> The notion of unbridled and absolute presidential discretion and authority in the name of self-defense [or otherwise we would add] is so diametrically in conflict with the antitotalitarian principles upon which this nation was founded that it is rarely even discussed, and when it is, there is the sense that the speaker feels it is almost unworthy of discussion.[65]

A. *International Obligations and the President*

The Constitution expressly states that treaties entered into by the United States are considered to "be the supreme [l]aw of the [l]and."[66] Article II, section 3 states that the President "shall take care that the laws be faithfully executed[.]"[67] Legal scholars have asserted that, when read together, these clauses require the President to obey and "faithfully execute supreme federal law whether it is customary or treaty-based."[68] Centuries of judicial decisions also support the proposition that the President is bound by international obligations.[69] The earliest judicial opinion recognizing that the president is "bound by international law" is *Ware v. Hylton.*[70] The Court stated that a treaty entered into by the United States is binding "on all, as well on the Legislative, Executive, and Judicial Departments[.]"[71]

As early as 1799, Representative John Marshall—who would later become Chief Justice of the Supreme Court—opined that the President "was bound to execute a treaty because it is supreme federal law[.]"[72] Throughout the next century, courts continued to recognize that the Executive was bound by international law.[73] As recently as 1984,

65. BUGLIOSI, *supra* note 3, at 278

66. U.S. CONST. art. VI.

67. U.S. CONST. art. II, § 3.

68. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 143 (1st ed. 1996).

69. *Id.*

70. *Id.*; *See* Ware v. Hylton, 3 U.S. 199 (1796).

71. PAUST, *supra* note 68, at 144 n.7 (quoting *Ware*, 3 U.S. at 272).

72. *Id.* at 144.

73. *Id.* at 144-46. In 1800, Justice Chase stated that

> [i]f the President, . . . by this treaty, was bound to give this Nash up to justice, he was so bound by the law; for the treaty is the law of the land[] . . . His delivery was the necessary act of the [P]resident, which he was by the treaty and the law of the land, bound to perform; . . . the [P]resident . . . [has a] duty . . . [of] carrying a solemn treaty into effect.

"Justice O'Connor also recognized that although the political branches may terminate a treaty, power 'delegated by Congress to the Executive Branch' as well as a relevant Congressional-executive 'arrangement' must not be 'exercised in a manner inconsistent with . . . international law.'"[74]

In addition to the judicial opinions, there are legal scholars who agree that "'the President has no plenary power to act in violation of international law,'" and that "'no one in the executive branch has the authority to breach customary international law.'"[75] The President must respect and abide by the treaties and customary international law that bind the United States. However, opponents of this theory assert that the President's broad authority in foreign relations is a constitutional stamp of approval to violate whichever treaties he may choose.

In *United States v. Alvarez-Machain*,[76] the Court recognized that the abduction of a Mexican national in Mexico by kidnappers acting at the behest of the Drug Enforcement Agency "may have been a violation of international law, and stated, 'Respondent . . . may be correct that [his] abduction was shocking and that it may be in violation of general international law principles.'"[77] While agreeing with the Court's final holding, Professor Halberstam of the Cardozo School of Law criticizes the recognition that international law may have been violated and

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United States v. Cooper, 25 F. Cas. 631, 641-42 (C.C.D. Pa. 1800). Justice Chase affirmed the same year that war's "extent and operations are . . . restricted . . . by the *jus belli*, forming a part of the law of nations[.]" Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800). "In 1801, Chief Justice Marshall recognized that if the President were to condemn a vessel in violation of a treaty, which is supreme law of the land, it 'would be a direct infraction of that law, and, of consequence, improper[.]'" Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 379 (1987) (quoting United States v. Schooner Peggy, 5 U.S. 103, 110 (1801)). The case *Brown v. United States* is cited as support for the theory that the Executive is above international law as Justice Marshall stated that "usage is a guide which the sovereign follows or abandons at his will." Brown v. United States, 8 Cranch 110, 128 (1814). However, the Court also recognized that usage "is not an immutable rule of law, but . . . is a question rather of policy than of law." *Id. The Paquete Habana*, decided in 1900, expanded further on "usage" as customary law, and "affirmed that although congress may authorize an infraction of, merely, the 'usage' of nations, such an infraction cannot be made 'even by direction of the Executive, without express authority from Congress.'" Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 381 (1987) (quoting The Paquete Habana, 175 U.S. 677, 711 (1900)). Because the President cannot order a violation even of "usage," it seems obvious that *The Paquete Habana* affirms that the President is bound by international law. *Id.*

74. PAUST, *supra* note 68, at 146 n.38 (citing Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 261 (1984)).

75. *Id.* at 147 (emphasis removed).

76. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

77. Malvina Halberstam, *International Kidnapping: In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736, 737 (1992) (citing *Alvarez-Machain*, 504 U.S. at 656) (emphasis removed) (applauding the Court's decision, but criticizing the determination that the President's action was a violation of international law).

asserts that "under the broad powers of the Executive in the conduct of foreign affairs," the President could order the trial of the defendant in *Alvarez* regardless of whether such action violated international law.[78] Halberstam references *Curtiss-Wright* in her assertion,[79] and states that "[t]he President's authority under the Constitution to take action that violates international law – customary or treaty – is well established."[80] Halberstam further asserts that constitutionally, only the President and Congress can decide "whether to breach U.S. obligations under international law."[81] However, Halberstam does not address the centuries of judicial decisions that imply that the President is bound by international law.

B. *President's Role in Interpreting International Legal Obligations*

While the President is bound by international obligations, he does play a significant, if not exclusive, role in the interpretation of international law. The requirement that "he shall take Care that the Laws be faithfully executed"[82] has served as a source for this claim. Because the primary purpose of this clause is to ensure that the President enforces laws passed by Congress, he is required and has the necessary power to assure that legislation involving "international relations is carried out as the law of the land."[83]

The President can only "make or amend treaties with[] the . . .

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78. *Id.* at 741.

79. *Id.* (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936)) ("[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

80. *Id.* at 742.

> Professor Henkin stated in his General Course on Public International Law at The Hague: "Acting for the United States, the President can denounce or terminate a treaty, even if to do so violates international law, and if he does, presumably it ceases to be a treaty of the United States and is no longer law of the United States. Also, like every State, the United States has the power (not the right) to act contrary to its treaty obligations or in violation of customary norms, and suffer the consequences; in the United States *the constitutional authority of the President may include power to take measures related to foreign affairs that may violate a treaty undertaking or a customary norm.*"

Id. (emphasis added).

81. *Id.* at 743. Halberstam acknowledges that "Congress can, of course, enact legislation limiting the Executive's authority." *Id.* at 743 n.51.

82. U.S. CONST. art. II, § 3. *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 206-07 (2d ed. 1996).

83. HENKIN, *supra* note 82, at 50.

consent of the Senate."[84] This provision has been used to argue that the President cannot "reinterpret a treaty to mean something different from the interpretation that was presented to the Senate and to which the Senate gave its consent."[85] In regards to whether a treaty has the effect of domestic law, the Supreme Court has the final decision in this determination.[86]

Most recently, the Court looked at the President's authority in ordering state courts to give effect to an international court's decision based on the Vienna Convention.[87] The Court recognized that while treaties may give rise to "international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[88] Chief Justice Roberts concluded that the President did not have the authority to make a non-self-executing treaty self-executing without an act of Congress.[89] Subsequently, because Congress had not enacted legislation that gave the treaty preemption over state law, the President's order for the Texas courts to give effect to the International Court of Justice's decision was beyond his authority.[90] This ruling seems to suggest that the President is not free to interpret international law as he chooses.

C. *Whether the President's Constitutional Powers Include the Possibility of Taking the Country to War Under False Pretenses*

1. The President's War Powers Under the Constitution

The Constitution states that the "President shall be Commander in Chief of the Army and Navy of the United States[.]"[91] In Federalist Number 69, Alexander Hamilton differentiates between the President and an absolute monarch.[92] After discussing the absolute authority of the King of England, Hamilton states:

84. Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT'L L. 757, 759 (1992) (referencing U.S. Const. art. II, § 2). Obviously, the subtleties of interpretation of Sole Executive Agreements and Congressional–Executive Agreements as opposed to Treaties are germane but beyond the purposes of this discussion. *See* HENKIN, *supra* note 82, at 215.

85. Leigh, *supra* note 84, at 759.

86. *Id.* at 760.

87. Medellin v. Texas, 552 U.S. 491 (2008) (issuing a decision based on the Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention).

88. *Id.* at 505 (internal quotations omitted).

89. *Id.* at 526.

90. *See id.* at 532.

91. U.S. CONST. art. II, § 2.

92. THE FEDERALIST NO. 69 (Alexander Hamilton).

> [T]he President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.[93]

The supreme command and direction of the military in a capacity such as a general or admiral suggests a significant limitation on the President's war powers. The U.S. Code describes the command authority of combatant commanders as giving authoritative direction to forces necessary to carry out their mission, "prescribing the chain of command[]" to forces within that command, and organization of the forces, among other similar duties.[94] These duties are directional and organizational in nature and are not unlimited authority to wage war as one sees fit. If the President's war powers are comparable, then it becomes apparent that the Framers did not intend for there to be unlimited, unrestricted power to make war in the office of the President.

The Federalist Papers address the concern that the President will be an all-powerful ruler comparable to the English monarch. In Federalist Number 67, Hamilton discusses opponents of the Constitution who "endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny . . . ."[95] Hamilton stresses that while opponents try to give the intended President all of the attributes of the English monarch, this is a false picture of the "real nature and form" of the subject.[96]

Repeatedly addressing such concerns seems to suggest that the Framers recognized the possibility of an all-powerful, uncontrollable President, and endeavored to allay the fears of those who thought the Constitution would create such an entity. Because the Framers made such significant efforts to demonstrate the differences between a President and the all-powerful English monarch, it seems apparent that they did not intend for the President to have unrestricted power, even in wartime, as is specifically discussed.

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93. *Id.*
94. 10 U.S.C. § 164 (2009).
95. THE FEDERALIST NO. 67 (Alexander Hamilton).
96. *Id.*

2. Just Causes for War

Inherent war powers are generally based on the premise that the President is acting for the safety of the nation and the American people. In Federalist Number 3, John Jay considered the safety of the American people against dangers from "foreign arms and influence" to be a first and foremost concern.[97] However, in Federalist Number 4, Jay recognized that the safety of Americans against dangers from foreign forces "depends not only on their forbearing to give *just* causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to *invite* hostility or insult; for it need not be observed that there are *pretended* as well as just causes of war."[98] Therefore, if the President does possess inherent, unlimited power in wartime, this seems to indicate it is only for the safety of the American people in a "just" war. Jay does not expand on what powers the President would have in the case of a just or an unjust war.

D. Curtiss-Wright *and the* Youngstown *Trilogy*

1. *Curtiss-Wright*

Curtiss-Wright[99] has greatly influenced the theory of the President as the "sole organ" in decisions involving foreign affairs.[100] The Court held that Congress may delegate broad foreign affairs authority to the President, but dicta indicated that the President could claim autonomy in foreign affairs absent any delegation from Congress.[101] This broad source of power does not depend on "affirmative grants of power" from the Constitution but rather was given to the President before the Constitution was adopted, and therefore, the President has exclusive power "as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress[.]"[102]

The opinion in *Curtiss-Wright* included a reference to a speech given by John Marshall before the U.S. House of Representatives, referring to the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations."[103] Legal scholars have

97. THE FEDERALIST NO. 3 (John Jay) (emphasis removed).

98. THE FEDERALIST NO. 4 (John Jay).

99. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

100. *See* Louis Fisher, *The Law: Presidential Inherent Power: The "Sole Organ" Doctrine*, 1 PRESIDENTIAL STUD. Q. 139, 139-52 (2007), *available at* http://www.loc.gov/law/help/usconlaw/pdf/SoleOrgan-March07.pdf.

101. *See id.* at 148.

102. *Id.* (quoting *Curtiss-Wright*, 299 U.S. at 319-20).

103. *Id.* at 140.

theorized that the speech does not give the President such broad foreign affairs power if read in the proper context. Before Marshall became Chief Justice of the U.S. Supreme Court, he wrote an article[104] where he described that the president was the "channel for communicating with other nations."[105] Thus, if the speech in which Marshall made the famous "sole organ" comment is read in full, it becomes apparent that the President, as the sole organ in foreign affairs, is limited to execution of laws passed by Congress." In relevant part, the speech instructs that:

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him. *He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it. . . . Congress, unquestionably, may prescribe the mode* . . . [A]nd Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the executive department to execute the contract by any means it possesses.[106]

Scholars suggest that Marshall's purpose when describing the President "as the sole organ 'was simply the President's role as an *instrument of communication* with other governments.'"[107] Marshall's subsequent rulings as Chief Justice indicated that he believed that Congress was the branch that possessed the power to make war. In *Little v. Barreme*, Marshall ruled that, "when a presidential proclamation issued in time of war conflicts with a statute enacted by Congress, the statute prevails."[108] When Marshall's writings and relevant judicial opinions are contrasted with the context of the opinion in *Curtiss-Wright*, it seems less likely that the case stands for broad and unrestricted presidential war power.

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104. *Id.* at 141.

105. *Id.* ("[O]n matters of extradition, nationals communicate with each other 'through the channel of their governments[.]'").

106. *Id.* at 141-42 (emphasis added).

107. *Id.* at 142.

108. *Id.* at 143 (quoting Little v. Barreme, 2 Cr. (6 U.S.) 170, 179 (1804)).

2. The *Youngstown* Trilogy

Youngstown Sheet & Tube Co. v. Sawyer,[109] also known as the Steel Seizure case, stands in contrast to *Curtiss-Wright* in regards to unlimited presidential power during wartime. Justice Black held that the President's power must stem either from an act of Congress or from the Constitution itself.[110] However, it is Justice Jackson's concurring opinion that has been most often used in looking at the limits on the President's war powers.[111] Known as the *Youngstown* trilogy, Jackson outlined three categories where the President's powers may be challenged.[112] The first category applies "[w]hen the President acts pursuant to an express or implied authorization of Congress[.]"[113] The President's authority is at its greatest in this category.[114] The second category is "[w]hen the President acts in absence of either a congressional grant or denial of authority" and "there is a zone of twilight in which he and Congress may have concurrent authority[.]"[115] The third category applies "[w]hen the President takes measures incompatible with the expressed or implied will of Congress" relying "only upon his own constitutional powers minus any constitutional powers of Congress . . . ."[116]

3. The *Youngstown* Trilogy following *Medellin*

Medellin v. Texas is a 2008 case applying the *Youngstown* trilogy.[117] Medellin, who was tried and convicted of murder in a Texas court, was one of 51 Mexican nationals named in "a claim brought by Mexico against the United States."[118] The International Court of Justice (ICJ) considered the claim and held that "based on violations of the Vienna Convention, . . . [the] nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States."[119] The Supreme Court issued an opinion involving an

109. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
110. *Id.* at 587-89.
111. *Id.* at 634-61.
112. *Id.* at 635-38.
113. *Id.* at 635.
114. *Id.*
115. *Id.* at 637.
116. *Id.*
117. Medellin v. Texas, 552 U.S. 491 (2008). *See also* Michael J. Turner, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U.L. REV. 665, 668 (2009).
118. *Medellin*, 552 U.S. at 497.
119. *Id.* at 497-98 (citing *Case Concerning Avena and Other Mexican Nationals* (Mex. v. United States), 2004 I.C.J. 12 (Mar. 31)).

unrelated claim[120] that followed the ICJ's holding that "contrary to the ICJ's determination, the Vienna Convention did not preclude the application of state default rules."[121]

However, in connection with the ICJ's ruling, President George W. Bush issued a Memorandum to the Attorney General stating that "the United States would 'discharge its international obligations' under *Avena* 'by having the State courts give effect to the [ICJ] decision.'"[122] The government argued that the President had the authority to settle international disputes through his broad discretion in foreign affairs.[123] Chief Justice Roberts applied the "zone of twilight" analysis to "h[o]ld that this 'independent source of authority' does not support the President's actions in this case."[124] In order for the Memorandum to fall within the "zone of twilight," there must be a long history of congressional acquiescence in this area. Chief Justice Roberts states that the cases the government relies on "involve a narrow set of circumstances[.]"[125]

Albeit in a 2010 Student Note, Michael J. Turner interestingly argues that this holding

> effectively eliminat[es] the "zone of twilight" [b]y requiring a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," [as] the Court is essentially extending the first category—executive action with the express or implied authorization of Congress—to cover the middle "zone of twilight."[126]

Another case that has implications for the *Youngstown* trilogy is *Hamdan v. Rumsfeld.*[127] In holding that "military commissions [for] trying enemy combatants violated federal and international law[,] [a]

120. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

121. *Medellin*, 522 U.S. at 498.

122. *Id.*

123. *Id.* at 523-24. The government relied on the "claims settlement" cases. *Id.* at 530-31 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003); Dames & Moore v. Regan, 453 U.S. 654, 679-80 (1981); United States v. Pink, 315 U.S. at 229; United States v. Belmont, 301 U.S. 324, 330 (1937)).

124. Turner, *supra* note 117, at 688 (quoting *Medellin*, 552 U.S. at 531). Turner argues that this suggests that "in order to enable executive action in the 'zone of twilight,' as the claims settlement cases did, the action would have to be 'supported by a particularly longstanding practice' of congressional acquiescence,'" or in other words, "[i]n order to fall within the 'zone of twilight,' the President must show a 'systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.'" *Id.* at 689-90 (quoting *Medellin*, 552 U.S. at 531).

125. *Medellin*, 552 U.S. at 531.

126. Turner, *supra* note 117, at 669.

127. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

majority of the Court held that the . . . commissions were unlawful because their 'structure and procedures violate both the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions . . . .'"[128] Justice Stevens stated, "'the President . . . may not disregard limitations that Congress . . . has placed on his powers[.]'"[129] Turner asserts that Justice Stevens' cite to *Youngstown* indicates an "assum[ption] that Jackson himself viewed the third category as a 'disabling zone' where Congress necessarily wins, which is by no means apparent[,]"[130] and the application of Jackson's taxonomy in *Hamdan* indicates "that where Congress and the President disagree, Congress always wins, except perhaps where the President can find a textual grant of power in the Constitution."[131]

Turner puts forth the idea that Jackson's three categories have been changed by the opinions in *Medellin* and *Hamdan*. In future cases involving Presidential action, the analysis could be "[w]hen the President acts with the express or implied authorization of Congress – including the implied blessing of a 'particularly longstanding practice' of congressional acquiescence – his power is at its maximum; otherwise, he cannot act unless he can point to a textual source of power in the Constitution."[132] Combined with the conclusion that *Curtiss-Wright* is based on a limited reading of John Marshall's speech to the House of Representatives, and the potential effect on *Youngstown* by the *Medellin* and *Hamdan* opinions, there seems to be an implication of considerable limitations on presidential war power than has been asserted by many in the Executive office.

While these debates about Presidential War Power will no doubt continue,[133] for current purposes, the heart of the argument we are making is that the Presidential War Power does not include the ability to take the country to war in Iraq on the basis of false pretenses that amount to a conspiracy to commit murder and murder. The robust version of that argument would be that the typical *Curtiss-Wright* or *Youngstown* type analysis is inapposite, as the President acting in such a

128. Turner, *supra* note 117, at 681.

129. *Id.* at 682 (quoting *Hamdan*, 548 U.S. at 593 n.23) (citing to Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).

130. *Id.*

131. *Id.*

132. *Id.* at 690. *Cf.* Ingrid Wuerth, *Medellin: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1 (2009) (taking issue with the Court's use of *Youngstown* in the treaty setting).

133. *See* Benjamin G. Davis, *Obama and Libya*, 7 FLA. A & M L. REV. (forthcoming Fall 2012) (discussing the current debate about presidential and congressional roles under the War Powers Resolution with regard to Libya). An excellent discussion on Libya and Presidential War Powers is summarized at Benjamin Wittes, *Peter Margulies Reports on AALS III*, LAWFARE, Jan. 12, 2012, http://www.lawfareblog.com/2012/01/peter-margulies-reports-on-aals-iii/.

manner is acting outside of his or her authority in any event in our constitutional structure.

V. A STATE CRIMINAL PROSECUTION IS CONSISTENT WITH COMPLEMENTARITY

In this part, we examine whether such a prosecution is consistent with complementarity[134] by comparing the prospects for such a prosecution in various fora. We conclude that while there are hurdles, state criminal prosecution may be the best available approach to assure accountability.

A. *International or Foreign Tribunals*

The pre-conditions for the exercise of jurisdiction by the International Criminal Court would be difficult to achieve due to the: 1) lack of a referral of a State party, 2) lack of a referral by the U.N. Security Council, and 3) lack of will of the prosecutor to initiate such a prosecution.[135] With regard to the lack of a referral of a State party, it is assumed that the United States, through a sitting President, would bring to bear its political, military and diplomatic pressure against any state with the "temerity" to make such a referral, particularly if the United States had signed an Article 98 agreement with that state.[136] With regard to a lack of a referral by the U.N. Security Council, as a permanent member, the United States would likely block the effort with a threatened veto or actual veto of such an attempted referral. With regard to the lack of will of the ICC prosecutor to initiate such a prosecution, similar political, military and diplomatic pressure would be brought to bear on the ICC prosecutor as would be against a state, including possible reference to the American Service-Members Protection Act, to dissuade such an action.[137]

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134. For a recent discussion of Complementarity, *see* Kevin Jon Heller, *A Sentence Based Theory of Complementarity*, 53 HARV. INT'L L.J. (forthcoming Winter 2012).

135. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 2, art. 12, U.N. Doc. A/CONF.183/9 (July 1, 2002), *available at* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/ Rome_Statute_English.pdf.

136. *Id.* pt. 9, art. 98. The United States aggressively sought to sign Bilateral Immunity Agreements (Article 98 Agreements) with other states to prevent the International Criminal Court from proceeding against U.S. personnel present in such country. *See* David A. Tallman, Note, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L.J. 1033 (2004); Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT'L L. REV. 1115 (2004); David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333 (2005).

137. American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (2012).

As to a foreign tribunal, as has been demonstrated in the numerous efforts to initiate prosecutions of American officials for alleged torture since September 11th, the United States would be relentless in asserting its right to undertake such prosecutions exclusively in U.S. domestic fora under the principle of complementarity (offensive assertion of complementarity).[138] Even if such an investigation and prosecution were initiated, the experience with the Italian torture case suggests that the United States would not make available the former President and, at most and only if permitted under the local law, a trial *in absentia* would be possible.[139]

Even if such a trial went forward, because it would be a foreign court and not a U.S. domestic court, the United States would not likely waive any immunity *ratione materiae* that could be asserted for the former U.S. President, raising a significant hurdle to the success of such a case.[140] Even if convicted *in absentia* and a sentence pronounced, it is

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Some people have tried to get the International Criminal Court to act on renditions, to no avail so far. *See* Brian Dolinar, *ICC Complaint Filed Against Bush, Cheney, et al. by UIUC Prof. Francis Boyle and Lawyers Against the War*, URBANA CHAMPAIGN INDEPENDENT MEDIA CENTER (Jan. 21, 2010), http://ucimc.org/content/icc-complaint-filed-against-bush-cheney-et-al-uiuc-prof-francis-boyle-and-lawyers-against-wa. Moreover, the former ICC prosecutor has publicly demonstrated a reluctance to initiate any investigation related to the War in Iraq or Afghanistan. *See* Office of the Prosecutor, *Response to Communications Received Concerning Iraq*, INTERNATIONAL CRIMINAL COURT (Feb. 9, 2006), *available at* http://www.icc-cpi.int (search "Response to Communications Received Concerning Iraq") ("Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute."). Since 2007, requests for information have been made to the Afghan government with no response. *Afghanistan*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+RefAfghanistan/ (last visited Mar. 5, 2012).

138. *See* Letter of the U.S. Department of Justice to the Spanish Court with regard to the Request for Assistance from Spain in the Matter of David Addington; Jay Bybee et al. (Mar. 1, 2011) (Spanish Ref. No. 0002342/2009-CAP), *available at* http://ccrjustice.org/files/US%20Letters%20Rogatory%20Response%20March%201,%202011%20-%20ENG.pdf; Sarah Posner, *Spain Court Turns Over Guantanamo Torture Investigation to US*, JURIST (Apr. 13, 2011), http://jurist.org/paperchase/2011/04/spain-court-turns-over-guantanamo-torture-investigation-to-US.php.

139. *CIA agents guilty of Italy kidnap*, BBC NEWS (Nov. 4, 2009), http://news.bbc.co.uk/2/hi/8343123.stm ("The Americans were all tried in their absence as they have not been extradited from the US to Italy.").

140. *See* the discussion of the Bashir indictment at Julian Ku, *African Union May Ask ICJ for Opinion on Bashir's Immunity from ICC*, OPINIOJURIS.ORG, Feb. 1, 2012, http://opiniojuris.org/2012/02/01/african-union-may-ask-icj-for-opinion-on-bashir%e2%80%99s-immunity-from-icc/; Dapo Akande, *ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong*, EJIL: TALK! (Dec. 15, 2011), http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/; Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo v. Belg.) 2002 I.C.J. 121 (Feb. 14).

doubtful that the former U.S. President would serve a day. Even if such a decision would be of symbolic importance overseas, it is doubtful that it would have the desired expressive effect in the United States because of the suspicion of the foreign (and international) tribunal process.

B. *Political Accountability or Criminal Accountability at the Federal Level in the United States*

In contrast to proceedings before an international or foreign tribunal, complementarity provides a further path for that accountability in the United States. In the post-World War II period,[141] the American vision of accountability included the idea of a federal official being held politically accountable through pressure to decline to seek reelection,[142] resigning in disgrace,[143] not being reelected,[144] or being tried if not impeached.[145] As to criminal accountability, there is significant resistance to criminal prosecution of high-level federal officials (though it can occur),[146] let alone a former U.S. President.

None of the electoral methods for political accountability (pressure

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> Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rule of domestic law.

Id.

141. For an excellent historical analysis discussing the censure by the House of President Polk over the Mexican-American War in mid-nineteenth century, see Fisher, *supra* note 10, at 173-74.

142. President Lyndon B. Johnson in relation to the Vietnam War.

143. President Richard M. Nixon with respect to Watergate.

144. President James Carter or President George H.W. Bush.

145. President William J. Clinton.

146. *See* Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT 503, 545-68 (2008). "A fourth lesson is to highlight misfeasance of the general staff through which non-judicial punishment as discipline appears more appropriate rather than malfeasance where a criminal prosecution might be seen as more appropriate." *Id.* at 557. President Gerald Ford's pardon of former President Richard Nixon is another paradigm of the cultural resistance to such a prosecution. The resistance to criminal prosecution of high-level civilians for torture by both the Bush and Obama Administration has led to ever more insistent private citizen "calls to action." *See* COLLEEN COSTELLO, INDEFENSIBLE: A REFERENCE FOR PROSECUTING TORTURE AND OTHER FELONIES COMMITTED BY U.S. OFFICIALS FOLLOWING SEPTEMBER 11TH (C. Costello et al. eds., 2012). But such federal prosecution can happen, as in the case of Edwin "Scooter" Libby, though the sentence was commuted by former President Bush. Bush Commutes Libby's Prison Term in CIA Leak Case (Update 5), July 2, 2007, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a2WQ_iYK.XEI.

to decline to seek reelection, resigning in disgrace, and not being reelected) are relevant as former President George W. Bush has no interest in a further political career. Impeachment of a former President is theoretically possible in our constitutional structure but very difficult.[147] Further, a successful impeachment would carry with it only the modest potential sanction of barring a former President from *future* federal service.

Under complementarity, in contrast to the political approach, domestic criminal prosecution is a further avenue for accountability. Such a criminal prosecution might typically be examined in terms of a federal criminal prosecution, as has occurred for some then-current or former federal officials. For a former President, however, a federal criminal prosecution is unlikely given the lack of political or institutional will of any sitting President to sit in judgment of any former President (most recently expressed in the pardon by President Gerald Ford of former President Richard Nixon who resigned in disgrace).[148]

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147. Please note that there appears to be one continuing possibility of the status of a former President (and any other official for that matter) that is under-examined, which is his impeachment after leaving office (by resignation or otherwise). The language of the Impeachment Clause states that

> [j]udgment in Cases of Impeachment shall not extend further than to removal from Office, *and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States:* but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. CONST. art. I, § 3, cl. 7 (emphasis added). The 1797 impeachment trial of Senator William Blount, who had fled, and the 1876 impeachment trial of Secretary of War William Belknap after his resignation demonstrate that the House and Senate have acted upon cases such as these to vindicate the disqualification-for-future-office prong of the Impeachment Clause. *See* ELEANOR BUSHNELL, CRIMES FOLLIES AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 24-41, 164-89 (1992); IRVING BRANT, IMPEACHMENT: TRIAL AND ERRORS 160-61 (1972). The former President might be subject to impeachment for acts done while in office with the subsequent sanction of "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States" in any future administration. U.S. CONST. art. I, § 3, cl. 7. The power appears to be there, and the question is whether the House and Senate still seek to exercise that power. *See* The Senate's Impeachment Role, http://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm (last visited Mar. 5, 2012).

148. Judicial willingness to countenance criminal prosecution of a former President for acts done during his term of office, and its impact on the Presidency as a coequal branch is another set of tensions that remain in the backdrop to this prosecution. On the one hand, President Ford's pardon of former President Nixon after the latter resigned was an acknowledgement by a sitting President of a former President's criminal liability for acts done during his term of office. In relevant part, President Ford's pardon of former President Nixon includes the following language:

In sum, whether international or foreign tribunals, domestic political accountability or federal criminal prosecution, the prospects for such approaches appear limited. We shall now examine the unexplored and less obvious avenue for accountability through complementarity in American federalism in the state criminal prosecution of a former President.

VI. THE STATE CRIMINAL PROSECUTION AND DEFENSES

For purposes of the Research Report on which this Article is based, we examined the laws of California with the hope that the approach will provide a useful template for the analysis in other states. For purposes of the analysis, we focus on the jurisdiction of the California state courts over conspiracy to commit murder and murder under the false pretenses theory, and we highlight the defenses that might be expected to be presented by a former President.

A. *Jurisdiction*

1. Conspiracy to Commit Murder

A California court will likely have jurisdiction over former President Bush for conspiracy to commit murder so long as he or one of his co-conspirators committed an overt act in California in furtherance of a conspiracy.[149] The two overt acts (perhaps among others to be discovered) that Bush committed in California in furtherance of the

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> As a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

Proclamation No. 4311 (Sept. 8, 1974), *available at* http://www.watergate.info/ford/pardon-proclamation.shtml. On the other hand, as has occurred with state criminal prosecutions of other former federal officials, the judiciary has developed doctrines discussed in Part VI, which may come into play with regard to a former President and other former federal officials.

149. California Penal Code Section 182 states that "[i]f two or more persons conspire . . . [t]o commit any crime," the case "may be prosecuted and tried in the superior court of any county in which any overt act tending to effect the conspiracy shall be done." CAL. PENAL CODE § 182(a) (West 2012). Section 184 states that "[n]o agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial . . . may be had in any county in which any such act be done." CAL. PENAL CODE § 184 (West 2012).

conspiracy to commit murder arise from the facts that (1) he addressed the nation, and his false pretenses for going to war were televised across the country, including in California, and (2) there was active military recruiting across the nation, including in California. A state prosecution for conspiracy in California of someone who was outside of California would be proper under California law as long as an overt act to affect the object of the conspiracy by a co-conspirator occurs in California within three years before the indictment in a non-capital case or at any time in a capital case.[150]

The range of evidence that is admissible on a charge of conspiracy is very broad: virtually any act in furtherance of the conspiracy would satisfy the overt act requirement.[151] Members of the conspiracy are bound by all acts of all other members that were committed in furtherance of the conspiracy—acts that follow as a probable and natural consequence of a common design, even where those acts were not intended as part of the original design or common plan.[152] Such overt acts need not be criminal in nature, so long as they are done in pursuit of the conspiracy.[153]

As to evidence physically outside the state, "[a] telephone call into a forum [] originating from outside [] it, made in furtherance of a criminal conspiracy, is a sufficient overt act" under Penal Code Section 182, "for purposes of establishing venue over a conspiracy prosecution in the forum county."[154] Evidence from another jurisdiction is admissible to show the object of the conspiracy.[155]

In sum, these precedents on evidence outside of California being admissible, operating from outside of California through intermediaries into California, and operating even over the internet or telephone lines not defeating jurisdiction of the California courts are favorable to a prosecution. When one adds to this vision the requirement of only one overt act (that may be lawful) of a co-conspirator in a context where the conspiracy could be seen as a "wheel" conspiracy (with former President Bush and other former officials at the hub) or "chain" conspiracy (with former President Bush at or near the beginning of the chain of conspirators), the likelihood of jurisdiction in California being

150. 17 CAL. JUR. 3D (Rev.) pt. 1, Supp. Crim. Law: Responsibility for Acts of Coconspirators § 146, at 101 (2012) (citing People v. Superior Court (Quinteros), 13 Cal. App. 4th 12 (1993)); People v. Lowery, 200 Cal. App. 3d 1207 (1998)). *See also* CAL. PENAL CODE §§ 182, 799 which read together make the statute of limitations of the underlying offense (here first degree murder which has no statute of limitations in California) apply also to the conspiracy to murder charge.

151. WAYNE R. LAFAVE, CRIMINAL LAW 663 (5th ed. 2010).

152. 19 CAL. JUR. 3D Crim. Law: Miscellaneous Offenses § 83 (2012).

153. *Id.* § 77.

154. *Id.* § 104.

155. *Id.* § 126.

proper is a virtual certainty.

2. Murder

As to the charge of murder, there have been cases in other jurisdictions where state proceedings (as opposed to federal proceedings) went forward, where the conduct adversely affecting the state took place within the territorial jurisdiction of even another country or the high seas, and where the state's jurisdiction was considered proper.[156] There have also been cases where the premeditation to commit murder is formed in one state, but the murder itself takes place in another.[157] These cases would suggest that U.S. CONST. Art. III, Sec. 2, Cl. 3 of the Constitution and 18 U.S.C. Sec. 3238 would not necessarily be an impediment to such a prosecution.[158] We have researched U.S. CONST. Art. III, Sec. 2 and found an oblique reference to it with regard to murder in the case of *Reid v. Covert*, but the issues in that case appear inapposite to the discussion at hand.[159]

Of more relevance is *Heath v. Alabama*.[160] With regard to the claim of double jeopardy, the Supreme Court, citing the uniform line of its cases with regard to the dual sovereign doctrine stated that: "States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty,' not from the Federal Government."[161] The Court further emphasized the nature of this state sovereignty:

> [E]ach government in determining what shall be an offence against its peace and dignity is exercising its own sovereignty, not that of the other. . . . It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by

156. California Penal Code Section 187(a) defines murder as "the unlawful killing of a human being . . . with malice aforethought." CAL. PENAL CODE § 187(a) (West 2012). Malice may be express or implied. *Id.* § 188. Malice is considered "express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." *Id.*; BUGLIOSI, *supra* note 3, at 309-10 (citing Strassheim v. Daily, 221 U.S. 280, 285 (1910); Skiriotes v. Florida, 313 U.S. 69, 73, 76 (1941); State v. Bundrant, 546 P.2d 530, 534-35, 554-56 (1976); State v. Jack, 125 P.3d 311, 318-22 (2005)).

157. BUGLIOSI, *supra* note 3, at 311 (citing Lane v. State, 388 So. 2d 1022 (Fla. 1980) and other cases).

158. *Id.* at 309.

159. Reid v. Covert, 354 U.S. 1 (1957) (holding that a spouse who is charged with murder of an on-duty soldier in the United Kingdom is entitled to a jury trial notwithstanding the U.S.–U.K. Status of Forces Agreement).

160. Heath v. Alabama, 474 U.S. 82 (1985).

161. *Id.* at 89 (quoting United States v. Wheeler, 435 U.S. 313, 320 n.14 (1978)).

each.

. . .

> The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecution derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.[162]

Each state's legislature determines the extent of its exercise of its sovereign power in this realm. Thus, it is necessary to determine whether a given state's legislation as interpreted by its courts has prescribed that, in exercising its sovereignty, the state's murder statute may reach these types of acts, with some acts in the state and the murder outside the state.

In this regard, California Penal Code Section 27 defines persons "liable to punishment under the laws of this state" to include "[a]ll persons who commit, in whole or in part, any crime within this state," as well as "[a]ll who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein."[163] Thus, California's approach to its sovereignty is consistent with an assertion of jurisdiction over crimes that occurred outside the state where California's interests are the strongest (California citizens or residents murdered outside of California), and where sufficient evidence of the preparatory acts in California can be provided.

A further issue to be determined is whether the application of the state criminal laws in this manner is a logical extension of the state's police powers. It would appear necessary to establish a sufficient nexus with the state for the relevant defendants, though following *Skiriotes* as analyzed in *Bundrant*,[164] state citizenship is not a prerequisite for such a prosecution. The *Bundrant* court does note in dicta that certain principles of international law form part of the bases for the assertion of jurisdiction.[165] Of the typical bases for a state's jurisdiction to prescribe, the principal bases for jurisdiction appear to be (at least partially) the effects doctrine basis in territorial jurisdiction in *Bundrant* and the nationality principle (citizen of Florida) in *Skiriotes*.[166] We note that both of these principles are recognized in international law, but that principles such as the passive personality (nationality of the victim—

162. *Id.* (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)).

163. CAL. PENAL CODE § 27 (West 2012).

164. State v. Bundrant, 546 P.2d 530, 554-56 (Alaska 1976).

165. *See id.* at 548-55.

166. *Id.*

i.e., California citizens killed in Iraq), the protective principle (protection of a state's interest), and the universality principle (proper jurisdiction for certain international crimes in all courts)[167] may be of relevance to the analysis.

Though their focus is described in terms of the state's interest, the effects doctrine cases appear to also be consistent with the passive personality and protective principles well recognized in international law. The argument in favor of California jurisdiction is comforted, in federal law, in the case of *United States v. Benitez*, in which crimes committed in Colombia were properly seen as subject to the jurisdiction of the federal district court for the Southern District of Florida, as these crimes had a potentially adverse effect upon the security or governmental functions of the United States.[168] Former President Bush's conspiring entirely in the United States has an even stronger tie to a California court than the *Benitez* conspiring in Colombia had to a Florida court.

As to the murder of Americans in Iraq (*i.e.*, outside the State of California), the relevant applicable doctrine would be the "innocent agent" or "innocent instrumentality" doctrine.[169] The essence of that doctrine can be described as follows:

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167. Professor Jordan Paust has noted that state courts have prosecuted international crimes over which there is universal jurisdiction when the criminal conduct took place within the state. *See, e.g.*, Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 113, 115 (Pa. O. & T. 1784). State courts have also allowed civil claims for international crimes over which there is universal jurisdiction. *See, e.g.*, Christian County Court v. Rankin & Tharp, 63 Ky. 502, 505-06 (1866); Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 618-20 (1989), *reprinted and revised in* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 226-27 (2d ed. 2003). One state court prosecution for murder using international legal standards occurred in the nineteenth century. *See* Jordan J. Paust, *My Lai and Vietnam: Norms, Myths, and Leader Responsibility*, 57 MIL. L. REV. 99, 116 n.60 (1972). In addition, numerous state court decisions have recognized that states are bound by customary international law. *See, e.g.*, JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 579-81 (3d ed., 2009), and cases cited therein; Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 245-50 (2008). It follows logically that state courts also have a retained competence under customary international law known as universal jurisdiction. Importantly also, states are bound by treaty law of the United States. *See, e.g.*, Jordan J. Paust, *Medellín, Avena, the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 315, 320-24 (2008), and cases cited therein; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987).

168. United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984).

169. It is beyond the scope of this Article to make a detailed presentation of this doctrine. Rather, it is presented as a means to see how American deaths in Iraq can be addressed in this murder charge. *See* BUGLIOSI, *supra* note 3, at 87-88, 271-72; Benjamin G. Davis et al., *supra* note 5.

> We thus conclude that when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator.[170]

It may also be summarized in the following manner:

> In [. . .], the court analyzed the responsibility of the criminal for a killing committed by the victim or a police officer as follows: When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life.
>
> Thus, the victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice.[171]

Thus, where there is "actus reus," but lesser or no "mens rea" in the agent or instrumentality, the person doing the killing may be the innocent agent or innocent instrumentality of the perpetrator. The murders that led to the California criminal case are the deaths of the American soldiers at the hands of Iraqis who are considered "innocent agents" of former President Bush.

B. *Removal*

In our system of concurrent federal and state jurisdiction, the federalism tensions described in the initial part come to the fore in the setting of a state proceeding in a state court against a federal official.

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170. People v. McCoy, 24 P.3d 1210, 1217 (Cal. 2001).

171. People v. Williams, 75 Cal. App. 3d 731, 747 (1977) (quoting People v. Gilbert, 63 Cal. 2d 690, 704-05 (1965)) (internal quote marks removed). *See also* People v. Antick, 15 Cal. 3d 79, 87-88 (1975); *Williams*, 75 Cal. App. 3d at 746-47 (1977) (citing Taylor v. Superior Court, 3 Cal. 3d 578, 583-84 (1970)).

This issue has been the subject of analysis by the courts back to the early nineteenth century. Currently, the principal statute for resolving such issues is the federal officer removal statute, which in part provides that:

> A civil action or criminal prosecution that is commenced in a State court . . . against . . . any of the following [persons] may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) . . . [a]ny officer (or person acting under that officer) of the United States or any agency thereof, . . . for . . . any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.[172]

1. Procedural Overview

In order to better situate the practicalities of such a removal, it is important to provide an overview of the process of such a removal. Once state criminal charges would be filed, like other present or former federal officials, former President Bush would likely seek removal of the matter from the state court to the federal district court embracing the place where the charges were pending.

2. Relevant Factors for Removal

The statute indicates, and courts have determined, that three factors must be met before federal officers may remove to federal courts.[173] First, the defendant must demonstrate that he is a federal officer or acting under one.[174] Second, the officer must show that he was working under the color of his authority at the moment the state crime was committed.[175] This means that there must be a causal connection between the action done under authority and the state prosecution.[176] Last, the defendant must raise a colorable federal defense to his actions.[177] If all three factors are met, a request for removal will be granted.

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172. 28 U.S.C. § 1442(a), (a)(1) (2012).

173. *See* Winters v. Shamrock Chem. Co., 149 F.3d 387, 397 (5th Cir. 1998); *see also* Mesa v. California, 489 U.S. 121 (1989).

174. *Winters*, 149 F.3d at 397.

175. *Id.*

176. Maryland v. Soper, 270 U.S. 9, 33 (1926).

177. *Winters*, 149 F.3d at 397.

Former President Bush meets the requirement that he be a federal officer, and he will certainly raise several federal defenses to his actions.[178] The only factor that may possibly hinder his ability to remove to the federal courts is if his actions were not done under the color of his authority as the President of the United States. Thus, to avoid such removal of the state criminal prosecution to federal court, it would appear necessary for the prosecutor to argue persuasively that former President Bush's action were not done under the color of his authority as the President of the United States. This "color of office" analysis in the removal setting should not be viewed in the same manner as an assertion of immunity, such as Supremacy Clause Immunity. In *Willingham v. Morgan*,[179] the Supreme Court held that, "the test for removal should be broader, not narrower, than the test for official immunity."[180] In disagreeing with the court below, the Supreme Court stated:

> The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words "under color of . . . office." In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of [§] 1442(a)(1).[181]

At the same time, in dicta distinguishing the type of showing required for removal in a criminal case as compared to civil cases, the Supreme Court in *Willingham* noted at footnote 4: "Were this a criminal case, a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts."[182]

The *Willingham* case would suggest that, for a given federal official seeking removal to federal court of a state criminal case, the sufficiency of the showing that the federal official would have to make ("a short

178. *See infra* Part VI.D.

179. Willingham v. Morgan, 395 U.S. 402 (1969).

180. *Id.* at 405.

181. *Id.* at 406-07.

182. *Id.* at 409 n.4 (citing Colorado v. Symes, 286 U.S. 510, 518-21 (1932); Maryland v. Soper, 270 U.S. 9, 35 (1926)).

and plain statement")[183] might not be to actually provide a sustainable defense, but still has to be more than a summary statement. At the same time, given the state criminal prosecution is of a former U.S. President and his powers and role under the Constitution, the Court's concern about protecting the federal interests in such a case through providing a federal forum may be particularly acute. These concerns may influence the district court's evaluation under its discretion of any statement made by a former President seeking removal.[184]

It should be highlighted that during the pendency of the federal court removal proceeding, the state court proceedings may go forward, except as to the rendering of a verdict before remand.[185] Thus, the state prosecutor should be prepared to proceed forward in the state case while at the same time arguing against the removal motion in the federal district court.

Assuming that removal has been granted, the next question that would arise is the disposition of the case in the federal court. The case could be dismissed on a Rule 12(b) type motion early in the federal court proceeding, or it could go all the way through trial to a verdict.[186]

C. *Request for Dismissal*

Courts have applied a range of reasoning that result in the protection of federal officers from criminal prosecution: the defendant's actions being honest and reasonable,[187] the defendant's conduct being necessary and proper under the circumstances,[188] and/or the defendant being on

183. 28 U.S.C. § 1446(a) (2011).

184. For example, the discretion of the district court is apparent in its discussion of what should be presented as grounds for removal, to wit:

> A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

Id. § 1446 (c)(2).

185. 28 U.S.C. § 1446(c)(3) ("The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.").

186. *See, e.g.*, California v. H & H Ship Serv. Co., No. 94-10182, 1995 U.S. App. LEXIS 30986 (9th Cir. Oct. 17, 1995).

187. Idaho v. Horiuchi, 214 F.3d 986, 994-95 (9th Cir. 2000), *vacated as moot* 266 F.3d 979 (9th Cir. 2001).

188. Clifton v. Cox, 549 F.2d 722, 728-30 (9th Cir. 1977).

active duty and merely making simple errors in judgment.[189] None of these types of reasoning on their face, would apply to a President knowingly taking the nation to war under false pretenses. Most of these cases involved FBI, Drug Agents and Military Personnel, among others. These cases are dismissed when defense counsels file 12(b) motions—the preferred vehicle by which to assert the defense of immunity under the Supremacy Clause of the U.S. Constitution.

After the indictment (*i.e.*, after the grand jury proceedings), the defendant might move to dismiss the indictment and seek petitions in the state appellate courts for a writ of prohibition.[190] Another form of intervention would be a federal court injunction of the state court criminal proceeding, sometimes referred to as a Younger-type action. In *Younger v. Harris*, the Supreme Court held that:

> For these reasons, fundamental not only to our federal system but also to the basic functions of the Judicial Branch of the National Government under our Constitution, we hold that the Dombrowski decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions. We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridges First Amendment rights. There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the Buck case, supra, we indicated:
>
> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."
> Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be. It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute on its face does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other

189. Maryland v. DeShields, No. 86-5180, 1987 WL 38619, at *7 (4th Cir. Sept. 25, 1987) (unpublished opinion).

190. Younger v. Harris, 401 U.S. 37, 58 (1971) (Brennan, J., concurring).

unusual circumstance that would call for equitable relief.[191]

In reaching its decision, the Supreme Court discussed at length the policy and legal concerns underpinning the decision. A key component of the analysis was the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[192]

Therefore, under *Younger*, cases where the state criminal prosecution involves 1) bad faith or harassment, 2) patent and flagrant unconstitutionality or 3) other extraordinary circumstances[193] have appeared to be the ones where federal courts might examine the question of injunctive, declaratory, or other equitable relief. It should be highlighted that *Younger* carefully leaves open the possibility that some extraordinary circumstances in future cases may cause a federal court to grant such injunctive, declaratory or other equitable relief.

In addition, it should be noted that, in *Younger*, the Court based its decision primarily on these concerns of equity and federalism, but did discuss, in passing, 28 U.S.C. § 2283, which provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[194] In the event that the defense seeks injunctive relief to stay the state prosecution, the state prosecutor may seek to invoke 28 U.S.C. § 2283 as a limitation on the federal court's power.

Given the nature of this case, where important federalism and separation of powers concerns form a backdrop, it is foreseeable that—whether on arguments of bad faith, harassment, patent and flagrant unconstitutionality, risk of multiple cases, or other federalism or separation of powers extraordinary circumstances—former President Bush might seek such an injunction or declaratory relief in federal court even before a grand jury indictment, in addition to any efforts in state court. We are uncertain as to the outcome of such an action by former President Bush, but we doubt the courts would allow the blocking of the grand jury proceedings of a credible prosecution. As to the nature of such an action, while this situation by a former President would appear unprecedented, logic would suggest that the arguments raised by the former President would be based on constitutional or statutory defenses,

191. *Id.* at 53-54 (majority opinion) (quoting Buck v. Watson, 313 U.S. 387, 401 (1941)) (internal citation omitted).

192. *Id.* at 43-44.

193. JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 277 (2006).

194. *Younger*, 401 U.S. at 40.

analyzed in the next part, that would empower the federal court to exercise its authority under 28 U.S.C. § 2283.

D. *Defenses*

We next briefly examine several defenses that former President Bush might raise to seek dismissal of the case.[195]

1. Federal Exclusive Domain

As was noted in *State v. Jack*,[196] based on *Skiriotes*, it is possible for state law to have extraterritorial effect. In this regard, the court in *Jack* presented a tripartite mode of analysis of whether state criminal law could reach acts which occurred outside the state, to wit: "(1) there must be a sufficient state interest, (2) there can be no conflict with federal law, and (3) the crime in question must not have been prosecuted by federal authorities, or the authorities of a foreign jurisdiction."[197]

In regard to point (1), it would appear that the State of California could establish a sufficient interest. In regard to point (2), an examination of the potentially relevant congressional acts—18 U.S.C. § 956, 18 U.S.C. § 1117, the *Iraq Liberation Act of 1998 ("1998 Congressional Resolution")*, and the *Authorization for Use of Military Force Against Iraq Resolution of 2002 ("2002 Congressional Resolution")*—shows both the difficulties and possibilities of demonstrating there is no conflict with federal law.[198] In regard to point (3), we are not aware of federal or foreign jurisdiction prosecution of the crime in question. With regard to any other factors, we believe there are credible arguments that support a state prosecution. We recognize that such a state prosecution is unprecedented, but we do believe that any California prosecutor would be able to argue in the appellate courts the propriety of bringing such an indictment and prosecution on the basis of the above analysis of the legal framework.

2. Federal Preemption

Another argument which might be raised is that state law in this area is preempted by federal law. This is a slightly different argument than an argument of federal exclusivity, as it focuses on direct preemption, implied preemption, and field preemption. It would appear to us, however, that the form of the analysis tracks well with the analysis in

195. An expanded analysis is available in Davis et al., *supra* note 5, at 41-80.

196. State v. Jack, 125 P.3d 311 (Alaska 2005).

197. *Id.* at 318-22 (citing to other cases).

198. An expanded analysis is available in Davis et al., *supra* note 5, at 45-60.

the preceding part. The central question is whether this prosecution for conspiracy to commit murder and murder based on "false pretenses" by the former President outside the realm of his powers (whether constitutional or congressional) lends itself to a clear preemption analysis.

In particular, the constitutional requirement on the President to "faithfully execute the laws"[199] provides a space, it would seem, for the prosecution in the state forum for the "false pretenses" prosecution. However, we would note that jurisprudence in this area is judge-made and does not lend itself to clear delineations. We recognize that such a state prosecution is unprecedented, but we do believe that any California prosecutor would be able to argue in the appellate courts the propriety of bringing such an indictment and prosecution on the basis of the above analysis of the legal framework.

3. State Secrets Privilege (National Security)

Whether a former President or a former department head may assert the State Secrets Privilege[200] once they have left office is unsettled. The cases in which it has been asserted were started when the federal official defendant was in office—though the federal official may have left government by the time the case was decided. In the Executive Privilege arena, which may be relevant, former Presidents are noted to have asserted "that [they] continue to enjoy some constitutional power after they leave office and can assert a privilege enjoyed by no other private citizen."[201] One would expect a similar argument to be made by the former President with regard to the State Secrets Privilege.

Obviously, discouraging a sitting President or head of department from asserting such a privilege would narrow the question for the court in the matter. Be that as it may, given the concerns of the sitting President, it is possible that the State Secrets Privilege might be asserted by a sitting President with regard to evidence in a criminal prosecution of a former President. However, the significance to federalism of a federal intervention by a sitting President on the basis of State Secrets to attempt to block a state court criminal proceeding of a former President should not be underestimated.

The reason that a sitting President might hesitate or be deterred from

199. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 703 (1952). This statement is based on U.S. CONST. art. II, § 3.

200. *See* United States v. Reynolds, 345 U.S. 1 (1953); *see generally* Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201 (2009).

201. Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 TEX. L. REV. 301, 302 (2009).

such an action would be due to the fact that the state prosecutor is representing a state and acting pursuant to vital state interests and considers the former Executive of the federal government as having run afoul of the most fundamental state criminal laws. Another view of the State Secrets Privilege in our federalism is to ask whether this privilege is exclusively a privilege of the federal government, or also a privilege of the state, leading to federalism tensions on its wielding by one of our dual sovereigns (in this case federal) to protect a former federal official (in this case a former President) from the prosecution of another of our dual sovereigns (in this case the state).

4. Executive Privilege

Given that former President Bush asserted in Executive Order 13,233 that a "former President[], Vice President[], and their heirs retain absolute veto power over the incumbent President concerning the privilege[,]" and that "if the former President asserts the privilege, the incumbent President may not release the information absent court order[,]" it is likely that former officials or the former President himself may seek to assert Executive Privilege.[202] The power of the former President (and by extension the former officials on behalf of the former President) to assert such Executive Privilege has been supported in *Nixon v. Administrator of General Services*, in which "the Court ruled that a former President retains executive privilege at least with respect to confidential communications and that he can assert that privilege in court even over the objections of the incumbent President."[203]

At the same time, the Court has recognized that assertions of Executive Privilege are not fatal in a criminal prosecution setting, such as in *United States v. Nixon*. Flowing from the proposed prosecution of Nixon by special prosecutor Leon Jaworsky over Watergate, in an 8-0 ruling, with Rehnquist recusing himself, the Court stated that:

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.[204]

Thus, there is a likelihood that specific assertions of Executive

202. *Id.* at 303.

203. *Id.* at 306 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 447-49 (1977)).

204. United States v. Nixon, 418 U.S. 683, 711-13 (1974).

Privilege may be made by the former President in such state criminal prosecution, and that the court will have to balance the interests present with regard to ordering the production of such evidence.

5. Supremacy Clause Immunity

The Supreme Court's leading case on Supremacy Clause Immunity is *In re Neagle*.[205] No other Supremacy Clause case has been decided since 1920, and modern Supremacy Clause Immunity has largely "been developed in the lower federal courts."[206]

In re Neagle is the celebrated case of a federal marshal (Neagle) who was protecting Supreme Court Justice Field traveling on a train during circuit duty in California.[207] After a very belligerent former litigant in the Justice's court (Terry), who had previously publicly threatened the Justice's life, punched the Justice twice in the dining car, Neagle ordered Terry to stop.[208] Neagle, believing Terry was reaching for a Bowie knife, then shot and killed Terry.[209] Neagle was arrested and held in state court for the murder of Terry.[210] Neagle sought a writ of habeas corpus and, in affirming the grant of that writ, the Supreme Court held:

> [I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court.[211]

The Court went on to hold that:

> The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the *discharge of his official duties*, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the

205. *In re* Neagle, 135 U.S. 1 (1890).
206. *See* Wyoming v. Livingston, 443 F.3d. 1211, 1220 (10th Cir. 2006).
207. *In re* Neagle, 135 U.S. at 52-53.
208. *Id.* at 43-46, 52-53.
209. *Id.* at 52-53.
210. *Id.* at 42.
211. *Id.* at 75 (emphasis added).

> assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.[212]

In *Clifton v. Cox*, the Ninth Circuit held that the test for Supremacy Clause Immunity for a federal official is whether his actions were (1) within the scope of his authority and (2) necessary and proper under the circumstances.[213] In line with the functionalist discussion in *In re Neagle*, the "within the scope of his authority" prong of the analysis is not limited to express authority, but includes implied authority derived from the Constitution and laws of the United States. Moreover, this scope of authority covers mandatory duties but also applies with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.[214]

Errors of judgment are not enough to meet this standard to avoid dismissal. Meeting this standard would appear to require a showing that the President was outside the outer perimeter of his scope of duties or that his acts did not meet the necessary and proper standard. For that to occur, the best evidence of the false pretenses would be to demonstrate former President Bush knew or should have known that the facts as he stated them to the American people were false based on what he knew at the time. This demonstration would include the actions of those under his authority or direction to "gin" up evidence that strained credulity; those actions, undertaken to buttress the President's assertions about Iraq and Saddam Hussein to garner the nation's approval to invade, would be considered part of the conspiracy to commit murder or murder. In addition, the language of *In re Neagle* and *Clifton* suggest that evidence developed after the statements, which showed them to be false, could be presented to address the reasonableness of the former President's assertions.

6. Qualified Immunity

While Supremacy Clause Immunity and Qualified Immunity have

212. *Id.* at 75-76 (emphasis added).
213. Clifton v. Cox, 549 F.2d. 722, 726-30 (9th Cir. 1977).
214. *Id.*

different sources, it has been said that there is a functional similarity between them—they both "reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation."[215] Qualified Immunity has been recognized in private cases; the leading case on Qualified Immunity is *Harlow v. Fitzgerald*.[216]

We are not aware of this standard being applied with regard to criminal prosecution. If it were argued that it should apply, and the court was to reject Absolute Immunity for a former President but recognize that Qualified Immunity should be present, the standard for Qualified Immunity would apply. That standard is: "[G]overnment officials performing discretionary functions, generally are shielded from liability . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[217] Interpreting this standard in the current context, the "false pretenses" evidence, as it was in the Supremacy Clause Immunity setting, should be sufficiently compelling to overcome the reasonable person standard.

In the last term, in *Ashcroft v. Al-Kidd*,[218] the Supreme Court revisited a question of Qualified Immunity of a federal official. While in the civil setting, the Court's discussion of the reasonable person standard would appear relevant. Justice Scalia, writing on behalf of the Court, notes that:

> A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. The constitutional question in this case falls far short of that threshold.[219]

If the standard described above for clearly established law applied for the assertion of a Qualified Immunity defense to this state criminal prosecution, then the evidence to support this prosecution would need to overcome the hurdles of what a reasonable official would have

215. Wyoming v. Livingston, 443 F. 3d. 1211, 1221 (10th Cir. 2006).

216. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

217. *Id.* at 818.

218. Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011).

219. *Id.* at 2083 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)) (citation omitted).

understood. In addition, existing precedent must have placed the statutory or constitutional question beyond debate.[220]

7. Political Question Doctrine

It would seem clear that should this issue be framed as one involving national policy, the intent or motivation for involvement in armed conflict, the prudence of such an action, or simply the defense of the United States, it will be dismissed as a non-justiciable issue under the Political Question Doctrine. As stated in *El-Shifa*, "[p]laintiffs . . . ask[] us to review whether the President was justified in striking the El-Shifa plant. Courts have no business hearing such claims."[221]

However, the court in *Gonzalez-Vera v. Kissinger* stated in dicta that "[t]o be sure, we can imagine a case in which a rogue agent commits an act so removed from his official duties that it cannot fairly be said to represent the policy of the United States[.]"[222] Further, "[t]he doctrine must be cautiously invoked, and the mere fact that a case touches on the

220. Further, while not part of the opinion of the Court, Justice Kennedy's concurrence in *al-Kidd* suggests a heightened requirement for "clearly established law" at the time of the conduct in the national security setting, which might operate as a further constraint on a state criminal prosecution to the extent that California law is argued by the defense to provide a less stringent standard for conspiracy to commit murder or murder as compared with other states. *Id.* at 2085 (Kennedy, J., concurring). Further comparative law research between the various state approaches to conspiracy to commit murder and murder might be prudent. Regardless of whether Justice Kennedy's suggested approach is an intimation of a future Supreme Court approach, what appears certain is that a state criminal prosecution would be of national significance. This national significance would place an additional burden on the state criminal prosecution, which raises the risk that a court might let prosper a defense argument to seek dismissal based on something akin to still undefined exceptional circumstances. The defense could focus on the possibility for criminal prosecution at the federal level under federal law, asserting that the lack of investigation and prosecution at the federal level by prosecutors tasked nationally militates against a state prosecutor examining these matters of national significance. The argument might be made that the opening of an investigation at the federal level of the same facts subject to the state criminal prosecution militates in favor of at least staying, if not outright dismissing, the state court prosecution in this matter of national significance, pending the results of the federal prosecution. We think the state prosecutor should keep uppermost in the court's mind the significant interest for our federalism in preserving, rather than allowing the atrophy of, the constitutional structure that provides the double security to the rights of the citizens. A second point would be that, subject to the oversight by the federal court in the removal setting (whether the case went forward in the federal court or pursuant to remand to the state court), the state prosecution operates with significant autonomy from the federal prosecution, which inures to the benefit of the citizens. The independent view by the state prosecutor of the evidence of presidential criminality assures that the concerns of a sitting President for preserving Presidential powers are balanced not only on a separation of powers plane but also on the federalism plane of our constitution in a setting of significant alleged criminality in the actions of a former President.

221. El-Shifa Pharm. Indus. Co. v. United States, 559 F.3d 578, 583-84 (D.C. Cir. 2009).

222. Gonzalez-Vera v. Kissinger, 449 F.3d 1260, 1264 (D.C. Cir. 2006).

political process does not . . . [automatically render it] beyond the court's jurisdiction."[223] Obviously, as a practical matter, a sitting president of the United States cannot be said to be acting for the good of public policy or the country if he garners support for an ill-advised war, against suggestions (indeed, factual findings) from his secuity advisors, covert operatives and international allies, by misleading the American public as to the reasons for instituting armed conflict.

Obviously, the issue must be framed as one of criminal behavior. The true nature of the behavior was shielded from decision-makers and the general public. Action was taken on the public's distorted perception of what the facts truly were. If the criminal nature of President Bush's actions are proved, we believe there will be no way to frame this issue as anything but subterfuge for criminal activity, and thus the court will have to preclude the application of the Political Question Doctrine, as suggested in *Gonzalez-Vera*.

8. Other Issues

The Act of State doctrine, for which the leading case is *Banco Nacional de Cuba v. Sabbatino*,[224] would apply to the criminal prosecution of former President Bush in the event that evidence is marshaled from other allies of the United States as part of the state's case. In such a circumstance, it would be prudent to make sure that—expressly or impliedly—the court is not asked to stand in judgment on the validity of those Acts of State of the other states in their own territory.

One point that does not lend itself to easy analysis in the domestic law setting is whether, when immunities are asserted by the former President with regard to the state prosecution, the state prosecutor would invoke international law obligations on the United States (including the former President) at the time of the false pretenses in a situation where the former President would not have the power to interpret these obligations (that power resting with the sitting President). In particular, the general view as a matter of international law is that the Head of State is immune from prosecution for all acts in office (*rationae personae*) and, after they have left office, for all acts done in an official capacity while in office (*rationae materiae*). If a former President were asserting broad immunities—that is, *rationae personae*—that were incompatible with levels of immunity foreseen under international law obligations of the United States for former Heads of States—that is,

223. *In re* Nazi Era Cases Against Ger. Defs. Litig., 129 F. Supp. 2d 370 (D.N.J. 2001) (citing Nixon v. Herndon, 273 U.S. 536, 540 (1927); Can. v. United States, 14 F.3d 160, 163 (2d Cir. 1994)).

224. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

rationae materiae—the state prosecutor might seek to comfort his or her domestic law arguments by demonstrating the compatibility between these arguments and international law understandings of the extent and limits of former Head of State immunity and criminality.

While the role of international law in U.S. domestic courts is a complex topic, the general view known as the *Charming Betsey* view tries to interpret congressional acts consistent with international law obligations if at all possible.[225] This *Charming Betsey* approach would suggest that each congressional act, such as the 1998 and 2002 Congressional Resolutions, would if at all possible be best interpreted as consistent with international law obligations on the United States. As a result, acts by the former President that were in violation of the international law obligations of the United States (rising to the level of international criminality) might then be further evidence to buttress the arguments in favor of finding domestic state criminality.

The analysis of the types of defenses that might be presented in this part note a number of significant hurdles, but not necessarily insurmountable ones, that might be confronted by such a state criminal prosecution of a former President.

VII. THE NORMATIVE QUESTION: SHOULD A STATE CRIMINAL PROSECUTION OF FORMER PRESIDENT BUSH BE DONE?

We believe that it is important for a state prosecutor to bring this prosecution of former President Bush because the evidence is compelling that Americans were killed in Iraq after being misled into a war. We do not in any manner wish to diminish the loss of Iraqis in this discussion, but we think it would be difficult for a U.S. state court to reach those deaths because the state interest is less clear, and those deaths are of people under the protection of the Iraqi state, not Americans under the protection of the United States.

We think of this prosecution as a means of honoring the enormous sacrifice of our uniformed soldiers who are asked, at the request of the Commander-in-Chief, to go into harm's way to protect America. Many of those who have gone into harm's way are our classmates, students, and people to whom we have other close ties. Those uniformed soldiers have only limited bases under the Uniform Code of Military Justice to question the orders of the Commander-in-Chief. That there is compelling evidence that they, and all other Americans, were misled into their noble sacrifice by former President Bush suggests that

225. *See generally* Murray v. Charming Betsy, 6 U.S. 64 (1804); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsey Cannon*, 46 B.C. L. REV. 293, 298 (2005).

meaningful accountability for the civilian leader is important as a marker for current generations and future generations about how a President can use his or her power.

We think that it is important that the distinction between errors of judgment by a President and false pretenses by a President begin to be delineated through such a prosecution so that the gravity of the decision to take the country to war is reinforced in the minds of the federal government and the American people. We see this prosecution as a means of vindicating the rights of the people by providing a mechanism for the kind of double security of the people's rights that was envisioned by the Framers of our Constitution.

If this prosecution is pursued, we expect that there will be many who will argue that such a prosecution will have dire effects on the United States. We do not believe so. On the domestic side, such a prosecution will provide a public record under oath of the evidence of the crime. We see the deliberative judicial process as providing the sober environment necessary for addressing such a serious crime. With all of the guarantees of our criminal justice system present, we see a process in which both judicial forms and judicial norms[226] will be respected.

We know that other countries have faced difficult moments: Argentina after the generals, Chile after Pinochet, France after the Occupation.[227] Yet, with courage and lucidity they have managed or are managing to address the grave crimes that occurred in their countries. We think that the Framers provided a Constitution that permits us to do the same. Where the separation of powers has not functioned well, federalism may provide the security to the rights of the people.

VIII. CONCLUSIONS

We have examined the legal issues relating to a state criminal

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226. Justice Robert Jackson, The Rule of Law Among Nations, Speech to the American Society of International Law Annual Meeting, April 13, 1945, *available at* http://www.robertjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-rule-of-law-among-nations/ (paraphrasing speech).

> The ultimate principle is that you must put no man on trial under the forms [of] judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict.

Id.

227. *See generally* PROSECUTING HEADS OF STATE (Ellen L. Lutz & Caitlin Reiger eds., 2009); KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011).

prosecution as a means to achieve accountability through complementarity in our federalism for the instigation of the War in Iraq. Provided the necessary factual evidence can be brought together by the prosecutor, we are of the view that a state criminal prosecution is consistent with the U.S. obligations under international law. We also are of the view that a state criminal prosecution is consistent with presidential war powers. Such a prosecution is also consistent with complementarity and reassures Americans by having an American jury in an American state court applying American law pass on the criminality of a former President. This domestic state prosecution vindicates the international rule on the Crime of Aggression without the need for a foreign or international tribunal assertion of universal jurisdiction.[228] We also find that, based on a California criminal prosecution that might serve as a template, a state criminal prosecution is possible, and there is an answer to each of the hurdles that might be raised as a defense. As a normative matter, we believe such a state criminal prosecution should be done.

228. It might also show how domestic law might effectively vindicate the Crime of Aggression without implementing legislation for the Kampala Amendments to the Statute of the International Criminal Court or universal jurisdiction worries. *Cf.* Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357 (2012).