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# **America's Longest Held Prisoner of War: Lessons Learned from the Capture, Prosecution, and Extradition of General Manuel Noriega**

*Geoffrey S. Corn\**

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## **INTRODUCTION**

In the fall of 1986, while serving his first tour as an Army officer in Panama, one of the authors, Professor Corn, participated in a large-scale field training exercise called Operation Kindle Liberty. For three weeks he worked alongside members of the Panamanian Defense Force (PDF) with the mission of enhancing the capability of the Panamanian military to work side-by-side with the U.S. military to defend the Panama Canal. At the end of their training, as is customary, the commanding generals of both armies came to the field to visit the troops. Then-First Lieutenant Corn stood in an impromptu formation outside of the combined U.S.-PDF tactical operations center as General John Galvin, Commander of United States Southern Command, and his Panamanian counterpart General Manuel Noriega walked down the row of U.S. and Panamanian officers, shaking hands and congratulating them for completing a successful exercise.

Nineteen years later, Professor Corn once again extended his hand to General Noriega. This time, however, he did so in a radically different context. General Noriega was a prisoner in the Federal Correctional Facility in Miami, Florida, and Professor Corn was the U.S. Army's senior law of war expert advisor, in Miami to provide expert assistance to the prison warden during General Noriega's annual visit by the International Committee of the Red Cross (ICRC). As a prisoner of war (POW) protected by the Geneva Convention Relative to the Treatment of Prisoners of War, General Noriega was entitled to an annual ICRC inspection visit. The warden requested assistance that year from the Army to ensure that prison personnel clearly understood the reasons for and actions in relation to the visit.

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After meeting with a representative from the ICRC, Professor Corn asked if he could accompany the representative to meet General Noriega that morning. The representative kindly agreed, and they entered General Noriega's two-room cell. The man who shuffled out of his sleeping cell was much different than the barrel-chested general Professor Corn remembered meeting almost 20 years earlier. General Noriega extended his hand in welcome, and as Professor Corn shook it, he told General Noriega that the last time they shook hands was in 1986 in Provincia Chiriqui in Panama. General Noriega smiled and responded that the tables had turned: "Back then I was checking on you; now you are checking on me."

As Professor Corn left the prison that day, he was struck by General Noriega's odd journey. In a one-year period of time, he and the army he commanded transformed from an ally of the United States to public enemy number one<sup>1</sup>—a transformation that exasperated General Noriega at the time and one that he will unlikely ever fully understand. Overnight, a simmering conflict emerged between the U.S. armed forces in Panama and General Noriega's PDF. From March of 1987 until the invasion in December 1989, the U.S. military engaged in a low-level struggle triggered by the national change in policy towards General Noriega, a struggle that was characterized primarily by harassment but that occasionally involved flashes of violence that almost triggered all-out war.<sup>2</sup> This standoff ultimately culminated in Operation Just Cause, the U.S. invasion of Panama ordered by President George H.W. Bush that led to the PDF's destruction and the capture of its commanding general.<sup>3</sup> General Noriega was ignominiously transported to the U.S. by military aircraft, turned over to federal authorities, and subsequently tried and convicted in the United States District Court for the Southern District of Florida.<sup>4</sup> Only recently was General Noriega released—the commanding general of an army that no longer existed. However, although he completed serving his sentence, General Noriega did not regain his freedom. Instead, he was extradited to France, where

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1. See Matthew Reichstein, Comment, *The Extradition of General Manuel Noriega: An Application of International Criminal and Humanitarian Law to Answer the Question, "If So, Where Should He Go?"*, 22 EMORY INT'L L. REV. 857, 857 (2008).

2. See Alan Berman, *In Mitigation of Illegality: The U.S. Invasion of Panama*, 79 KY. L.J. 735, 739–43 (1991).

3. *Id.* at 735, 743.

4. *United States v. Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997).

he was tried and convicted for money laundering offenses. He is now serving an additional seven-year sentence in a French prison.<sup>5</sup>

General Noriega's journey through the U.S. legal system provides insight into an issue that has been consistently avoided in connection with the current "war on terror": the consequence of granting wartime captives prisoner-of-war status and its impact on the ability of the U.S. to use its criminal law system to hold such captives accountable for their pre-capture conduct. Ironically, General Noriega's saga also triggered a legal battle over the effect of the Military Commission Act of 2009 (MCA), a law enacted by Congress to provide for the trial by military courts of captured al-Qaeda and Taliban personnel. In what can only be considered the final ironic twist of fate for General Noriega, his effort to fight extradition turned on the validity of the MCA's provision limiting access to judicial remedies for enemies captured in a war radically different from the one in which General Noriega was captured—captives who, unlike Noriega, did not even qualify for the protections of the Prisoner of War Convention.<sup>6</sup> Nonetheless, like so many other legal issues related to his status as a U.S. captive, the MCA nullified the last modicum of value General Noriega sought to derive from his status as a prisoner of war, preventing him from invoking that status as a barrier to his extradition.

As America's longest-held prisoner of war, General Noriega's capture, detention, prosecution, and ultimate extradition provide many important lessons in the balance between the protection of POWs and the flexibility afforded to detaining states to address pre-capture misconduct committed by these captives. It is therefore ironic that in the post-September 11 debates over the relative merits of extending POW status to captured al-Qaeda and Taliban personnel, so little attention has been paid to the plight of General Noriega. His ouster from power, capture, trial, conviction, 20 years of incarceration, and most recent efforts to block extradition offer a fascinating insight into the intersection of national security and law, both domestic and international. What was his status upon capture? If a POW, what was the scope of his lawful immunity, and what was his status upon conviction in a domestic criminal court? How did Congress criminalize his conduct in Panama? Did an invasion to bring him to justice implicate due process concerns?

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5. Maia de la Baume, *France: Freedom for Noriega Rejected*, N.Y. TIMES, Dec. 16, 2010, at A8.

6. See Memorandum from George W. Bush to the Vice President et al. (Feb. 7, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (establishing the U.S. determination that neither Taliban nor al-Qaeda detainees qualify for prisoner of war status).

Would his extradition violate the Geneva Prisoner of War Convention, and if so, what remedy did the Convention provide for the General?

Through General Noriega's journey, this Article will survey each of these legal issues and the law relied upon to resolve them. The authors offer this survey in order to highlight how General Noriega's POW status never really impeded the ability of the U.S. to address the misconduct it sought to sanction him for. Because the authority to prosecute wartime captives is as important today as it was when the U.S. took General Noriega into custody, the authors believe the lesson of General Noriega's experience deserves greater attention. In many ways it rebuts the flawed assumption that POW status and protection of the nation from individuals who commit pre-capture misconduct directed against the national security interests of the nation are somehow incompatible. Instead, General Noriega's legal saga will offer insight into the viability of existing law to address the challenge of such captives, even in the context of the contemporary struggle against international terrorism. Although the authors do not intend to suggest that these lessons mandate reconsideration of the status of captured al-Qaeda and Taliban personnel, they do call into question the credibility of the argument that granting POW status (or perhaps only combatant immunity)<sup>7</sup> will disable the U.S. from subjecting them to criminal sanctions for their pre-capture misconduct.

## I. CRIMINAL, POW, OR SOMEWHERE IN BETWEEN?

### *A. Applicability of the Law of War to General Noriega's Captivity*

General Noriega initially challenged the government's effort to bring him to justice by asserting that the prosecution was barred by international law.<sup>8</sup> Specifically, General Noriega asserted that he was entitled to status as a POW in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War (GPW),<sup>9</sup> and as a result he was immune from criminal prosecution for violation of U.S. domestic law.<sup>10</sup>

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7. See Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253 (2011).

8. *United States v. Noriega*, 746 F. Supp. 1506, 1511–12 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

9. *Id.*

10. *Id.* at 1525.

By asserting POW status in the context of his criminal prosecution, General Noriega forced the issue of Geneva Convention applicability on the Federal District Court judge assigned to his case.<sup>11</sup> This generated an issue of first impression for the federal courts: no criminal suspect (or any individual detained by the United States) had prior to this case asked for a judicial determination of POW status.<sup>12</sup> Instead, this determination had previously fallen within the exclusive prerogative of the executive branch.<sup>13</sup>

To understand the complexity of this issue, it is first necessary to understand the limited situations in which the GPW applies. This treaty, like the broader law of war itself, is a component of the *lex specialis*<sup>14</sup> international law developed to regulate the conduct of hostilities and to protect victims of war. Accordingly, it is not a source of law constantly in force; instead, it applies only to those situations it was developed to regulate, namely, armed conflicts.<sup>15</sup> Indeed, the term “armed conflict” is itself a term of art, adopted after the Second World War to ensure this branch of international law would apply to armed hostilities between states, even if the states themselves disavowed the existence of a technical state of war.<sup>16</sup>

Accordingly, not all individuals captured by U.S. armed forces are *ipso facto* entitled to POW status.<sup>17</sup> Instead, POW status is applicable only to individuals captured during the course of an international armed conflict—a dispute between two or more states leading to the intervention of armed forces, resulting in armed hostilities or uncontested belligerent occupation.<sup>18</sup> Claiming POW status is therefore only applicable to individuals captured in the context of interstate armed hostilities.<sup>19</sup> Even then, POW status is

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11. *Id.*

12. *Id.* at 1511.

13. *United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1992).

14. See David Glazier, *Full and Fair by What Measure? Identifying International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 99 (2006) (showing that the GPW represents specific law of war provisions that would supersede more general legal provisions).

15. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

16. INT'L COMM. OF THE RED CROSS, COMMENTARY OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 20 (Jean Pictet ed., 1960).

17. John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 37 (1991).

18. INT'L COMM. OF THE RED CROSS, *supra* note 16, at 23.

19. Parkerson, *supra* note 17, at 41.

not automatic but instead requires determination of whether the individual meets the requirements of Article 4 of the GPW, which defines who is entitled to this status.<sup>20</sup>

This two-part equation for determining POW status is often referred to as the right-type-of-conflict/right-type-of-person test.<sup>21</sup> First, the GPW must be triggered by an international armed conflict, bringing into effect the requirement to assess status pursuant to Article 4.<sup>22</sup> Second, the individual must meet the qualification requirements established in Article 4.<sup>23</sup> If this two-part test is satisfied, the individual is entitled to POW status; if either part of the test is not satisfied, POW status is inapplicable.<sup>24</sup>

On the night of December 19, 1989, the U.S. launched a large-scale highly coordinated land, sea, and air assault against General Noriega's PDF.<sup>25</sup> Designated "Operation Just Cause," the stated objectives of the assault were to eliminate the threat to U.S. personnel and the Panama Canal posed by General Noriega's PDF; to facilitate the assumption of power by Guillermo Endara—the candidate who, by all accounts, had been legitimately elected to the office of President—after General Noriega nullified the results of his election; and to capture General Noriega to bring him to justice in the U.S. for trial on an indictment alleging violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>26</sup> More than 24,000 U.S. military personnel simultaneously struck objectives all over Panama.<sup>27</sup> The ensuing 48–72 hours involved intense combat against a PDF that proved more determined than many U.S. planners had anticipated.<sup>28</sup> Although the outcome was inevitable, the cost was high for both sides of the fight, with the U.S. suffering 23 killed in action and the PDF losing somewhere in the range of 300.<sup>29</sup> It is estimated that

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20. Geneva III, *supra* note 15, art. 4.

21. Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 42 (2002).

22. *Id.*

23. *Id.*

24. *Id.*

25. Melissa Healy, *Combat in Panama; Panamanian Military 'Decapitated' by Coordinated U.S. Strike*, L.A. TIMES, Dec. 21, 1989, at A4.

26. *United States v. Noriega*, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997); George H.W. Bush, Presidential Address to Nation on Panama Invasion (Dec. 20, 1989), available at <http://www.americanrhetoric.com/speeches/ghwbushpanamainvasion.htm>.

27. Storer Rowley & Nathaniel Sheppard Jr., *Noriega's Forces Keep Battle Going*, CHI. TRIB., Dec. 24, 1989, at C1.

28. *Id.*

29. Linda Diebel, *Panama Unpacified a Year After Noriega, U.S. Troops Maintain a Perilous Presence*, TORONTO STAR, Dec. 9, 1990, at H1.

several thousand civilians were also killed or injured in the fighting.<sup>30</sup>

It may come as a surprise to individuals unfamiliar with the law of war that serious debate even existed over whether General Noriega qualified for POW status when he was captured. Objectively, Operation Just Cause looked as much like a war as had any mission the U.S. had conducted since Vietnam.<sup>31</sup> For the U.S. forces engaged in the operation, the nature of the mission necessitated application of and compliance with the law of war.<sup>32</sup> This was not, however, the result of a determination that the operation qualified as an international armed conflict, thus triggering the Geneva Conventions.<sup>33</sup> Instead, U.S. forces applied the law of war pursuant to a longstanding Department of Defense policy that required the military to apply the law of war to all military operations, irrespective of the actual legal characterization of those operations.<sup>34</sup>

Compliance with this policy produced no real controversy until the U.S. found itself in control of a country without any viable forces to maintain law and order. In an ironic precursor to the initial days of the U.S. occupation of Baghdad in 2003,<sup>35</sup> almost as soon as the fighting subsided, lawlessness broke out.<sup>36</sup> The U.S. Command was suddenly required to determine whether it was an occupying power pursuant to the law of war.<sup>37</sup> If so, the

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30. PHYSICIANS FOR HUMAN RIGHTS, OPERATION JUST CAUSE: THE HUMAN COST OF MILITARY ACTION IN PANAMA 45 (1991), available at <http://physiciansforhumanrights.org/library/documents/reports/operation-just-cause.pdf>; Linda Diebel, *Beyond the Bizarre: Noriega Goes on Trial*, TORONTO STAR, Sept. 4, 1991, at A1.

31. See Adam Isaac Hasson, Note, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic—Trends in Political Accountability and Transactional Criminal Law*, 25 B.C. INT'L & COMP. L. REV. 125, 131 (2002).

32. *United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992); see Parkerson, *supra* note 17, at 41–42 (applying analysis to determine whether U.S. invasion of Panama on behalf of Endara government made conflict “international” for the purposes of GPW).

33. *Noriega*, 808 F. Supp. at 795.

34. *Id.*; Dep’t of Def. Directive 5100.77 (Dec. 9, 1998).

35. See Dexter Filkins, *In Baghdad, Free of Hussein, a Day of Mayhem*, N.Y. TIMES, Apr. 12, 2003, at A1.

36. Charlotte Grimes, *Noriega’s ‘Ghost’ Haunts Panama; Political Factions Continue to Battle*, ST. LOUIS POST-DISPATCH, Mar. 31, 1991, at B4.

37. Interview with W. Hayes Parks, Special Assistant to the Judge Advocate Gen. of the Army for Law of War Matters, Office of the Judge Advocate Gen., U.S. Army, in Rosslyn, Va. (Apr. 23, 1999); see also Geoffrey S. Corn & Michael L. Smidt, *To Be or Not to Be, That Is the Question: Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/06-1999.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/06-1999.pdf).



responsibility to restore and maintain law and order would fall to U.S. forces.<sup>38</sup> It was, however, clear that asserting the occupation authority would be perceived as contrary to the established strategic objective of restoring legitimate authority to the Panamanians. Instead, invocation of such authority would imply that the U.S. had resurrected the oft-criticized policy of routine "Banana Republic" interventions.

As a result of this concern, the executive branch took the position that Operation Just Cause had not been an international armed conflict, and as a result the U.S. was not an occupying power (a legal obligation incurred only in the context of an international armed conflict).<sup>39</sup> Instead, the U.S. asserted that it had been invited to intervene in Panama to assist the legitimately elected government in ousting a rogue military commander who had seized power illegally. U.S. forces would continue to comply with the law of war as a matter of policy where doing so was operationally logical—for example, by treating captured PDF personnel *as if* they were POWs.<sup>40</sup> As a matter of law, however, the U.S. rejected any obligations flowing from the law of belligerent occupation.<sup>41</sup>

This conclusion that the intervention in Panama had not qualified as an international armed conflict became the focal point of contention between General Noriega and the U.S. during the initial stages of his criminal prosecution.<sup>42</sup> General Noriega's attorneys asserted that their client was entitled to POW status not as a matter of Department of Defense policy but as a matter of law by operation of the GPW.<sup>43</sup> The U.S. responded that it was not necessary for the court to make this determination, because pursuant to the policy that it applied during Operation Just Cause, the U.S. would continue to ensure that General Noriega was treated consistently with the requirements of the GPW.<sup>44</sup> This response included formal opinions by both the Department of Justice and the Department of Defense concluding that Operation Just Cause did not qualify as an international armed conflict technically triggering applicability of the GPW because there had never been a genuine dispute between the United States and Panama.<sup>45</sup>

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38. Parkerson, *supra* note 17, at 72.

39. United States v. Noriega, 808 F. Supp. 791, 794–95 (S.D. Fla. 1992).

40. *Id.* at 794 n.4.

41. *Id.*

42. *Id.* at 794.

43. *Id.* at 793.

44. *Id.* at 794.

45. *Id.* at 794 n.4.

On December 8, 1992, Judge Hoeveler, the Senior District Judge of the United States District Court for the Southern District of Florida, issued his opinion on the question of General Noriega's POW status.<sup>46</sup> Judge Hoeveler first noted how the government sought to avoid the issue throughout the case by relying on its intent to treat him as if he were a POW:

The government has thus far obviated the need for a formal determination of General Noriega's status. On a number of occasions as the case developed, counsel for the government advised that General Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention. At no time was it agreed that he was, in fact, a prisoner of war.<sup>47</sup>

This proved unpersuasive to Judge Hoeveler, who then highlighted the defect in the government's position: it provided no assurance to General Noriega that he would continue to be treated in such a manner.<sup>48</sup> According to Judge Hoeveler, this defect was precisely why General Noriega was entitled to a legal status determination:

The government's position provides no assurances that the government will not at some point in the future decide that Noriega is *not* a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. Because of the issues presented in connection with the General's further confinement and treatment, it seems appropriate—even necessary—to address the issue of Defendant's status.<sup>49</sup>

Judge Hoeveler then rejected the government's characterization of the operation in Panama as anything other than an international armed conflict.<sup>50</sup> Relying on the plain language of Article 2 of the GPW, supported by the International Committee of the Red Cross Commentary associated with that provision, Judge Hoeveler concluded that Operation Just Cause did in fact qualify as an *international* armed conflict triggering GPW applicability, "[h]owever the government wishe[d] to label it."<sup>51</sup>

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46. *Id.* at 803.

47. *Id.* at 794.

48. *Id.*

49. *Id.*

50. *Id.* at 795.

51. *Id.*

By determining Operation Just Cause qualified as the right type of armed conflict to trigger applicability of the GPW, Judge Hoeveler was then required to determine whether General Noriega qualified as the right type of person for purposes of POW status.<sup>52</sup> Judge Hoeveler had little difficulty resolving this component of the two-pronged POW qualification requirement, concluding that:

Geneva III's [GPW's] definition of a POW is easily broad enough to encompass General Noriega. It is not disputed that he was the head of the PDF, and that he has "fallen into the power of the enemy." Subsection 3 of Article 4 states that captured military personnel are POWs even if they "profess allegiance to a government or an authority not recognized by the Detaining Power."<sup>53</sup>

General Noriega was therefore a POW not simply as a matter of policy, but as a matter of law.<sup>54</sup>

#### *B. The Impact of POW Status on General Noriega's Incarceration*

Unfortunately for General Noriega, the court's determination that he qualified as a POW did not produce the effect that he hoped for.<sup>55</sup> In earlier pretrial motions, General Noriega asserted that as a POW, he was immune from trial for the indicted allegations:

Defendants Noriega and Del Cid [an indicted co-conspirator and Colonel in the PDF] contend that they are prisoners of war ("POW") within the meaning of the Geneva Convention Relative to the Treatment of Prisoners of War, (Geneva III), a status, Defendants maintain, which divests this Court of jurisdiction to proceed with this case.<sup>56</sup>

In response to this assertion, the court proceeded on the assumption that Noriega was in fact a POW (although, at that point in the litigation, the court determined that it was unnecessary to resolve that issue based on this assumption).<sup>57</sup> The court then addressed the most critical question related to the intersection of criminal prosecution and POW status: Did that status prohibit a

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52. *Id.*

53. *Id.*

54. *Id.*

55. *United States v. Noriega*, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

56. *Id.* at 1525 (footnote omitted).

57. *Id.*

detaining power (the U.S.) from prosecuting a POW for criminal offenses in violation of its domestic law?<sup>58</sup>

This question implicated a law of war concept that provides qualified immunity from criminal prosecution to lawful combatants.<sup>59</sup> According to this concept, it is generally true that POWs are immune from prosecution by a detaining power.<sup>60</sup> This is one of the most important rights afforded POWs and is commonly referred to as "combatant immunity."<sup>61</sup> However, combatant immunity is not absolute; instead, it extends only to pre-capture conduct related to the armed conflict that is consistent with the law of war.<sup>62</sup> Accordingly, two types of offenses fall outside the scope of combatant immunity: (1) violations of the laws and customs of war (war crimes) committed within the context of an armed conflict, and (2) violations of other criminal prohibitions unrelated to the armed conflict in which the POW participated.<sup>63</sup>

Resolving the challenge to jurisdiction raised by General Noriega—that his POW-based combatant immunity barred the U.S. from asserting its jurisdiction to criminally prosecute him for his pre-conflict violations of U.S. domestic law—necessitated analysis of these distinctions and the limitations of combatant immunity.<sup>64</sup> General Noriega asserted what was in effect an

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58. *Id.* at 1526.

59. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 33–39 (2d ed. 2010); see also *United States v. Lindh*, 212 F. Supp. 2d 541, 557 n.35 (E.D. Va. 2002). Concluding that John Walker Lindh was not a lawful combatant, the *Lindh* court stated that [b]elligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict. . . . [C]ombatants "may not be sentenced . . . to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts."

*Lindh*, 212 F. Supp. 2d at 553 (quoting Geneva III, *supra* note 15, art. 87); see also Geneva III, *supra* note 15, art. 82 ("A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.").

60. Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 9–10 (2004).

61. *Id.* at 9 n.11.

62. *Id.* at 9.

63. *Id.* at 10.

64. *United States v. Noriega*, 746 F. Supp. 1506, 1525–29 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

unlimited concept of combatant immunity, an assertion that did not withstand judicial scrutiny.<sup>65</sup> Although it was true that as a POW General Noriega was immune from criminal sanction derived from his lawful conduct as a combatant during the armed conflict in Panama, this was not the nature of the indicted offenses.<sup>66</sup> Instead, the indictment alleged numerous violations of the U.S. criminal code that occurred well before December 19, 1989—the date the armed conflict began.<sup>67</sup>

Relying on Article 84 of the GPW,<sup>68</sup> the Federal District Court concluded that because members of the U.S. armed forces could have been tried for the same offenses alleged against General Noriega, his immunity as a POW did not shield him from criminal jurisdiction.<sup>69</sup> This ruling was consistent not only with the GPW but also with the underlying customary principle of combatant immunity reflected in Article 84.<sup>70</sup> This ruling and General Noriega's subsequent prosecution for his pre-capture violations of U.S. law illuminate the purpose and limitations of combatant immunity. That immunity was never intended to be absolute or to absolve a POW from criminal responsibility for any pre-capture criminal misconduct. Instead, it was and remains a protection derived from the logic that engaging in armed hostilities as an agent of the state is an obligation, and therefore, so long as the individual complies with the international laws and customs of war that dictate permissible conduct during armed hostilities there should be no adverse criminal consequence that results. This also reflects the reciprocal foundation of the principle, which accords this protection to all participants in armed hostilities, on the condition precedent that their participation is pursuant to state authority (right type of conflict) and that they meet the requirements established by international law to lawfully participate in the hostilities (right type of person).

There is simply no link between this underlying rationale and the type of unqualified immunity General Noriega asserted. Extending combatant immunity to pre-capture conduct unrelated to

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65. *Id.* at 1529.

66. *Id.* at 1510.

67. *Id.*

68. Geneva III, *supra* note 15, art. 84 ("A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.").

69. *Noriega*, 746 F. Supp. at 1525–26.

70. *Id.* at 1526; *see also* INT'L COMM. OF THE RED CROSS, *supra* note 16, at 412.

the armed conflict would disconnect its tether to the law of war and vest potential criminals with an unjustified windfall. Indeed, such an extension might even produce the perverse result of encouraging such individuals to participate in hostilities in order to obtain the cleansing effect of unqualified immunity. Perhaps more importantly, understanding the established qualifications of combatant immunity reveals that there is no fundamental incompatibility between POW status and the ability of a state to sanction genuine criminal misconduct. Whether because the individual fails to qualify for POW status, or the alleged misconduct is unrelated to the armed conflict, or the alleged misconduct violates the laws and customs of war (for example, if General Noriega had ordered the assassination of U.S. POWs), the concept provides ample flexibility for the state to sanction misconduct. Only in those limited situations where the state would expect its own armed forces to be protected from post-capture criminal prosecution does the concept limit the prerogative of the state. General Noriega stands as a reminder, therefore, that the GPW and the law of war it implements reflect a logical balance between the needs of state protection and the dictates of humanity.

## II. EXTRATERRITORIAL JURISDICTION

A major hurdle for the government to overcome in prosecuting General Noriega in a U.S. court was the establishment of jurisdiction over acts that were committed in Panama. It is axiomatic that in order for the government to prosecute any criminal defendant, it must first establish jurisdiction.<sup>71</sup> This becomes a challenge for the government in cases involving international criminal acts. Extraterritorial jurisdiction is necessary for the government to impose criminal sanctions for these acts, yet domestic and international legal restrictions prevent the U.S. from asserting jurisdiction over all criminal acts that occur outside of its borders.<sup>72</sup> Criminal defendants charged with committing crimes outside of U.S. territory may challenge their prosecution on the basis that the country cannot properly assert jurisdiction over the conduct.<sup>73</sup> Thus, the government must overcome these legal

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71. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 126 (2007).

72. *Id.* at 127–28.

73. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–03 (1987); see also CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2010), available at <http://www.fas.org/sgp/crs/misc/94-166.pdf>.

hurdles in any case in which a defendant is being criminally charged for a crime committed in a foreign land.

The legal restrictions placed upon a country's ability to assert jurisdiction over crimes that occur outside its territory have deep historical roots. Premised on the idea of state sovereignty and comity, countries historically left the prosecution of crimes occurring outside their borders to the states in whose territory the crimes occurred.<sup>74</sup> Not wanting other states to interfere with the enforcement of laws within its own borders, a country would thus defer to the prosecution of crimes that occurred outside its territory. This desire to discourage interference with state sovereignty and to protect interests of comity led to restrictions on the exercise of extraterritorial jurisdiction rooted in both domestic and international law.<sup>75</sup>

In addition to addressing concerns about foreign relations, limits on extraterritorial jurisdiction remedied some practical problems posed by the prosecution of criminal acts occurring outside of the prosecuting country's territory. The laws of individual countries are not identical, and one state may criminalize conduct that is not the subject of criminal sanctions elsewhere. Unlimited state authority to assert jurisdiction beyond its borders might lead to the prosecution for acts or omissions committed in a country that had not criminally prohibited such conduct. In order to provide both notice to individuals about the laws that govern their behavior as well as consistency in prosecution, international and domestic law impose restrictions on the exercise of extraterritorial jurisdiction.<sup>76</sup>

Thus, there are strong political and practical reasons for limiting a state's exercise of extraterritorial jurisdiction. In the U.S., a two-step process is used to determine the propriety of extending criminal jurisdiction beyond U.S. territory.<sup>77</sup> First, the court will examine international law to determine whether the assertion of extraterritorial jurisdiction is appropriate.<sup>78</sup> Second, even if the assertion of jurisdiction is permitted by international law, jurisdiction will not exist unless the domestic law establishing the criminal prohibition was intended by Congress to apply extraterritorially.<sup>79</sup> Therefore, the prosecution for extraterritorial

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74. Colangelo, *supra* note 71, at 127-28.

75. See generally DOYLE, *supra* note 73.

76. See Colangelo, *supra* note 71, at 165-66 (noting some of the due process concerns with the application of extraterritorial jurisdiction).

77. *Noriega*, 746 F. Supp. at 1512.

78. *Id.*

79. *Id.*

crime will only proceed if both customary international law and the laws of the U.S. authorize the exercise of jurisdiction.

When the U.S. brought General Noriega before the Federal District Court in Miami to stand trial on an indictment that predated the invasion and his capture, General Noriega directly challenged the court's jurisdiction over the indicted offenses.<sup>80</sup> Specifically, the indictment contained charges of racketeering under the RICO statutes,<sup>81</sup> conspiracy to manufacture cocaine, with the intent to import it into the U.S.; conspiracy to import and distribute cocaine into the U.S.; distributing and aiding and abetting the distribution and manufacture of cocaine, intending that it be imported and distributed in the U.S.; and using interstate travel to promote an unlawful activity.<sup>82</sup> General Noriega challenged the court's jurisdiction over acts committed outside the borders of the U.S. by the leader of a sovereign nation.<sup>83</sup> His challenge accordingly implicated both limits on extraterritorial criminal jurisdiction and immunity for foreign heads of state. After noting that the question of immunity from prosecution was distinct from the issue of jurisdiction, the Federal District Court examined whether jurisdiction was appropriate under international and domestic laws.<sup>84</sup>

The court's ruling on General Noriega's motion to dismiss began by citing international law principles regulating the exercise of state jurisdiction. Customary international law permits the exercise of jurisdiction over acts under several theories. The most common basis for jurisdiction is territorial: a state has jurisdiction over events that occur within its territory.<sup>85</sup> For events occurring outside the territory of the nation, international law permits jurisdiction based upon five distinct theories.<sup>86</sup> The first and perhaps most commonly utilized basis for extraterritorial

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80. *Id.*

81. 18 U.S.C. §§ 1961–1968 (2006 & Supp. 2009). Congress enacted RICO to respond to a growing concern over the influence of organized crime on commercial enterprises in the U.S. Since its enactment, the government has greatly expanded its use of RICO to apply to enterprises other than those involving organized crime. *See Salinas v. United States*, 522 U.S. 52 (1997). Specifically, RICO criminalizes acquiring or operating an enterprise through a pattern of racketeering activity affecting interstate or foreign commerce.

82. *Noriega*, 746 F. Supp. at 1510.

83. *Id.* at 1512.

84. *Id.*

85. Colangelo, *supra* note 71, at 127–28.

86. Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 13 (2007).



jurisdiction is nationality.<sup>87</sup> A country has jurisdiction over acts committed by its own citizens, even if those acts occurred outside the territorial limits of the nation.<sup>88</sup> Second, a state may assert jurisdiction over extraterritorial acts when those acts obstruct the function of the government or threaten the security of the state under the protective principle of jurisdiction.<sup>89</sup> When the state must prosecute an individual to protect the state's own interests—such as the prosecution of a spy who committed acts against the state abroad—international law permits jurisdiction. Third, a country may also assert extraterritorial jurisdiction under the theory of passive personality.<sup>90</sup> When a defendant commits acts that harm a state's citizens abroad, principles of international law allow for jurisdiction over that defendant.<sup>91</sup> Fourth, the universality principle allows for any state to prosecute criminal acts that are so heinous as to be universally condemned and therefore every member of the community of nations has an equal right to prosecute.<sup>92</sup> Thus, under international legal principles, any state can exercise jurisdiction over an individual who commits crimes against humanity, genocide, war crimes, piracy, or other offenses falling within the category of universal jurisdiction regardless of where those crimes occurred, the nationality of the actor, or the nationality of the victim.<sup>93</sup> Fifth, under the objective territorial theory of jurisdiction, a state has jurisdiction over acts that occur overseas but are intended to have a substantive effect within the territory of the state.<sup>94</sup> Although limited in scope, these five theories of jurisdiction essentially allow for a country to enact law asserting jurisdiction over extraterritorial acts when those acts impact the country in some significant way.

It was under the objective territoriality theory that the court in the Noriega case determined that extraterritorial jurisdiction was appropriate.<sup>95</sup> Noting that the criminal conduct ascribed to General Noriega occurred in Panama and Cuba, the Federal District Court nonetheless found that the conduct produced or was intended to produce effects in the United States.<sup>96</sup> The court explained that the

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87. *Id.* at 18–21.

88. *Id.*

89. *Id.* at 22–25.

90. *Id.* at 25–28.

91. *Id.*

92. *Id.* at 28–29.

93. *Id.*

94. *Id.* at 14–16.

95. *United States v. Noriega*, 746 F. Supp. 1506, 1513–14 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

96. *Id.*

objective territorial theory allows for jurisdiction under several circumstances. First, a state has jurisdiction over any defendant whose conduct produces actual effects within the territory of that state.<sup>97</sup> Second, a state has jurisdiction over any defendant who is part of a conspiracy and whose co-conspirators participated in conduct within the state that furthered the conspiracy.<sup>98</sup> Finally, the court noted a recent trend in international jurisprudence that extended the objective territorial theory to conduct that may not have produced effects within a state but was intended to produce effects within that state.<sup>99</sup> Citing the *Restatement (Third) of Foreign Relations Law*, the court noted that under this final circumstance, no proof of an effect or overt act within the territory of the country is necessary.<sup>100</sup>

When the intent to commit the proscribed act is clear and demonstrated by some activity, and the effect to be produced by the activity is substantial and foreseeable, the fact that a plan or conspiracy was thwarted does not deprive the target state of jurisdiction to make its law applicable.<sup>101</sup>

The court noted that in drug smuggling cases, courts often look to the mere intent of the defendant to import drugs into the U.S. to determine whether jurisdiction exists.<sup>102</sup> Specifically in this context, courts have found it unnecessary for repercussions to be felt within the U.S. in order to find such intent.<sup>103</sup>

The court examined the allegations against General Noriega and found that actions both within and outside the U.S. created jurisdiction under all aspects of the objective territoriality theory.<sup>104</sup> The court noted that overt acts occurred within the U.S. in furtherance of the conspiracy for which General Noriega was charged.<sup>105</sup> The court also explained that the indictment alleged that General Noriega's actions in Panama led to more than 2,000 pounds of cocaine being imported into the U.S., clearly satisfying the effects test.<sup>106</sup> Finally, the court reasoned that even if these acts had not produced any effect within the U.S., the indictment alleged

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97. *Id.* at 1513.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. D (1987)).

102. *Id.*

103. *Id.*

104. *Id.* at 1513–14.

105. *Id.*

106. *Id.* at 1514.

that the intent of the conspiracy was to import cocaine into the U.S., therefore satisfying the objective territoriality test.<sup>107</sup>

General Noriega, also relying on the *Restatement*, argued that the exercise of extraterritorial criminal jurisdiction is permissible "only upon a strong justification" and that no such justification existed in his case.<sup>108</sup> The court, however, held differently, finding that the *Restatement* specifically addressed narcotics offenses as being a strong justification for the exercise of such jurisdiction.<sup>109</sup> The court further explained the particular interest of the U.S. in exercising jurisdiction under these circumstances, noting the growing drug epidemic in the U.S., and found that the U.S. has a strong duty to curb the importation of drugs within its borders.<sup>110</sup> Thus, the court rejected General Noriega's claims that extending U.S. federal criminal statutes to reach his extraterritorial conspiracy was inherently unreasonable.<sup>111</sup>

Having determined that international law permitted the exercise of criminal jurisdiction over General Noriega, the court then examined the domestic criminal statutes under which he was indicted.<sup>112</sup> The court quickly found that all charges relating to the importation of drugs were, by their very nature, intended to apply to acts that occurred outside of the territory of the United States.<sup>113</sup> Although the court noted that only one of the narcotics statutes expressly authorized extraterritorial jurisdiction, it nonetheless inferred that the other narcotics statutes also applied to conduct which commenced abroad, finding that the statutes would be rendered meaningless without such a conclusion.<sup>114</sup>

The court devoted the most time to dissecting the RICO statute to determine congressional intent.<sup>115</sup> Noting that this was an issue of first impression, the court examined the legislative history behind RICO and found that Congress intended the statute to be extraordinarily broad in application.<sup>116</sup> The court discussed the purpose of RICO: to contribute to an unprecedented attack on organized crime "on all available fronts."<sup>117</sup> Based upon this history, and without any express congressional discussion of the

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107. *Id.*

108. *Id.*

109. *Id.* at 1514-15.

110. *Id.*

111. *Id.* at 1515.

112. *Id.*

113. *Id.*

114. *Id.* at 1515-16.

115. *Id.* at 1516-17.

116. *Id.*

117. *Id.* at 1517.

extraterritorial application of RICO, the court found that "Congress was concerned with the effects and not the locus of racketeering activities" and therefore concluded RICO applies to conduct intended to produce effects within the U.S.<sup>118</sup> In a similar analysis, the court also found that crimes alleged under the Travel Act<sup>119</sup> reached criminal conduct occurring outside of the U.S.<sup>120</sup> Thus, under both international and domestic law, the court found that jurisdiction was authorized and appropriate for acts occurring outside of the U.S.

The expansion of jurisdiction beyond pure territorial theories has far-reaching consequences but also provides the government with a powerful and important weapon in its arsenal to battle transnational threats to the nation. The reasoning used by the Federal District Court applies to a host of cases involving criminal acts overseas. Specifically, the same reasoning used by the court is used to establish jurisdiction in cases involving detainees accused of terrorist activities. And the same rationale used by the court to establish jurisdiction over General Noriega is asserted as providing a basis for jurisdiction in international terrorism cases.

At the same time, Congress has not left it entirely in the hands of the courts to determine whether a statute has extraterritorial applicability. In response to the events of September 11 and the growing concern over terrorist threats, Congress has specifically addressed jurisdictional limitations on the prosecution of terrorists. In particular, the government has enhanced its ability to extend jurisdiction to terrorist acts committed overseas through amendments to the material support for terrorism statute.<sup>121</sup> In application, the material support statute criminalizes a broad range of conduct that would previously have been prosecuted under the RICO statute. However, as initially enacted, the extraterritorial applicability of the statute was, at the very least, unclear.<sup>122</sup> Recognizing the jurisdictional issues that RICO presented to the courts, Congress amended the material support statute to extend to

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118. *Id.*

119. 18 U.S.C. § 1952 (2006). The Travel Act criminalizes conduct that involves the use of interstate commerce to further racketeering activities.

120. *Noriega*, 746 F. Supp. at 1518.

121. 18 U.S.C. §§ 2339A–2339C (2006 & Supp. 2009).

122. Alexander J. Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional yet Foreseeable Consequences of Extraterritorially Criminalizing the Provision of Material Support to Terrorists and Foreign Terrorist Organizations*, 22 CONN. J. INT'L L. 313, 315–17 (2007) (noting that "[p]rior to the Patriot Act, section 2339A did not apply extraterritorially" and that section 2339B contained language that cast doubt on its extraterritorial applicability).

extraterritorial acts.<sup>123</sup> Thus, as the prosecution of criminal acts has extended more and more to conduct occurring overseas, both the courts and the legislature have struggled to find a jurisdictional basis upon which to punish the conduct. Although these jurisdictional issues have garnered great attention as they relate to the prosecution of terrorist suspects, the issues presented in current cases are the very issues that courts struggled with in the Noriega case. General Noriega's prosecution serves as a prime example of the long reach of U.S. law to criminal acts occurring overseas in a variety of contexts.

### III. INTERNATIONAL ABDUCTION AND DUE PROCESS

General Noriega did not confine his attack on U.S. jurisdiction to asserting his POW status. In an alternate attack, he invoked the Due Process Clause of the Fifth Amendment of the U.S. Constitution. General Noriega raised several due process claims, all of which shared the underlying assertion that his treatment at the hands of the U.S. government was so outrageous that it justified barring the government from prosecuting him. More specifically, he argued that his due process rights were violated by the manner of his capture, arrest, and presentation in the U.S. for trial.<sup>124</sup>

The *Ker-Frisbie* doctrine is a long-settled rule from two United States Supreme Court cases, *Ker v. Illinois*<sup>125</sup> and *Frisbie v. Collins*,<sup>126</sup> that allows the exercise of domestic criminal jurisdiction over a defendant irrespective of the methods utilized by the government to bring the defendant into the jurisdiction of a court.<sup>127</sup> More specifically, the *Ker-Frisbie* doctrine stands for the

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123. *Id.*

124. *United States v. Noriega*, 117 F.3d 1206, 1213-14 (11th Cir. 1997) ("In his pre-trial motion, Noriega also sought the dismissal of the indictment against him on the ground that the manner in which he was brought before the district court (i.e., through a military invasion) was so unconscionable as to constitute a violation of substantive due process. Noriega also argued that to the extent the government's actions did not shock the judicial conscience sufficiently to trigger due process sanctions, the district court should exercise its supervisory power to decline jurisdiction. The district court rejected Noriega's due process argument, and it declared Noriega's alternative supervisory power rationale non-justiciable.").

125. 119 U.S. 436 (1886).

126. 342 U.S. 519 (1952).

127. *United States v. Noriega*, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997). In its broadest reading, *Ker-Frisbie* ultimately stands for the concept of *male captus, bene detentus*: wrongly captured, rightly detained. The U.S. is not alone in upholding jurisdiction over

proposition that the forcible abduction of a defendant for purposes of bringing him to justice in the U.S. does not justify the remedy of dismissal on the basis of predicate government illegality.<sup>128</sup> Pursuant to these precedents, such a defendant is afforded due process so long as the defendant is present in court after having been informed of the charges against him and afforded a fair trial.<sup>129</sup> The Court in *Frisbie* even proclaimed that there was “nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.”<sup>130</sup> Clearly, forced abduction was no bar to jurisdiction under the long-standing rule.<sup>131</sup>

The *Ker-Frisbie* doctrine would appear to foreclose any due process challenge to the exercise of jurisdiction by General Noriega. However, General Noriega invoked a rarely used exception to the doctrine, arguing that the use of a military invasion to capture him “shocked the conscience,” thereby rebutting the *Ker-Frisbie* presumption and requiring the Federal District Court to prohibit his prosecution as a means of punishing the U.S. for its actions.<sup>132</sup> Known as the *Toscanino* exception, this rule emerged as the Supreme Court expanded its interpretation of due process to include substantially more protections for a criminal defendant than merely the right to fair procedure under *Frisbie*.<sup>133</sup> This broadened conception of due process empowered the judiciary to act to prevent the government from using illegal and morally questionable tactics to gain the upper hand in the dispensation of justice—more specifically international kidnapping.<sup>134</sup>

In very real sense, the *Toscanino* exception to the *Ker-Frisbie* doctrine is the international abduction analogue to the exclusionary rule. Both rules operate as “judicially-created device[s] designed to

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abducted defendants, as Great Britain, Israel, and France each applied the concept in the latter half of the twentieth century. Jeffrey J. Carlisle, *Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping*, 81 CALIF. L. REV. 1541, 1554 (1993).

128. *Noriega*, 746 F. Supp. at 1529. *But see* United States v. Rauscher, 119 U.S. 407 (1886); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1348 (9th Cir. 1991) (stating that under certain specifically drafted extradition treaties, a court may be required to forfeit jurisdiction over a defendant as to all crimes but those for which the defendant was extradited).

129. *Frisbie*, 342 U.S. at 522.

130. *Id.* at 522.

131. *Id.*

132. *Noriega*, 746 F. Supp. at 1511–12.

133. United States v. Toscanino, 500 F.2d 267, 272 (2d Cir. 1974).

134. *Id.*

deter disregard for constitutional prohibitions and give substance to constitutional rights."<sup>135</sup> For example, if the government were to use police brutality to coerce a confession or carry out an unconstitutional search and seizure to obtain evidence, then pursuant to the exclusionary rule, the court has a duty to deny the government the fruits of its illegal activity.<sup>136</sup> In such cases, the fruit would be the coerced confession or the unconstitutionally seized evidence.<sup>137</sup> The concept of exclusion as a remedy to government illegality is premised on the Supreme Court's determination that absent the threat of exclusion, the law creates no incentive for the government agents to respect fundamental principles of law in their efforts to investigate and convict criminal misconduct. Exclusion, therefore, was a tool created by the judiciary to ensure due process.<sup>138</sup>

This policy of exclusion was in sharp contrast with the *Ker-Frisbie* doctrine, which essentially gave the government carte blanche to engage in questionable tactics to capture suspects outside the country and bring them before the courts for trial and punishment.<sup>139</sup> Although the exclusionary rule was never conceived as a tool to deter such government conduct by foreclosing prosecution altogether, the principle of exclusion was and still is a highly valued procedural due process remedy.<sup>140</sup> As the international war on drug trafficking increased in the 1980s, it was only a matter of time before the Court would reconsider *Ker-Frisbie*.<sup>141</sup>

This reconsideration began in the federal circuit courts, where criticism of the *Ker-Frisbie* doctrine became increasingly common.<sup>142</sup> In the seminal *Toscanino* decision, the defendant claimed that his arrest had been procured unlawfully by agents of the United States who subjected him to extensive and continuous torture, including pinching his fingers with metal pliers, flushing alcohol into his eyes and nose, forcing other fluids up his anal passage, and attaching electrodes to his extremities and genitals.<sup>143</sup> Rather than condemn the cruel treatment of the defendant as a

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135. *Id.* at 273-74.

136. *Id.* at 275; *see also* *Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverthorne v. United States*, 251 U.S. 385 (1920).

137. *Toscanino*, 500 F.2d at 275.

138. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

139. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir. 1974).

140. *United States v. Blue*, 384 U.S. 251, 255 (1966).

141. Jim Schachter, *Arrests Abroad; Long Arm of Law Bends the Rules*, L.A. TIMES, July 17, 1986, at 1.

142. *Toscanino*, 500 F.2d at 272-73.

143. *Id.* at 270.

deprivation of his due process rights, the United States Court of Appeals for the Second Circuit instead focused its criticism on the government's "exploitation of any deliberate and unnecessary lawlessness" as a violation of the Fourth Amendment.<sup>144</sup>

Relying on cases focusing on interpretations of the exclusionary rule, the *Toscanino* court determined that due process now required a court to divest itself of jurisdiction over a defendant if the government's conduct regarding his apprehension was sufficiently wrongful.<sup>145</sup> First, the court considered *Rochin v. California*,<sup>146</sup> a U.S. Supreme Court case decided the same term as *Frisbie*.<sup>147</sup> In *Rochin*, the Supreme Court reversed a narcotics conviction after the defendant argued his due process rights were violated when the government forcibly pumped his stomach to induce vomiting and retrieve the evidence used to prosecute him.<sup>148</sup> The Court found that:

Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." . . . It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.<sup>149</sup>

The techniques used in *Rochin* were examples of "conduct that shocks the conscience" and were "bound to offend even hardened sensibilities."<sup>150</sup> The Court refused to affirm the conviction, because in doing so it would also affirm the brutality used to obtain it.<sup>151</sup>

The *Toscanino* court also considered exclusionary-rule principles found in *Weeks v. United States*<sup>152</sup>—principles later applied to the states in *Mapp v. Ohio*<sup>153</sup>—where the Supreme Court decided criminal prosecution must be sacrificed in order to uphold due process and deter government misconduct.<sup>154</sup> The court saw

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144. *Id.* at 275.

145. *Id.* at 273–75.

146. 342 U.S. 165, 166–67 (1952).

147. *Toscanino*, 500 F.2d at 273.

148. *Rochin*, 342 U.S. at 166–67.

149. *Id.* at 173.

150. *Id.* at 172.

151. *Id.* at 173–74.

152. 232 U.S. 383 (1914).

153. 367 U.S. 643 (1961).

154. *United States v. Toscanino*, 500 F.2d 267, 274 (2d Cir. 1974).



the exclusionary rule as a tool of the courts created to discourage the states and the government from violating defendants' constitutional rights simply to ensure a conviction.<sup>155</sup>

The *Toscanino* court had to make a decision.<sup>156</sup>

Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield.<sup>157</sup>

The court held it was required to give up jurisdiction in light of deliberate and unreasonable violations of a defendant's constitutional rights.<sup>158</sup> In the court's view, this new kind of exclusionary rule represented no more than an extension of the power of the federal civil courts to decline jurisdiction over defendants whose presence was obtained unconstitutionally.<sup>159</sup>

No less than 10 months after deciding *Toscanino*, the Second Circuit swiftly narrowed its new exclusionary rule by calling it a mere "exception" in *United States ex rel. Lujan v. Gengler*.<sup>160</sup> There, the defendant, a pilot, was tricked into flying a man hired by American agents from Argentina to Bolivia, where he was subsequently taken into custody by Bolivian police and forbidden communication with his embassy, attorney, or family.<sup>161</sup> A week after he was first detained by the Bolivians, the defendant arrived at Kennedy Airport in New York City and was arrested by federal agents.<sup>162</sup> Neither Argentina nor Bolivia charged the defendant, nor did either country protest his abduction.<sup>163</sup> Unlike the brutal acts alleged in *Toscanino*, the capture in *Lujan* was, at worst, "unconventional," "simply illegal," but "lacking . . . shocking governmental conduct."<sup>164</sup>

The court made it clear that *Toscanino* was simply an exception to *Ker-Frisbie*, not the rule.<sup>165</sup> "In holding that *Ker* and *Frisbie* must yield to the extent they were inconsistent with the

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155. *Id.* at 274-75.

156. *Id.* at 275.

157. *Id.*

158. *Id.*

159. *Id.*

160. 510 F.2d 62, 65 (2d Cir. 1974).

161. *Id.* at 63.

162. *Id.*

163. *Id.*

164. *Id.* at 63, 66.

165. *Id.* at 65.

Supreme Court's more recent pronouncements, we scarcely could have meant to eviscerate the *Ker-Frisbie* rule, which the Supreme Court has never felt impelled to disavow."<sup>166</sup> The Second Circuit made clear in *Lujan* what it barreled past in *Toscanino*: *Ker-Frisbie* is still valid, and not every illegal capture or forcible abduction will deprive a court of jurisdiction over a defendant.<sup>167</sup> Simply alleging that there was an international abduction or that there was anything illegal about the process of bringing a defendant into a court's jurisdiction is insufficient to establish a due process violation.<sup>168</sup> Indeed, the court "did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court."<sup>169</sup> Instead, to effectively invoke what the court now labeled the exception to *Ker-Frisbie*, the methods of obtaining the defendant's presence in the court's jurisdiction must "shock the conscience," "offend a sense of justice," or be "cruel, inhuman and outrageous."<sup>170</sup>

Drawing heavily from the language used by the Second Circuit, General Noriega sought the remedy of dismissal, basing his due process claim on the facts and circumstances related to Operation Just Cause. General Noriega attempted to convince the court that the military invasion of Panama was conducted for one clear and inescapable purpose: to bring him to justice. Furthermore, he emphasized the widespread loss of life and destruction caused by the operation.<sup>171</sup> General Noriega acknowledged the normal application of *Ker-Frisbie* to individuals brought before U.S. courts following international abduction, but he argued that the use of more than 25,000 military personnel in a full-scale invasion of a sovereign country conducted in order to secure his arrest and presence for trial provided a clear example of conscience shocking government conduct, therefore triggering the *Toscanino* exception. This presented the Federal District Court with another issue of first impression: Did the military invasion of Panama, an invasion launched in part to bring General Noriega to justice,<sup>172</sup> require the court to deny the government the opportunity to try General

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166. *Id.*

167. *Id.*

168. *Id.* at 67.

169. *Id.* at 65.

170. *Id.*

171. *United States v. Noriega*, 746 F. Supp. 1506, 1530 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

172. *Bush*, *supra* note 26.

Noriega because the methods it employed shocked the conscience?<sup>173</sup>

Regardless of Judge Hoeveler's opinion on the legitimacy of the invasion of Panama, the challenged status of *Ker-Frisbie*, or the *Lujan* reinterpretation of the *Toscanino* exception, he found General Noriega's argument to be without merit for a different reason altogether.<sup>174</sup> General Noriega's due process argument was dismissed because he had not alleged a government violation of his individual rights.<sup>175</sup> He was not mistreated, nor did he suffer any kind of physical abuse comparable to *Toscanino*.<sup>176</sup> Instead, the judge noted that General Noriega's asserted due process violation focused on what he alleged to be the unnecessary death and injury to Panamanian citizens and the destruction of their property as the result of the U.S. invasion.<sup>177</sup> The court concluded General Noriega could not assert third party allegations of due process violations.<sup>178</sup> No Panamanian, except for General Noriega himself, had any stake in having his indictment dismissed.<sup>179</sup> Not having asserted any personal violation of due process, General Noriega's presence in the Federal District Court fell within the *Ker-Frisbie* rule.<sup>180</sup>

The court's reliance on third party standing obviously skirted the core question of whether the use of military interventions to apprehend fugitives shocks the conscience. However, it also reinforced the extremely narrow nature of the *Toscanino* exception to the *Ker-Frisbie* doctrine. General Noriega's efforts to obtain Supreme Court review ultimately failed,<sup>181</sup> suggesting that at least at that time the Court had little interest in revisiting *Ker-Frisbie*. One unavoidable lesson from the litigation is that absent physical abuse, *Toscanino* provides little in the way of a constraint on government action. This is of course not insignificant. In an era of secret detentions and waterboarding, imposing a penalty on the government for physically abusing detainees subsequently brought to trial in federal courts could prove an effective deterrent to such government conduct. But one must wonder: How, if ever, could

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173. *Noriega*, 746 F. Supp. at 1530.

174. *Id.* at 1531.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1532.

179. *Id.*

180. *Id.*

181. *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010) (denying certiorari). Justice Thomas authored a dissent, to which Justice Scalia joined. *Id.* at 1002 (Thomas, J., dissenting).

the use of the armed forces to apprehend an international fugitive trigger *Toscanino* when the invasion of a country did not? *Male captus, bene detentus* appears alive and well in U.S. due process jurisprudence, allowing extraordinary means to bring individuals before U.S. courts to answer for their criminal actions.

#### IV. EXTRADITION AND HABEAS REVIEW

Following his prosecution in the Federal District Court, General Noriega was convicted of drug trafficking offenses and ultimately sentenced to 30 years imprisonment (later reduced by 10 years based on the court's conclusion that other co-conspirators received substantially more lenient sentences).<sup>182</sup> General Noriega's designation as a POW required that the GPW govern the conditions of his custody while he was held in the U.S.<sup>183</sup> As a result, he was held in a private cell in the Federal Correctional Facility in Miami, received annual visits by the International Committee of the Red Cross, received other benefits such as care packages and private recreation time, and was permitted to retain his uniform and military insignia and badges. However, his status as a POW in no way limited the authority of the U.S. to subject him to punitive confinement after hostilities terminated.

General Noriega became eligible for parole in September 2007.<sup>184</sup> However, the U.S. was not the only country interested in prosecuting General Noriega for criminal activity committed during his reign as Chief of the PDF and de facto Panamanian head of state. During General Noriega's incarceration, the French government tried and convicted him in absentia for money laundering offenses in France.<sup>185</sup> As a result, shortly before his scheduled release on parole, the French government requested the extradition of General Noriega to France to be retried for violations of French law (the French agreed to vacate his original absentia conviction).<sup>186</sup> This request was made pursuant to an extradition

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182. Associated Press, *Federal Judge Reduces Noriega's Prison Sentence by 10 Years*, LUBBOCK ONLINE (Mar. 5, 1999), [http://lubbockonline.com/stories/030599/nat\\_030599058.shtml](http://lubbockonline.com/stories/030599/nat_030599058.shtml).

183. *Noriega v. Pastrana*, 564 F.3d 1290, 1293 n.1 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1002 (2010).

184. *Id.* at 1292–93.

185. *Id.* at 1293 n.2. General Noriega owned several apartments in Paris and frequently visited France during his time in power. The French alleged that he laundered approximately 2.3 million euros in ill-gotten gains from his connections with the Medellin drug cartel. *Noriega to Stand Trial in Paris*, RTE NEWS (June 25, 2010), <http://www.rte.ie/news/2010/0625/noriega.html>.

186. *Noriega*, 564 F.3d at 1293.

treaty in place between France and the U.S.<sup>187</sup> In response to this request, the U.S. filed a complaint for the extradition of General Noriega to France.<sup>188</sup>

General Noriega objected to the extradition and filed a writ of habeas corpus arguing that the GPW prevented his transfer to France.<sup>189</sup> Finally, it seemed that General Noriega's status as a POW might provide him with a significant benefit. His challenge was based on Article 87 of the treaty, which prohibits a detaining power from transferring a POW to another power when the other power refuses to recognize the detainee's POW status and respect the Convention:

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.<sup>190</sup>

Because France had no intention of treating General Noriega as a POW—perhaps unsurprising considering he was the Commanding General of an Army not even in existence—General Noriega asserted extradition would violate U.S. obligations under the Convention.<sup>191</sup> Unfortunately for General Noriega, he was about to fall victim to a law enacted 17 years after his capture to limit access to judicial remedies by a very different group of captives from a very different war: the Military Commissions Act of 2006.<sup>192</sup>

Two significant questions were therefore raised by General Noriega's invocation of the GPW to block his extradition: first, whether the MCA bars a POW from invoking the GPW as a basis for remedy in habeas proceedings in the United States, and second, whether the GPW prevents the extradition of a POW from the

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187. Extradition Treaty, U.S.-Fr., art. 1, Apr. 23, 1996, S. TREATY DOC. NO. 105-13 (2002).

188. *Noriega*, 564 F.3d at 1293.

189. *Id.* General Noriega incorrectly filed his habeas petition under 28 U.S.C. § 2255, which allows a prisoner to challenge his sentence. The Federal District Court nonetheless reviewed the case, expecting that a petition under the proper habeas statute would be filed. General Noriega subsequently filed a petition under 28 U.S.C. § 2241, asserting that he was being held in violation of the GPW.

190. Geneva III, *supra* note 15, art. 12.

191. *Noriega*, 564 F.3d at 1294.

192. Pub. L. No. 109-366, §§ 5, 7, 120 Stat. 2600, 2631, 2635 (codified as amended at 18 U.S.C. § 2441(e) (2006)).

detaining power to a country other than his home country upon termination of hostilities.<sup>193</sup>

#### A. The MCA and Habeas Review

The first major issue raised by General Noriega's fight to block extradition to France involved whether the court could even consider a challenge based on invocation of the GPW in habeas proceedings.<sup>194</sup> In an effort to limit the ability of al-Qaeda and Taliban captives held in Guantánamo from challenging their detention, Congress included in the MCA (a law enacted for the primary purpose of providing statutory authority for the trial of alien unprivileged belligerents by military tribunal) several provisions prohibiting or severely restricting the ability of a prisoner to seek habeas relief.<sup>195</sup> The provision of the MCA that erected a barrier to General Noriega's invocation of the GPW is contained in Section 7 of the Act, which bars enemy combatants from habeas relief in U.S. courts.<sup>196</sup> Although federal courts initially deferred to this provision in the MCA and refused to entertain enemy combatant habeas petitions, in a landmark decision the Supreme Court found this prohibition of habeas review to be unconstitutional.<sup>197</sup> In *Boumediene v. Bush*, the Court held that Guantánamo detainees were constitutionally entitled to seek habeas relief, and therefore the MCA's prohibition violated the Constitution.<sup>198</sup>

General Noriega's challenge did not, however, implicate the invalidated Section 7 of the MCA. Instead, it was Section 5 of the Act that the government cited to prevent General Noriega from invoking the GPW.<sup>199</sup> Section 5 restricts the arguments that may be raised by enemy combatants in a habeas action, but does not bar habeas relief altogether.<sup>200</sup> Specifically, Section 5 provides that enemy combatants are barred from invoking the Geneva Conventions in civil actions against the U.S. in a U.S. court.<sup>201</sup>

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193. *Noriega v. Pastrana*, 130 S. Ct. 1002, 1002 (2010) (Thomas, J., dissenting).

194. *Noriega*, 564 F.3d at 1296.

195. See Military Commissions Act of 2006 §§ 5, 7.

196. *Noriega*, 564 F.3d at 1294.

197. *Boumediene v. Bush*, 553 U.S. 723 (2008).

198. *Id.* The Court did not address whether the Guantánamo detainees were entitled to be awarded relief or whether they were lawfully detained.

199. *Noriega*, 564 F.3d at 1296.

200. *Id.* at 1294.

201. Military Commissions Act of 2006 § 5.

General Noriega's challenge required the court to address two significant constitutional questions generated by Section 5. The first issue was whether the GPW as a treaty trumped the subsequent statute pursuant to the Supremacy Clause of the Constitution.<sup>202</sup> General Noriega argued that Congress could not constitutionally enact legislation that nullified provisions of the GPW.<sup>203</sup> Thus, as a POW, General Noriega contended that he was entitled to the protections of the Convention and therefore must necessarily be permitted to make arguments under GPW in his habeas proceedings, despite Section 5's ban against such arguments.<sup>204</sup> The second challenge presented by Section 5 of the MCA was whether the limitation on the types of arguments that could be made in habeas proceedings amounted to an unconstitutional denial of habeas relief, much like the ban on habeas actions found to be unconstitutional by the Supreme Court in *Boumediene*.<sup>205</sup>

The Federal District Court bypassed these constitutional questions by ruling that the GPW did not bar the extradition of General Noriega.<sup>206</sup> The Eleventh Circuit affirmed the lower court's decision but made a specific determination that the MCA controlled its resolution of General Noriega's challenge, finding that Section 5 of the Act was a constitutional limitation on the substantive law applicable during habeas actions.<sup>207</sup> As a predicate matter, the appellate court opined that it did not need to determine whether the GPW was self-executing and therefore judicially enforceable.<sup>208</sup> The court reasoned that the Constitution empowered Congress to enact any legislation it saw fit, even if that legislation conflicted with the provisions of a self-executing international treaty.<sup>209</sup> The court noted that a statute enacted after the adoption of a treaty nullifies the treaty's provisions to the

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202. *Noriega*, 564 F.3d at 1295–96.

203. *Id.*

204. *Id.* at 1296–97.

205. *Id.* at 1294.

206. *United States v. Noriega*, 694 F. Supp. 2d 1268, 1273 (S.D. Fla. 2007).

207. *Noriega*, 564 F.3d at 1295–96.

208. *Id.*

209. *Id.* This aspect of the court's decision is consistent with longstanding federal jurisprudence and is traditionally characterized as the "last-in-time rule." See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 600 (1889), which concluded that treaties and acts of Congress are co-equals pursuant to the Supremacy Clause, and "no paramount authority is given to one over the other" and finding also that "the last expression of the sovereign will must control." Because of this, courts historically presume that latter-in-time statutes are intended by Congress to operate consistently with treaty obligations. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

extent that the treaty conflicts with the statute.<sup>210</sup> Thus, the court rejected General Noriega's assertion that the MCA violated the Supremacy Clause and found that "Congress has superseded whatever domestic effect the Geneva Conventions may have in actions such as [the Noriega case]."<sup>211</sup>

The court further noted that the constitutional problems posed by the bar to habeas actions in Section 7 of the MCA were not present in Section 5.<sup>212</sup> The court found that because Section 5 only prohibited General Noriega from making one type of argument in his habeas proceeding and did not effectively ban him from making all arguments in seeking habeas relief, Section 5's limitation did not violate the Suspension Clause and was therefore distinct from the defect identified in Section 7 by the *Boumediene* decision.<sup>213</sup>

Following the decision of the Eleventh Circuit, General Noriega petitioned the Supreme Court for review of the decision, a petition denied by the Court.<sup>214</sup> The significance of the Eleventh Circuit's interpretation of Section 5 was however revealed by the fact that two Justices took the unusual step of dissenting to the denial of the petition. Justice Thomas, joined by Justice Scalia, filed a lengthy and vigorous dissent criticizing the Court's unwillingness to provide a definitive interpretation of Section 5.<sup>215</sup> Justice Thomas argued that the Court needed to hear the appeal to clarify the significant questions of law that were raised by the case.<sup>216</sup> Specifically, Justice Thomas asserted that the petition offered the Court an ideal opportunity to provide guidance on how laws like that contained in Section 5 impact a prisoner's constitutional right to habeas corpus.<sup>217</sup> Further, Justice Thomas indicated that the Court needed to provide clarity on "whether the Geneva Conventions are self-executing and judicially enforceable."<sup>218</sup> What was particularly compelling about the petition, according to Justice Thomas, was that it enabled the Court to address an issue of potential critical importance to the "war on terror" in a context immune from the charged atmosphere of

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210. *Noriega*, 564 F.3d at 1295–96.

211. *Id.* at 1296.

212. *Id.* at 1294.

213. *Id.*

214. *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010).

215. *Id.* at 1002 (Thomas, J., dissenting).

216. *Id.* at 1002–03.

217. *Id.* at 1002.

218. *Id.*



Guantánamo cases.<sup>219</sup> In short, General Noriega was an ideal supernumerary for the eventual detainee challenges to Section 5.

The Supreme Court's decision to deny certiorari has a far broader impact than the Noriega case. Even the inference that the Eleventh Circuit's interpretation of Section 5 was correct will invite other federal courts to avoid difficult questions of Geneva Convention applicability in future detainee habeas litigation.<sup>220</sup> In contrast, a determination that Section 5 is invalid would place the legislative and executive branches on notice that their efforts to place limits not only on access to habeas review, but also on law applicable to habeas review, are invalid. As Justice Thomas noted in his dissent, without concrete guidance from the Supreme Court, lower courts will continue to struggle with the validity and applicability of Section 5 of the MCA in actions involving detainees seeking habeas relief, actions that are unlikely to abate after the Court ruled in *Boumediene* that outright denial of habeas review is unconstitutional.

### *B. Extradition*

Underscoring the confusion of the lower courts about the relationship between the MCA and the constitutional right to habeas corpus, the Eleventh Circuit analyzed whether the GPW barred General Noriega's extradition to France, despite the court's determination that Section 5 barred invocation of the GPW in General Noriega's habeas proceeding.<sup>221</sup> The fact that the court felt compelled to address General Noriega's GPW arguments despite its determination that such arguments were invalid in habeas proceedings is a clear indication of the significant uncertainty in the law governing this area.

In deciding the permissibility of General Noriega's extradition to France, the Eleventh Circuit first examined the applicability of the extradition treaty in place between France and the U.S.<sup>222</sup> The

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219. *Id.* at 1007.

220. Although General Noriega invoked only the GPW, that treaty is one of four Geneva Conventions of 1949, each of which protects a distinct category of war victims. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, T.I.A.S. 3363; Geneva III, *supra* note 15; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. 3365.

221. *Noriega v. Pastrana*, 564 F.3d 1290, 1297–98 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1002 (2010).

222. *Id.* at 1294–95.

law of extradition is governed by treaties between nations and is generally limited by the long-standing doctrines of speciality and dual criminality.<sup>223</sup> Under these restrictions, a state seeking the extradition of a person cannot try that person for offenses other than those for which he is being extradited.<sup>224</sup> Further, a state can only extradite a person if the conduct for which he is being prosecuted is illegal in both the surrendering state and the state seeking the extradition.<sup>225</sup> Under the treaty in place between France and the U.S., each state is obligated to surrender a person to the requesting state if the person is accused of an offense that is “punish[able] under the laws in both States by deprivation of liberty for a maximum of at least one year or by a more severe penalty.”<sup>226</sup> Thus, General Noriega’s conviction in France for money laundering met the qualifications established in the treaty, satisfying the doctrines of speciality and dual criminality.<sup>227</sup> For this reason, the U.S. asserted that contrary to General Noriega’s argument, it actually bore an affirmative treaty obligation to surrender General Noriega to France under the treaty’s terms.<sup>228</sup>

General Noriega argued that Articles 118 and 119 of the GPW prevented his extradition to France and that the Convention required that he be repatriated to his home country of Panama.<sup>229</sup> Article 118 of the GPW obligates a detaining power to release and repatriate POWs “without delay after the cessation of active hostilities.”<sup>230</sup> This provision is expanded upon in Article 119, which states that “[p]risoners of war against whom criminal proceedings for an indictable offense are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offense.”<sup>231</sup> Thus, General Noriega asserted that the GPW trumped any extradition treaty obligation between the U.S. and France and required the U.S. to return him to Panama after completion of his criminal sentence in the U.S.<sup>232</sup>

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223. See, e.g., *Benitez v. Garcia*, 449 F.3d 971, 976 (9th Cir. 2006).

224. See, e.g., *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir. 1986).

225. See, e.g., *Ordinola v. Hackman*, 478 F.3d 588, 595 n.7 (4th Cir. 2007).

226. Extradition Treaty, U.S.-Fr., art. 1, Apr. 23, 1996, S. TREATY DOC. NO. 105-13 (2002).

227. *Noriega v. Pastrana*, 564 F.3d 1290, 1295 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1002 (2010).

228. *Id.* at 1294–95.

229. *Id.* at 1297–98.

230. Geneva III, *supra* note 15, art. 118.

231. *Id.* art. 119.

232. *Noriega*, 564 F.3d at 1296–97.

The Eleventh Circuit rejected General Noriega's argument and found that the GPW did not bar extradition.<sup>233</sup> First, the court looked to the articles themselves and determined that the language did not explicitly or implicitly bar extradition of a POW from one state to be prosecuted criminally in another state.<sup>234</sup> The court also noted that the stated purposes of the articles were to prevent protracted detention of POWs while at the same time permitting the detention of those being criminally prosecuted.<sup>235</sup> Thus, the court found that there was nothing in either Article 118 or 119 that prohibited General Noriega's extradition to France.<sup>236</sup>

Further, the court examined Article 12 of the GPW, which, as noted above, provides restrictions on the transfer of a POW from a detaining power to another state, allowing such transfers only when the receiving state agrees to apply the Convention.<sup>237</sup> The court noted that Article 12 did not provide any further restrictions on the transfer of a prisoner from one country to another.<sup>238</sup> Thus, the court determined that because both the U.S. and France are parties to the GPW, and because France had provided the U.S. with assurances regarding the rights and benefits General Noriega would receive as a criminal defendant in France (although France made no commitment to treat Noriega as a POW), Article 12 of the Convention was satisfied and there was no bar to extradition.<sup>239</sup>

The court rejected General Noriega's argument that Article 12's failure to include the word "extradite" as a method of transfer necessarily implied that extradition was forbidden under the Article's terms.<sup>240</sup> Reasoning that the language of Article 12 of the GPW is similar to that contained in Article 12 of the Fourth Geneva Convention<sup>241</sup> ("GC IV"), the court pointed out that the ICRC Commentary to Article 12 of the GC IV specifically references extradition as a method of transfer.<sup>242</sup> Thus, the court determined that the term "transfer" in Article 12 of the GPW necessarily included extradition, reasoning that a contrary holding would lead to the incongruous result "that a country would be obligated to extradite a civilian [under the GC IV], but not a

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233. *Id.* at 1299.

234. *Id.* at 1298.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1299.

241. Geneva III, *supra* note 15; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. 3365.

242. *Noriega*, 564 F.3d at 1298-99.

prisoner of war [under the GPW], when they are facing identical criminal charges.<sup>243</sup>

Thus, although the Eleventh Circuit found that General Noriega was barred by Section 5 of the MCA from making arguments under the GPW in his habeas action, it nonetheless examined the substance of his arguments under the Convention. In so doing, the court determined that the GPW does not bar a detainee's extradition to another country for criminal prosecution when the receiving country is a signatory to the Convention and the transferee country is satisfied that the receiving country will treat the transferee in a manner consistent with the GPW. Following the Supreme Court's denial of certiorari in the case, and almost three years after the French government made its initial request, extradition proceedings in the Noriega case commenced.<sup>244</sup> General Noriega has since been transferred to France, prosecuted, convicted, and sentenced to an additional seven years in prison.<sup>245</sup>

#### CONCLUSION

General Noriega's journey through the American legal system demonstrates many of the difficult issues related to addressing the extraterritorial conduct of enemy personnel in U.S. courts. Scholars and commentators generally have overlooked his journey, which has been overshadowed by the more proximate issues of the so-called war on terror. However, in many ways the legal issues triggered by General Noriega's capture, prosecution, and extradition serve as a prologue to the innumerable challenges confronted by our nation following the terrorist attacks of September 11, 2001. It would be disingenuous to suggest some larger profound lesson from his experience. However, his experience, or perhaps more appropriately the efficacy of existing law to address the many issues generated by his capture and prosecution, serves to illustrate that existing international and U.S. law provide a rational and sufficiently flexible framework for reconciling national security interests and the rights of wartime captives. Issues relating to General Noriega's status as a POW and the rights afforded to him under international conventions, the applicability of U.S. law to acts committed by the General

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243. *Id.* at 1299.

244. Elisabeth Malkin, *Noriega Extradited to France to Face Charges*, N.Y. TIMES, Apr. 26, 2010, at A12.

245. David Jolly, *French Court Sentences Noriega to Seven Years*, N.Y. TIMES, July 7, 2010, at A12.

overseas, and the ability of the U.S. to extradite General Noriega were all effectively addressed using laws in place at the time of his detention.

This does not, of course, mean that the law related to the treatment of captured enemy personnel is without uncertainty. As explained throughout this Article, government legal advisors, prosecutors, defense lawyers, and judges were challenged by a number of unique legal issues related to General Noriega. What is significant about General Noriega's case, however, is the commitment of the state and judiciary to address those challenges within the framework of existing law, with no attempt to erect extra-legal solutions for novel problems. This commitment provides a lens through which judges, lawyers, and scholars alike can view the complex legal issues that will inevitably confront the nation in the future. Policies and procedures historically in place to safeguard the rights of those faced with the prosecutorial power of the U.S. are sufficiently authoritative and adaptable to protect those who are captured by American forces in contexts not previously contemplated.