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COMMENTS

AN INQUIRY REGARDING THE INTERNATIONAL AND DOMESTIC LEGAL PROBLEMS PRESENTED IN *UNITED STATES v. NORIEGA*

I. INTRODUCTION

On February 4, 1988 General Manuel Antonio Noriega, Commander-in-Chief of the Panama Defense Forces (PDF) and *de facto* leader of Panama,¹ was indicted by United States grand juries in Miami and Tampa, Florida. The twelve-count Miami indictment² charged that General Noriega, as a "principal,"³ had violated the Travel Act,⁴ participated in a racketeering enterprise (RICO),⁵ and conspired to import, distribute and/or manufacture cocaine for sale in the United States.⁶ The three-count Tampa in-

1. See *infra* note 99 and accompanying text.

2. *United States v. Noriega*, No. 88-0079CR (S.D. Fla. filed Feb. 4, 1988). Indicted along with Noriega were Pablo Escobar Gaviria and Gustavo DeJesus Gaviria-Rivero, leaders of the Medellin drug cartel; Major Luis del Cid, an officer in the PDF; Amet Paredes, son of former Panamanian National Guard Commander Reuben Dario Paredes; Ricardo Bilonick, a Panamanian civilian who was a part-owner of Panamanian cargo carrier Inair Airlines; Brian Davidow, a cocaine distributor based in Miami; Francisco Chavez-Gil, an intermediary; David Rodrigo Ortiz-Hermida, Roberto Steiner, Eduardo Pardo, and Daniel Miranda, aircraft pilots; and Herman Velez, William Saldarriaga, Jaime Gomez, and Luis Fernando Escobar-Ochoa, Colombian cocaine traffickers.

3. *Id.* 18 U.S.C. § 2 (1982) states that whoever directly or indirectly, by aiding and abetting, commits a crime against the United States is punishable as a principal.

4. *Id.* 18 U.S.C. § 1952(a)(3) (1982) proscribes the use of interstate or foreign commerce, through travel or otherwise, with intent to facilitate unlawful activity and states that such an act is punishable by a fine not exceeding \$10,000 or imprisonment for not more than five years.

5. *Id.* 18 U.S.C. §§ 1962(c), (d) proscribe participation in, or conspiracy with regard to, an enterprise engaged in a pattern of racketeering.

6. *Id.* 21 U.S.C. § 963 (1982) provides for punishment of individuals attempting or conspiring to commit an offense against the United States; 21 U.S.C. § 959 (1982) prohibits the manufacture, distribution and intended importation of a controlled substance into the

dictment⁷ charged that General Noriega had conspired to import and/or distribute marijuana for sale in the United States.⁸

The indictments of General Noriega are virtually without legal precedent. Never has the United States attempted to extend its criminal laws to acts committed by the leader of an important strategic ally with whom the United States has openly conducted relations,⁹ who, in return, has lent support to United States policy in Latin America,¹⁰ and where such allegedly criminal acts were committed outside United States territory.¹¹ What makes the case even more interesting is that prior to and following the indictments, a number of reports have appeared in the press relating tales of General Noriega's alleged double-dealings and participation in illicit drug trade over the past number of years¹² — activities apparently engaged in with the tacit approval of the United States. Thus, although certain officials in the United States Government may have had knowledge of General Noriega's allegedly questionable business activities, those officials obviously were willing to overlook such activities in exchange for the General's support of United States military and intelligence programs in Central America. Such a revelation necessarily warrants exacting scrutiny of the political circumstances surrounding United States relations with General Noriega, and the legal tools employed in the facilitation of the indictments.

United States, including acts of manufacture or distribution committed outside of the territorial jurisdiction of the United States; 21 U.S.C. § 952 (1982) proscribes the importation of controlled substances subject to certain exceptions.

7. *United States v. Noriega*, No. 88-28CRT (M.D. Fla. filed Feb. 4, 1988). The indictment also named Panamanian businessman Enrique Pretelt.

8. *Id.* 21 U.S.C. § 846 (1982) states that persons who attempt or conspire to commit any offense involving controlled substances are subject to punishment by imprisonment or fine; 21 U.S.C. §§ 952, 963, *supra* note 6. Essentially, the Miami indictment (the more serious of the two) alleges that General Noriega participated in an unlawful racketeering enterprise, utilizing his official position to "facilitate the manufacture and transportation of large quantities of cocaine destined for the United States and to launder narcotics proceeds." *United States v. Noriega*, No. 88-0079CR (S.D. Fla. filed Feb. 4, 1988), at 1. The Tampa indictment charges General Noriega with smuggling one million pounds of marijuana into the United States between 1982 and 1984. *Noriega*, No. 88-28CRT (M.D. Fla. filed Feb. 4, 1988), at 1. *See Noriega Indicted by U.S. for Links to Illegal Drugs*, N.Y. Times, Feb. 6, 1988, at 1, col. 2 (city ed.); *Miami Jury Indicts Noriega*, Miami Herald, Feb. 5, 1988, at 1A, col. 1 [hereinafter *Miami Jury*].

9. *See infra* note 121.

10. *See, e.g.*, text accompanying *infra* notes 44-51.

11. *U.S.: Noriega Sold Out Panama*, Miami Herald, Feb. 6, 1988, at 20A, col. 1 [hereinafter *Noriega Sold Out*]. *See infra* note 18.

12. *See, e.g.*, *infra* note 25.

The United States Attorney under whom the indictments of Noriega were issued, has acknowledged that General Noriega probably never will stand trial in the United States.¹³ Such an acknowledgment, viewed in light of provisions of the Panamanian constitution,¹⁴ Panamanian statutory law,¹⁵ and an extradition treaty with the United States prohibiting the extradition of Panamanian nationals,¹⁶ serves as a strong basis for questioning the law enforcement purpose of the grand jury proceedings and subsequent indictments of General Noriega.

Noriega represents the ultimate intersection of United States domestic law and foreign policy,¹⁷ and its precedential value should not be understated.¹⁸ The case presents interesting questions of

13. See *Noriega Sold Out*, *supra* note 11 (statements of former United States Attorney for the Southern District of Florida Leon B. Kellner); *Miami Jury*, *supra* note 11. See also *Others Could Help Arrest Noriega*, *Miami Herald*, Feb. 6, 1985, at 21A, col. 1 (examining the unlikelihood of direct extradition of Noriega from Panama to the United States and the possibility of indirect extradition from a third country should Noriega leave Panama) [hereinafter *Others Could Help*].

14. PANAMA CONST. art. 24 (1983) (1986 ed.) ("The State may not extradite its nationals . . . for political offenses.").

15. PANAMA CRIMINAL PROCEDURE CODE art. 2508(1); Law No. 23, art. 30(1) (governing the extradition of persons charged with drug-related offenses) *cited in* *United States v. Noriega*, No. 88-0079CR (S.D. Fla. Apr. 5, 1988) at exhibit A, p.3 (Response of United States to Defendant's Motion to Allow Special Appearance of Counsel, declaration of Mary Ellen Warlow, Associate Director of the United States Justice Department Criminal Division's Office of International Affairs).

16. Treaty Providing for the Extradition of Criminals, May 25, 1904, United States-Panama, art. 5, 34 Stat. 2851, T.S. No. 445, *reprinted in* 2 I. KRAVASS & A. SPRUDZS, *EXTRADITION LAWS & TREATIES: UNITED STATES* 680.1 (1987) ("Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Treaty.").

17. Essentially, United States foreign policy toward Panama implicitly permitted General Noriega to engage in illicit drug trade, *see infra* notes 41-54 and accompanying text, and, therefore, was on a collision course with intensifying United States domestic policy against the importation and use of illegal drugs. In this connection, *Noriega* is a product of the foreign and domestic policy collision and is illustrative of the harmful effects that can arise from maintaining contradictory policies.

18. Only once before, in *United States v. Saunders*, Nat'l L.J., Aug. 5, 1985, at 14, col. 2 (S.D. Fla. July 19, 1985), has the United States prescribed its criminal laws over a foreign leader. See *Duffy, Three Island Leaders Face Bribe Counts*, Nat'l L.J., July 29, 1985, at 6, col. 1. However, the circumstances surrounding *Saunders* bear little resemblance to those involved in *Noriega*.

In 1985, a United States grand jury indicted several officials of the Turks and Caicos Islands, a self-governing Caribbean protectorate of Great Britain. Norman Saunders, Chief Minister of the Turks and Caicos Islands, and fellow Turks and Caicos officials Alden Smith, Parliamentary Secretary to the Ministry of Works, and Stafford Missick, Minister of Commerce and Development, were charged with violation of the Travel Act, 18 U.S.C. §§ 371, 1952 (a)(3) (1982), and conspiracy to import and/or distribute controlled substances for sale in the United States, 21 U.S.C. § 963 (1982). The indictment of Saunders, Smith, and

first impression regarding the reasonableness of the United States exercise of extraterritorial jurisdiction and the utilization of the federal grand jury in a case thoroughly riddled with politics. While federal grand jury procedures provide a convenient means for the United States to apply pressure on foreign leaders who are perceived to be breaking United States law extraterritorially, such utilization of the grand jury exposes the institution's weakness of political manipulability and thoroughly defeats its purpose in cases where the United States does not maintain the leverage necessary for effective enforcement of an indictment.¹⁹ In the instant case, the United States government has taken advantage of its unique position as the sole overseer of the federal grand jury process, and in so doing has been accused — with or without justification — of conducting foreign policy through its system of criminal procedure.²⁰ The indictments of General Noriega have placed in jeop-

Missick was issued at the conclusion of an intensive three-month United States Drug Enforcement Administration (DEA) investigation, the focus of which was the dissolution of support organizations important to the export of illicit drugs to the United States. See *Chief Minister Arrested on Drug Charges*, Sunday Times (London), Mar. 7, 1985, at 6, col. 4 [hereinafter *Chief Minister Arrested*]. The grand jury received direct evidence supporting the DEA's allegation that, in exchange for money, Saunders had granted aircraft landing rights on the Turks and Caicos Islands to drug smugglers en route to Colombia. The direct evidence consisted of video tapes of Saunders taking kickbacks from DEA agents posing as drug smugglers between January and March 1985 in Miami. Ultimately, Saunders, Smith and Missick were arrested while visiting the United States on business unrelated to the crimes for which they had been indicted, see *Chief Minister Arrested*, and Saunders and Missick subsequently were convicted. See Duffy, *Two Turks and Caicos Leaders Convicted on Drug Charges*, Nat'l L.J., Aug. 5, 1985, at 14, col. 2. Norman Saunders was convicted on one count of conspiracy to travel to promote a narcotics business and five counts of travel to further that business. *Id.* Stafford Missick was convicted of one count of conspiracy to import marijuana and cocaine into the United States, one count of conspiracy to travel to promote that business, and two counts of actual travel in furtherance of that business. *Id.*

Noriega is easily distinguished from *Saunders*. Although certain charges contained in the respective indictments were similar, the charges contained in the *Noriega* indictments are far more extensive than those involved in *Saunders*. More importantly, unlike General Noriega, who was charged with crimes in which he participated outside United States territory and has yet to be taken into custody, Norman Saunders was arrested as a result of criminal transactions in which he participated within United States territory. See, e.g., *Noriega Sold Out*, *supra* note 11.

Simply put, Norman Saunders and his cohorts were the subjects of a well-planned DEA operation reasonably calculated to bring the suspects to trial in the United States, thereby achieving a valid law enforcement purpose. On the other hand, the effort to indict General Noriega, while certainly the result of intensive investigation and evidence-gathering, see *Miami Jury*, *supra* note 8, appears to have not been thoughtfully conceived.

19. See *infra* notes 143-46 and accompanying text.

20. See, e.g., Strasser, *Noriega Charges: Misuse of Courts?*, Nat'l L.J., Feb. 22, 1988, at 3, col. 1. Noriega's American attorneys have asserted that "the United States is trying to remove General Noriega for various reasons and is conducting 'diplomacy by indictment'

ardly the credibility of United States criminal law and procedure, and deference to the rule of law both at home and abroad. It is essential, therefore, that the United States rethink the legal strategy employed in *Noriega* in preparation for similar future cases.

II. BACKGROUND: THE POLITICAL NATURE OF THE CASE

A. *Noriega and the Consolidation of Power*

Manuel Antonio Noriega began his rise to power in the early 1970s as head of the intelligence branch (G-2) of the Guardia Nacional de Panama (National Guard) under the regime of General Omar Torrijos.²¹ Noriega, therefore, was privy to, and had control

[and that] "[t]he purpose of [the Miami indictment] is to shape foreign policy," thereby resulting in a misuse of the courts. *Id.* See also *Lawyer: Noriega Indicted for Opposing U.S. Policy*, Miami Herald, Feb. 8, 1988, at 4A, col. 1 (examining the credibility of the grand jury witnesses whose testimony contributed to the issuance of the indictments, and the slim chance of Noriega standing trial in the United States).

21. In 1968 Torrijos commanded a successful *coup d'état* resulting in the overthrow of civilian President Arnulfo Arias Madrid. Torrijos was a respected military leader whose strong nationalism garnered the broad support of the Panamanian military and populace. See generally W. JORDEN, *PANAMA ODYSSEY* (1984). On the other hand, President Arias, while personally well-liked by Panamanians, was involved in an unpopular government suspected of mass corruption. *Id.*

Rather than forming a new civilian government, Torrijos remained in power. In March 1969, Torrijos declared a temporary formal moratorium on organized political activity and the legal extinction of all political parties, pending the reformulation of the electoral code and a restructuring of the party system. GALE RESEARCH COMPANY, *COUNTRIES OF THE WORLD YEARBOOK 1987* 940-49 (1987) [hereinafter GALE RESEARCH]. Thus, formal political debate within Panama was stifled until the "temporary" moratorium was lifted in order to allow debate on the 1977 Panama Canal Treaties, *infra* note 43. See generally Arias Calderon, *Panama: Disaster or Democracy*, 66 FOREIGN AFF. 328 (Winter 1987/88).

In addition, Torrijos institutionalized military rule in Panama through constitutional changes including a provision which granted him extraordinary executive powers. See PANAMA CONST. art. 277 (1972). Indeed, contrasting certain provisions of the 1946 Panama constitution with the 1972 constitution vividly illustrates the "legal" integration of military rule into the Panamanian governmental structure after 1968.

The Panama constitution of 1946, in its description of the Panamanian State, provided for the separation of powers among a tripartite system consisting of executive, legislative, and judicial branches; it made no mention of the military or police. See PANAMA CONST. tit. 1, art. 2 (1946) ("The Public power emanates only from the people. The State exercises it in the manner established by this Constitution, by means of the Legislative, Executive and Judicial Organs, which act within limits and separately, but in harmonious collaboration."). Rather, the purposes and functions of the military and police — known jointly as the "Fuerza Publica" (Public Force) — were addressed separately. See PANAMA CONST. tit. 8, arts. 248-51 (1946) (providing for the separate organization of the military and the National Police, and explicitly acknowledging both the nondeliberative nature of the Public Force and the role of the lawmaking body of the government regarding the power to regulate the "importation, manufacture and use" of certain arms).

The 1972 constitutional revisions substantially altered the structure of national govern-

over, the exchange and transmission of military intelligence, criminal investigations, customs, and immigration.²² In such a powerful position, Noriega became valuable to the United States in light of that country's political-military interests in Latin America,²³ and his services allegedly were utilized by the United States Central Intelligence Agency (CIA) and the Defense Intelligence Agency

ment in Panama. First, the 1972 constitution placed the Public Force on virtually equal footing with the legislative, executive, and judicial branches by explicitly incorporating the Public Force into the description of the Panamanian State. See PANAMA CONST. tit. 1, art. 2 (1972) ("The Public power emanates from the people. It is exercised by the Government through the distribution of functions among Executive, Legislative, and Judicial Branches, members of which will act in harmonious collaboration among themselves and with the Public Forces" [emphasis added]). Second, the provision for separation of powers contained in the 1946 constitution was eliminated. Third, Title 8 of the 1946 constitution, describing the role of the Public Force, was reformulated into new Title 13 which explicitly stated that the "National Defense and Public Security shall be exercised by an institution called the National Guard." Gone were the 1946 provisions regarding the separation of the military and police and the nondeliberative nature of the Public Force; the provision regarding the role of the lawmaking body in the regulation of the manufacture, importation and use of certain arms was made innocuous by amendments. See PANAMA CONST. tit. 13, arts. 269-71 (1972).

Ultimately, it was a particular enactment under new Title 13, subtitled, "Transitory Provisions," which, when read in connection with the other new constitutional provisions, gave Torrijos extraordinary authority as head of government. For example, Torrijos was given, for a period of six years, express authority as "Commander-in-Chief of the National Guard [and] Maximum Leader of the Panamanian Revolution" to perform functions ranging from free appointment and removal of Ministers of State to approval power regarding the execution of contracts and the power to direct foreign relations. Moreover, Torrijos was granted the power to participate and vote in the National Legislative Council and to participate in the debates of the National Assembly. See PANAMA CONST. tit. 13, art. 277 (1972).

In the late 1970s, pursuant to agreements made with United States President Jimmy Carter during the negotiation of the Panama Canal Treaties, see *infra* note 43, General Torrijos embarked on a phase of democratic reform in Panama as a way of guiding the transition from military to civilian rule. While such "reform" gave the appearance that Panama was heading toward the United States form of democracy, thereby clearing the way for United States Senate ratification of the Panama Canal Treaties, the changes merely were cosmetic, because the provisions of the 1972 Panama constitution, with the exception of article 277, remained in force. See PANAMA CONST. tit. 13, art. 277 (1972). Thus, undemocratic laws — such as the "temporary" 1969 moratorium on formal nongovernmental political activity — finally were ended and political parties again were legal in Panama. See GALE RESEARCH, at 944. However, General Torrijos subsequently founded the Democratic Revolutionary Party (PRD), a political vehicle of the National Guard, in order to perpetuate his rule. See Arias Calderon, at 331-32. Regardless of Torrijos' democratic reforms, the formal role of the military in government was not about to change, and following Torrijos' death, the top officers of the National Guard, including Noriega, Ruben Dario Paredes, and Roberto Diaz Herrera, established a compromise agreement granting each a role in the command of the military and the governance of Panama. *Id.* at 331.

22. See Cooper, Lane, Nordland, Gonzalez, Parker & Sandza, *Drugs Money & Death*, NEWSWEEK, Feb. 15, 1988, at 32 [hereinafter Cooper & Lane].

23. See *infra* notes 41-54 and accompanying text.

(DIA) of the United States Department of Defense.²⁴ Interestingly, it was as head of G-2 that Noriega was first suspected of being involved in illicit drug trafficking.²⁵ Of course, Noriega's access to intelligence information placed him in close proximity to General Torrijos,²⁶ and by the time of Torrijos' demise in a 1981 helicopter crash,²⁷ Noriega had accumulated a wealth of political influence.²⁸ Noriega was the most logical candidate to replace General Torrijos, and had positioned himself in anticipation of the ensuing struggle for succession.

Noriega assumed command of the National Guard in 1983, and three significant events followed. First, the 1972 constitution was amended, formally eliminating the role of the military in the government.²⁹ The approved draft was essentially a resurrection of the 1946 Constitution.³⁰ However, by 1983, the National Guard had acquired substantial political and economic power, and was entrenched in the operation of the Panamanian government. These factors, combined with the chilling effect of a 1969-77 moratorium on formal political activity, the power of the National Guard-controlled Democratic Revolutionary Party (PRD), a thriving canal-based economy, United States support, and the nationalistic ideology of "Torrijismo," permitted Noriega and the military to circum-

24. Indeed, it has been alleged that General Noriega was financially remunerated for intelligence services he supplied beginning in the late 1960s. See Cooper & Lane, *supra* note 22, at 35; Arias Calderon, *supra* note 21, at 340. See generally *infra* note 57.

25. Reports indicate that the United States government suspected General Noriega's ties to drug trafficking as far back as 1972, but that the United States believed Noriega's position and knowledge were too valuable to be outweighed by allegations of his involvement in illegal narcotics trade. See, e.g., *Miami Jury*, *supra* note 8; *U.S. Suspected Noriega Drug Ties*, *Miami Herald*, Feb. 7, 1988, at 1A, col. 5 ("Official U.S. concern about Noriega's activities was expressed as long ago as 1972 and was reiterated in a Defense Department memorandum dated November 1, 1985, which noted that the Panamanian armed forces leadership 'is involved in illegal activities (e.g., drugs)'"). See also *U.S. Aides in '72 Weighed Killing Officer Who Now Leads Panama*, *N.Y. Times*, June 13, 1986, at 8, col. 3 (city ed.) ("Law enforcement officials in the Nixon Administration once proposed the assassination of General . . . Noriega, who was then chief of intelligence of the [National Guard], as partial solution to that nation's heavy drug trafficking") [hereinafter *Killing Officer*]; *Panama Strongman Said to Trade in Drugs, Arms and Illicit Money*, *N.Y. Times*, June 12, 1986, at 1, col. 1 (city ed.) ("The army commander of Panama . . . is extremely involved in illicit money laundering . . . drug activities, and has provided a Latin American guerilla group with arms, according to evidence collected by American intelligence agencies") [hereinafter *Strongman*].

26. See Arias Calderon, *supra* note 21, at 332.

27. See generally W. JORDEN, *supra* note 21.

28. See Arias Calderon, *supra* note 21, at 330-32.

29. See generally PANAMA CONST. (1983).

30. See *supra* note 21.

vent the purpose of the 1983 constitutional amendments and to continue in power, under the facade of formal democracy.³¹

Second, in September 1983, the National Guard was formally restructured and renamed the Panama Defense Forces (PDF),³² incorporating under a single command the armed forces (i.e., the National Guard, Air Force, Navy, and Canal Defense Force), the Police, and the Traffic, Immigration, and Investigation Departments.³³ Notably, the PDF was assigned the responsibility of narcotics interdiction.³⁴ Thus, as commander-in-chief of the new PDF, Noriega was in charge of a massive and pervasive military bureaucracy with no civilian oversight.³⁵

Finally, Noriega allegedly had agreed to provide support for fellow commander Ruben Dario Paredes' presidential candidacy in the 1984 elections.³⁶ However, Noriega subsequently undercut the Dario Paredes campaign by creating a coalition of pro-government political parties known as the National Democratic Union (UNADE),³⁷ which, in turn, supported former World Bank vice president Nicolas Ardito Barletta as its presidential candidate.³⁸ Ardito Barletta and UNADE ultimately were victorious in the 1984 elections, amidst charges of election fraud.³⁹ However, the Ardito Barletta presidency was short-lived. In 1985, allegedly as a response to pressure exerted by Noriega, Ardito Barletta resigned after supporting a controversial call for an investigation into the death of political opposition leader Hugo Spadafora.⁴⁰ In the end,

31. See generally W. JORDEN, *supra* note 21; GALE RESEARCH, *supra* note 21; Cooper & Lane, *supra* note 22; Arias Calderon, *supra* note 21; *Miami Grand Jury*, *supra* note 8.

32. See GALE RESEARCH, *supra* note 21, at 949.

33. See *id.* A stated objective of the 1983 military restructuring was the "enhancement of its professional capabilities in preparation for greater responsibilities in defense of the [Panama] canal," the control of which will be transferred to Panama in the year 2000. *Id.* The United States provided the new PDF with assistance pursuant to a 1984 "Force Modernization Plan" involving an increase in the number of officers, troops, and units, and the upgrading of equipment and training for anti-terrorist and low-intensity warfare activities. *Id.* See also Arias Calderon, *supra* note 21, at 333.

34. See GALE RESEARCH, *supra* note 21, at 949.

35. See Arias Calderon, *supra* note 21, at 333.

36. Cooper & Lane, *supra* note 22, at 35.

37. The UNADE coalition primarily consists of the PRD, the Labor Party (PALA), the Republican Party, and the Liberal Party. See Arias Calderon, *supra* note 21, at 333.

38. *Id.*

39. *Id.* Arias Calderon alleges that the Democratic Opposition Alliance (ADO), a coalition primarily composed of the Authentic Panamanian Party and the Christian Democratic Party, "obtained a majority of some 50,000 votes [in the 1984 election] but it was unable to mobilize the country in defense of its victory." *Id.* at 333.

40. *Id.* at 335; Cooper & Lane, *supra* note 22, at 35.

it was General Noriega who became the true leader of Panama, for although he was not an elected official, the General commanded executive power under the new Panamanian military structure, in combination with the entrenched military-based social structure initiated by Torrijos in 1968.

B. United States Strategic Interests in Panama and Relations With Noriega

Since the commencement of its construction in 1897, the oversight, operation and the security of the Panama Canal has been the top priority in United States-Panama relations.⁴¹ Although the canal's importance to the United States has decreased in recent years,⁴² the waterway remains a source of serious American political concern, as illustrated by the continuing debate surrounding the Panama Canal Treaties.⁴³ More immediately, however, United States concern over political events in Latin America and the Caribbean has made cooperation with Panama imperative.

Most importantly, Panama is the headquarters for the 10,000 troop United States Southern Command (SOUTHCOM), which is responsible for American military operations in Latin America.⁴⁴

41. For a detailed accounting of the creation of the Panama Canal and the combination of public and private international interests which brought the canal to fruition see D. McCULLOUGH, *THE PATH BETWEEN THE SEAS* (1977).

42. See Rohter, *The Strategic Importance of a Waterway*, N.Y. Times, Feb. 14, 1988, at 3, col. 4 (city ed.) ("[O]fficials of the Panama Canal Commission, . . . acknowledg[e] that the waterway is no longer critical to the United States and that its relative importance is declining in world trade").

43. Panama Canal Treaty of 1977, Sept. 7, 1977, United States-Panama, 93 Stat. 452, T.I.A.S. No. 10030, reprinted in 16 I.L.M. 1022 (1977); Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, 93 Stat. 452, T.I.A.S. No. 10029, reprinted in 16 I.L.M. 1040 (1977). The treaties provide for the transfer of control of the canal from the United States to Panama in the year 2000. See generally The Panama Canal Act of 1979, Pub. L. No. 96-70, 93 Stat. 452 (codified at 22 U.S.C. § 3601 (1982)) reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 1034; *Recent Developments*, 21 HARV. INT'L L.J. 283 (1980). See also W. FURLONG & M. SCRANTON, *THE DYNAMICS OF FOREIGN POLICYMAKING: THE PRESIDENT, CONGRESS AND THE PANAMA CANAL TREATIES* (1984); W. JORDEN, *supra* note 21; G. MOFFETT, *THE LIMITS OF VICTORY: THE RATIFICATION OF THE PANAMA CANAL TREATIES* (1985). Specifically, the continuing debate involves the allocation of the authority and responsibility to defend the canal, an aspect not clearly provided for in either of the two treaties. See, e.g., Erickson, *The Panama Canal: Potential Problems in the Years Ahead*, 5 FLETCHER FORUM 119 (1981); Maier, *United States Defense Rights in the Panama Canal Treaties: The Need for Clarification of a Studied Ambiguity*, 24 VA. J. INT'L L. 287 (1984); Rohter, *supra* note 42.

44. See Rohter, *supra* note 42. See also W. JORDEN, *supra* note 21; Cooper & Lane, *supra* note 22.

Moreover, Panama has become useful to the United States intelligence community as a convenient monitoring post.⁴⁵ Of course, a military-intelligence investment of such magnitude could not be maintained without stability in the Panamanian government and without the help of General Noriega as Commander-in-Chief of the PDF. According to testimony before the Senate Committee on Foreign Relations Subcommittee on Western Hemisphere Affairs, General Noriega has been instrumental in furthering United States political interests in Latin America⁴⁶ such as assisting the Nicaraguan *contras*.⁴⁷ In exchange, Panama allegedly has been supplied with intelligence information gathered by United States agencies,⁴⁸ and Noriega has been permitted to carry on questionable commercial activities involving both legitimate Panamanian business enterprises⁴⁹ and illicit narcotics trafficking, without resistance from the United States government.⁵⁰ However, it is important to note that such allegations should be weighed against the inherent political tensions involved in the current rift in United States-Panamanian relations.⁵¹

Even with such policy considerations in mind, the conflicting attitudes within the United States Executive Branch regarding re-

45. See Rohter, *supra* note 42.

46. See *United States Putting New Heat on Noriega*, 46 CONG. Q. 293 (1988) [hereinafter *New Heat*]. See also *U.S. Officials Express Concern Over Charges Against Panamanian*, N.Y. Times, June 13, 1986, at 8, col. 3 (city ed.) [hereinafter *Officials Express Concern*].

47. *Id.* See also Parry, *From Pretoria to the Contras?*, NEWSWEEK, Feb. 15, 1988, at 36; *Drug Link to Contras Claimed*, Miami Herald, Feb. 12, 1988, at 10A, col. 1; *Hearings Tie Noriega to Contras and Drugs*, Christian Sci. Monitor, Feb. 11, 1988, at 3; *Pentagon Official Linked to Contra Arms Plan*, Miami Herald, Feb. 8, 1988, at 1A, col. 2; *Ex-Aide: Noriega OK'd Contras' Use of Bases*, Miami Herald, Feb. 11, 1988, at 1A, col. 3; *Noriega Foe: North Asked Help in Arms Plot*, Miami Herald, Feb. 4, 1988, at 15A, col. 1.

48. *Id.* See also *Noriega Got CIA Reports, Ex-Aide Says*, Miami Herald, Feb. 10, 1988, at 1A, col. 5. *But cf.* *Senator Rebuts Testimony*, Miami Herald, Feb. 12, 1988, at 10A, col. 2 ("Senate Intelligence Committee [chairman David Boren] who is looking into U.S. relations with Panama for the past year, says he does not believe the CIA improperly gave classified reports on U.S. Senators to . . . General . . . Noriega").

49. See *U.S. General Tells of "Shady" Dealings by Noriega*, N.Y. Times, Feb. 9, 1988, at 12, col. 1 (city ed.) (testimony of retired General Paul Gorman, commander of SOUTHCOM from 1983 to 1985, before the Senate Committee on Foreign Relations Subcommittee for Western Hemisphere Affairs) [hereinafter *Shady Dealings*]; *General: U.S. Ignored Noriega's Role in Drugs*, Miami Herald, Feb. 9, 1988, at 1A, col. 1 (same); *Businesses Add to Noriega's Clout*, Miami Herald, Feb. 6, 1988, at 1A, col. 1 (giving a detailed account of General Noriega's and the PDF's involvement in various Panamanian businesses).

50. See *supra* note 25.

51. See *infra* notes 55-71 and accompanying text.

lations with General Noriega are obvious and disturbing. For instance, less than one year before the Miami and Tampa indictments for illegal drug trafficking were handed down, in May 1987, Drug Enforcement Administration (DEA) Director John C. Lawn sent letters to General Noriega praising his efforts in illicit drug interdiction.⁵² In addition, American Embassy officials in Panama City described the General as "extremely cooperative" in helping the United States crack down on drug trafficking.⁵³ This praise, so close in time to the indictments and to a United States Department of State recommendation that Panama be penalized for failing to take adequate measures to stem the flow of illicit drugs,⁵⁴ is disconcerting, to say the least. The contradictions seem to beg the question of whether certain officials in the United States Government knew of General Noriega's alleged involvement in illicit drug trafficking.

C. Origins and Frustration of United States Efforts to Oust Noriega: Setting the Stage for Criminal Proceedings

The relatively recent turn in United States relations toward the Noriega regime appears to have been touched off by a spring 1986 United States Senate Committee on Foreign Relations subcommittee hearing regarding allegations of General Noriega's ties to drug trafficking and to the brutal murder of political opposition leader Hugo Spadafora.⁵⁵ Following the Senate inquiry, in June 1986, a number of news articles appeared in the *New York Times* alleging that General Noriega was heavily involved in money laundering, narcotics trafficking, secret dealings with Latin American guerilla groups, and providing intelligence information to Cuba, and that such activities had been ignored by the United States Executive Branch.⁵⁶ In addition, the United States House of Repre-

52. See *U.S. Officials Praised Drug Effort by Noriega*, N.Y. Times, Feb. 9, 1988, at 11, col. 1 (city ed.).

53. See *Shady Dealings*, *supra* note 49.

54. See *State Department Asks Reagan to Penalize Panama Over Drug Trafficking*, N.Y. Times, Feb. 24, 1988, at 12, col. 1 (city ed.). See also *Drug Unit Said to Have Neglected Evidence of Noriega Trafficking*, N.Y. Times, Feb. 13, 1988, at 1, col. 2 (city ed.).

55. See *Situation in Panama: Hearings Before the Subcommittee on Western Hemisphere Affairs of the Senate Committee on Foreign Relations*, 99th Cong., 2d Sess. (1986). See generally Arias Calderon, *supra* note 21; Cooper & Lane, *supra* note 22.

56. See *Strongman*, *supra* note 25; *Killing Officer*, *supra* note 25; *Officials Express Concern*, *supra* note 46 ("The Reagan Administration and its predecessors were . . . aware of General Noriega's . . . activities, including the simultaneous transfer of intelligence to Cuba and the United States. Administration officials said that the United States had been

sentatives Committee on Foreign Affairs conducted its own investigation into corruption and narcotics racketeering within the Panamanian government and the PDF.⁵⁷ Although the House hearings seemed to confirm at least some of the allegations portrayed in the *New York Times* articles, neither Congress nor the Administration appeared willing to pursue further the matter.⁵⁸

It was not until one year later, in the summer of 1987, that the United States was forced to take a firm stand against General Noriega. In June 1987, retired PDF Colonel Roberto Diaz Herrera, a first cousin of Omar Torrijos,⁵⁹ publicly accused General Noriega of taking part in the murder of Hugo Spadafora and the assassination of Torrijos,⁶⁰ committing electoral fraud in 1984, and participating in illegal drug trafficking.⁶¹ Diaz Herrera's remarks were followed by a series of public demonstrations in Panama calling for Noriega's resignation, but General Noriega rebuked the protests and blamed the civil unrest on the United States.⁶² The United States soon joined in the call for democracy in Panama, but appeared unwilling to take any solid steps toward applying overt pressure on General Noriega.⁶³ However, in July, following anti-

willing to accept his activities because of the privileges granted by . . . Noriega . . . for military and intelligence purposes"). Of course, General Noriega denied all of the accusations presented in the press. See *Panamanian, Denying Charges, Says He Won't Quit*, N.Y. Times, June 18, 1986, at A3, col. 3 (city ed.) [hereinafter *Won't Quit*]; *Panamanian Says Charges Are Aimed at Nation*, N.Y. Times, June 14, 1986, at 3, col. 4 (city ed.).

57. See *Issues in United States-Panama Anti-Narcotics Control: Hearings Before the Task Force on International Narcotics Control of the House Committee on Foreign Affairs*, 99th Cong., 2d Sess. (1986).

58. In fact the only action taken by the United States was the delivery by United States Ambassador to Panama, Arthur Davis, of a "formal clarification" of United States policy toward Panama. See, e.g., *U.S. Envoy to Panama Delivers a Note on Policy*, N.Y. Times, June 17, 1986, at A5, col. 2 (city ed.); *U.S. Envoy Outlining Policy for Panama*, N.Y. Times, June 16, 1986, at A8, col. 1 (city ed.).

59. See Arias Calderon, *supra* note 21, at 328.

60. Diaz Herrera alleged that the helicopter crash which took the life of General Torrijos was the result of sabotage. See Kinzer, *infra* note 61.

61. Arias Calderon, *supra* note 21, at 329. See Kinzer, *Future of Canal an Issue Again in Panama*, N.Y. Times, June 21, 1987, at 3, col. 1 (city ed.) ("[A]nti-government riots and other protests were ignited . . . by a series of accusations of military misdeeds [by General Noriega]").

62. See, e.g., *Won't Quit*, *supra* note 56; *Panamanians Promise More Protests*, N.Y. Times, July 12, 1987, at 3, col. 1 (city ed.); *Panama's Government Unleashes Drive to Blame U.S. for Trouble*, N.Y. Times, July 5, 1987, at 1, col. 4 (city ed.); *Panama's Strongman Tries to Ride Out the Storm*, N.Y. Times, June 25, 1987, at A2, col. 3 (city ed.).

63. The only measure taken by the United States at this juncture was a Senate Resolution calling for the restoration of democracy in Panama. S. Res. 239, 100th Cong., 1st Sess., 133 CONG. REC. S8848-49 (1987). See also *New Heat*, *supra* note 46; *U.S. Berates Panamanian Regime in Pressing for Democratic Rule*, N.Y. Times, July 2, 1987, at A1, col. 5 (city

American demonstrations in front of the United States Embassy in Panama City,⁶⁴ the Reagan Administration suspended all military and economic aid to Panama.⁶⁵

During the remainder of the summer and into the autumn of 1987, General Noriega's resistance to political change intensified, as did the anti-government protests within Panama and the swelling tide of United States criticism of the General's regime.⁶⁶ Finally, in late December 1987, the Reagan Administration sent Assistant Secretary of State Richard L. Armitage to Panama in an unsuccessful effort to convince General Noriega to abdicate his position as Commander-in-Chief and make an "honorable" exit.⁶⁷

Thus, the stage was set for the indictments. The official United States position, as enunciated by the Department of Justice, has been that the purpose of the indictments is to achieve a valid law enforcement purpose in seeking to bring a suspected criminal to trial without consideration of United States foreign policy interests.⁶⁸ While much of the public debate surrounding *Noriega* has focused on whether the indictments were issued as an improper way of furthering United States foreign policy where the political apparatus seems to have failed,⁶⁹ such an argument misses

ed.); *Panama Military Holding to Power*, N.Y. Times, Mar. 28, 1987, at 11, col. 1 (city ed.).

64. See *U.S. Lashes Out at Panama Regime*, N.Y. Times, July 5, 1987, at 2, col. 6 (city ed.) ("[T]he State Department said the [Panamanian] military had orchestrated [the demonstrations] to counter American calls for democratic rule").

65. See *U.S. Suspends Aid to Panama to Press Regime for Change*, N.Y. Times, July 24, 1987, at A1, col. 2 (city ed.).

66. See *In Panama, Protest is a Daily Affair*, N.Y. Times, Sept. 27, 1987, at 3, col. 1 (city ed.) ("American Ambassador to Panama, Arthur Davis, delivered a strong protest note to the [Panamanian] government two weeks ago when an American diplomat [David Miller] was arrested and held for eight hours . . ."); *U.S. Walking on Eggshells in Panama Crisis*, N.Y. Times, Aug. 12, 1987, at 3, col. 2 (city ed.).

67. See *U.S. Aide Urged Panama General to Yield Control, Diplomats Say*, N.Y. Times, Jan. 8, 1988, at A1, col. 5 (city ed.). The plan was similar to those which resulted in the removal of the Philippines' Ferdinand Marcos and Haiti's Jean-Claude Duvalier. *Id.* See generally Note, *The Dictator Dilemma: A Comparison of United States and French Asylum Procedures*, 19 N.Y.U. J. INT'L L. & POL. 1087 (1987) (authored by Melissa A. McAndrew).

68. Such a basis for seeking the indictments was reiterated by former Chief Assistant United States Attorney Richard D. Gregorie in a lecture focusing on *Noriega*, given at the University of Miami School of Law on March 8, 1988. See also Sciolino, *Doubts on Panama*, N.Y. Times, Feb. 6, 1988, at 5, col. 5 (city ed.) ("The indictment[s] [were] motivated less by foreign policy considerations than by the doggedness of two Florida Federal [sic] grand juries").

69. An interesting argument can be advanced that the indictments were intended to facilitate United States foreign policy by uniting Panamanian and world opinion against Noriega, thus strengthening the overall bargaining position of the United States in negotiat-

the crucial legal issue of whether, as a matter of United States and international law, prescription of United States criminal jurisdiction and the use of the federal grand jury/indictment process are appropriate in such a blatantly political situation. Where a criminal indictment has no effective means of enforcement, the issuance of such an indictment jeopardizes the credibility of the United States criminal justice system.⁷⁰ Indeed, measures taken by the Reagan Administration subsequent to the indictments amount to a tacit acknowledgement that the issuance of the *Noriega* indictments was incorrect at least as a matter of policy, and that coordination between the relevant political and legal arms of the United States Executive Branch (i.e., the Departments of State and Justice) is of utmost importance in such situations.⁷¹

III. THE INDICTMENTS IN CONTEXT

A. *United States Jurisdiction to Prescribe its Laws with Respect to General Noriega*

The initial legal issue involved in *Noriega* is whether the United States has jurisdiction to prescribe its laws with respect to the Panamanian general where the crimes for which he has been charged were committed outside of the United States. The United States purports to have jurisdiction to prescribe under the objective territorial principle.⁷² Under the United States interpretation

ing the removal of the General. However, the opposing view is that the indictments have impeded the removal of General Noriega because of the threat of extradition from a third country if he were to leave Panama. This view was proffered early on by critics, *see, e.g., Others Could Help, supra* note 13; *Ouster of Noriega in Peace Unlikely, Panamanians Say*, N.Y. Times, Feb. 7, 1988, at 3, col. 1 (city ed.), and in the months that have passed since the indictments were issued, this view seems to have proven true. *See, e.g., Strike Fades; Noriega Aide Cries Victory*, Miami Herald, April 1, 1988, at 1A, col. 5 [hereinafter *Strike Fades*].

70. *See U.S. Policy on Panama Questioned*, Miami Herald, May 15, 1988, at 1A, col. 1.

71. *See Reagan Gets Say in Indictment of Foreign Leaders*, N.Y. Times, June 27, 1988, at A7, col. 1 (city ed.) [hereinafter *Reagan Gets Say*]; *Reagan Backs Deal to Drop Indictments*, Miami Herald, May 24, 1988, at 1A, col. 4; *U.S. Plan Would Let Noriega Ally Remain in Office*, Miami Herald, May 15, 1988, at 13A, col. 1; *Noriega Exit Plan Assailed U.S. Defends 'Plea Bargain'*, Miami Herald, May 13, 1988, at 1A, col. 5 [hereinafter *Exit Plan*]; *Offer to Drop Noriega Case Infuriates Prosecutors*, Miami Herald, May 12, 1988, at 1A, col. 1.

72. *See generally* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 820 (1987) [hereinafter L. HENKIN]; Harvard Research in International Law, *Extraterritorial Jurisdiction with Respect to Crime*, 25 AM. J. INT'L L. 435 (Supp. 1935) [hereinafter Harvard Research]; Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159 (1957).

of this territorial principle, a state may prescribe its laws with respect to a foreign national where the charged offense has, or is intended to have, an effect in the territory exercising jurisdiction.⁷³ However, while application of the objective territorial principle has not been uncommon in cases involving illicit narcotics conspiracies,⁷⁴ utilization of objective territorial jurisdiction in the context

73. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) § 402 [hereinafter RESTATEMENT (THIRD)] provides in pertinent part:

. . . [A] state has jurisdiction to prescribe law with respect to

- (1) (a) conduct that, wholly or in a substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory which has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

(emphasis added)

Parts (1), (2) and (3) of § 402 illustrate the territorial, nationality, and protective principles of jurisdiction respectively.

74. The international legal doctrine regarding the assertion of criminal jurisdiction based on objective territoriality began in Cutting's Case, which involved the arrest and imprisonment of a United States citizen in Mexico for the publication of a Texas newspaper story criticizing the business dealings of a Mexican citizen. Cutting's Case stood for the proposition that a state's courts may exercise objective territorial jurisdiction only where the harmful "effect" of an extraterritorial crime has actually occurred within the territory of the state asserting jurisdiction. See Moore, *A Report on Extraterritoriality and the Cutting Case* 1887 U.S. FOR. REL. 757 (1887); 2 J. MOORE, INTERNATIONAL LAW DIGEST 228 (1906).

The "effects" principle was subsequently extended in *Strassheim v. Daily*, 221 U.S. 280 (1911), which held that where an offense is committed abroad and harmful effects are intended to and do occur in United States territory, United States courts may assert jurisdiction based on the objective territorial principle. *Ford v. United States*, 273 U.S. 593 (1927) extended the effects principle even further. In *Ford*, the United States Supreme Court upheld, on the basis of objective territoriality, the convictions of several British subjects who had been onboard a British vessel 25 miles off of the San Francisco coast, for conspiracy to violate United States liquor laws. The Court's use of objective territoriality as the jurisdictional basis in *Ford* has been the source of controversy regarding the meaning of objective territoriality and the effects principle because the convictions in *Ford* were based on conspiracy. Professor Christopher L. Blakesley posits that the *Ford* Court incorrectly interpreted objective territorial jurisdiction where conspiracy is an "inchoate offense" and has no "effect" until the substantive crime which is the subject of the conspiracy has occurred. See, e.g., Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1130 (1982) [hereinafter *Blakesley I*]. Accord F. MANN, STUDIES IN INTERNATIONAL LAW 69-81 (1973) ("The effect occurring within the country [exercising jurisdiction] must be the fact which completes the offense"); Jennings, *supra* note 72, at 146, 175 ("Practically unlimited extraterritorial jurisdiction cannot reasonably be founded on a territorial principle") cited in W. HOLDER & G. BRENNAN, THE INTERNATIONAL LEGAL SYSTEM 543-48 (1972). However, the *Ford* extension apparently has prevailed. See RESTATEMENT (THIRD), *supra* note 73. Compare *United States v. Loalza-Vasquez*, 735 F.2d 153, 156 (5th

of *United States v. Noriega* raises the interesting question of

Cir. 1984) ([T]he jurisdictional requisites with regard to . . . controlled substance conspiracy counts may be satisfied merely by proof of intended extraterritorial effects within the sovereign territory of the United States) and *United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980) (Defendants were convicted of conspiracy to import marijuana into the United States with intent to distribute. The Court of Appeals for the Fifth Circuit held that "[t]he requirement of territorial effect may be satisfied by evidence that the defendants intended their conspiracy to be consummated within the nation's borders" (emphasis in original), even though no actual effect was realized in the United States) with *Rivard v. United States*, 375 F.2d 882, 886 (5th Cir. 1967) (Canadian nationals were convicted of conspiracy to smuggle heroin into the United States on the basis of objective territorial jurisdiction where "Rivard twice sent [his] co-conspirator . . . across the Canadian border [into the United States] to deliver caches of heroin brought back from Europe.").

Notably, while the "protective principle" of extraterritorial jurisdiction also has been utilized by the courts in drug smuggling cases, it has been applied with much less frequency than the objective territorial principle and has yet to be asserted in conspiracy cases. The protective principle is based on the theory that extraterritorial crimes which can be construed as threatening to United States national security are subject to the jurisdiction of the United States courts. See *RESTATEMENT (THIRD)*, *supra* note 73, at § 402(c); Chelburg, *The Contours of Extraterritorial Jurisdiction in Drug Smuggling Cases*, MICH. Y.B. INT'L LEGAL STUD. 43 (1983); Note, *Drug Smuggling and the Protective Principle*, 39 LA. L. REV. 1189 (1979) (authored by Edward Thomas Meyer). See also *United States v. Marino-Garcia*, 679 F.2d 1373, 1381 (11th Cir. 1982) ("[T]he protective principle allows nations to assert jurisdiction over foreign vessels on the high seas that threaten [national] security or governmental functions"); *United States v. Newball*, 524 F. Supp. 715, 720 (E.D.N.Y. 1981) ("Drug smuggling threatens the security and sovereignty to the United States by affecting its armed forces, contributing to widespread crime, and circumventing federal customs laws"); *United States v. James-Robinson*, 515 F. Supp. 1340, 1346 (S.D. Fla. 1981) (Application of the the protective principle is possible "if the controlled substance in question is found near U.S. territory or if the shipment is bound for the United States, or if the foreign defendants know or intend that their illegal cargo will be distributed in this country"); *United States v. Egan*, 501 F. Supp. 1252, 1258 (S.D.N.Y. 1980) ("The unlawful import of drugs bypasses the federal customs laws, and thus directly challenges a governmental function. . . . Accordingly, the protective principle supports assertion of jurisdiction in [such a] case"); *United States v. Keller*, 451 F. Supp. 631, 635 (D. P.R. 1978) (holding that a planned invasion of United States territory by marijuana smugglers had a potentially adverse effect on security and government functions in the enforcement of laws prohibiting the importation of controlled substances). In light of the United States current emphasis on reducing the supply and demand of illicit narcotics and current public opinion indicating that the illicit drug trade poses the greatest threat to United States national security, see *Wall St. J.*, October 17, 1988, at A24, col. 1, the courts may soon feel compelled to increase the application of the protective principle to extraterritorial narcotics conspiracy cases.

Additionally, increasing international attention to the extensive criminal nature of drug trafficking in the future may lead to the exercise of universal jurisdiction, which permits courts to assert jurisdiction with regard to certain internationally condemned crimes. See generally Shachor-Landau, *Extraterritorial Penal Jurisdiction and Extradition*, 29 INT'L & COMPAR. L.Q. 274, 284 (1980) (application of universal jurisdiction to narcotics cases); *Secretary General's Report on International Campaign Against Traffic in Drugs*, 24 I.L.M. 1170 (1985); Thomas, *International Campaign Against Drug Trafficking*, 85 DEPT. ST. BULL. 50 (1985); Westrate, *Drug Trafficking and International Terrorism*, 12 DRUG ENFORCEMENT 19 (1985). Thus, although Professor Blakesley has argued that trafficking in narcotics has not yet achieved sufficient interest to warrant recognition as a basis for the assertion of universal jurisdiction, see Blakesley, *Extraterritorial Jurisdiction*, in 2 M. BASSIOUNI, INTERNA-

whether such an exercise is limited by the "reasonableness" standard enunciated by the Restatement of Foreign Relations Law of the United States.⁷⁵

Much has been written regarding the exercise of extraterritorial criminal jurisdiction;⁷⁶ however, the law governing the exercise of extraterritorial criminal jurisdiction with respect to foreign lead-

TIONAL CRIMINAL LAW 3, 32 (1986) [hereinafter *Blakesley II*], and the RESTATEMENT (THIRD) does not explicitly recognize narcotics trafficking as an international offense, the RESTATEMENT (THIRD) has recognized the expanding class of universal offenses. See RESTATEMENT (THIRD), *supra* note 73, at § 404, Comment *a*. Indeed, one might argue that the exercise of jurisdiction in a case like *Noriega* would be far more reasonable and convincing if couched in terms of universal jurisdiction and violations of international as well as domestic law. Such an exercise of universal jurisdiction could be based on possible violations of the Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 500 U.N.T.S. 1407 amended by 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3, which was entered into force for the United States in 1967.

75. RESTATEMENT (THIRD), *supra* note 73, at § 403 states in pertinent part:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Moreover, Comment d to § 402 states that "[t]his Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403." RESTATEMENT (THIRD), *supra* note 73, at § 402, Comment d (emphasis added).

76. See, *e.g.*, *Blakesley I*, *supra* note 74; *Blakesley II*, *supra* note 74; Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes* 1984 UTAH L. REV. 1149 (1984); Harvard Research, *supra* note 72.

ers has not been substantively addressed. Thus, where the scope of jurisdiction under international law varies with the international legal person whose jurisdiction is in question,⁷⁷ the legal person with respect to whom jurisdiction is sought, and the nature of the legal violation at issue, a serious inquiry regarding the reasonableness of the United States assertion of objective territorial jurisdiction with respect to General Noriega is necessary.

In terms of jurisdiction to prescribe, the Restatement lists a number of criteria for determining reasonableness.⁷⁸ These criteria may be balanced with each other as a way of concluding whether the exercise of extraterritorial jurisdiction over a foreign leader is indeed reasonable in a given case.⁷⁹

It is true that the regulation of traveling, racketeering, and conspiring in furtherance of an illicit narcotics enterprise is of "importance" to the United States,⁸⁰ and that the United States has a "justified expectation"⁸¹ in seeking to bring suspected foreign narcotics traffickers — regardless of their political status — to trial in the United States. However, while such considerations of reasonableness are certainly justified, *Noriega* illustrates some of the technical problems in exercising extraterritorial criminal jurisdiction over a foreign leader.

Objective territorial jurisdiction exercised where the activity sought to be regulated was "intended to have a substantial effect" within the regulating state,⁸² is constrained by the "extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; . . ."⁸³ In the instant case, the activities for which General Noriega was indicted took place entirely outside United States territory. Moreover, the charges against General Noriega are couched in terms of

77. L. HENKIN, *supra* note 72, at 822.

78. See RESTATEMENT (THIRD), *supra* note 73, at § 403.

79. While application of the § 403 "balancing test" has been examined with regard to the exercise of extraterritorial jurisdiction to prescribe United States antitrust laws, securities regulations, and international trade controls, see, e.g., Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310 (1985), the test has yet to be applied to the exercise of extraterritorial jurisdiction to prescribe United States criminal laws with respect to foreign leaders.

80. This is a factor for determining the reasonableness of the exercise of jurisdiction under RESTATEMENT (THIRD), *supra* note 73, § 403(2)(c).

81. This is another factor in determining whether the exercise of jurisdiction is reasonable. *Id.* at § 403(2)(d).

82. *Id.* at § 402(1)(c).

83. *Id.* at § 403(2)(a).

conspiracy. In this regard, where conspiracy is an inchoate offense (i.e., an offense which has not yet had a material effect), the magnitude of its "effect upon or in" the United States is open to question.

Furthermore, prescription of United States criminal laws over a foreign leader must be considered in light of the "importance of the regulation to the international political, legal, or economic system."⁸⁴ Although the United States, in *United States v. Saunders*,⁸⁵ prescribed its criminal laws over a foreign leader, any questions regarding possible future adverse "international" effects which may have resulted from that case were removed by its facts.⁸⁶ However, the facts presented in *Noriega* call for a different conclusion regarding the possibility of adverse effects on the international political, legal, and economic systems.

The harm to the Panamanian economy which has resulted from sanctions imposed by the United States after the indictments of General Noriega,⁸⁷ indicates the danger that seeking to punish a nation's leader for alleged violations of United States criminal law will result in the punishment of that nation's citizens, while their leader remains virtually unscathed.⁸⁸ The exercise of extraterritorial criminal jurisdiction resulting in such vicarious punishment of a foreign country's people is certainly unreasonable where the possibility of prosecuting the indicted foreign leader is tenuous.

An equally important consideration in determining the reasonableness of the exercise of objective territorial criminal jurisdiction in a case such as *Noriega* is the possibility of retaliation by the government of the indicted foreign leader. Such retaliation could, in turn, lead to increased international legal, political, and economic instability. While retaliation has not been severe in the instant case, in similar future cases, there may be the potential for serious damage from retaliation against the United States or its allies by countries with less dependency on the United States or on

84. *Id.* at § 403(2)(e).

85. *See supra* note 18.

86. *Id.*

87. *See* S. 2134, 100th Cong., 2d Sess., 134 CONG. REC. S1901-06 (1988) (imposing trade, aviation, and banking sanctions on Panama). The Reagan Administration also decided to deposit, in escrow, payments to Panama for the United States use of the Panama Canal. *See* Exec. Order No. 12,635, 53 Fed. Reg. 12,134 (1988). *See also Panama Crisis: U.S. Embargo Moves Slowly* 46 CONG. Q. 559 (1988); *U.S. Puts Sanctions on Panama* 46 CONG. Q. 634 (1988).

88. *See Strikes Fade, supra* note 69.

which the United States is dependent.⁸⁹

There can be no doubt that the exercise of objective territorial jurisdiction with respect to a foreign leader like General Noriega is unreasonable and sets bad precedent regarding the possible long-term upset of the international political, legal, and economic system because such regulation is entirely inconsistent with the "traditions of the international system."⁹⁰ An international legal inconsistency of the magnitude represented by the United States attempted extraterritorial prescription of its criminal laws with respect to General Noriega threatens to trivialize concepts of international legal and political cooperation, and comity of nations.⁹¹ In

89. Economic retaliation in the form of price-fixing and retaliatory legislation (i.e., secrecy statutes, "clawback" statutes, and blocking statutes) have been effectuated against the United States in past cases where the United States has either sought to exercise civil jurisdiction extraterritorially or imposed economic restraints on international trade. See Note, *supra* note 79, at 1311, 1320. Thus, it is certainly plausible that a foreign nation, politically at odds with the United States, would engage in substantive retaliation (e.g., terrorist acts against the United States) if the United States sought to indict its leader. See *infra* notes 108-10 and accompanying text. Based on the premise that the United States shares a global interest in preserving a stable international political, legal, and economic climate, the United States must act responsibly in furthering that interest. In other words, the United States must refrain from actions which may upset international order and detract from the attainment of "global justice." See generally Pogge, *Liberalism and Global Justice: Hoffmann and Nardin on Morality in International Affairs*, 15 PHIL. & PUB. AFF. 67 (1986). While it may be true that General Noriega, by allegedly engaging in unlawful activities, has not acted responsibly as the leader of his nation, the United States has been equally irresponsible by attempting to prescribe its criminal laws in a situation where there exists no effective method of enforcement and where much in terms of Panamanian political and economic stability is at stake. In this connection, the events following the issuance of the indictments against General Noriega have certainly added to the international perception that the United States cannot effectively stem international drug trafficking through extraterritorial application its criminal law, and have led to serious economic and political strife in Panama. See *supra* note 87. See also *Unyielding Panamanian*, N.Y. Times, Mar. 21, 1988, at 1, col. 4 (city ed.) ("The Panamanian economy is in ruins with banks closed, the poor going hungry and a general strike scheduled to begin Monday); *Strike in Panama Has Wide Effect*, N.Y. Times, Mar. 24, 1988, at 6, col. 1 (city ed.); *Town is Short of Food and Patience*, N.Y. Times, Mar. 22, 1988, at 8, col. 4 (city ed.); *Panama's Showcase Comes to Grief*, N.Y. Times, Mar. 21, 1988, at 10, col. 1 (city ed.).

90. See RESTATEMENT (THIRD), *supra* note 73, at § 403(2)(f).

91. "Comity is 'a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.'" United States v. Bank of Nova Scotia, 691 F.2d 1384, 1390 (11th Cir.), *cert. denied*, 462 U.S. 1119 (1983) (citing *Sompportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972)). See *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976). See also RESTATEMENT (THIRD), *supra* note 73, at § 403, Rep. note 2. In other words, comity is the "recognition which one state allows within its territory to the legislative, executive or judicial acts of another." BALLENTINE'S LAW DICTIONARY 220 (3d ed. 1969). Interestingly, Comment f to § 403 of the RESTATEMENT (THIRD) states that "the presence of substantial foreign elements will ordinarily weigh

light of the current legal status of the Panamanian government⁹² and the deterioration of political relations between the United States and Panama that has taken place over the past two years,⁹³ it is unreasonable for the United States Department of Justice to insist that the indictments of General Noriega be recognized in Panama. In seeking to subject General Noriega to a criminal process that is virtually unenforceable under the circumstances, the United States has exhibited blatant disrespect of international order by selfishly ignoring the interests of Panama, and has struck a serious blow to the underpinnings of international law.⁹⁴

The United States will probably contend that in addition to furthering its own interests, the indictments of General Noriega were intended to further the Panamanian and international legal orders by intensifying efforts aimed at illicit narcotics interdiction. However, the events that have followed the issuance of the indictments⁹⁵ prove that such intentions were, at best, misconceived and, at worst, merely a by-product of United States self interest. In the end, the exercise of objective territorial criminal jurisdiction by the United States against General Noriega is unreasonable because it has drastically exacerbated the political problems faced by Panama which, ironically, the United States is in large part responsible for fostering.⁹⁶

Bearing in mind the pervasive and detrimental nature of illicit drug trafficking, it is important for the United States to employ a predictable legal policy when dealing with leaders of foreign na-

against application of criminal law." Although Comment f continues: "Legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication," and — in this connection — although the criminal laws under which General Noriega has been charged have been successfully applied extraterritorially in prior cases, the balance weighs in favor of the "substantial foreign elements" involved where objective territorial jurisdiction is sought with respect to a foreign leader like General Noriega. Simply put, with respect to traditional international legal principles, and as a way of avoiding future problems similar to those currently faced by the United States and Panama, a situational line must be drawn regarding the extraterritorial application of United States criminal laws.

92. See *supra* notes 21-40 and accompanying text.

93. See *supra* notes 55-71 and accompanying text.

94. In terms of comity, the integrity of international law demands that a country seeking to enforce its laws extraterritorially consider the effects of such enforcement on the foreign country in question. Such a consideration illustrates the concepts of international cooperation and mutual respect which are the foundation of international law. See generally L. HENKIN, *supra* note 72, at xxxiii-xliii.

95. See *supra* note 71.

96. See *supra* notes 41-54 and accompanying text.

tions who are suspected of seriously violating United States law.⁹⁷ Predictability reinforces the ideas of legal fairness and validity, and furthers the concept of order with regard to the law sought to be prescribed over the foreign leader. However, regardless of such a policy's predictability, it will remain hollow if it is not readily enforceable.⁹⁸ Ultimately, whether such a legal policy can be effective in the context of a case like *Noriega* is arguable at best. Situations like the one presented in *Noriega* — while involving possible violations of United States criminal law — are overtly political and therefore emphasize the inadequate nature of any United States legal proceeding under such circumstances. In short, international political situations demand international political solutions.

B. United States Jurisdiction to Prescribe and the Head of State Question

The United States exercise of objective territorial jurisdiction with respect to General Noriega is exceptionally unreasonable because of the General's status as the *de facto* leader of Panama,⁹⁹ and the fact that the crimes for which he is charged are a result of United States policy toward Panama.¹⁰⁰ However, the corollary issue of whether General Noriega should be accorded immunity from prosecution under United States law because he is a "head of state," is far from resolved regardless of the current position of the

97. This concept relates to the possibility of disrespect for the attempted law enforcement or retaliation by the foreign leader being subjected to United States criminal law. See Note, *supra* note 79, at 1321 ("If other nations believe that American policy unfairly disadvantages their citizens or that it proceeds from fiat rather than principle, they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own. Predictability imbues a finding of jurisdiction with a minimum degree of fairness"). In this vein, even where possible violations of United States criminal laws are at issue, when it appears that such criminal laws are being prescribed over a foreign leader in furtherance of a political goal, disregard for the prescribed laws and retaliation by the foreign leader should not be unexpected.

98. Notably, in the aftermath of the *Noriega* debacle, the Reagan Administration instituted a new policy designed to avoid such embarrassment in the future. Essentially, the new policy provides for Presidential consultation before the Justice Department proceeds with criminal proceedings against a foreign leader. See *Reagan Gets Say*, *supra* note 71.

99. A government is *de facto* when it has the assent or acquiescence of the people and "is in actual control of the administrative machinery of the state [and] is performing governmental functions." Fenwick, *The Recognition of New Governments Instituted By Force*, 38 AM. J. INT'L L. 448 (1944). Thus, in terms of his governmental status, there can be little doubt that General Noriega is indeed the *de facto* leader of Panama. See *supra* notes 21-40 and accompanying text.

100. See *supra* notes 41-54 and accompanying text.

United States executive branch.¹⁰¹ United States law on head of state immunity is unclear, and there exists no consistent international standard.¹⁰²

1. Suggestions of Immunity and Constitutional Deficiencies

Past practice indicates that grants of head of state immunity are conferred by the United States Department of State through "suggestions of immunity."¹⁰³ Conversely, the State Department may issue an "opinion" denying head of state immunity.¹⁰⁴ Although the terms "suggestion" and "opinion" seem to indicate that they are nonbinding, opinions and suggestions are accorded substantial weight by United States courts.¹⁰⁵ Thus, ultimately, a judi-

101. See *infra* notes 120-27 and accompanying text.

102. Head of state immunity should not be confused with diplomatic or sovereign (state) immunity. Diplomatic immunity in the United States is governed under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, and the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. Sovereign immunity in the United States is governed under The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611, (1982)). Head of state immunity, on the other hand, has never been institutionalized in formal United States law — either by way of an international convention or domestic legislation — and remains in a state of confusion. See Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169 (1986).

103. Note, *supra* note 102, at 175.

104. See *In re Grand Jury Proceedings, Doe #700*, 817 F.2d 1109, 1110 (4th Cir.), *cert. denied*, 108 S. Ct. 456 (1987).

105. *Id.* (citing *Kilroy v. Windsor (Prince of Wales)*, Civ. No. C-78-291 (N.D. Ohio 1978) *excerpted in* 1978 DIG. U.S. PRAC. INT'L L. 641-43 (holding Prince of Wales immune in accordance with a State Department Suggestion of Immunity); *Psinakis v. Marcos*, Civ. No. C-75-1725 (N.D. Cal. 1975) *excerpted in* 1975 DIG. U.S. PRAC. INT'L L. 344-45 (holding President of Philippines immune under Suggestion of Immunity); *Chong Boon Kim v. Kim Yong Shik*, (Hawaii Cir. Ct. 1963) *excerpted in* 58 AM. J. INT'L L. 186-87 (1964) (holding Korean foreign minister immune in accordance with Suggestion of Immunity)). See also Note, *supra* note 102, at 175, 181.

Although it has been posited that, according to United States Supreme Court precedent, "Suggestions of Immunity, submitted by the State Department, bind federal courts," Comment, *The Power of United States Courts to Deny Former Heads of State Immunity from Jurisdiction*, 18 CAL. W. INT'L L.J. 355 (1988) (citing *Mexico v. Hoffman*, 324 U.S. 30, 36 (1945) and *Ex Parte Republic of Peru*, 318 U.S. 578, 588-89 (1943)) such a broad contention is incorrect and misleading. Simply put, *Mexico* and *Peru* merely support the proposition that "[U.S.] national interest will be better served [where] the wrongs to suitors, involving [U.S.] relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Peru*, 318 U.S. at 589 (emphasis added). See *Mexico*, 324 U.S. at 34 ("Chief Justice [John] Marshall introduced the practice . . . that . . . jurisdiction in rem acquired by the judicial seizure of [a] vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of government charged with the con-

cial determination resting on a State Department head of state immunity determination is vulnerable to an attack that the granting of such immunity is a matter of executive fiat. This raises a particularly grave problem where the United States seeks to subject a politically controversial foreign leader to United States criminal laws.

Where foreign nationals are entitled to the same constitutional due process of law considerations as United States citizens,¹⁰⁶ and where the United States seeks to subject a foreign leader to United States criminal laws, serious questions arise regarding the constitutionality of a judicial decision resting on a suggestion or opinion issued under current State Department procedures. First, a State Department decision to issue a suggestion or an opinion is not made pursuant to a set standard.¹⁰⁷ Second, State Department head of state immunity decisions are not made through administrative adjudication. Rather such decisions are made at the discretion of the Office of the Legal Advisor, and therefore are susceptible to political influence.¹⁰⁸

For example, suppose a United States grand jury sitting in the Southern District of Florida indicted Libyan Colonel Muammar Qaddafi for violating United States criminal laws; in response, Libyan nationalists took a number of people hostage who are either United States citizens or citizens of an important United States ally. Under such circumstances, in an attempt to defuse tensions between Libya and the United States and to gain the release of the hostages, it is likely that the State Department would issue a suggestion of immunity for Colonel Qaddafi, effectively putting an end to United States criminal proceedings against him.

duct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General." (emphasis added)). Therefore, one can conclude only that suggestions of immunity issued by the State Department, in cases involving *friendly foreign governments*, shall be given binding effect by the court attempting to exercise jurisdiction as a method of preventing potential embarrassment which might result from a judgment against either the United States or the foreign government. However, one cannot assume, *a fortiori*, that suggestions of immunity (or opinions denying immunity) are binding upon a federal court attempting to exercise jurisdiction in a criminal case involving the *de facto* head of state of an *unfriendly* foreign government.

106. *United States v. Pink*, 315 U.S. 203 (1942). The fifth amendment to the United States Constitution states in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

107. See Note, *supra* note 102, at 183.

108. *Id.* at 184-85 (citing Leigh, *New Departures in the Law of Sovereign Immunity*, 69 PROC. AM. SOC. INT'L L. 187, 190-91 (1975)).

However, because there is little political leverage available to General Noriega which would persuade the United States to grant him head of state immunity, the State Department will probably not grant such immunity; thus, the General will remain eligible for prosecution in the United States. Hence, where the United States seeks to subject a foreign leader to United States criminal laws, a State Department head of state immunity decision based on the magnitude of the political leverage possessed by the foreign leader in question deprives the concept of due process of all meaning.¹⁰⁹

Moreover, other foreign leaders who perceive themselves to be in the same position as Colonel Qaddafi may, under similar circumstances, expect equal treatment from the State Department¹¹⁰ and may, therefore, feel free to disregard United States laws. Such a result would be disastrous for both the United States and the international community. In short, for the sake of preserving due process of law and the international legal order, State Department procedures regarding the determination of head of state immunity must be perfected.

The United States Constitution distributes between the executive and legislative branches the power to conduct foreign affairs.¹¹¹ The United States might, therefore, contend in the instant case that a failure by the district court to follow a State Department determination denying General Noriega head of state immunity constitutes a violation of the doctrine of separation of powers. In other words, the United States might argue that an independent judicial determination regarding the head of state issue constitutes a usurpation of the executive's foreign affairs power. However, such an argument would almost certainly destroy the United

109. In the case of *Rochin v. California*, 342 U.S. 165, 209 (1952), Justice Frankfurter stated:

[although the] faculties of the Due Process Clause may be indefinite and vague, . . . the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgement not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Where the United States is an interested party — as opposed to a mere intervenor, see *supra* note 105 — such as in the instant criminal case, a judicial decision emanating from a purely discretionary State Department head of state immunity decision certainly cannot be characterized as a "disinterested inquiry." Ultimately, any such judicial decision in the instant case must be regarded as "*ad hoc* and episodic" and ignorant of continuity.

110. See Note, *supra* note 102, at 186.

111. U.S. CONST. arts. I & II.

States claim that the case against General Noriega is legal and not political.¹¹²

As an interested party to a lawsuit, the United States is not exempt from the requirements of constitutional due process. More specifically, where the United States has taken the position that the case against General Noriega is strictly legal, where current State Department head of state immunity procedures will lead to a constitutionally infirm judicial result, and where no legislative standard for determining head of state immunity currently exists,¹¹³ the *Noriega* court is free to set the standard on which a judicial determination of head of state immunity with respect to General Noriega should be based, even though the *Noriega* case may touch on foreign policy.¹¹⁴

2. United States Recognition/Diplomatic Relations Policy and the Scope of Head of State Immunity

Head of state immunity has been most recently addressed in *In re Grand Jury Proceedings, Doe No. 700*¹¹⁵ where former President of the Philippines, Ferdinand Marcos, moved to quash subpoenas requiring his testimony in front of a grand jury investigating possible corruption in American companies' arms contracts with the Philippines. Marcos claimed that he was entitled to head of state immunity and that he was, therefore, not required to testify.¹¹⁶ While the facts in *Doe* differ significantly from those in the instant case, the Fourth Circuit Court of Appeals' reasoning gives, at least, a slight indication of how the *Noriega* court might handle such a claim.

112. See *supra* note 68 and accompanying text.

113. A congressionally-mandated standard, codified in legislation, is certainly preferable as a method of guiding judicial decisions regarding head of state immunity. See generally Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747 (discussing the problems involved with judicial lawmaking as a substitute for congressional legislation). However, where there exists no congressionally-mandated standard or binding precedent, the court must be permitted to make its own inquiry.

114. *Baker v. Carr*, 369 U.S. 186 (1962). In other words, where a criminal suit is brought by the United States against a foreign leader, suggestions and opinions issued by the Office of the Legal Advisor under current State Department procedures amount to no more than affidavits submitted by an interested party and should be accorded judicial deference only to the same extent as any similar act engaged in by an interested party in a typical criminal case.

115. 817 F.2d 1108 (4th Cir.), *cert. denied*, 108 S. Ct. 456 (1987).

116. *Id.* at 1109-10.

The *Doe* court began its head of state immunity analysis by stating that "the doctrine maintains that a head of state is immune from the jurisdiction of a foreign state's courts, at least as to authorized official acts taken while the ruler is in power."¹¹⁷ Curiously, the court's use of the term "at least" indicates that there may exist other occasions where head of state immunity might be facilitated. Indeed, the *Doe* court readily acknowledged that "[t]he exact contours of head of state immunity . . . are unsettled."¹¹⁸ Ultimately, the Fourth Circuit denied Marcos' head of state immunity claim on the basis that the successor government in the Philippines had "waived" such immunity for Marcos, and that to grant Marcos head of state immunity in the face of such a waiver "would offend the present Philippine government."¹¹⁹

In response to a claim by General Noriega that he is entitled to head of state immunity, the United States might argue that because the United States Government formally recognizes President Eric Arturo Delvalle as the legitimate leader of Panama,¹²⁰ General Noriega is precluded from claiming head of state immunity. However, such an argument is logically inconsistent because of the history of United States recognition policy generally, and the nature of United States recognition toward, and relations with, Panama specifically.¹²¹ In essence, the United States would be forced to

117. *Id.* at 1110 (emphasis added).

118. *Id.*

119. *Id.* at 1111. The court reasoned that "[h]ead of state immunity is founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals."

120. See S.J. Res. 267, 100th Cong., 2d Sess., 134 CONG. REC. S1621-23 (1988); H. Res. 399, 100th Cong., 2d Sess., 134 CONG. REC. H796-801 (1988); DEPT. ST. BULL. 69-73 (May 1988).

121. Since the 1960s the United States has deemphasized the use of formal recognition with regard to regimes which obtain power through extraconstitutional means, and instead has emphasized "diplomatic relations." This change in foreign policy doctrine is a result of the view that "recognition," in the formal sense, is an unsuitable instrument for conducting a realistic foreign policy and is politically manipulative. See generally L. GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES* (1978); Dozier, *Recognition in Contemporary Inter-American Relations*, 8 J. INTER-AM. STUD. 320 (1966). United States policy toward Panama therefore has followed the diplomatic relations scheme.

Interestingly, prior to the indictments of General Noriega, the United States apparently had never thought of "recognition" of the Panamanian government as a real issue, although the United States was fully aware of the political situation in Panama. See *supra* notes 29-67 and accompanying text. After the 1968 coup, the United States resumed diplomatic relations with the new Torrijos regime, see *U.S. Resumes Diplomatic Relations with Panama*, DEPT. ST. BULL. 573 (Dec. 2, 1968) (official statement of Nov. 13, 1968), and despite the State Department's November 13, 1968 official statement, which seemed to indicate that the resumption of diplomatic relations was conditional on the "intention of the Panamanian

take the position that General Noriega's head of state immunity has been waived. Logically, such a position constitutes an admission that prior to the United States formal recognition of Delvalle, the General could have claimed head of state immunity. This reasoning poses a serious problem for the United States, because unlike Ferdinand Marcos in *Doe*, General Noriega is still in power in Panama. In this connection, even though the United States officially recognizes President Delvalle as the legitimate leader of Panama, such recognition is hollow where President Delvalle currently exercises no governmental power in Panama.¹²²

Simply put, General Noriega is the *de facto* leader of Panama,¹²³ and as such has been — since 1983 — at the helm of a government with which the United States has openly conducted diplomatic relations. Thus, it would appear that General Noriega is entitled to head of state immunity because, under the analysis applied in *Doe* with respect to Marcos, the United States position regarding official recognition is essentially without merit.¹²⁴

Another potential contention of the United States might be that where the violations of law for which General Noriega is under indictment were not "authorized official acts," General Noriega is disqualified from claiming head of state immunity.¹²⁵ However, the

Government to hold elections, to return to constitutional government, to respect human rights, and to observe Panama's international obligations," *id.*, the Johnson Administration and its successors appeared content with maintaining hospitable relations with General Torrijos as the legitimate, yet unelected, leader of Panama. See, e.g., *supra* note 21 and accompanying text. After Torrijos' death and Noriega's subsequent accession to power, the United States continued to maintain full diplomatic relations with Panama. Moreover, the United States did not indicate displeasure with General Noriega until 1987, see *supra* notes 55-71, and did not "de-recognize" Noriega's *de facto* government until the indictments of the General were issued in February 1988. Notably, even after the recognition of Eric Arturo Delvalle as the legitimate leader of Panama, the United States did not significantly reduce the scope of its diplomatic relations with General Noriega's Panama until the autumn of 1988. See *N.Y. Times*, Sept. 16, 1988, at A5, col. 1 (city ed.).

122. Indeed, when President Delvalle expressed resistance to General Noriega's rule the Panamanian National Assembly, responding to pressure from General Noriega, ousted Delvalle from the government and forced him to retreat into hiding. See *Noriega Prevails as Assembly Picks New President*, *N.Y. Times*, Feb. 27, 1988, at 1, col. 6 (city ed.).

123. See *supra* note 99.

124. It is indeed ironic that the United States has returned to the abandoned policy of "recognition" as a way of solidifying its stance against General Noriega, especially where, following the issuance of the indictments of General Noriega, the United States has maintained diplomatic relations with Panama. Such a manipulation of policy is illustrative of the inconsistent position of the United States in the instant case and detracts from the legal and political coherence required for the proliferation of international order. See generally L. HENKIN, *supra* note 72.

125. In re Grand Jury Proceedings, *Doe* #700, 817 F.2d 1109, 1110 (4th Cir.), cert. de-

Doe court, in recognizing the Philippine government's waiver of head of state immunity for Marcos, stated that "[w]e . . . need not decide whether . . . immunity would have extended to unauthorized acts during Mr. Marcos' term or whether it would have been limited to authorized acts."¹²⁶ Indeed, the *Doe* court refused to defer to an opinion — included in the record — submitted by the State Department's Deputy Legal Advisor indicating that neither Ferdinand Marcos nor his wife should be accorded head of state immunity.¹²⁷ Thus, at least under *Doe*, the acts for which General Noriega is under indictment are not *prima facie* evidence that he is precluded from claiming head of state immunity.

In addition, the General hypothetically might argue that if he engaged in certain activities which might be construed as violative of United States law while serving as the leader of Panama, he did so with the acquiescence of the United States government. The essence of such a contention would be that any allegedly criminal act engaged in by General Noriega had been permitted by a United States foreign policy which implicitly "authorized" him to do so. Thus, one can logically conclude that during General Noriega's service as Panama's *de facto* leader, his involvement in activities that are possibly violative of United States law were a by-product of the conduct of United States foreign policy, and that the United States, therefore, should be estopped from initiating a prosecution against General Noriega.

In light of the foregoing analysis, a failure by the court to grant General Noriega head of state immunity will spell disaster for the credibility of United States foreign relations, the application of United States criminal laws to foreign leaders, and United States support for international legal order. Current State Department procedures for determining such immunity do not provide constitutional safeguards, and the United States has maintained full diplomatic relations with Panama under the General's *de facto* control. In short, the history of United States relations with General Noriega's Panama seems to indicate that the United States exercise of objective territorial jurisdiction to prescribe its criminal laws with respect to General Noriega is patently unreasonable.

nied, 108 S. Ct. 456 (1987).

126. *Id.* at 1111.

127. *Id.* ("[I]t [is not] necessary for us to decide whether to defer to the opinion of the Deputy Legal Advisor of the State Department, expressed in a letter that is part of the record, that the Marcos' are not entitled to head of state immunity").

United States government officials, civilian and military alike, have acknowledged General Noriega's political power.¹²⁸ The fact that United States government officials may have turned a blind eye toward the General's alleged wrongdoings in exchange for his strategic aid certainly weighs heavily in favor of granting head of state immunity to General Noriega.¹²⁹ The immediate issue is not General Noriega's guilt or innocence, but the proper use by the United States of its criminal justice system against a foreign leader accused of violating United States criminal laws, where the case is essentially the result of United States foreign policy decisions gone awry. Affording General Noriega immunity from criminal prosecution certainly is not an acknowledgment of his innocence; it simply will prevent the United States from trivializing its criminal justice system and reducing into mere words its support for a coherent international legal system.

C. *The Federal Grand Jury Exposed*

1. The Political Nature of the Institution

United States grand jury procedure¹³⁰ provides a convenient avenue for the United States government to try to place pressure on foreign leaders whose acts may be construed as violative of federal law. First, the grand jury is not bound by the Federal Rules of Evidence.¹³¹ Thus, the issuance of an indictment may be based in

128. See *supra* notes 55-71 and accompanying text.

129. Interestingly, the United States Department of Justice allegedly considered initiating indictment proceedings against General Noriega in 1980, because of evidence tying Noriega — then head of G-2 — to the illegal export of military hardware; the State Department did not want the case to go forward for fear of upsetting General Torrijos. It seems that the United States needed the cooperation of General Torrijos in providing a Panamanian refuge for the deposed Shah of Iran and that indicting one of Torrijos' top military men (i.e., Noriega) would place the United States in a difficult negotiating position. See *Noriega Case Stified in '80 Sources Say*, Miami Herald, Mar. 20, 1988, at 1A, col. 5. However, even after Torrijos' death in 1981 and Noriega's subsequent accession to power in 1983, the United States continued to maintain full diplomatic relations with Panama, and did not immediately re-institute legal proceedings against General Noriega, even though the General's illicit business activities allegedly were well-known within the United States government. See *supra* notes 41-54 and accompanying text.

130. FED. R. CRIM. P. 6.

131. C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 19.06 (1980). There are a number of reasons for not restricting the grand jury's inquiry on the basis of the Federal Rules. First, the role of the grand jury is investigatory and non-adjudicatory in nature, and inadmissible evidence is not without probative value. Second, rules such as those governing hearsay are designed to be invoked during adversary proceedings. Third, the accused's rights are protected at trial by exclusionary rules. Finally,

whole or in part on hearsay.¹³² Second, the presentation of illegally-obtained evidence to the grand jury is not a ground for quashing an indictment based on such evidence.¹³³ Third, functional oversight of the grand jury is solely in the hands of the United States Attorney.¹³⁴ Finally, the accused has no right to appear before the grand jury.¹³⁵ Thus, it can be seen that the one-sided nature of federal grand jury procedure is highly vulnerable to political manipulation by the United States government.¹³⁶ While it is true that in typical criminal cases prosecutors maintain the burden of preparing for trial, therefore reducing any incentive for promoting evidentially unsound indictments,¹³⁷ this safeguard has no bearing in cases like *Noriega*. In the instant case, there is virtually no chance that General Noriega will stand trial in the United States.¹³⁸ In addition, the potentially damaging revelations regarding United States relations with General Noriega and United States policy in Latin America, which may result from a federal court trial,¹³⁹ certainly seem to dictate against sincere legal pursuit of General Noriega by the United States. Hence, utilization of the federal grand jury in the context of a case like *Noriega* is improper because of the possibility of unchecked abuse of prosecutorial discretion in conducting the investigation. The mere existence of such a possibility reduces the credibility of the grand jury as a viable institution in United States criminal procedure and defeats the

making rules of evidence applicable to the grand jury — a body comprised of laypeople — would unduly burden the expedition of an indictment decision by subjecting grand jury deliberations to court review. *Id.*

132. *Id.*

133. *Id.*

134. FED. R. CRIM. P. 6(d). Although the court maintains the duty of summoning the grand jury, alerting grand jury members as to the extent of their investigatory power and instructing the grand jury on points of law, the court plays no part during the actual grand jury inquiry. See C. WHITEBREAD, *supra* note 148, at § 19.04.

135. C. Whitebread, *supra* note 131 (citing Kirby v. Illinois, 406 U.S. 682 (1972)). Cf. Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807 (1972) (arguing that an accused should have the right to participate during the grand jury's determination of probable cause and should be entitled to assistance of counsel).

136. Governmental abuse of the grand jury process and the characterization of the indictment as a "rubber-stamp" of the charges sought by the prosecutor certainly are not new. For earlier discussions of this phenomenon see, e.g., L. CLARK, *THE GRAND JURY: THE USE & ABUSE OF POLITICAL POWER* (1975); FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* (1977); Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 214 (1955).

137. See NATIONAL INSTITUTE OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE, *GRAND JURY REFORM: A REVIEW OF KEY ISSUES* 22 (1983).

138. See *supra* note 13 and accompanying text.

139. See *supra* notes 41-54.

rule of law.

2. The *Noriega* Plea Bargain

Even assuming, *arguendo*, that the indictments against General Noriega are sound in terms of the evidence on which they are based and the motives of the prosecution, utilization of the federal grand jury in the context of *Noriega* is improper. There has been much debate regarding the actual effectiveness of the grand jury and whether the original purposes of the grand jury—to provide an independent body of citizens serving the interests of the community by precluding unjust prosecutions and uncovering crime¹⁴⁰—have been substantially compromised in the United States.¹⁴¹ However, regardless of the current state of grand jury procedure, at least in spirit, the purposes of the institution have remained important enough to prevent its abolition at the federal level.¹⁴² In this connection, the grand jury indictment process has been useful to federal prosecutors in securing profitable plea bargains.¹⁴³ Indeed, one might maintain that the efficacy of plea bargaining is a primary reason for retention of the federal grand jury/indictment process. In the present case, the United States attempted to strike

140. W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 8.2 (1985); Orfield, *The Federal Grand Jury* 22 F.R.D. 343 (1959) (“[The purposes of the grand jury] are to protect the defendant and to permit the grand jury, as public spirited citizens, chosen by democratic procedures to attack corrupt conditions”).

141. The American jurisprudential theory of the grand jury as a protector of the citizen against the will of the government evolved during the period immediately preceding the American Revolution when the British Crown sought to prosecute colonists engaging in anti-British civil disobedience. NATIONAL INSTITUTE OF JUSTICE, *supra* note 137, at 10. However, research performed during the first half of this century indicated that grand juries “did not actively seek out evidence of criminal offenses but rather yielded to the direction established by the prosecutor.” *Id.* (citing Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931)). It is interesting to note that England, which provided the model for the United States grand jury system, abolished the grand jury requirement in 1933 because of its ineffectiveness. *Id.*

142. Indeed, formal abolition of the federal grand jury would require revision of the fifth amendment to the United States Constitution. See U.S. CONST. amend. V (“No person shall be held to answer for a . . . crime unless on a *presentment or indictment by a Grand Jury*” (emphasis added)).

143. A plea bargain is a negotiation between the prosecutor and defense counsel or the accused. The plea bargain takes place after the indictment has been issued and the arrest made, and “involves discussions looking toward an agreement under which the accused will enter a plea of guilty in exchange for a reduced charge or a favorable sentence recommendation by the prosecutor.” F. ZIMRING & R. FRASE, *THE CRIMINAL JUSTICE SYSTEM* 495 (1980). Alternatively, a plea bargain may involve dismissal, by the prosecutor, of some or all of the charges contained in an indictment in exchange for difficult-to-obtain information (usually regarding an ongoing criminal investigation) from the accused.

a bargain with General Noriega: in exchange for a dismissal of the charges, the General would be required to leave Panama and not return until after the May 1989 elections.¹⁴⁴

The formula for any successful negotiation includes the maintenance of some leverage by each party over the other. In the absence of such leverage on one side, the other side will have no incentive to bargain because nothing will be gained. With the exceptions of direct military intervention and covert paramilitary activity, actions which apparently have been ruled out for the time being, the only way for the United States to gain leverage over General Noriega is through strong Panamanian political/military opposition. However, even though the United States — by issuing the indictments — has clearly signaled its support for such opposition, Panamanian political leaders have failed to mobilize an effective campaign against General Noriega. Moreover, in March 1988 an attempted coup d'état, emanating from within the PDF, failed and enabled General Noriega to further consolidate his power by expelling five senior military officials.¹⁴⁵

Thus, *Noriega* illustrates the plea bargain turned on its head. Instead of the prosecution maintaining the leverage necessary to force the defense to approach the bargaining table, in the instant case it is the defense which is forcing the prosecution to bargain. In essence, until the United States is able to offer to General Noriega a "deal" that is of greater value to him than his current situation, or until the United States obtains some bargaining leverage, the General will probably remain where he is. The embarrassment suffered by the United States because of this uncomfortable situation could have been avoided if the efforts of the Departments of State and Justice had been coordinated. Such coordination would have enabled the Reagan Administration to see the untenable nature of legal proceedings against General Noriega, and would have permitted a viable political alternative to be formulated.¹⁴⁶

3. Extradition

Simply put, extradition of General Noriega to the United

144. See *Exit Plan*, *supra* note 71.

145. *Panama Recasts Military, Imposes Curbs After Revolt*, N.Y. Times, Mar. 18, 1988, at 3, col. 4 (city ed.).

146. See Strasser & Carter, *In Plea Bargains, Leverage is all; Was the Noriega Deal Proper?*, Nat'l L.J., June 13, 1988, at 3, col. 1.

States is virtually impossible. The General may not be extradited under the United States-Panama Extradition Treaty of 1904,¹⁴⁷ or under Panamanian statutory or constitutional law¹⁴⁸ because of his status as a Panamanian national¹⁴⁹ and, more to the point, because of his position as *de facto* leader of Panama.¹⁵⁰

Where direct economic and political intervention have failed to force General Noriega from power and provide the United States with an opportunity for extradition from a third country,¹⁵¹ the only remaining method of bringing the General to the United States to stand trial — other than by overt or covert military force — is to forcefully abduct him under the *Ker-Frisbie*, Doctrine. According to *Ker-Frisbie*, an indicted foreign national may lawfully stand trial in the United States even though he has been forced to appear against his will.¹⁵²

However, application of *Ker-Frisbie* in the context of the instant case raises questions of propriety. In cases like *Noriega*, where the target for *Ker-Frisbie* abduction is a controversial for-

147. *Supra* note 16.

148. *Supra* notes 14-15.

149. Even if General Noriega was extraditable as a Panamanian national, difficult issues normally the subject of extradition proceedings — such as the requirement of “double criminality” (i.e., the prerequisite that the crimes for which the foreign accused is charged are prosecutable in the country of origin) — remain unresolved. For a comprehensive discussion of the problems involved with international extradition in cases involving illicit drug trafficking see Bernholz, Bernholz & Herman, *International Extradition in Drug Cases*, 10 N.C. J. INT’L L. & COMM. REG. 353 (1985). See also RESTATEMENT (THIRD), *supra* note 73, at § 478.

150. See *supra* note 99.

151. See *supra* notes 67, 71, 87.

152. The doctrine has evolved from two cases: *Ker v. Illinois*, 119 U.S. 436 (1886) (holding that a United States citizen who is facing charges in the United States, and who is in a foreign country, may be forcefully removed from the foreign country by United States officials and may not challenge his indictment on the ground that he was brought within United States jurisdiction against his will) and *Frisbie v. Collins*, 342 U.S. 519 (1952) (holding that the conviction of an accused who, as a result of forceful abduction, was brought to trial against his will is not unconstitutional). Although *Ker* involved the forceful abduction of a United States citizen in a foreign land, and *Frisbie* involved interstate — as opposed to international — forceful abduction, the *Ker-Frisbie* Doctrine has been codified in The Restatement. RESTATEMENT (THIRD), *supra* note 73, § 433 states in pertinent part:

External Measures in Aid of Enforcement of Criminal Law: Law of the United States

. . . (2) A person apprehended in a foreign state, whether by foreign or by United States officials, and delivered to the United States, may be prosecuted in the United States unless his apprehension or delivery was carried out in such reprehensible manner as to shock the conscience of civilized society

RESTATEMENT (REVISED), *supra* note 73, at § 433(3). See also *id.* at Comment b to § 433 and Rep. Note 3 to § 433 (both discussing the *Ker-Frisbie* Doctrine).

eign leader, the resemblance between "legal" abduction and unlawful forceful intervention in the political affairs of a sovereign is striking.¹⁵³ More poignantly, in light of the history of United States relations with General Noriega and his predecessor Torrijos, the United States could suffer substantial public opinion backlash and a reduction in its foreign relations credibility — not to mention serious foreign policy and national security damage — from a trial of the General.¹⁵⁴ Such reasoning seems sufficient to justify the conclusion that the United States government simply may not want General Noriega to stand trial in the United States. As a corollary, the United States may refuse to employ the *Ker-Frisbie* Doctrine in the instant case, thereby emasculating the indictments and undermining the decisions of the Miami and Tampa grand juries.

In summary, the legal action instituted by the United States government in the present case has detracted from the credibility of the federal grand jury. Moreover, the United States inability to prosecute General Noriega might be observed by other foreign leaders engaged in possibly criminal activities as a sign that any criminal legal action initiated by the United States against a foreign leader is meaningless.¹⁵⁵ Only adverse consequences can result from a foreign leader's disregard for the domestic law of a sovereign. However, disregard for a sovereign's law by a foreigner seems unavoidable where the sovereign itself misuses its legal institutions, as the United States has done with the grand jury in the instant case.¹⁵⁶

IV. CONCLUSION

Where the crimes for which General Noriega has been indicted

153. Such direct intervention is generally regarded as unlawful under customary international law. See L. HENKIN, *supra* note 72, at 689-702. Of course, if the United States decides to forcibly abduct General Noriega, such an abduction might be justifiable if the United States contends that the "intervention" was by the invitation of the "recognized" government of deposed President Eric Delvalle. In support of such an argument, the United States could contend that where President Delvalle is the constitutional leader of Panama, he has the authority to make such an invitation. However, in light of the inconsistencies involved with United States "recognition" of Panama, see *supra* notes 121, 124, the persuasiveness of such a contention is, at best, unclear.

154. See *supra* notes 41-54 and accompanying text.

155. See *supra* note 70.

156. See *id.* (comments of Harvard Law School Professor Alan Dershowitz, former United States National Security Advisor Brent Scowcroft, Princeton University Professor Ethan Nadelmann, and American Enterprise Institute Fellow Mark Falcoff).

are a by-product of United States foreign policy, prescription of United States criminal jurisdiction with respect to the General is unreasonable. Moreover, where the United States has openly conducted relations with General Noriega's Panama, United States recognition of Eric Arturo Delvalle as the legitimate leader of Panama and denial of General Noriega's status as a head of state are meritless. Finally, the United States, in seeking to oust General Noriega, has abused its position as the sole overseer of the federal grand jury system, thereby exposing the institution's vulnerability to political manipulation and placing in jeopardy the credibility of the United States criminal justice system and deference to the rule of law both at home and abroad.

Regardless of whether the indictments of General Noriega are ultimately dismissed, subjecting the General to criminal process in the United States is inappropriate as a matter of international and domestic law, and sets poor precedent for future similar cases. The United States apparently has ignored the possible international destabilizing effects of its extraterritorial prescription of criminal jurisdiction with respect to a politically controversial foreign leader. Furthermore, by failing to coordinate the legal and foreign policy branches of government, thereby permitting the issuance of unenforceable indictments against the *de facto* leader of a strategically important country, and by failing to implement a foreign policy in step with domestic policy, the United States needlessly has subjected itself to the ridicule of General Noriega, the international community, and the American people. Hopefully, the Noriega debacle has taught the United States that the unchecked use of its legal process against a foreign leader may only exacerbate the harm caused by its own flawed foreign policy and that such harm can only be healed through international political redress.

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* This article is dedicated to the author's father, Saul N. Sherman.