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**THE LOST ARCHIVES OF NORIEGA:  
EMANCIPATING PANAMANIAN HUMAN RIGHTS  
DOCUMENTS IN U.S. MILITARY CUSTODY**

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ABSTRACT

*This Article analyzes an ongoing debate within the U.S. government about the legal status of thousands of boxes of documents U.S. forces seized from the regime of Manuel Noriega in 1989 that remain in U.S. military custody. The ongoing legal and diplomatic deliberations center on two questions: under both the law of armed conflict and U.S. records laws, (1) who owns these seized documents and (2) what should be done with them?*

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*Wartime seizures of foreign government documents raise unique issues of ownership given that “enemy” documents can be a source of intelligence information, while also forming a part of the administrative, historical, and cultural heritage of a nation. This Article argues that given the nature of the U.S. intervention in Panama, the U.S. government should treat the seized documents as Panamanian property under both international and U.S. law. The Noriega regime documents are also crucial for ongoing human rights work focused on unresolved cases of missing and disappeared persons. This Article concludes that the United States should offer to repatriate the documents to Panama for the benefit of human rights researchers, historians, and attorneys on both sides of current legal proceedings arising out of Noriega’s return to Panama in late 2011.*

### I. INTRODUCTION

In December 2011, a French court granted the extradition of General Manuel Noriega back to Panama after serving more than twenty years in prisons in the United States and France for drug trafficking.<sup>1</sup> The return of Noriega forces Panama to revisit a crucial and painful part of its history and the unresolved fate of a central part of that history: thousands of boxes of Noriega regime documents that U.S. forces seized during “Operation Just Cause” in 1989. After years of uncertainty about the location and status of the seized documents, the U.S. government confirmed to the author in late 2011 that they are still in U.S. Army custody.<sup>2</sup>

The United States initially treated the seized documents as “on loan” from the government of Panama and asserted repeatedly during Noriega’s U.S. criminal case that the U.S. government had agreed to return them to Panama as soon as possible.<sup>3</sup> Beginning in 1993, however, when the United States was prepared to transfer custody of the documents, the government of Panama reportedly was reluctant to receive them due to the sensitivity of their content.<sup>4</sup> Specifically, the documents include dossiers on Panamanian citizens compiled by the Noriega regime.<sup>5</sup> At some point in

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<sup>1</sup> Tracy Wilkinson, *An Extradited Noriega Returns to Panama*, L.A. TIMES, Dec. 11, 2011, <http://articles.latimes.com/2011/dec/11/world/la-fg-noriega-panama-20111212>.

<sup>2</sup> Douglas Cox, Op-Ed, *The Noriega File*, L.A. TIMES, Oct. 5, 2011, at A15, available at <http://articles.latimes.com/2011/oct/05/opinion/la-oe-cox-noriega-20111005>.

<sup>3</sup> See Memorandum from James W. Moore, Assistant Archivist for Records Admin., Nat’l Archives and Records Admin., to Archivist of the U.S. (July 3, 1995), available at <http://www.dcofiles.com/p/795.pdf> (noting that the U.S. Army “takes the position that the original documents are on loan from the Government of Panama”) [hereinafter July 1995 Moore Memo].

<sup>4</sup> See Andres Oppenheimer, *Political Hot Potato Sits in Panama Warehouse*, MIAMI HERALD, Jan. 17, 1993, at A25 (stating that Panama would not seek to recover “up to 15,000 boxes of secret documents seized by U.S. troops”).

<sup>5</sup> *Id.* While the exact coverage of the documents is unclear from public sources, they

the mid-1990s, the United States transferred over 9000 boxes of the documents from Panama to a military warehouse in Albany, Georgia, where they remain today.<sup>6</sup>

In 2001, the Panama Truth Commission sought access to the records to assist in investigating human rights abuses during the Noriega regime and the fate of missing or disappeared persons.<sup>7</sup> After multiple requests for assistance, the U.S. State Department ultimately rejected the Commission's requests for access.<sup>8</sup> The documents were thereafter largely forgotten, even within the U.S. government, until they were essentially rediscovered in 2010, when archivists found references to them in Defense Intelligence Agency ("DIA") records.<sup>9</sup>

This Article explores the complex legal status of the Noriega regime files seized by the United States. Part II describes the seizure and exploitation of the documents during Operation Just Cause and their subsequent fate. Part III assesses the current legal status of the documents in light of the law of armed conflict, U.S. federal records laws, and the complex question of whether the documents are currently the property of the United States, Panama, General Noriega, or some combination of the three. Part IV argues that the United States should follow earlier precedents by offering the original documents to Panama and that the Panamanian government should accept this offer and take responsibility for its own history. With originals in Panama and a copy in the U.S. National Archives, access to, and accountability for, the documents will maximize the benefit to historians, human rights researchers, families of victims, and attorneys on both sides of current legal proceedings related to the Noriega regime.

## II. THE ODYSSEY OF THE NORIEGA FILES

On December 20, 1989, U.S. forces began the assault against the Noriega

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may also include a significant number of records predating the Noriega regime.

<sup>6</sup> See Memorandum from Richard Rayburn, Nat'l Archives and Records Admin., to Sam Welch, Nat'l Archives & Records Admin., "Captured Records from Operation Just Cause (Invasion of Panama) (Dec. 16, 2010) available at <http://www.dcofiles.com/p/1210.pdf> (describing site visit to seized Panamanian records in military storage in Albany, Georgia) [hereinafter Rayburn Memo].

<sup>7</sup> *Truth Commission: Panama*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-panama-truth-commission-comisi-n-de-la-verdad-de-panam> (last visited Mar. 11, 2013) (noting how the Commission "... was mandated to investigate human rights violations..." that took place under Noriega's dictatorship).

<sup>8</sup> COMISION DE LA VERDAD, INFORME FINAL DE LA COMISION DE LA VERDAD 6 (2002). An English translation of the Panama Truth Commission's discussion of the seized records by Joan Shnier is available at <http://www.dcofiles.com/p/ptctrans.pdf>.

<sup>9</sup> See *infra* Part II.C.

regime codenamed Operation Just Cause.<sup>10</sup> The operation involved almost 26,000 U.S. troops and resulted in the surrender of General Noriega on January 3, 1990.<sup>11</sup> The United States justified the military intervention on several grounds, including that the “illegitimate Panamanian National Assembly,” at the “instigation of Manuel Noriega,” had “declared that a state of war existed between the Republic of Panama and the United States.”<sup>12</sup> The United States also stated that the military action was “an exercise of the right of self-defense recognized in Article 51 of the United Nations Charter” and was necessary “to protect American lives in imminent danger and to fulfill our responsibilities under the Panama Canal Treaties.”<sup>13</sup>

#### A. Seizure & Exploitation

During the course of U.S. operations in Panama, the U.S. military seized significant quantities of documents from installations of Noriega’s Panamanian Defense Forces, including its massive headquarters called the *Commandancia*, Noriega’s offices, and government facilities throughout Panama.<sup>14</sup> A 1990 U.S. Army study attributed the “sheer volume of documents retrieved and turned in for exploitation” to the fact that initially “there were not priorities on locations to be searched or on what to look for,” which was “compounded by a shortage of interrogators, multiple exploitation priorities, and widely dispersed locations of large volumes of documents.”<sup>15</sup>

The exact quantity of documents seized has been reported in various, and sometimes inconsistent, ways. The 1990 U.S. Army study, for example, stated that within the “first week” of Operation Just Cause, “it was

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<sup>10</sup> Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on U.S. Military Action in Panama (Dec. 21, 1989), in 2 PUB. PAPERS, at 1734 [hereinafter President Bush Letter to Speaker]. For an extensive account of the invasion, see generally THOMAS DONNELLY, MARGARET ROTH & CALEB BAKER, OPERATION JUST CAUSE: THE STORMING OF PANAMA (1991).

<sup>11</sup> R. CODY PHILLIPS, OPERATION JUST CAUSE: THE INCURSION INTO PANAMA 42, 44 (2004).

<sup>12</sup> President Bush Letter to Speaker, *supra* note 10.

<sup>13</sup> *Id.* On December 20, 1989, the United Nations General Assembly condemned “the intervention in Panama” by U.S. forces and stated that it constituted “a flagrant violation of international law.” G.A. Res. 44/240, ¶ 1, U.N. Doc. A/RES/44/240 (Dec. 29, 1989).

<sup>14</sup> See, e.g., Cox, *supra* note 2 (“During the U.S. invasion of Panama to remove Noriega from office, American forces seized 15,000 boxes of documents from Noriega’s offices and the Panamanian Defense Forces.”).

<sup>15</sup> *Document Exploitation*, in 3 OPERATION JUST CAUSE LESSONS LEARNED: INTELLIGENCE, LOGISTICS, AND EQUIPMENT, BULLETIN NO. 90-9 (1990), available at <http://www.globalsecurity.org/military/library/report/1990/90-9/9093ch1.htm>.

estimated that over 120 tons of documents had been captured.”<sup>16</sup> On the other hand, a January 1990 memorandum from the DIA on the document exploitation effort stated that the “collected material is expected to approach 50 tons.”<sup>17</sup> Various news reports cited fifteen thousand boxes of documents.<sup>18</sup> The current volume of the original seized documents in U.S. custody is measured variously as 9,131 boxes,<sup>19</sup> approximately six million documents,<sup>20</sup> or some four thousand cubic feet of records.<sup>21</sup>

The January 1990 DIA memorandum described the wide variety of material seized noting:

The exploitation team has reviewed a considerable amount of personal correspondence, bank statements/transfers, travel records indicating shipment of illegal aliens, arms inventories, policy letters, stolen U.S. documents, personal checking accounts, election ballots, letters to and from commercial firms, PDF G-2 reports on enemies of the government, and other like material.<sup>22</sup>

Documents of human rights value are listed in an index to the records.<sup>23</sup> The materials include videotapes, which could contain interrogations and torture.<sup>24</sup> Seized documents also include “routine government records from

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<sup>16</sup> *Id.*

<sup>17</sup> Memorandum from Def. Intelligence Agency for the Deputy Nat’l Sec. Advisor to the President, Nat’l Sec. Council (Jan. 2, 1990) (on file at George H.W. Bush Presidential Library), available at <http://www.dcofiles.com/panama/diareport.pdf> [hereinafter 1990 DIA Memo].

<sup>18</sup> See, e.g., John Otis, *Panama Gets Control of Noriega Documents*, UNITED PRESS INT’L, Aug. 10, 1990 (citing “about 15,000 boxes of documents captured by U.S. troops”); Oppenheimer, *supra* note 5 (referring to “up to 15,000 boxes of secret documents seized by U.S. troops”).

<sup>19</sup> Memorandum from Douglas J. Feith, Under Sec’y of Def., to Sec’y of the Army (Aug. 1, 2001), available at <http://www.dcofiles.com/p/801.pdf> (describing “over six million pages of Panamanian documents” that are “stored in 9,131 boxes”) [hereinafter Feith Memo].

<sup>20</sup> *Id.*; see also July 1995 Moore Memo, *supra* note 3, at 1 (noting that the seized material comprises approximately six million documents).

<sup>21</sup> Rayburn Memo, *supra* note 6, at 1.

<sup>22</sup> 1990 DIA Memo, *supra* note 17, at 1.

<sup>23</sup> Some examples from this index include: “Pictures of Morrison, Wendell’s tortured body. Information on Medrano,” “Info collected on the assassination of Panamanian President Remon, Jose Antonio and Miro, Ruben,” and “files on suspected subversives.” Memorandum from Dir., Foreign Military Studies Office (Aug. 13, 2001), available at <http://www.dcofiles.com/p/fmso.pdf> (quoting an index to the documents) [hereinafter 2001 FMSO Memo].

<sup>24</sup> See the summary contained in “August 9: Operation Just Cause Records Phone Call,” which documents a teleconference between the State Department and the U.S. Army from August 2011, available at <http://www.dcofiles.com/p/811.pdf> [hereinafter 2011 State Dep’t/U.S. Army Teleconference].

such places as the Panamanian passport office, Social Security Office, and the Panamanian equivalent of the Department of Motor Vehicles.”<sup>25</sup>

Given the uncertain circumstances of the military seizure during the hostilities and the presumed sensitive nature of the content of the records, controversies over the integrity of the documents in U.S. custody began almost immediately. According to one account:

Army intelligence officials said they became concerned the day following the invasion when CIA personnel told members of the Army’s [470th] Military Intelligence Brigade to vacate the building. Some suspected the CIA agents cleared the building so that they could rummage through the files before anyone else knew what was there or what was missing.<sup>26</sup>

In criminal proceedings against Noriega, which began almost immediately after his capture, criminal defense attorneys also asserted publicly “it was likely that American intelligence agencies had ‘sanitized’ the documents of embarrassing material.”<sup>27</sup> Further, there were concerns that the military intelligence unit that initially controlled the documents may have been a questionable custodian of the records because of its earlier relationship with Noriega.<sup>28</sup> A *New York Times* article cited a “senior State Department official” as stating that there “was deep concern” in the government that certain governmental entities, including “the Army’s 470th Military Intelligence unit that operated in Panama, may have involved itself

<sup>25</sup> Government’s Motion to Return Seized Documents to Government of Panama at 2, *United States v. Noriega*, (S.D. Fla. May 21, 1991) (No. 88-cr-79), available at <http://www.dcofiles.com/p/591.pdf>. Partial inventories of the seized documents, which were publicly filed in Noriega’s criminal case, provide more detailed samples of the material. See Douglas Cox, *Inventories of Captured Panama/Noriega Documents*, DOCUMENT EXPLOITATION (Dec. 14, 2011), <http://www.docexblog.com/2011/12/inventories-of-captured-panamanoriega.html>.

<sup>26</sup> STEVE ALBERT, *THE CASE AGAINST THE GENERAL: MANUEL NORIEGA AND THE POLITICS OF AMERICAN JUSTICE* 100 (1993).

<sup>27</sup> James LeMoyné, *A Thin Paper Trail in Noriega Inquiry*, N.Y. TIMES, June 10, 1990. There had been earlier document preservation issues involving the case against Noriega. An informant had reportedly provided a box worth of documents to the U.S. Embassy in Panama in 1988 that supposedly showed connections between Noriega and drug trafficking and money laundering. When the documents were sent to federal investigators in Miami, however, the sealed box had been opened and documents were reportedly missing. DRUGS, LAW ENFORCEMENT AND FOREIGN POLICY: PANAMA: Hearing Before the Subcomm. on Terrorism, Narcotics & Int’l Operations, 100th Cong. 93 (1988); see also ALBERT, *supra* note 26, at 100-01.

<sup>28</sup> See, e.g., LeMoyné, *supra* note 27 (“American officials say they have used former members of the Panamanian Army to help identify and organize some documents. Some Panamanian officials have called that a risky step that could allow former military officials to tamper with evidence.”).

in illegal operations with General Noriega.”<sup>29</sup>

Concerns about the integrity of the captured documents were compounded by reports that U.S. investigators were utilizing former members of Noriega’s Panamanian Defense Forces “to help identify and organize” some of the documents.<sup>30</sup> Panamanian officials criticized this as a “risky step.”<sup>31</sup> A Panamanian investigator argued that this practice was like “letting the mouse guard the cheese,” as “[t]hese are exactly the same people who must be investigated.”<sup>32</sup>

While Justice Department officials involved in Noriega’s criminal case reportedly asserted that they had been “given access to all documents, which are under the control of the United States Army,” according to news reports, when pushed, officials from the Pentagon, State Department, and Justice Department nevertheless acknowledged that “it was possible some documents were destroyed or removed during the chaotic first days of the invasion.”<sup>33</sup>

Given such considerations, in January 1990, Noriega’s defense attorneys filed an emergency motion for an order prohibiting the U.S. Attorney “or any other branch or agency of the United States Government from destroying any items seized from or belonging to” Noriega.<sup>34</sup> The motion was granted on January 23, 1990.<sup>35</sup> This was quickly followed by a motion for return of “stolen property” that accused the U.S. military of stealing personal items from Noriega’s offices that were reportedly being sold in the United States.<sup>36</sup> They argued that such conduct was “reminiscent of ancient

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<sup>29</sup> *Id.*; see also *United States v. Noriega*, 117 F.3d 1206, 1215-16 (11th Cir. 1997) (“In pre-trial proceedings, the government offered to stipulate that Noriega had received approximately \$320,000 from the United States Army and the Central Intelligence Agency. Noriega insisted that the actual figure approached \$10,000,000.”).

<sup>30</sup> LeMoyne, *supra* note 27.

<sup>31</sup> *Id.*

<sup>32</sup> John Otis, *Magistrate Accuses U.S. of Obstructing Justice*, UNITED PRESS INT’L, May 13, 1990.

<sup>33</sup> LeMoyne, *supra* note 27 (quoting Charles S. Saphos, then Chief of the Justice Department’s narcotics division, stating, “We have heard a bunch of rumors to that effect, but we have not been able to substantiate any of them.”).

<sup>34</sup> Defendant’s Emergency Motion for Inventory and Inspection of All Items Seized from or Belonging to the Defendant Pursuant to Federal Rules of Criminal Procedure 16(a)(1)(C), Emergency Motion to Prevent Government from Destroying Any and All Items Seized from or Belonging to the Defendant, *United States v. Noriega*, (S.D. Fla. May 21, 1991) (No. 88-cr-79), available at <http://www.dcofiles.com/p/1901.pdf>; [hereinafter Jan. 1990 Emergency Motion].

<sup>35</sup> Order, *United States v. Noriega*, (S.D. Fla. May 21, 1991) (No. 88-cr-79), available at <http://www.dcofiles.com/p/190.pdf>.

<sup>36</sup> Motion for Inventory and Return of Stolen Property at 1-2, *United States v. Noriega*, (S.D. Fla. Jan. 23, 1990) (No. 88-cr-79), available at <http://www.dcofiles.com/noriegamotion.pdf>.

times when Attila the Hun and barbarians sacked and burned cities and later divvied up the booty among themselves.”<sup>37</sup>

Demands from both Noriega’s lawyers and Panamanian investigators for access to the documents in U.S. custody also quickly became contentious. Following a court order to create an inventory of the documents seized, the government began making certain documents available to Noriega’s defense counsel, but the scope of the access remained a contested issue.<sup>38</sup>

Meanwhile, in Panama in May 1990, a Panamanian magistrate judge accused U.S. officials of “obstructing justice by restricting his access to documents he needs to investigate former associates” of Noriega.<sup>39</sup> Shortly thereafter, an official from the Panamanian controller’s office reportedly “ordered the U.S. Army to give Panamanian auditors access to documents captured” in Panama and complained that, while Noriega had access to documents “to obtain evidence that can serve his defense,” Panama did “not have access to the documentation to get information and evidence to help the (justice) process.”<sup>40</sup>

Ironically, at the same time the United States was withholding the documents from Panamanian government investigators, U.S. prosecutors in Noriega’s case in Miami were simultaneously questioning the authority of the court to order the U.S. government to *retain* custody of the seized documents.<sup>41</sup> U.S. prosecutors invoked the political question doctrine by arguing that by “requiring the United States to maintain custody of the items seized in Panama,” the court was “impermissibly intrud[ing] on foreign policy matters solely within the Executive Branch.”<sup>42</sup>

According to U.S. government filings, the U.S. government had previously “reached an agreement with the Vice President of Panama in which the United States would relinquish custody of items seized during the

<sup>37</sup> *Id.*

<sup>38</sup> In a June 1990 filing, the U.S. government noted that documents covered by court order had been “segregated and placed in a secure room for defense counsel’s inspection” in Panama. Government’s Response to Defendant’s Motion to Enforce Compliance with Standing Discovery Order at 3, *United States v. Miranda*, (S.D. Fla. June 27, 1990) (No. 88-cr-79), available at <http://www.dcofiles.com/p/690.pdf>. See also *infra* Part III.C. (discussing the scope of documents subject to this order).

<sup>39</sup> Otis, *supra* note 32.

<sup>40</sup> John Otis, *Panama Demands Access to Noriega Records*, UNITED PRESS INT’L, May 17, 1990.

<sup>41</sup> Order, *United States v. Noriega*, (S.D. Fla. Jan. 23, 1990) (No. 88-cr-79), available at <http://www.dcofiles.com/p/290.pdf>.

<sup>42</sup> Order Affirming in Part and Reserving Ruling on the Remainder of the Magistrate’s Ruling Requiring the Government to Retain Custody of Items Seized in Panama, *United States v. Noriega*, (S.D. Fla. Jan. 23, 1990) (No. 88-cr-79), available at <http://www.dcofiles.com/p/890.pdf> (ordering the government to retain documents until defense lawyers could review an inventory and “take any appropriate legal action to preserve same for use at any hearings or trial herein”) [hereinafter Aug. 1990 Order on Retention].



military action to the newly constituted Panamanian government.”<sup>43</sup> The agreement “arose from a number of diplomatic concerns, including respect for Panamanian sovereignty and a desire to minimize the United States’ presence in Panama.”<sup>44</sup> Although there was no timetable for the return of the documents under the agreement, the government nevertheless asserted that any court-ordered retention of the documents “frustrates these foreign policy goals and ignores the rightful claims of the Panamanian government to the seized property.”<sup>45</sup>

In his August 1990 decision on the issue, however, District Judge William Hoeveler found the government’s arguments unpersuasive, stating:

Where, as here, the Government has chosen to arrest and prosecute the leader of a foreign country or de facto head of state, it is inevitable that foreign policy concerns will loom over many, if not all, of the issues raised in this case. But the government’s legitimate desire to pursue diplomatic goals cannot be considered to the exclusion of a criminal defendant’s rights . . . [T]he judicial branch’s lack of jurisdiction over foreign policy matters properly committed to the political sphere of government does not then too divest the Court of jurisdiction to protect the interests of a criminal defendant standing before it.<sup>46</sup>

By Summer 1990, disappointed U.S. government officials reportedly admitted that they had “found almost no documents . . . that conclusively prove[d] General Noriega trafficked in drugs.”<sup>47</sup> According to a contemporaneous account by the *New York Times*, “a six-month review of tens of thousands of captured documents has turned up no evidence of drug dealing by General Noriega, according to three American officials closely informed of the painstaking review of documents by several American agencies.”<sup>48</sup> An American official in Panama at the time, however, simply attributed the lack of a “smoking gun” to the fact that “Noriega was smart enough not to put anything on paper.”<sup>49</sup>

#### *B. Demands & Offers to Return the Documents*

Once the U.S. government had completed its initial review of the

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> LeMoyne, *supra* note 27 (noting that the result conflicted with U.S. government expectations that there would be “a damning paper trail of incriminating documents among General Noriega’s private and official papers”).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

documents, it began to expand Panamanian officials' access, although the documents remained in tight U.S. control.<sup>50</sup> A July 25, 1990 State Department cable, for example, authorized the U.S. Embassy in Panama to establish a "fixed procedure" that would allow limited access to specific Panamanian prosecutors and magistrates and would document in detail "access to every document" on the basis that prosecutors in Noriega's case in Miami would have to "explain the procedures to the court and assure that the procedures have been followed."<sup>51</sup> The cable further required that the procedures must indicate that access to the documents was provided to Panamanian prosecutors for "investigative purposes only" and "not for publication or the like."<sup>52</sup>

Once Panamanian officials were allowed more extensive access to the documents, however, they began to confront the negative consequences of that access. In an August 1990 press conference, Panamanian President Guillermo Endara announced the formation of an "ad hoc commission made up of Panamanian clergy" that would undertake a review of the documents and "decide which documents should be turned over to government ministries for investigations" and "which documents on private citizens gathered by Noriega's intelligence service will be destroyed."<sup>53</sup> President Endara later noted that he chose "clergymen because he figured they would keep the secrets contained in the boxes."<sup>54</sup> The ad hoc commission, however, "dissolved itself before it started to work," reportedly due to the fact that "some sensitive G-2 [intelligence] documents already had disappeared, and the priests feared they would be accused of leaking them if they appeared in the press."<sup>55</sup>

Despite the concerns of the Panamanian government about the records, prosecutors in Noriega's case continued to assert that the Panamanian government was repeatedly requesting custody of the documents.<sup>56</sup> U.S.

<sup>50</sup> Cable from Dep't of State Regarding Captured Documents (July 25, 1990) (on file with George H.W. Bush Presidential Library), National Security Council Records, William T. Pryce, Panama (Seized Documents File), available at <http://www.dcofiles.com/p/790.pdf> [hereinafter Cable from Dep't of State]; Otis, *supra* note 32 (noting how after "three months of waiting," an auditor was finally allowed to access the documents "but U.S. military officials refused to give him unrestricted access to the boxes").

<sup>51</sup> See Cable from Dep't of State.

<sup>52</sup> *Id.* By August 1990, the U.S. government had expanded access to the government of Panama to the extent that a Panamanian magistrate stated that, while the documents continued to "be guarded by the U.S. military at a secret site," they were essentially "controlled by Panama." Otis, *supra* note 18. Based on later events, this statement appears to have been an overstatement.

<sup>53</sup> Otis, *supra* note 18.

<sup>54</sup> Oppenheimer, *supra* note 5.

<sup>55</sup> *Id.*

<sup>56</sup> Government's Response to Defendant's Request that this Court Order the United States to Continue to Retain Custody Over Items Seized in Panama at 2, *United States v.*

prosecutors stated in court filings: “[t]he current Government of Panama needs these records to operate an orderly Government,” and “[t]he United States Government has been attempting to comply with the Government of Panama’s request that they be returned to the proper record custodians.”<sup>57</sup>

When the United States was finally prepared to return custody of the documents to Panama following Noriega’s trial, however, the Panamanian government reportedly balked. In January 1993, the *Miami Herald* published an article aptly titled “Political Hot Potato Sits in Panama Warehouse.”<sup>58</sup> According to the piece, President Endara stated that he would “not seek to recover up to 15,000 boxes of secret documents seized by U.S. troops during the 1989 invasion because they contain sensitive files about the sexual activities of scores of prominent citizens.”<sup>59</sup> President Endara was quoted as saying that “[t]hose boxes spell trouble” and that “[y]ellow journalists would have a field day with them.”<sup>60</sup> The article reported, “U.S. officials have told the Panamanian government that Panama can have access to the boxes as soon as it wants. Panama had replied that it’s in no hurry to take them over.”<sup>61</sup> The article concluded,

Now the boxes remain in U.S. military custody and in a legal limbo, Panamanian and U.S. officials say. U.S. diplomats say they most likely will be turned over to Panama before U.S. troops leave Panama as scheduled by the end of 1999, but it’s unclear whether they will change hands anytime soon.<sup>62</sup>

For years, the 1993 *Miami Herald* account remained the final public report on the fate of the documents. An internal National Archives and Records Administration (“NARA”) memorandum from July 1995, recently made public via the Freedom of Information Act (“FOIA”), continued the story noting that the U.S. Army had informed NARA that it had “offered to return the original documents” to the government of Panama, but that Panama had “not yet responded and Army cannot predict when a response will be forthcoming.”<sup>63</sup> The Army therefore requested NARA’s assistance in developing a contingency plan for possibly transferring custody of the documents either to NARA or the U.S. Army Center for Military History.<sup>64</sup>

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Noriega, (S.D. Fla. Jan. 23, 1990) (No. 88-cr-79), available at <http://www.dcofiles.com/p/990.pdf>.

<sup>57</sup> *Id.*

<sup>58</sup> Oppenheimer, *supra* note 5.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> July 1995 Moore Memo, *supra* note 3.

<sup>64</sup> *Id.*; Memorandum from Jimmie C. Simpkins, Colonel, Deputy Commander – Support, U.S. Army South, to Jerry Nashorn, Nat’l Archives & Records Admin. (May 5,

At some point thereafter in either 1995 or 1998, the thousands of boxes of original captured documents were transported to the United States and placed in storage in the Defense Distribution Depot in Albany, Georgia.<sup>65</sup> It appears that the boxes were then largely forgotten until an inquiry by the Panama Truth Commission.

Established by a January 18, 2001 Presidential decree, the Panama Truth Commission, or *Comisión de la Verdad de Panamá*, was empowered to “investigate human rights violations perpetrated during the military dictatorships of Generals Omar Torrijos and Manuel Noriega between 1968 and 1989.”<sup>66</sup> Given the importance of the Noriega regime documents to this work, the Truth Commission sought to locate the documents seized by U.S. forces. After initial inquiries to Panamanian military and policy authorities and the U.S. Embassy led to “unsatisfactory results,” the Truth Commission “unofficially” received information from an unknown source indicating that the documents may be located in a U.S. military installation.<sup>67</sup>

The Truth Commission, thereafter, repeatedly sought to access the documents in U.S. custody.<sup>68</sup> In February 2002, however, the State Department informed the Truth Commission by letter that the seized documents remained in the custody of the U.S. Army. If the Truth Commission wanted to obtain access, it would have to submit FOIA requests, a right no greater than that afforded to any member of the general

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2010), <http://www.dcofiles.com/p/595.pdf> (requesting NARA’s “assistance and input to develop a concept plan for transferring JUST CAUSE documents to your organization”).

<sup>65</sup> Compare Rayburn Memo, *supra* note 6, at 1 (“[C]aptured records from Operation Just Cause had been stored at the [Defense Department] facility since 1995,”), with Isaac Hampton, U.S. Army South Command Historian, Timeline of Operation Just Cause Records, Oct. 10, 2011, at 4, available at <http://www.dcofiles.com/p/1011.pdf> [hereinafter Dr. Hampton Draft Report] (stating that the storage agreement and the transfer of the documents to Georgia took place in 1998). The exact circumstances surrounding the transfer of the documents to Georgia remain unclear. According to recent investigations by NARA, the agreement to store the documents at the defense depot in Georgia was signed by the Center for Military History, rather than U.S. Army South, although the latter has been responsible for the records. Rayburn Memo, *supra* note 6, at 1. One possible explanation is that, according to an unrelated report by the Center for Military History in 1997, there was limited storage space available for Army equipment in the mid-1990s due to the downsizing of the Army, post closures, and “unit inactivations.” CENTER FOR MILITARY HISTORY, REFLAGGING IN THE ARMY 9 (1997). As a result, the Army began using the depot in Georgia for temporary storage, although due to “an agreement with Defense Department officials in Albany to keep activity at a minimum, the Army property there was to be treated as ‘dead storage,’” which meant that the Center for Military History “was not able to verify what was in storage at Albany, and inquiries by units as to the location of their property could not be answered.” *Id.*

<sup>66</sup> *Truth Commission: Panama*, *supra* note 7.

<sup>67</sup> COMISION DE LA VERDAD, *supra* note 8.

<sup>68</sup> *Id.*

public.<sup>69</sup> While the Truth Commission considered it an achievement to simply verify the continued existence of the documents, the U.S. government failed to make them available to the Truth Commission to help it unearth evidence of human rights violations perpetrated by the Noriega regime.<sup>70</sup>

*C. Resurrecting Boxes from Dead Storage*

In 2010, more than a decade after the boxes were placed in storage in Georgia, the existence of the collection suddenly reemerged as a result of an enterprising archivist and a \$64,000 bill.<sup>71</sup> In 2010, librarians at the Foreign Military Studies Office (“FMSO”) at Fort Leavenworth, Kansas were considering what to do with a collection of microfilm rolls.<sup>72</sup> In investigating the provenance of the collection with the assistance of an archivist from NARA, the archivist determined that the collection consisted of microfilm copies of the seized Noriega regime documents that were on loan from the DIA. During this process, the NARA archivist also located references to the original hard copy documents in a 2001 Defense Department memorandum that noted that “over six million pages of Panamanian documents” were “currently stored in 9131 boxes at the Defense Distribution Depot in Albany, GA.”<sup>73</sup> A February 2010 email from the NARA archivist asked, “[S]hould NARA begin inquiring about the status of the 9,000+ boxes of war records from Panama reportedly being stored in the Defense Distribution Depot in GA?”<sup>74</sup>

Not long afterward, the Commander of U.S. Army South, the unit that had been responsible for the records, unexpectedly received a bill for \$64,000 from the Depot in Georgia for ten years of past fees incurred for storing the documents.<sup>75</sup> The Commander of U.S. Army South then tasked the unit’s historian with investigating the stored materials and finding a long-term solution for their disposition.<sup>76</sup>

NARA, U.S. Army South, the DIA, and the State Department have subsequently been attempting to unravel the legal and diplomatic puzzle of the legal status of these records and determining what to do with them.<sup>77</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> U.S. Army South Command Historian, *supra* note 65, at 5.

<sup>72</sup> E-mail from Karen Shaw, Nat’l Archives & Records Admin., to Jerome Nashorn, Nat’l Archives & Records Admin. (Feb. 12, 2010), *available at* <http://www.dcofiles.com/p/210.pdf>.

<sup>73</sup> Feith Memo, *supra* note 19, at 1.

<sup>74</sup> E-mail from Karen Shaw, *supra* note 72.

<sup>75</sup> Dr. Hampton Draft Report, *supra* note 65, at 5.

<sup>76</sup> *Id.*

<sup>77</sup> *See, e.g.*, “Operation Just Cause Records Disposition Teleconference,” Mar. 23, 2011

### III. THE LEGAL STATUS OF THE NORIEGA FILES

The central question for the U.S. government's analysis is whether the original documents seized during Operation Just Cause remain the property of the government of Panama or whether they are now U.S. federal records. Specifically, the U.S. Army appears prepared to treat the seized documents as U.S. Army records, considering them "documents captured or confiscated in wartime by international law."<sup>78</sup>

The seemingly straightforward questions of whether the Noriega regime documents were "captured" or "confiscated" during Operation Just Cause and who owns them are, in fact, complicated by several factors. First, the standards governing document seizures under the law of armed conflict may vary depending upon whether Operation Just Cause is classified as an international or non-international armed conflict, a classification for which there is conflicting evidence.<sup>79</sup> Second, the status of the documents as U.S. federal records may be affected by post-seizure diplomatic discussions and other developments, details of which remain non-public. Third, the legal status of the records may also vary with the nature of individual documents, with the result that some may constitute Panamanian property, U.S. property, or personal property of General Noriega.

#### A. Law of Armed Conflict

The first issue to consider is the classification of Operation Just Cause as either an international or non-international armed conflict and the possible consequences of that classification for the legal status of seized records.

##### 1. Seized Documents in an International Armed Conflict

In many respects, Operation Just Cause appeared to be a traditional international armed conflict. The armed forces of one state, the United States, engaged in hostilities against the armed forces of another state, Panama.<sup>80</sup> Additionally, following Noriega's conviction in 1992, District

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(involving representatives from NARA, U.S. Army South, and the DIA), available at <http://www.dcofiles.com/p/311.pdf>; 2011 State Dep't/U.S. Army Teleconference, *supra* note 24.

<sup>78</sup> Request for Records Disposition Authority from Dep't of the Army to Gen. Serv. Admin. (1983), [http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-defense/departments-of-the-army/rg-au/nc1-au-83-033\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-defense/departments-of-the-army/rg-au/nc1-au-83-033_sf115.pdf).

<sup>79</sup> See, e.g., GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 169 (2010) (using Operation Just Cause as an example of the difficulty of classifying armed conflicts); John E. Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 41-43 (1991) (describing the difficulty of classifying Operation Just Cause).

<sup>80</sup> See PHILLIPS, *supra* note 11, at 44 (summarizing the conflict and providing estimates

Judge William Hoeveler adjudicated whether the United States had to treat Noriega as a prisoner-of-war under the 1949 Geneva Conventions during his incarceration.<sup>81</sup> In doing so, Judge Hoeveler expressed little doubt about the issue of the classification of Operation Just Cause, holding that “what occurred” in Panama “in late-1989 – early-1990 was clearly an ‘armed conflict’ within the meaning of Article 2” of the Geneva Conventions and noting that “[a]rmed troops intervened in a conflict between two parties to the treaty.”<sup>82</sup> Judge Hoeveler’s determination relied upon not only the text of the Geneva Conventions, but also the expressed policy of the United States “that Article 2 of the Conventions should be construed liberally.”<sup>83</sup>

If U.S. operations in Panama were part of an Article 2 international armed conflict, the full body of the law of armed conflict would apply to those operations and the seizure of the Noriega regime documents would implicate the complicated set of rules that apply to enemy documents “captured” or “confiscated” in armed conflict.<sup>84</sup>

In general, the law of armed conflict provides that the lawfulness of the seizure of enemy property depends upon the presence of military necessity or whether such property constitutes a “military objective.”<sup>85</sup> Subject to this restriction, not only may belligerents seize enemy documents, but the laws of war provide that lawfully captured enemy moveable property generally becomes the property of the capturing state as “war booty.”<sup>86</sup>

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of United States military and Panama Defense Forces casualties).

<sup>81</sup> *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992); *see also* Geoffrey S. Corn & Sharon G. Finegan, *America’s Longest Held Prisoner of War: Lessons Learned from the Capture, Prosecution, and Extradition of General Manuel Noriega*, 71 *LA. L. REV.* 1111, 1115 (2011).

<sup>82</sup> *United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992).

<sup>83</sup> *Id.*

<sup>84</sup> *See* Douglas Cox, *Archives and Records in Armed Conflict: International Law and the Current Debate Over Iraqi Records and Archives*, 59 *CATH. U. L. REV.* 1001, 1016-1020 (2010) (describing the legal standards governing the seizure of documents during an armed conflict).

<sup>85</sup> Under Geneva Protocol I, military objectives are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 *U.N.T.S.* 3, at art. 52.

<sup>86</sup> War booty is defined as consisting “principally of governmental enemy property.” YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 247 (2d ed. 2010) (noting how “[i]n conformity with customary international law, title to any movable public property belonging to the enemy State and captured on the battlefield is acquired automatically by the Belligerent Party whose armed forces have seized it . . .” regardless of the property’s military character).

“Public property captured or seized from the enemy,” the U.S. Army Field Manual summarizes, “as well as private property validly captured on the battlefield and abandoned property, is the property of the United States.”<sup>87</sup>

Government documents, however, represent a unique form of “enemy” property, given that they can have administrative, historical, military, intelligence, and even cultural value. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, for example, includes “archives” within its protections for “cultural property,” although the protections remain subject to a waiver in the case of imperative military necessity.<sup>88</sup>

In practice, the treatment of foreign documents seized by U.S. forces during international armed conflicts has been inconsistent. During World War II, for example, the United States internally debated whether documents seized in Germany had converted into U.S. property under the law of armed conflict.<sup>89</sup> Ultimately, the United States asserted that title to at least a portion of the documents had passed to the United States and their return to Germany was characterized as a “donation” that required congressional approval.<sup>90</sup> Similar debates took place within the government in relation to seized Japanese records.<sup>91</sup> More recently, Iraqi documents seized by U.S. forces during Operation Desert Storm in 1991 were treated as U.S. property and as U.S. federal records.<sup>92</sup> In contrast,

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<sup>87</sup> DEP’T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 150 (1956); see also INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL, OPERATIONAL LAW HANDBOOK 42 (Andrew Gillman & William Johnson, eds., 2012) (“When required by military necessity, confiscated property becomes the property of the capturing state”) [hereinafter 2012 OPERATIONAL LAW HANDBOOK]; cf. 50 U.S.C. § 2204(4) (2012) (defining “spoils of war” as “enemy movable property lawfully captured, seized, confiscated, or found which has become United States property in accordance with the laws of war”).

<sup>88</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, at art. 1, art. 4.

<sup>89</sup> See ASTRID M. ECKERT, THE STRUGGLE FOR THE FILES: THE WESTERN ALLIES AND THE RETURN OF GERMAN ARCHIVES AFTER THE SECOND WORLD WAR 179-85 (2012).

<sup>90</sup> U.S. Nat’l Archives & Records Admin., General Records Schedule, Seized German Records, Job No. II-NNA-777 (Aug. 1, 1953), U.S. Nat’l Archives, Record Group 242, AGAR-S No. 3144, available at <http://www.dcofiles.com/3144.pdf>.

<sup>91</sup> See Greg Bradsher, *A “Constantly Recurring Irritant,” Returning Captured and Seized Japanese Records, 1946-1961*, in RESEARCHING JAPANESE WAR CRIMES 169, 175 (Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group ed., 2006) (describing a debate over whether the law of armed conflict provided only the “right to custody and use” of seized Japanese records or whether title to the records had passed).

<sup>92</sup> See Request for Records Disposition Authority from Def. Intelligence Agency to Nat’l Archives & Records Admin, SF 115, Job. No. N1-373-02-3, (approved Aug. 9, 2002) available at [http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-defense/defense-agencies/rg-0373/n1-373-02-003\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-defense/defense-agencies/rg-0373/n1-373-02-003_sf115.pdf) (scheduling original hard



however, during the war in Vietnam, which the U.S. government treated as an international armed conflict,<sup>93</sup> the U.S. government took the position that “enemy documents captured in the Republic of Vietnam are legally the property of the Vietnamese government.”<sup>94</sup>

## 2. Seized Documents in a Non-International Armed Conflict

Whether the United States “captured” or “confiscated” the Noriega regime documents under the law of armed conflict is further complicated by the fact that the U.S. executive branch has consistently taken the position that Operation Just Cause was *not* an international armed conflict.<sup>95</sup> The executive branch’s view is that Operation Just Cause was not part of a conflict *between* Panama and the United States, but rather U.S. forces were intervening at the request of the legitimate government of Panama in an *internal* conflict against anti-government insurgent forces loyal to Noriega.<sup>96</sup>

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copies of seized documents from Iraq).

<sup>93</sup> See, e.g., John Norton Moore, *The Lawfulness of Military Assistance to the Republic of Vietnam*, 61 AM. J. INT’L L. 1, 2 (1967) (arguing that the United States was assisting in the collective defense of the Republic of Vietnam against the “unlawful armed attack” from the Democratic Republic of Vietnam, which were “separate international entities”). At the time there was a lively debate among international law scholars as to whether the war in Vietnam was an international armed conflict between North and South Vietnam, as the U.S. government asserted, or a civil war within one Vietnam. See Wolfgang Friedmann, *Law and Politics in the Vietnamese War*, 61 AM. J. INT’L L. 776 (1967) (responding to John Norton Moore’s article); John Norton Moore, *Law and Politics in the Vietnamese War: A Response to Professor Friedmann*, 61 AM. J. INT’L L. 1039 (1967).

<sup>94</sup> U.S. MILITARY ASSISTANCE COMMAND VIETNAM, MACV J2 STUDY OF THE EXPLOITATION OF CAPTURED DOCUMENTS IN SVN 15 (1968); see also JOSEPH A. MCCHRISTIAN, VIETNAM STUDIES: THE ROLE OF MILITARY INTELLIGENCE 1965-1967 39 (1994) (stating that seized original documents “were the legal property of the Republic of Vietnam”). *But see* Morrison v. United States, 492 F.2d 1219, 1226-27 (Ct. Cl. 1974) (holding that enemy currency seized in Vietnam had converted into U.S. property under the laws of war).

<sup>95</sup> Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, (Jan. 22, 2002), available at <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> at 26 [hereinafter 2002 OLC Memo] (stating that intervention in Panama was not an international armed conflict); see also INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL, LAW OF WAR HANDBOOK 82 n.24 (2005) (stating that “the U.S. official position was Panama was not an Article 2 conflict”) [hereinafter 2005 LAW OF WAR HANDBOOK]; Parkerson, *supra* note 79, at 41 (stating that “[a]t first glance, it may appear ludicrous to contend” that U.S. operations in Panama “could be characterized as anything but ‘international,’” but that international humanitarian law may well treat Panama as a non-international armed conflict).

<sup>96</sup> See generally Parkerson, *supra* note 79 (examining conflict status for Operation Just Cause). To confuse things further, the U.S. Army’s Law of War Handbook also previously

The U.S. position relies upon the executive branch's use of the recognition power. That is, while Noriega may have been the *de facto* head of Panama, the United States never formally recognized the Noriega regime as the legitimate government of Panama.<sup>97</sup> Instead, the United States aligned itself with Guillermo Endara, who had been elected President of Panama several months earlier in an election that the Noriega regime had nullified.<sup>98</sup> Shortly before U.S. forces engaged Noriega's forces as part of Operation Just Cause, Endara was sworn in as the President of Panama on a U.S. military base.<sup>99</sup> The United States then recognized his government as the legitimate government of Panama.<sup>100</sup> President Endara, in turn, invited U.S. forces to intervene in Panama on its behalf.<sup>101</sup> According to the State Department Legal Adviser at the time, "Every action taken after the arrival of U.S. forces was with the approval of President Endara."<sup>102</sup>

The U.S. government's position, therefore, was that the United States was assisting the Panamanian government in a non-international armed conflict, for which only the more basic provisions of Common Article 3 of the Geneva Conventions would apply.<sup>103</sup> This position allowed the United

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classified Operation Just Cause using a separate, but now discontinued, rubric of military doctrine, as a "military operation other than war" to which the "[t]raditional law of war regimes do not technically apply." 2005 LAW OF WAR HANDBOOK, *supra* note 95, at 242.

<sup>97</sup> United States v. Noriega, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990); 2002 OLC Memo, *supra* note 95 at 26 (stating that the United States did not recognize Noriega as "Panama's legitimate ruler").

<sup>98</sup> 2005 LAW OF WAR HANDBOOK, *supra* note 95, at 82 n.24 (noting that the U.S. position was that "the legitimate Government of Panama invited us to assist them in reestablishing control of Panama after General Noriega nullified the free elections where Mr. Endara was elected President.").

<sup>99</sup> See *id.* ("[C]oncurrent with the invasion, Mr. Endara was sworn in as President of Panama in the U.S. Southern Command Headquarters one hour before the invasion occurred; forces were already airborne en route.").

<sup>100</sup> See *id.* (referring to Mr. Endara's government as the "legitimate Government of Panama").

<sup>101</sup> See President Bush Letter to Speaker, *supra* note 10, at 1734 ("In the early morning of December 20, 1989, the democratically elected Panamanian leadership announced formation of a government, assumed power in a formal swearing-in ceremony, and welcomed the assistance of U.S. Armed Forces in removing the illegitimate Noriega regime."); 2005 LAW OF WAR HANDBOOK, *supra* note 95, at 82 n.24 ("[C]oncurrent with the invasion, Mr. Endara was sworn in as President of Panama in the U.S. Southern Command Headquarters one hour before the invasion occurred; forces were already airborne en route.").

<sup>102</sup> *The Panamanian Revolution: Diplomacy, War and Self-Determination in Panama (I&II) Self-Determination and Intervention in Panama (I)*, 84 AM. SOC'Y OF INT'L LAW PROC. 182, 188 (1990) (statement of Abraham Sofaer, State Department Legal Adviser).

<sup>103</sup> See Parkerson, *supra* note 79, at 42 (stating that for the situation in which the foreign state intervenes on behalf of the established government and against the insurgents or rebels, the traditional answer is that "the conflict 'remains non-international,' and common

States initially to avoid granting Noriega formal status as a prisoner-of-war and to deny that it was obligated to fulfill the responsibilities of an occupying power. A 1990 legal memorandum from W. Hays Parks to the Judge Advocate General of the Army, for example, asserted:

Inasmuch as there was a regularly constituted government in Panama in the course of JUST CAUSE, and U.S. forces were deployed in support of that government, the Geneva Conventions did not apply . . . nor did the U.S. at any time assume the role of an occupying power as that term is used in the Geneva Conventions.<sup>104</sup>

Judge Hoeveler's subsequent rejection of the government's position and his findings that Operation Just Cause was an Article 2 international armed conflict and that Noriega was a prisoner-of-war did not alter the view of the executive branch. A 2002 Department of Justice Office of Legal Counsel ("OLC") memorandum on the legal status of detained members of the Taliban and al-Qaeda cited Panama as an example of a conflict to which the full provisions of the Geneva Conventions did not apply, reasserting that:

[I]n the view of the executive branch, the conflict was between the Government of Panama assisted by the United States on the one side and insurgent forces loyal to General Noriega on the other. It was not an international armed conflict between the United States and Panama, another State. Accordingly, it was not, in the executive's judgment, an international armed conflict governed by common article 2 of the Geneva Conventions.<sup>105</sup>

The 2002 OLC memorandum also expressly noted and rejected Judge Hoeveler's 1992 decision, stating:

To the extent that the holding assumed that the courts are free to determine whether a conflict is between the United States and another "State" regardless of the President's view whether the other party is a "State" or not, we disagree with it. By assuming the right to determine that the United States was engaged in an armed conflict with *Panama* – rather than with insurgent forces in rebellion against the recognized and legitimate Government of Panama – the district court impermissibly usurped the recognition power, a constitutional

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Article 3 determines the extent of application of humanitarian law").

<sup>104</sup> 2005 LAW OF WAR HANDBOOK, *supra* note 95, at 242 (quoting Memorandum from W. Hays Parks, Special Assistant for Law of War Matters, to the Judge Advocate General of the U.S. Army (Oct. 1, 1990)). A copy of the quoted W. Hays Parks memorandum regarding Operation Just Cause is unfortunately no longer available in the U.S. Army's records as explained in the FOIA response letter available at <http://www.dcofiles.com/p/Parksmemo.pdf>.

<sup>105</sup> 2002 OLC Memo, *supra* note 95, at 26.

authority reserved to the President.<sup>106</sup>

The treatment of Operation Just Cause as a non-international armed conflict complicates the analysis of the status of the Noriega regime documents. The central issue becomes whether seized property can be confiscated as war booty during a non-international armed conflict.

The basic provisions of Common Article 3 that apply during non-international armed conflicts do not delineate any guidance on the legal status of seized property. Moreover, according to the International Committee of the Red Cross, customary international legal standards governing the issue of war booty in non-international armed conflicts have not yet been established.<sup>107</sup> Standards that would be relevant to such seized property, however, would include the domestic law of the state within whose borders the conflict occurred. Domestic law might apply differently depending upon which side is seizing property.

Consider, for example, two hypotheticals, one in which anti-government forces seize government property, and the other in which the government seizes property of anti-government forces. Common Article 3 neither prohibits nor expressly authorizes either of these seizures. Under the domestic law of the state, however, the government could prosecute anti-government forces for the “theft” of government property in the same way that anti-government forces in a non-international armed conflict can be

<sup>106</sup> *Id.* at 26-27 n.101. The OLC memo ignores that Judge Hoeveler expressly accepted in an earlier decision the fact that the Executive’s decision not to recognize Noriega as Panama’s head of state was “binding on the Court” in denying Noriega’s claims of head of state immunity based on a line of cases “holding that recognition of foreign governments and their leaders is a discretionary foreign policy decision committed to the Executive Branch and thus conclusive upon the courts.” *United States v. Noriega*, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990). The two decisions are arguably not inconsistent to the extent that Hoeveler was rejecting the government’s argument that the conflict could be rendered a non-international conflict simply by recognizing Guillermo Endara as head of a government that had no command and control over any armed forces or other governmental entities within Panama.

<sup>107</sup> 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 174 (2005) (“With respect to non-international armed conflicts, no rule could be identified which would allow, according to international law, the seizure of military equipment belonging to an adverse party, nor was a rule found which would prohibit such seizure under international law.”); *see also The Law of Non-International Armed Conflicts*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 605, 627-28 (Dieter Fleck et al. eds., 2d ed. 2008) (stating that while “parties to an international armed conflict may seize military equipment belonging to an adverse party as war booty . . . [i]n a non-international armed conflict the seizure of such equipment is not regulated under international law.”); KNUT DÖRMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 465 (2002) (“[I]t must be emphasized that there are no specific rules of international humanitarian law allowing requisitions, contributions, seizure or taking of war booty in a non-international armed conflict.”).

prosecuted for engaging in hostilities against the government.<sup>108</sup> The government's seizure of the property of anti-government forces, in contrast, could be further *enabled* by domestic law powers allowing for confiscation and forfeiture of property used in crimes. It would be limited only by the parameters of domestic law protections (such as government "takings" restrictions<sup>109</sup>) and, perhaps in extreme cases, human rights standards governing the right to property (such as the American Convention on Human Rights<sup>110</sup>).

Moreover, as a practical matter, in non-international armed conflicts in which control over the central government is at issue, the status of seized government property, including documents, will often resolve itself. Government records seized by anti-government forces seeking to overthrow the government, for example, may be recovered and re-incorporated into the records of the central government in the event the insurgency is defeated. In the alternative, if insurgent forces prevail in overthrowing the government, government records seized by insurgent forces during the conflict may be incorporated into the records of the new government as the successor to the old.

The complicating factor in the situation of Operation Just Cause is the intervention of U.S. forces in the internal conflict in Panama. That is, the question becomes to what extent the U.S. characterization of Operation Just Cause as an intervention in a non-international armed conflict to assist the government of Panama – at its request – in defeating anti-government forces alters the effect of property seizures by U.S. forces. From the technical perspective of the law of armed conflict, the answer would be the same: only Common Article 3 would apply. As discussed above, Common Article 3 would neither empower nor prohibit seizures of property, but the property would remain, in theory, subject to Panamanian domestic law.

More specifically, a practical analysis of the effect of the seizure of Noriega regime documents by U.S. forces is both clearer and more persuasive. That is, to the extent U.S. forces were seizing documents from Panamanian government facilities – even under the "illegitimate" control of the Noriega regime – asserting that those seizures would constitute "captured" or "confiscated" property to which title would pass to the U.S. government would effectively mean that the United States was divesting ownership of government records from the "legitimate" Panamanian government that it was purporting to assist.

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<sup>108</sup> See, e.g., SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 243 (2012) (noting that members of armed groups in non-international armed conflicts "remain subject to domestic criminal law and may be prosecuted for taking part in the hostilities").

<sup>109</sup> See, e.g., U.S. CONST. amend. V, § 6.

<sup>110</sup> See Organization of American States, American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

This analysis also appears consistent with U.S. guidance on the distinction between Article 2 international armed conflicts and non-international armed conflicts in which a host nation government invites U.S. forces into its territory. The U.S. Army's 2012 *Operational Law Handbook*, for example, discusses an "Article 2 Threshold" for the application of the property confiscation rules of the law of armed conflict.<sup>111</sup> "If a host nation government invites U.S. forces into its territory," the *Handbook* states, "the territory is not occupied, and U.S. forces have no right" to confiscate property because the law of armed conflict "and the property rules therein have not been triggered."<sup>112</sup>

Treating the records as Panamanian government property is also consistent with the initial position of the U.S. government in Noriega's criminal case.<sup>113</sup> The U.S. government never asserted legal ownership over the seized records and stated that the U.S. and Panamanian government had agreed that the United States would return the documents to the government of Panama.<sup>114</sup>

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<sup>111</sup> 2012 OPERATIONAL LAW HANDBOOK, *supra* note 87, at 43.

<sup>112</sup> *Id.* U.S. views on these issues are complicated by the U.S. military policy of applying the law of armed conflict even during operations in which it may not technically apply. See DEP'T OF DEFENSE DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM § 4 (May 9, 2006) (stating that "it is DoD policy that [m]embers of the DoD Components comply with the law of war during all armed conflicts, *however such conflicts are characterized, and in all other military operations.*") (emphasis added). During Operation Just Cause, for example, the State Department Legal Advisor issued a letter addressing the status and treatment of individuals detained during operations in Panama and argued that the fact that the Geneva Conventions did not technically apply was largely irrelevant, because, as a matter of U.S. policy, it was treating all detainees from operations in Panama *as if* they were prisoners-of-war. Such a policy is designed to provide consistency and avoid confusion during military operations and, in many situations, the policy may provide both clearer guidance to U.S. forces and enhanced protections for civilians and combatants. In the context of seizures of property, including documents, however, such a policy may confuse the legal status of such property. In particular, as discussed above, under the law of armed conflict, property seized by U.S. forces can be converted into U.S. property as "war booty." Applying such standards as policy in *all* U.S. military operations, however, regardless of whether the law of armed conflict is applicable and regardless of the role of the host nation in the U.S. operation, might cause confusion about U.S. ownership over seized records. *Cf.* Andrew R. Atkins, *Doctrinally Accounting for Host Nation Sovereignty During U.S. Counterinsurgency Security Operations*, 212 MIL. L. REV. 70, 71-72 (2012) (arguing that U.S. counterinsurgency policy continues to apply "conventional targeting, intelligence, and tactical methods" and fails to adequately reflect the "primacy of a host nation's domestic" law in "non-international armed conflicts in which U.S. forces support a sovereign host nation government").

<sup>113</sup> See Aug. 1990 Order on Retention, *supra* note 35 at 2-3 (citing the "rightful claims of the Panamanian government to the seized property").

<sup>114</sup> *Id.*

*B. U.S. Federal Records Laws*

Concluding that title to the seized documents did not transfer to the United States under the law of armed conflict as war booty is not dispositive of the related, but separate, issue of whether the documents may nevertheless constitute U.S. federal records.

As an initial matter, it is important to recognize that there is unequivocal evidence that the U.S. Army did not initially treat the seized documents as federal records. A January 1995 NARA memorandum noted that NARA had “been in touch with the Department of the Army General Counsel’s Office concerning the status” of the seized Panamanian records. The memorandum noted:

The Army General Counsel has taken the position that the documents are not subject to the Federal Records Act because they were not made or received by the Army. Rather, there was a diplomatic understanding between the Government of Panama and the U.S. Government that the documents were to be loaned to the U.S. and returned to the Government of Panama. For this reason, none of the documents were incorporated into Department of Army files.<sup>115</sup>

That the seized documents were not originally considered U.S. federal records is clear. Moreover, this was the understanding of NARA when then Archivist of the United States, John W. Carlin, wrote to the Secretary of Defense urging the Department of Defense (“DOD”) at the beginning of the 2003 U.S. invasion of Iraq to treat original captured Iraqi documents as Iraqi property.<sup>116</sup> Archivist Carlin specifically noted that “[t]his was the approach that the Department of Defense used, and NARA endorsed, for records obtained during Operation Just Cause in Panama in 1989.”<sup>117</sup> The more complicated question is whether other events may have changed this analysis.

Under the statutes collectively known as the Federal Records Act, “records” is defined broadly to include, in relevant part:

All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by

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<sup>115</sup> Memorandum from James W. Moore, Asst. Archivist for Records Admin., Nat’l Archives Records Admin. to Acting Archivist of the United States (Jan. 11, 1995), *available at* <http://www.dcofiles.com/p/195.pdf>.

<sup>116</sup> Letter from John W. Carlin, Archivist of the United States, to Donald H. Rumsfeld, U.S. Sec’y of Def., at 1 (April 17, 2003), *available at* <http://www.dcofiles.com/17.pdf> [hereinafter Carlin Letter].

<sup>117</sup> *Id.*

that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.<sup>118</sup>

The standard for what constitutes a federal record has been fleshed out most frequently in the context of litigation under FOIA about the meaning of “agency records,” which is particularly pertinent given that courts have held that documents that satisfy the standard for agency records under FOIA are also records subject to the Federal Records Act.<sup>119</sup> In general, the U.S. Supreme Court has held in the FOIA context that to qualify as an “agency record” an agency (1) must either “create or obtain” the record, and (2) must be in “control” of the records at the time of the FOIA request.<sup>120</sup>

The “create or obtain” element roughly corresponds to the “made or received” language of the statutory definition of records.<sup>121</sup> NARA regulations expressly note the ambiguity of whether seized documents are “received” by an agency by stating that “[a]dvice of legal counsel should be sought regarding the ‘record’ status of loaned or seized materials.”<sup>122</sup> As described above, the initial view of the Army General Counsel was that the seized Panamanian documents were not “received” by the Army.

In relation to the element of “control,” the U.S. Supreme Court has noted in the FOIA context that “[b]y control we mean that the materials have come into the agency’s possession in the legitimate conduct of its official duties.”<sup>123</sup> Lower courts have further expanded the concept of “control” based on four factors:

[1] the intent of the document’s creator to retain or relinquish control over the records, . . . [2] the ability of the agency to use and dispose of the record as it sees fit, . . . [3] the extent to which agency personnel have read or relied upon the document, . . . and [4] the degree to which the document was integrated into the agency’s record system or

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<sup>118</sup> 44 U.S.C. § 3301 (2011).

<sup>119</sup> See, e.g., *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Homeland Sec.*, 592 F. Supp. 2d 111, 124 (D.D.C. 2009) (“It follows, then, that the records at issue here – having been found by this Court to be subject to FOIA – are ‘federal records’ subject to the FRA.”).

<sup>120</sup> *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

<sup>121</sup> 44 U.S.C. § 3301 (2006).

<sup>122</sup> 36 C.F.R. § 1222.10(b)(4) (2012). In publishing the final rule in the Federal Register, NARA further clarified that “received” “may or may not refer to loaned or seized materials depending on the conditions under which such materials came into agency custody or were used by the agency.” 74 Fed. Reg. §1222/10(b)(4) (Oct. 2, 2009).

<sup>123</sup> *U.S. Dep’t of Justice*, 492 U.S. at 145 (noting that the Court’s treatment of “control” was consistent with the definition of records in 44 U.S.C. § 3301 as including documents “made or received by an agency . . . under Federal law or in connection with the transaction of public business”) (emphasis in original).



files[.]<sup>124</sup>

Applying these factors to the seized Panamanian documents helps clarify both what is known and what additional information is needed to make a determination about whether they ought to constitute U.S. federal records. Regarding the intent of the document creator to relinquish control over the records, the question becomes to what extent has Panama indicated any desire for the return of the documents. The available facts include, on the one hand, Panama's apparent failure to respond to U.S. offers to transfer custody of the original documents in approximately 1993-1994. This could arguably be interpreted as abandoning or relinquishing control over the documents. On the other hand, the Panamanian Truth Commission, formed and empowered by the Panamanian President, later expressly requested access to the documents, which arguably could be read as a renewed assertion of control. Whether Panama has subsequently expressed any interest in the "rediscovered" documents and the nature of discussions, if any, between the U.S. State Department and Panama, is unclear.

In relation to the second factor, the U.S. Army's treatment of the documents would appear to illustrate its ability to "use and dispose" of the records as they see fit. The U.S. government's rejections of the Panama Truth Commission's requests for access in 2001 are arguably an assertion of this control. At the same time, the recent discussions within the U.S. government about how to treat the documents illustrate some uncertainty about whether to assert control over the documents and whether the government of Panama is interested in obtaining them.

The analysis of the third and fourth factors of "control" relate to whether "agency personnel have read or relied upon the documents" and whether they have been "integrated into the agency's record system or files" would appear to be clearer.<sup>125</sup> While the U.S. Army did initially utilize and maintain the original records for purposes of intelligence exploitation, they also copied and microfilmed the records for purposes of long-term use.<sup>126</sup> As noted above, the U.S. Army expressly stated that it did not incorporate the seized documents in its files in the mid-1990s.<sup>127</sup> Once transported to the United States, the documents lay sequestered and unused in storage.

Based on the foregoing analysis, and without further information, the

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<sup>124</sup> *Lindsey v. U.S. Bureau of Prisons*, 736 F.2d 1462, 1465 (11th Cir. 1984), *rev'd* 469 U.S. 1082 (1984) (vacated on other grounds); *Dow Jones & Co. v. Gen. Servs. Admin.*, 714 F. Supp. 35, 39 (D.D.C. 1989).

<sup>125</sup> *Id.*

<sup>126</sup> See Carlin Letter, *supra* note 116, at 1 (distinguishing between seized original records the United States intends to return, which would not be subject to the Federal Records Act ("FRA"), and "[c]opies of original records that you make and actively use to carry out agency business" that "would likely be subject to the requirements of the FRA") (emphasis in original).

<sup>127</sup> See July 1995 Moore Memo, *supra* note 3, at 1.

argument that the seized documents have become U.S. federal records appears suspect.

*C. The Nature of the Documents*

A final crucial issue relevant to the foregoing discussion is that the nature of individual seized documents may further alter their legal status. Certain descriptions of the contents of the seized records include notations, for example, that they include some “stolen U.S. documents” to which the U.S. may properly assert ownership.<sup>128</sup>

More broadly, based on available public information, the seized documents from Panama include at least some material that almost assuredly constituted personal property of General Noriega. Partial inventories filed in Noriega’s U.S. criminal case, for example, disclose that the seized material includes, among other things, letters, photographs, family Christmas cards, school grades, doctors notes, and personal credit cards.<sup>129</sup>

Under the law of armed conflict, the personal property of prisoners-of-war is protected from permanent confiscation.<sup>130</sup> This provision could apply to Noriega through reliance on Judge Hoeveler’s 1992 determination that Noriega was a prisoner-of-war, or, by analogy, based on U.S. policy of applying the laws of armed conflict in military operations regardless of whether they are technically triggered.<sup>131</sup>

In particular, under the annexed regulations to the 1907 Hague Convention on the law of land warfare, for example, “personal belongings” of captured combatants generally remain their property except for “arms, horses, and military papers.”<sup>132</sup> Similarly, the Third Geneva Convention provides that “[a]ll effects and articles of personal use, except arms, horses, military equipment and *military documents*, shall remain in the possession of prisoners of war.”<sup>133</sup> Commentary by the International Committee of the Red Cross provides additional flavor by interpreting “military documents” to include “maps, regulations, written orders, plans, individual military

<sup>128</sup> 1990 DIA Memo, *supra* note 17, at 1.

<sup>129</sup> See, e.g., Partial Inventory of Panamanian Materials from Specified Residences of Manuel Antonio Noriega at 2, *United States v. Noriega* 746 F.Supp. 1506 (S.D. Fla. Aug. 2, 1990) (88-cr-79), available at <http://www.dcofiles.com/p/990.pdf>.

<sup>130</sup> See *infra* notes 132-134 and accompanying text.

<sup>131</sup> See DEP’T OF DEFENSE DIR. 2311.01E, DoD LAW OF WAR PROGRAM § 4, *supra* note 112 (“DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”).

<sup>132</sup> Annex to the Convention Respecting the Laws and Customs of War on Land art. 4 Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (noting that “personable belongings” remain the property of prisoners-of-war, “except arms, horses, and military papers”).

<sup>133</sup> Geneva Convention Relative to the Treatment of Prisoners of War, art. 18 Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. (emphasis added).

records, etc.”<sup>134</sup>

The application of this distinction between the personal and the institutional has always been difficult to apply in practice. During World War II, for example, the U.S. considered the legal status of captured diaries of high-ranking Nazi officials using a fact-intensive inquiry.<sup>135</sup> Military lawyers determined “that if the diary was so related to the official duties of the writer that it might be considered as properly part of the official papers pertaining to the German war effort, it may properly be considered to be ‘military papers.’” However, “if a similar diary reflected merely the personal observation of the writer, it would not be considered ‘military papers’ and therefore must be considered private property.”<sup>136</sup>

Determining which seized documents might constitute Noriega’s personal property was also the subject of litigation in his criminal case. The issue arose specifically in the context of pre-trial discovery pursuant to Federal Rule of Criminal Procedure 16(a)(1)(E), which provides in relevant part that “[u]pon a defendant’s request, the government must permit the defendant to inspect and to copy . . . papers [and] documents . . . within the government’s possession, custody, or control” if “the item was obtained from or belongs to the defendant.”<sup>137</sup>

In January 1990, Noriega’s defense counsel filed an emergency motion pursuant to the Fed. R. Crim. P. 16 that demanded an “inventory and inspection of all items seized from the *Commandancia* Headquarters of the Panamanian Defense Forces (“PDF”), or any other location in Panama.”<sup>138</sup> The motion asserted that federal prosecutors had already traveled to Panama “for the very purpose of reviewing items seized from these locations, and has been in contact with United States military officials who may presently be in control of these items.”<sup>139</sup>

Following a hearing, U.S. Magistrate Judge William C. Turnoff granted Noriega’s emergency motion and ordered the government “to prepare an

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<sup>134</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 18, construed in Int’l Comm. of the Red Cross, Commentary- Art. 18. Part III.n/a, para. 1 n.4, available at <http://www.icrc.org/ihl.nsf/COM/375-590023>.

<sup>135</sup> William G. Downey, *Captured Enemy Property: Booty of War and Seized Enemy Property*, 44 AM. J. INT’L L. 488, 495 (1950).

<sup>136</sup> *Id.*

<sup>137</sup> FED. R. CRIM. P. 16(a)(1)(E). At the time the relevant rule was FED. R. CRIM. P. 16(a)(1)(C).

<sup>138</sup> Jan. 1990 Emergency Motion, *supra* note 35, at 1.

<sup>139</sup> *Id.* at 3. Noriega’s attorneys further argued that the seized documents “contain information material to the defense” in that they “demonstrate the assistance that General Noriega has given to various agencies of the United States in their efforts to eradicate trafficking in narcotics and in other endeavors beneficial to the interests of the United States,” and, therefore, “the government is hereby on notice of the existence of and need to preserve such exculpatory evidence.” *Id.*

inventory of items seized at the defendant's two residences," as well as an "inventory of the defendant's military offices and those directly under his control."<sup>140</sup>

The scope of Magistrate Turnoff's order and the scope of Noriega's ownership interest in the documents thereafter became a more contentious issue before District Judge Hoeveler. The government argued, for example, that documents seized from the headquarters of the PDF and the Panamanian Police Forces "do not belong to Noriega within the meaning" of Fed. R. Crim. P. 16.<sup>141</sup> As summarized by Judge Hoeveler, the government's argument was that documents housed within "Panamanian government and military installations" were "the property of the Panamanian government" on the basis that "if Noriega had resigned his official position and returned to private life, there is no basis for assuming that official files contained in these locations would have been his to take," and the government objected to the Magistrate's order insofar as it "interpret[ed] official government and military documents as belonging to Noriega."<sup>142</sup>

During the hearing, Judge Hoeveler opined that the government's argument "seems to make a fair amount of sense," noting:

It would seem to me that to draw an analogy, if the head of our Joint Chiefs of Staff was replaced, only a small amount of the files that were in his office would probably be determined to be his personal files. When the new Chief of Staff came in, he would pick up the files that were there. . . . [W]hen someone leaves Government, depending upon the circumstances, of course, . . . a lot of things . . . would not be considered his personal files, even though he may have had access to them and used them, but they would be files of the Government of Panama.<sup>143</sup>

In contrast, Noriega's attorneys argued that "although housed in government or military facilities, many of the items seized from these locations were his own personal files for his use only."<sup>144</sup>

<sup>140</sup> Order on Defendant's Emergency Motion, *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. Jan. 23, 1990) (No. 88-cr-79), available at <http://www.dcofiles.com/p/190.pdf>; see also Richard L. Berke, *U.S. is Told to Preserve Noriega Data*, N.Y. TIMES, Jan. 20, 1990.

<sup>141</sup> See Aug. 1990 Order on Retention, *supra* note 42, at 5.

<sup>142</sup> *Id.* The government, for example, while noting that "naturally there are a dirth [sic] of cases in the area on items seized form military officers," argued that "property of the institution, even though it may be used by and physically possessed by the officer" does not come within Rule 16. Transcript of Hearing at 5, *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. Aug. 2, 1990) (No. 88-cr-79), available at <http://www.dcofiles.com/p/890t.pdf> [hereinafter Aug. 2, 1990 Hearing].

<sup>143</sup> *Id.* at 7.

<sup>144</sup> See Aug. 1990 Order on Retention, *supra* note 42 at 4-5.

While Judge Hoeveler did not directly resolve the issue and largely held his ruling in abeyance, and while the issue was limited to an interpretation of Fed. R. Crim. P. 16, the debate over the breadth of Noriega ownership continues to be relevant.<sup>145</sup> The arguments and analysis were, however, limited in that they primarily were based on common sense assumptions about the distinction between personal and government records. The debate largely failed to take into consideration the rich body of guidance and precedent in U.S. law for determining the distinction between personal records and federal (or presidential) records, which, while not technically applicable, could have provided direction, nuance, and analogy.

There is at least a colorable argument, for example, that different rules might apply to the Noriega regime documents on the basis that he was the de facto head of state, even if he was not recognized as such by the United States. While records of the U.S. President, for example, are currently the property of the U.S. government, this is only because of the specialized, and, in many respects unique, Presidential Records Act of 1978.<sup>146</sup> Prior to its enactment, presidential records in the United States were considered personal property of the President. And even now, the President retains broad authority to determine what documents constitute “presidential records” that are subject to the Act.<sup>147</sup>

Moreover, U.S. law has also addressed with some regularity the distinction between personal records and federal records for other government officials.<sup>148</sup> The practical application of these standards has been, at times, extremely broad. Most famously, when former Secretary of State Henry Kissinger left office, the Legal Adviser of the Department of State advised Kissinger that transcripts of telephone conversations conducted in his official capacity and involving substantive discussions of U.S. policy were nevertheless “not agency records, but were his personal

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<sup>145</sup> *Id.* at 5.

<sup>146</sup> Presidential Records Act of 1978, 44 U.S.C. §§ 2201-2207 (2006).

<sup>147</sup> See 44 U.S.C. § 2201(2) (2006); see also Supplemental Declaration of Gary M. Stern at 3, *Citizens for Responsibility and Ethics in Washington v. Nat’l Archives and Records Admin.*, 583 F.Supp.2d 146 (June 21, 2007) (No. 07-cv-48), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2007cv00048/123882/11/1.pdf> (stating that the President decides which records are presidential records and that NARA “has no formal role” in this “threshold question”).

<sup>148</sup> See, e.g., *U.S. Dep’t of Justice*, 492 U.S. at 145 (“[T]he term ‘agency records’ is not so broad as to include personal materials in an employee’s possession, even though the materials may be physically located at the agency.”); *Bureau of Nat. Affairs, Inc. v. U.S. Dep’t of Justice*, 742 F.2d 1484, 1486 (D.C. Cir. 1984) (determining whether appointment books of agency employees constituted personal or agency records); NAT’L ARCHIVES & RECORDS ADMIN., DISPOSITION OF FEDERAL RECORDS: A RECORDS MANAGEMENT HANDBOOK 27 (1997) (describing standards for personal papers maintained within agency offices) available at <http://www.archives.gov/records-mgmt/pdf/dfr-2000.pdf>.

papers, which he would be free to take when he left office.”<sup>149</sup>

Given the insistence of the United States that Operation Just Cause was a non-international armed conflict, the body of law most relevant for determining the precise distinction between Panamanian governmental records and Noriega’s personal records is the law of Panama, a thorough examination of which is beyond the scope of this Article and the expertise of its author. Such analysis would include an examination of whether, and to what extent, Panamanian law makes a distinction between personal and government records generally. It would also include, more specifically, whether Panama’s confiscation of Noriega’s property affected his ownership interests in the seized documents.<sup>150</sup>

#### IV. EMANCIPATING THE NORIEGA FILES

The legal analysis above highlights the complexity of determining the precise legal status of the documents seized during Operation Just Cause and challenges any assertions by the U.S. government that the documents constitute U.S. property pursuant to the law of armed conflict or U.S. Army records pursuant to U.S. federal records laws. The more basic and practical question is, in light of the uncertainty of the documents legal status, what should the U.S. government do with them. Outlined below are a few recommendations and thoughts on resolving the question of the documents.

As an initial matter, the U.S. government should recognize that the seized Panamanian documents constitute human rights documentation that potentially contains information about individuals whose fate still remains a mystery to human rights investigators and family members in Panama. Additionally, they could also constitute evidence, either for the prosecution or defense, in ongoing legal proceedings following Noriega’s recent return. On these bases alone, the U.S. government should treat the disposition of these documents as essential and time-sensitive.

Moreover, given the “rediscovery” of the documents, simply maintaining the status quo by retaining custody of them may ultimately deprive the executive branch of the ability to make and effectuate reasonable, responsible, and diplomatically sound decisions about the status of the documents. Issues of ownership and access may become decisions for the courts. FOIA litigation following requests for access to the documents, for example, could bring court decisions about the status of the documents that might undermine the government’s own analysis and frustrate its diplomatic goals.

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<sup>149</sup> *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 140-41 (1980).

<sup>150</sup> *See, e.g.,* Noemie Bisserbe & Jose de Cordoba, *21 Years Later, Noriega to be Returned to Panama*, WALL ST. J., Aug. 4, 2011 (noting that Panama had confiscated Noriega’s property).

In resolving the legal and diplomatic issues presented by these documents, the most central uncertainty is the perspective of the government of Panama.<sup>151</sup> Given the passage of time, the United States should, if it has not done so already, renew its offer to return the original documents to Panama.<sup>152</sup> This act would offer several benefits.

First, as outlined in the legal analysis above, treating the documents as the property of Panama is consistent with the executive branch's view that U.S. forces seized the documents during a non-international armed conflict in which the U.S. forces intervened on behalf of the government of Panama.<sup>153</sup>

Second, offering the documents to Panama would be consistent with the earlier understanding that the documents were only on "loan" to the United States.<sup>154</sup> It would also be consistent with the earlier diplomatic agreement with Panama that the documents would be returned, and with the related legal conclusion by the Army General Counsel that the documents were not U.S. federal records.<sup>155</sup>

Third, recognizing and asserting that Panama retains a legal right to these records would display respect for Panamanian sovereignty and may avoid accusations that the U.S. government is depriving Panama ownership over its own history, or stated less diplomatically, allegations that the United States has plundered Panamanian history as war booty. There is a long and infamous history of controversies over the fate of government records displaced by armed conflict.<sup>156</sup> There is no reason to unnecessarily create a

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<sup>151</sup> Rayburn Memo, *supra* note 6, at 2 ("It is not known whether the present Panamanian government knows about the existence of these records."). *Cf.* Dr. Hampton Draft Report, *supra* note 65, at 5 ("By August of 2011, the working group determined Panama might still have interest in reclaiming these records. As this juncture the ARSOUTH Political Advisor, [redacted] contacted the State Department on the issue of ownership and how to proceed concerning the government of Panama.").

<sup>152</sup> Absent a direct challenge from Noriega while the documents remain in U.S. custody, the United States should transfer those documents to which Noriega might have a claim back to the Panamanian government, thereby allowing the issue of Noriega's ownership to be adjudicated in the Panamanian courts consistent with Panamanian law.

<sup>153</sup> *See supra* Part III.A.2.

<sup>154</sup> *See supra* Part III.B.

<sup>155</sup> *Id.*

<sup>156</sup> *See, e.g.,* ECKERT, *supra* note 89 (discussing the lengthy debate over the return of German records seized during World War II); PATRICIA KENNEDY GRIMSTED, *THE ODYSSEY OF THE SMOLENSK ARCHIVE: PLUNDERED COMMUNIST RECORDS FOR THE SERVICE OF ANTI-COMMUNISM* (1995) (describing the controversy over Russian records seized by Nazi Germany that came into U.S. possession at the end of World War II); Trudy Huskamp Peterson, *Archives in Service to the State*, in *POLITICAL PRESSURE AND THE ARCHIVAL RECORD* 259 (Margaret Procter et al. eds. 2005) (surveying issues of archives seized in war); Cox, *supra* note 84 (discussing the debate of records captured in Iraq beginning in 2003); Bruce P. Montgomery, *Immortality in the Secret Police Files: The Iraq Memory Foundation*

new controversy with respect to these now largely historical records. Ironically, what currently distinguishes the Noriega regime documents from more controversial collections of foreign captured documents is the silence of the Panamanian government.

Finally, offering to return the documents has the related benefit of providing Panama with an opportunity to take responsibility for an important part of its history by preserving, managing, and making the documents accessible to its citizens and others in a responsible manner.

If, however, despite an offer to return the documents, Panama either affirmatively declines or otherwise indicates an intention to relinquish their rights to the documents, the U.S. Army would have a more solid legal basis for treating the documents as its records. The Army would also have a more compelling practical argument to undertake steps to properly preserve the documents and declassify them where necessary. Ultimately, the documents could be added to the National Archives to make them available to researchers.

Moreover, in order to maximize transparency and acceptance of such a determination to treat the original foreign records as U.S. Army records, the U.S. Army should not quietly classify them pursuant to the inapposite “captured” documents records schedule, but rather should submit a new proposed records schedule specific to the unique Noriega regime documents, notice of which NARA should publish in the *Federal Register* to provide public notice and invite public comment.

The dangers of treating the original seized documents as Panamanian property and offering to return them are also navigable. There are legitimate fears about what the fate of the original documents would be in Panama. The record of Panama in treating its own records is less than encouraging. The records of the Panama Truth Commission itself, for example, were subjected to theft, and their whereabouts, as of a 2005 report by a former acting Archivist of the United States, were unknown.<sup>157</sup>

Such risks to the documents and the corresponding risks to other stakeholders in these records (including historians and human rights researchers in the United States) could be minimized in returning them to Panama. Not only could the U.S. government create a “safety” copy of the original documents prior to their return, which is consistent with past U.S. practice, but a microfilm copy of a significant portion of the seized records

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*and the Baath Party Archive*, 18 INT’L J. CULT. PROP. 309, 310 (2011) (describing the debate over Iraqi documents at the Hoover Institute at Stanford University); Douglas Cox, “‘Inalienable’ Archives: Korean Royal Archives as French Property Under International Law”, 18 INT’L J. CULT. PROP. 409, 410 (2011).

<sup>157</sup> See TRUDY HUSKAMP PETERSON, FINAL ACTS: A GUIDE TO PRESERVING THE RECORDS OF TRUTH COMMISSIONS 72-73 (2005) (describing earlier thefts of records of the Panama Truth Commission records and noting that “inquiries about the current location of and access to the records” of the Commission “have all gone unanswered”).



(if not all of them) is already in the custody of the Defense Intelligence Agency.<sup>158</sup>

#### V. CONCLUSION

While many records of former repressive regimes, such as those in Argentina, Chile, Cambodia, and East Germany are held in special archival repositories or “museums of memory,” the documents of the Noriega regime remain to this day in a military warehouse in Georgia. While these Noriega archives present a unique challenge as records that are simultaneously both displaced from the nation to which they pertain, but also not subject to any apparent, or at least public, demands by that nation for their return, the status quo is not an acceptable option. The documents constitute a crucial part of Panamanian history, but are also a part of U.S. history. Accordingly, they need to be made responsibly accessible in both countries.

As with any collection of documents from a former repressive regime, they will undoubtedly contain information that may require legitimate protection from disclosure on national security or personal privacy grounds. Access to these documents, however, should be as broad as such considerations will allow. For purposes of history, human rights, government accountability, and current legal proceedings in Panama involving Noriega, the Just Cause documents should be emancipated and returned home.

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<sup>158</sup> See 2001 FMSO Memo, *supra* note 23 (describing microfilm copies).