

ABSTRACT

Title of Dissertation:

THE GUANTÁNAMO TRIALS:
SOVEREIGNTY AND SUBJECT
FORMATION IN THE WAR ON TERROR

Dissertation directed by:

Lester Howard Andrist
Roberto Patricio Korzeniewicz, PhD, Department
of Sociology

Recent political theory has explored the idea that states reconstitute sovereign power by deciding on the exception to law. By deciding on which laws to follow and how to interpret them in new ways, sovereign states not only reconstitute sovereign power but they also exercise the power to set the terms of citizenship and political exclusion. By focusing on the U.S.-led global War on Terror, I argue that this explanation of how sovereignty reconstitutes itself and how it sets the terms of citizenship focuses too narrowly on the juridical dimension. Sovereign power also reconstitutes itself in a representational dimension by attending to processes of signification and representation. The juridical dimension and the representational dimension are connected because the decision on the exception is simultaneously an effort to create exclusions, both legally and through the deployment of representations. I analyze these exceptional decisions as orchestrated security events that create discursive openings and a platform for state officials to introduce frames and narratives for understanding the unfolding events in the War on Terror. Specifically, I look at the first few years after the 9/11 attacks and analyze the legal documentation that comprise the rationale and wording of key decisions on the exception, which created the Guantánamo Bay detention camps. I also conduct a textual analysis of newspaper articles written about Guantánamo Bay during the same time period in order to catalogue the frames, narratives, and representations deployed by state officials. One major aim of this dissertation is to describe how the juridical and representational dimensions articulate with one another.

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IN THE WAR ON TERROR

by

Lester Howard Andrist

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Advisory Committee:

Professor Roberto Patricio Korzeniewicz, Chair
Professor Fred Alford
Professor Patricia Hill Collins
Professor Sahar Khamis
Professor Kris Marsh

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Dedication

For Julie Chang

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Chapter 1: Introduction

Today in the United States it seems as if the phrase “radical Islamic terrorism” is so often spoken and written about that the phrase should be hyphenated. There is an enormous amount of anxiety about “radical Islam” and “Islamic terrorism” and comparatively little concern about threats posed by other “radical” groups, including radical Christians. As Edward Said (1979) understood, there is long history of objectifying and othering the Islamic world, including the existence of entire professions and specialists devoted to looking into the deep recesses of the Muslim mind and Muslim culture.

After the attacks against the United States on September 11, 2001, this devotion to understanding once and for all the Muslim other has also been largely aimed toward exposing an alleged network of sleeper cells, it has been aimed toward ferreting out the lone wolfs Islam supposedly inspires, and it has been aimed toward learning about how Muslims radicalize others. There is a heightened fear that the Muslim enemy is secretly living within an otherwise harmonious American society, and there is anxiety about whether these Muslim terrorists can be identified in advance of “the next attack.” But more than identifying the enemy and preventing attacks, there has been a change in how Muslim-Americans are regarded more generally in communities across the United States.

Hate crimes against Muslims in the United States have surged and have remained high relative to the years prior to the attacks on 9/11 (FBI 2001). It is also the case that hate crimes against non-Muslims who are said to “look Muslim,” but who may identify as Christian or Sikh, have also increased in the wake of the 9/11 attacks (Ahmad 2004, Lewin 2001). In the last

decade there has been an uptick in vandalism and arson directed toward mosques in the United States, and proposals to begin construction on new mosques have often been met with controversy (Pew Research Center 2012).¹ In a more official capacity, a growing national security state routinely targets Muslims in its dealings with the public or cites Islam directly in providing a rationale for expanding powers to routinely surveil the public (Benner 2016, Moynihan 2016).

While there is a tendency to view this heightened scrutiny, suspicion, deployment of stereotypes, and violence as the inevitable and natural response to the 2001 attacks or more recent attacks by the self-declared Islamic State, public fears are not simply the unmediated awareness of an objective, statistical risk. For instance, terrorist attacks from radical white Christian groups, such as Identity Christians and Ku Klux Klan paramilitaries, occupy a prominent place in the America's history of domestic terrorism. One study found that since 9/11, nearly twice as many people in the U.S. have been killed by white supremacist or other right-wing domestic terrorists than Muslim jihadists (New America Foundation 2015). Even taking under consideration the substantive details of particular cases, it is hard to reconcile the seeming disconnect between statistical threats and the threats that manifest within public discourses. Consider the Oklahoma City bombing in 1995, which was by any measure one of the most notorious acts of domestic terrorism in American history (Morrison 2015). Despite initial speculation from news outlets that Arab or Muslim terrorists were to blame, the public soon learned that the attack was likely perpetrated by two white, Christian, anti-government militants,

¹ In 2010, a national controversy erupted over the proposed building of a Muslim cultural center, which included a mosque, two blocks away from ground zero. Although this incident received the most media coverage, it was only one of many controversies involving mosques (Pew Research Center 2012).

Timothy McVeigh and Terry Nichols. Michael Fortier, a third White Christian man, had knowledge of the impending attack and failed to warn authorities.

The death and destruction from the Oklahoma City bombing was considerable. McVeigh's fertilizer bomb nearly leveled the Alfred P. Murrah Federal Building, killing 168 people and injuring over 680, including scores of children in the building's daycare center. Not long after, McVeigh was arrested, found to be guilty, and was executed by lethal injection in 2001. The attack has had a lasting presence in public memory, but as sociologist Aaron Winter (2010) argues, despite the fact that both the Oklahoma City bombing and the 9/11 attacks were both full-fledged national tragedies, the events have been regarded very differently by the state and media. In 1995, Americans seemed ready to see radical Islamic terrorists, and in fact, in the immediate aftermath of the bombing backlash violence was briefly directed toward Arab- and Muslim-Americans (Linenthal 2001). But once it came to light that the perpetrator was a white Christian, the bombing was largely framed as the work of a deeply psychologically disturbed man. Though McVeigh had ties to white separatist groups and his views matched those espoused by those groups, no similar war was launched to root out Christian extremists in the United States. In sharp contrast, the 9/11 attack kicked a U.S.-led War on Terror into high gear and seems to have branded an enduring association between Islam and terrorism into the American imaginary. Considering controversial provisions in legislation such as the Patriot Act and bold new interpretations of U.S. obligations to international treaties such as the Geneva Convention, it is worth noting that the fear of Muslim extremism appears to have had a far greater impact on civil liberties than fears of Christian extremism.

As the foregoing discussion suggests, I began researching this project with an interest in why the U.S. public's perception of Muslims is so uneven. Given the outrage against "Islamic terrorism," the problem is very clearly related to representations of Muslims, but the fact of people being mistaken for Muslims based on appearances, suggests that the Muslim category is more than a religious designation; it also carries racial connotations. By thinking about how different discourses organized along the lines of race and religion intersect and create ideas about Muslims, which cannot be tamed or contained by the people who may identify as Muslim, I understood that I was also interested in the process of subject formation. The way in which Muslims have been discussed in the wake of the 9/11 attacks, or for that matter, the way Christians were discussed in the wake of the Oklahoma City attack, is related to how these two subjects have come to reside in the American imaginary. Moreover, it bears mentioning that no one is ever simply identified as belonging to the Muslim category, as with any socially constructed category, they are also being located within the broader national community, and this insight necessarily raises questions about citizenship. As I will show, questions about citizenship and subject formation are inextricably tied to processes of state formation, which leads me to modify the question I posed above that motivates this research: Why has the U.S. public's perception of Muslims been so uneven, and what role does the state play in making it so?

To speak of the perceptions of any particular group is to speak of representation and signification; however, the problem confronting anyone who is generally interested in the shifting sands of citizenship in the wake of the 9/11 and during the U.S.-led global War on Terrorism is that the issue of representation and signification constitute only one dimension of the problem. In other words, citizenship is not just how a given group is perceived to exist in the national community; it is also about whether they are actually—which is to say, legally—

included in the national community. In a little more than a week following 9/11, state agents who were coordinating at very high levels of the government had already begun an effort to rework the usual understanding of “established” law, and as I will make clear, they were also reworking codified rights and privileges of formal political citizenship. International and domestic laws, which were long regarded as a safeguard preventing states from violating fundamental human rights, were reinterpreted by the United States so that the normal understanding of those laws no longer applied. Prior to the attacks, the usual reading of U.S. treaty obligations and U.S. domestic legal code forbid the United States from indefinitely detaining and torturing individuals, even those captured in the context of a war. But based on remarks from various U.S. officials, it was clear early on that the United States was carving out a new position which established that these legal restrictions either did not apply or they would apply differently, and as time would tell, these exceptions the U.S. took to established law would not only hold consequences for the “unlawful combatants” captured in the theater of war, but also for U.S. citizens captured on U.S. soil. Thus to understand changes to Muslim subject formation and to understand changes in Muslim citizenship, one must also consider the cascading series of formal legal exclusions, which began to rapidly unfurl in the wake of the 9/11 attacks.

At this juncture, I have already suggested that in order to understand citizen-subject formation, one needs to theorize the representational dimension and the juridical dimension. In making this claim, I have centered analytical attention on the state and its role in molding the formation of citizenship, race, and religion, but insofar as I am also examining how groups are formally excluded, I am also focusing analytical attention on law. By directing attention to the state as an entity that constitutes power through the exercise of taking legal exceptions (exceptions to established law that exclude), I am also centrally engaging questions of

sovereignty. In short, sovereignty is the power to decide on the exception to the rule of law, which is to say, where there is sovereign power, there is no absolute “rule of law”; there can only be a set of laws that appear to function in a relatively consistent manner, until suspended by a sovereign power. In modern times, sovereignty is a power that has been almost exclusively wielded by the state.

For the sake of clarity, it is useful to bring together all of the concepts I have introduced thus far in characterizing this dissertation as an exploration of four basic insights: First, sovereignty is bound up with citizenship, and by extension, subject formation. This insight has been explored in various ways by Michel Foucault, but even more recently by Giorgio Agamben, who in turn follows Carl Schmitt’s thinking in arguing that sovereign power primarily reconstitutes itself through making decisions on the legal exception. Agamben adds that it is through the exercise of this quintessentially sovereign power that individuals become subject to the ban, which is to say they are excluded from living politically qualified existences.

The second insight is that sovereignty is a power that reconstitutes itself through a concomitant deployment of representations, and for the purpose of this dissertation, I pay particular attention to representations pertaining to race, religion, and sovereignty itself. Just as state agents ultimately make formal pronouncements of sovereign decisions on the exception, it is also the case that in making those decisions state agents draw from a historically built repertoire of representations in order to promote and establish a particular public reading of key historical events. They put forth frames and narratives in an effort to swerve the sensemaking discourse pertaining to such events. As I will explain, I am primarily concerned with terror events, such as the 9/11 attacks and what I call *security events*, such as the Military Order delivered by President George W. Bush in the wake of the attacks.

Having established that sovereign power works through a juridical dimension and a representational dimension, the third insight is that these two dimensions are connected. Detailing how they are connected is an important aim of this dissertation and a distinct theoretical contribution. Theorists have tended to focus on the juridical dimension, or the sovereign's ability to reconstitute its power through legal maneuvering or the outright suspension of law, and they have tended to ignore the representational dimension (i.e., How is the suspension of a given law publicly justified as absolutely necessary? How does the broader public come to understand those are to be excluded?). In order to understand how the two dimensions are connected, one must understand that the characteristically sovereign decision on the legal exception is an event that simultaneously changes law and (re)produces representations. There are of course theorists who are attentive to representations of sovereignty, and in fact, there is a literature devoted to studying the reconstitution and proliferation of such representations (see Kantorowicz 1998, Wagner-Pacifici 2005). However, theorists working in this literature have too often overlooked the importance of the decision on the exception as a representational and performative moment where a sovereign power demonstrates itself to be a power that is not beholden to the dictates of law.

I am interested in the decision on the exception as an orchestrated security event, or put differently, I am interested in it as a performative moment that has enormous implications for deploying representations of sovereignty and reconstituting sovereign power. However, representations of sovereignty, and representations of the sovereign, comprise only half the representational story. I think it is also important to consider how a sovereign acting state, in the act of orchestrating security events where the decision on the exception is announced, is *also*

creating a moment where the state can be observed to persuasively deploy representations about the subjects over whom it claims to rule.

As the entity that legitimately wields sovereign power, states have an important role to play in this story. States may routinely endeavor to reconstruct the ontological status of subjects through declaring exceptions to the laws that define a set of inalienable human rights associated with formal citizenship; however, these exceptions do more than codify new legal norms and set in motion new practices of enforcement. When state officials announce decisions on the exception, they are creating discursive openings, wherein ideas about citizenship can be reformulated. Citizen-subjects, for their part, must ultimately interpret and make sense of the exclusions they witness. In the context of the creation of the Guantánamo Bay detention camps at the start of the global War on Terror, not only did exceptions to the habeas corpus imperative make individuals newly vulnerable to indefinite detention, such declared exceptions fed a broader, national discourse that eagerly sought to define what type of person can and should be denied the basic rights of due process. Thus a decision on a legal exception may appear in the form of a military order, and on paper this order is squarely located within the juridical dimension, but it is an order that cannot be easily confined to this dimension; it routinely bursts its banks and spills over into a broader discourse that attends to the standing of individuals within imagined national and local communities (Anderson 2006).

Note that by referring to “the state” and “state agents,” I do not mean to suggest that the state is a monolithic and fully coherent entity. On the contrary, agents of the state often disagree. To take just one example, the United States Supreme Court has reversed exceptional decisions outlined by the President of the United States. Rather, as Foucault understood, the state should be conceived of as an entity that is embedded in historically contingent power relations, which it

cannot completely wrangle under its control. The task for analysts of the state, then, is to discern where the state is able to emerge within these broader power relations, and as I argue, it is very likely that this emergence is not random happenstance.

As is well demonstrated in the early years of the U.S.-led War on Terror, the United States can, through its exceptional decisions, change the political standing and status of people with the stroke of a pen, but in announcing the legal exceptions that paved the way for the creation of Guantánamo Bay, President George W. Bush, Defense Secretary Donald Rumsfeld, and other state agents held regular press briefings and gave countless interviews where they went further than simply outlining the legal details; they also drew from a common representational repertoire about civilization and the Arab-Muslim enemy, and using these representations, they deployed a shared set of narratives about why new legal exclusions were necessary. Thus the fourth insight I explore in this dissertation is that by being attentive to the security event, which I have been calling the decision on the exception, one is able to identify a place where the state emerges. Given that the state agents collaborate at high levels, it is also fair to say that the decision on the exception marks the place where the state strategically positions itself within power relations, drawing on a sovereign power to effect tactical changes in law and representational politics.

I began this introduction by noting that I was originally interested in understanding why the U.S. public's perception of Muslims has been so uneven. Why, for example, are Muslims so readily associated with terrorism despite persistent terrorist violence from other groups, including white Christian groups? This is a question that calls for an analysis of discourse, or put

differently, what are the major factors that determine the shape and content of discourses regarding Islam, Muslims, and terrorism? One recent analysis from sociologist Christopher Bail (2012) argues that fringe anti-Muslim “civil society organizations” have played a starring role in directing the media discourse with fear- and anger-driven messages about radical Islamic terrorism. While Bail’s attention to civil society organizations is important, the argument I put forth in this dissertation is that one must also bring the state back into discussions of directing media discourse, and given that discourse on Arab and Muslim subjects tracks closely with the U.S.-led War on Terror, it also necessary to consider questions of sovereignty.

Theoretical Orientation

In 2001, in the immediate wake of the September 11 attacks, the United States launched a global War on Terrorism, and within a month, had invaded Afghanistan and began taking prisoners. At about the same time as the military invasion, various state officials began discussing the possibility that there would be new rules for detaining and treating prisoners in this new War on Terror and that the United States would not necessarily be bound by the Geneva Convention. In countless press briefings U.S. state officials informed the U.S. public of progress in the war, and although the topics varied, a substantial amount of attention was devoted to describing the nature of the enemy and why U.S. obligations under the Geneva Convention would not apply. Thus from the very start the United States was asserting itself as a sovereign power that would not be bound by international law.

Political theorist Giorgio Agamben (1998, 2005) has noted the peculiar manifestation of U.S. sovereignty in the war on terror, but has also formulated a much broader theory of sovereignty that synthesizes and extends the ideas of Carl Schmitt and Michel Foucault on the

nature of such power as both a constituting and constituted power. Crucially, Agamben (1998) proposes that Foucault's genealogical investigations into power presents us with a "blind spot" that is the point of intersection between a juridico-institutional form of power and a biopolitical form of power, and at the same time, between *political technologies* with which the state endeavors to exert social control, and *technologies of the self* by which processes of subjectivization bring individuals to bind themselves. As Agamben describes it, the two forms of power and the processes they imply are in fact two manifestations of a sovereign power: "*It can even be said that the production of a biopolitical body is the original activity of sovereign power*" (p. 5-6).

Having identified the seeming blind spot in Foucault's work, Agamben quickly sets about making his theoretical case. In sharp contrast to his treatment of Schmitt, Agamben devotes very little time retreading the rich terrain first surveyed by Foucault, which is somewhat disorienting, given that his own project is ostensibly dependent on many of Foucault's conclusions about how power manifests in modern states². Despite this cursory treatment, the different modalities of power first identified by Foucault, and the associated techniques of power that derive from these modalities, are central to my own analysis, so for the purpose of clarity, I outline them below. The three modalities I distill from Foucault's account are juridico-sovereignty, disciplinary, and governmentality.

The juridico-sovereign modality refers to the power associated with monarchs, who are conceived to be unbound by the laws that govern common people. The sovereign monarch commands its subjects from above and seeks a corporeal loyalty, often with what is a widely

² It is an odd feeling to be halfway through reading a work that claims to synthesize Foucault, only to realize that Foucault appears to have left the room long ago.

recognized as the divine right to do so. As Foucault notes, the monarch's power through decree is distinctly prohibitive and repressive, and any transgression of the sovereign's law is characteristically received as a personal affront, not only against the sovereign, but its divine right to prohibit (Foucault 1977, 1990). Transgressions, then, are typically met with vengeful, violent tortures and executions. Indeed, as Foucault documents, well into the eighteenth century monarchs routinely exercised a right that was distinctive to the juridico-sovereign modality, a "right to take life or let live" (Foucault 1977, 1990, p. 136).

But as Foucault makes clear, systems of power are in a perpetual state of transformation, though there remains an imbrication between them. That is, subjects may find themselves simultaneously entangled in multiples relations of power, and it would be a mistake to interpret the emergence of different modalities—different relations of power—as somehow forming and dissipating in a linear manner where one emerges and completely overtakes its predecessor. Still Foucault sees evidence that by the nineteenth century a new modality of power had become prominent just as juridico-sovereignty fell into decline. Political theorist Banu Bargu (2014) usefully summarizes Foucault's argument regarding the impetus behind the transition from a juridico-sovereign modality to a disciplinary power:

Foucault acknowledges that with modern revolutions, sovereign power has shifted from the monarchs to the people, and the juridical structure of power has become solidified in a system of rights....monarchs are replaced by "the people" as the new sovereign. Power is depersonalized by the rise to prominence of democratically made or legitimated law. Despite its democratic extension (or perhaps because of it) to encompass citizen participation, sovereignty also begins to lose its hold over society (p. 44-46).

Whereas the sovereign of the eighteenth century may have exercised a right to kill based on a divine lineage, democratic revolutions powerfully introduced the idea that the people could rule themselves. Sovereignty could no longer be easily located within any single person, divine or otherwise. Instead, it had become shattered and was dispersed among the citizens of the nation, making it possible for philosophers like Rousseau (1893) to conceive of a social contract, where citizens transcended a state of nature by agreeing to abide by laws in exchange for state protections.

Disciplinary power, the second modality of power, begins to loom large in the democratic era and is distinct from juridico-sovereignty in that it is no longer a power that works exclusively from the top down. Instead, disciplinary power refers to the “micro-physics of power,” which is to say, it focuses on the way power became less a hierarchal imposition of a vengeful sovereign seeking corporeal obedience and more a power that was simultaneously interiorized and “capillary” (1977). As Bangu (2014) again summarizes, in a disciplinary society the subject “becomes the bearer and vehicle of power relations and their object of inquiry, intervention, and point of application” (p. 46).

To understand how a body becomes a bearer and vehicle of power relations, it is useful to examine how Foucault discusses power and knowledge, two concepts he thought so closely implicated each other that he often expressed them as a single, hyphenated term: “power-knowledge”³ (1980). For Foucault, knowledge—whether it exists in the form of a legal system, a propaganda campaign, or something referred to as common sense—is never created in the

³ Underscoring the idea that power and knowledge could not be easily separated, he wrote that “we should abandon the belief that power makes mad and that, by the same token, the renunciation of power is one of the conditions of power” (Foucault 1977, p. 27).

absence of power relations. All fields of knowledge both presuppose and constitute power relations. To say a subject is a bearer of power-knowledge is to say the subject “knows” itself and is conversant in other knowledges that claim to describe the way the world is. On the other hand, to say a subject is a vehicle of power-knowledge is to say a subject plays a role in transmitting and affirming what it “knows” about the world.

By directing the analytical focus to power-knowledge, Foucault reorients the analysis of power from seeing it as prohibitive and repressive toward understanding how power is also capable of producing subjects, so that it becomes unnecessary to prohibit. Whereas social control under juridico-sovereignty was maintained through extraordinary acts of violence, social control within a disciplinary society is achieved through various technologies of control, such as surveillance technologies that not only monitor subjects but also encourage subjects to internalize the possibility that they are always being monitored.

It would be a mistake to conclude that conceiving of “power without the king,” is the same as conceiving of power as a zero-sum, tit for tat game without any clear beneficiaries (Foucault 1990, p. 91). On the contrary, Foucault argued that there are nodes within the networks of power-knowledge, and that power relations may even benefit subjects or institutions depending on their position vis-à-vis such nodes. In other words, it may be misdirected to describe power in the modern era as absolutely hierarchical, but this does not mean that power is uniformly distributed among all subjects, institutions, or other entities caught up within a particular discourse. The state, for instance, is not an equal bearer and vehicle of power⁴. As Foucault makes clear later in his career, the state is a powerful institution, but not because it

⁴ It is important to note that Foucault also argued that these “nodes” of power are always met, diverted, and created by nodes of resistance.

dictates from above. To explicate Foucault's thinking on the state, it is important to his review his third modality of power, which he referred to as the "art of government" or governmentality.

In sharp contrast to a powerful sovereign exercising a "right to take life or let live," power under governmentality can be characterized as a power concerned with "making live or letting die." Foucault writes "the ancient right to take life or let live was replaced by a power to foster life or disallow it to the point of death" (Foucault 1990, p. 138). Here Foucault is discussing a power that extends into the personal lives of individuals but may also target population dynamics. It is just as concerned with the production of individual bodies as it is with the regulation of fertility rates. Instead of prohibiting behaviors with laws, governmentality describes a power that works through law when law is used as a set of tactics to manage people and populations (Butler 2006). In contrast to juridico-sovereignty, governmentality describes a power with both a greater reach and an interest in reaching considerably further, to include employing surveillance and other political technologies in order to effect security and manage contingencies (Foucault 2007).

Examining Foucault's work on the state vis-à-vis governmentality leaves one with the impression that Foucault saw the state as an institution which was less coherent than the version offered by state theorists who preceded him. In contrast to state theorists like Theda Skocpol (1979), he saw the state as neither an autonomous nor semi-autonomous actor, nor can it be seen as an institution that acts with a high degree of internal consistency, as if its machinery is at the beck and call of newly appointed elites fortunate enough to acquire the master controls. As historian Stephen Sawyer (2015) notes, Foucault saw the state as, "embedded in larger networks of power. The state does not stand outside or determine the deployment of power, but is rather

tied into and shares in a nexus of power.” He continues that the task, as Foucault saw it, is to “examine power relations and explore where the state seems to emerge” (p. 143).

Foucault’s characterizations of changing relations of power as juridico-sovereignty, disciplinary, and governmentality are, as Foucault well understood, chocked full of discontinuities. While one can certainly find historical contingencies that likely contributed to the rise of new discourses, Foucault avoids trying to write a “complete” history and does not endeavor to identify an underlying logic that would have demonstrated how all three modalities were related to each other. Giorgio Agamben has no such reticence, and his discussion of the “blind spot” in Foucault’s work signals his attempt to formulate a synthesis.

In order to shed light on the point of intersection between juridico-institutional power and biopolitical power (i.e., disciplinary power and governmentality), Agamben posits that both forms are in fact a single and coherent expression of sovereign power, the roots of which can be traced back to antiquity. To explain, Agamben begins by reintroducing readers to the structure of the exception, which is a description of how sovereign power works first identified by the German juridical theorist, Carl Schmitt⁵.

⁵ It is important to point out that Carl Schmitt was a member of the Nazi Party, which he joined on May 1, 1933. While Schmitt himself understood that by articulating the mechanism of sovereign power he was providing an ideological foundation and justification for Nazi power, I have drawn on his ideas about this sovereign mechanism only to expose it and hopefully to render it less destructive.

Carl Schmitt's Exception

Schmitt took issue with constitutional theorists who thought that something like a sovereign power could be anchored in legal documents, including a constitution. As a kind of social contract, a state constitution was conceived of as a negotiated deal struck between states and citizen subjects. In exchange for offering rights, protection and order, states could exercise exceptional powers over citizens, and most strikingly, this included the power to suspend the rights and protections of citizens during times of emergency.

However, Schmitt (2005) noted that any law written down in a constitution—any declaration of rights or statement intended to circumscribe the power of an otherwise aggressive state—must always be interpreted and applied to concrete cases, and one ought not forget that in modern times it is the sovereign state who performs this interpretive function. He argues that the one who is the interpreter, or the one who decides on the exception to the rule, is drawing on a power that stands above the constitution:

The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juristic element—the decision in its absolute purity. The exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about. Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogenous medium. . . . For a legal order to make sense, a normal situation must exist, and he is sovereign who definitively decides whether this normal situation actually exists (p. 13).

Foucault (1977, 1990, 2003) had often argued that while power relations were constantly in flux, people remained preoccupied with the idea that sovereignty worked exclusively through law, and Schmitt is making a similar observation above. While many people, including jurists, think the constitution is the source of sovereign power, and is therefore capable of establishing and maintaining a “normal situation” on its own. In fact, this view is misaligned with how sovereign power actually works. As Schmitt famously put it, “The sovereign is he who decides on the state of exception” (p. 5).

Examples abound of programs, organizations, and entire institutions being created in the wake of states of emergency. During such emergency periods state agents claim a power to make decisions on the specific exceptions, which is to say these agents reinterpret existing law, or they deem long standing laws and legal conventions suddenly inapplicable. One particularly vulgar example is the U.S. National Security Agency, which is now known to have cast a wide net in an ambitious program of domestic and foreign surveillance and to have routinely overstepped the usual legal constraints on such activities “thousands of times each year” (Gellman 2013). The detention camps at the Guantánamo Bay Naval Base constitute another ready example of the state exercising sovereign power through its declaration of exceptional circumstances. The camps have been, according to state officials, beyond the reach of law⁶. Those being held in cells are “unlawful enemy combatants,” not soldiers; they are “detainees,” not prisoners—terms intended to underscore the inapplicability of existing law. Like the surveillance programs of the National Security Agency, the indefinite detention at Guantánamo Bay emerged after a declared

⁶ As I will discuss, in the camps one finds a population for whom the privilege to petition for a writ of habeas corpus has been suspended and the normative prohibitions against torture have been eroded.

state of emergency known as the War on Terror and its establishment coincided with a state of legal exception⁷.

As identified by Schmitt, and as Agamben would elaborate, this practice of routinely declaring exceptions ties into a larger *structure of the exception*, which can be understood as a mechanism that characterizes how sovereign power works. In declaring an exception, the sovereign effectively creates an exceptional space, or a sphere outside the reach of law. However, as Agamben notes, the routine decisions on the exception implies an “inclusive exclusions,” which is to say that the sphere of excluded phenomena exists in a tacit relationship with the sphere of law. Interestingly, this insight is also echoed Charles Tilly’s (1998) work on durable inequality, where he draws attention to categorical pairs—in “included” category and an “excluded” category—and insists they must be understood in relational terms. The included category is modified by the excluded category and the boundary between the two is contested.

In more practical terms, what this means is that behaviors thought to be protected as inalienable rights can only be understood as such by witnessing the banning of behaviors and bearing witness to what happens to those who partake in banned behavior: *I understand my citizenship by understanding what happens to people who do not have my citizenship*. But the process of a given citizen’s understanding of whether their citizenship precludes the possibility of, say, torture is a fluid one, and it is mediated by their understanding of a changing context, one example being the transition into a War on Terror. When U.S. Secretary of Defense Donald

⁷ The U.S. government’s preferred term for alleged militants captured in the War on Terror has changed over time. When prisoners first began arriving at Guantanamo, the government referred to them as “unlawful combatants” or “unlawful belligerents.” Later in the 2004 ruling of *Hamdi v. Rumsfeld* (542 U.S. 507) the government preferred the term “enemy combatant,” but defined it narrowly as someone who was “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States.”

Rumsfeld declared that the War on Terror was a different kind of war, that militants captured in Afghanistan would be referred to as “unlawful combatants,” he was invoking a new context, as well as a status that describes persons who are to be placed outside the protections of a citizenship (Seelye 2002).

Since 1949 when the U.S. became a signatory to the Geneva Convention, prisoners of war were defined roughly as members of the armed forces or any other type of militia that has the misfortune of “falling into the power of the enemy” (Geneva III, Article 4(A-B)), but the creation of the unlawful combatant category, despite being entirely absent from the Convention, meant: 1) prisoners could no longer be captured in the theaters of Afghanistan and Iraq; and 2) prisoners were not to be confused with people held in indefinite detention, particularly at Guantánamo Bay. In channeling the sovereign power of the United States to posit a category of persons who exist outside international law, Rumsfeld implicitly established a relationship between people normally categorized as prisoners of war and unlawful combatants. Insofar as he was also positing a category of person who exists outside U.S. domestic law, he was implicitly drawing a distinction between U.S. citizens and alleged militants captured in the War on Terror. One category simply modified the other.

Zones of Indistinction

There is one further argument that the structure of the exception brings into focus. One consequence of a mechanism of power that involves orchestrating a relation between a sphere of law and a sphere of excluded phenomena (e.g., types of armed conflict, types of persons captured in a theater of conflict and who are affiliated with an organization) is that the routine practice of declaring exceptions opens up what Agamben refers to as a zone of indistinction. This is space where “the state of exception begins to become the rule,” and where the sovereign de facto

produces situations that can be used as further justifications for decisions on the exception (Agamben 1998, p. 169-170). Here Agamben is pointing to the blurring of legal and illegal phenomena, but also between potentiality and actuality (i.e., what is possible and what is actual), two philosophical concepts first discussed by Aristotle.

Here again Agamben is working at a fairly high level of abstraction, and it is worth specifying what precisely is indistinct, how it becomes indistinct, and where this zone of indistinction occurs. Looking again to the indefinite detention at Guantánamo Bay, zones of indistinction might be understood as spaces where the rule of law most clearly loses its usual meaning, or where it is most apparent that the sovereign state ultimately decides on states of exception, meaning that the state also decides on the conditions under which it follows existing law. Coupled with the reality that camps are not typically open to independent monitoring organizations (which is also an exception to international law), from the standpoint of any given detainee, what law prohibits and allows become indistinguishable. Indeed, pursuing an answer to the question no longer makes any sense. Judith Butler (2004) describes the situation in similar terms when she argues that the camps at Guantánamo Bay, and other such zones of indistinction, must be understood as spaces where the state decides on the conditions under which decisions on the fate of any given detainee need not conform to established criteria or to particular protocols of evidence and argument. Instead, in such spaces law is unveiled as tactic of sovereign power.

Underscoring the equivocation surrounding the rule of law, Guantánamo officials have routinely invoked judicial concepts when discussing the conditions and fates of detainees, including notions of due process, standards of evidence against the detainees, and treatment of detainees in accordance with the prescriptions of international law. Yet at the same time, these agents have insisted that the United States is engaged in a new kind of war, and are therefore not

bound by the international laws that would apply to the treatment of prisoners in a conventional war. For instance, in terms of due process, military officials announced that military tribunals would be established, but then added that even if a detainee was acquitted, the U.S. would not necessarily release him (Bush 2001b). Thus Guantánamo Bay is a space where, on the one hand, state agents reference law, as if to affirm its legitimacy as a set of rules that puts limits on power; yet on the other hand, such officials assert their ability to exercise the power to decide whether any law or ruling from a court is even applicable. Again, law in this space is indistinct because its application is revealed as tactical and not capable of protecting anything like inalienable rights. Lady Justice is not really the blindfolded adjudicator of guilt and innocence, but is fully revealed as a simple allegory agents of the state invoke when it suits them to do so.

In his work on spaces of exception and the paradigmatic zones of indistinction they seem to produce, Agamben connects the World War II concentration camps with their modern descendants, such as Guantánamo Bay, but he points to the political theorist Hannah Arendt as having begun this work. Writing nearly 50 years earlier in her treatise on imperialism and the phenomena of the Nazi camps, Arendt (1994) also paid special attention to these spaces of exception and the way distinctions between potentiality and actuality dissolved for both prisoners and prison guards. Arendt observed that the Nazi state used the spaces as laboratories to experiment with technologies of power and control. In her words, the camps are spaces of experimentation or “the laboratories in which the fundamental belief of totalitarianism that *everything is possible* is being verified” (p. 437; italics mine). She writes:

The camps are meant not only to exterminate people and degrade human being, but also serve the ghastly experiment of eliminating, under scientifically controlled conditions, spontaneity itself as an expression of human behavior and of transforming the human

personality into a mere thing, into something that even animals are not; for Pavlov's dog, which as we know was trained to eat not when it was hungry but when a bell rang, was a perverted animal (p. 438).⁸

It is now possible to discern why Schmitt's sovereign structure of the exception is the link that connects Foucault's notions of juridico-sovereign power and governmentality. The top-down power to declare a state of emergency, to prohibit or exclude by decree, the power to take life, and ultimately the power to establish a relationship between the rule and the exception is a characteristically sovereign power. However, as Arendt was already alluding to at mid-century, in exercising this power, sovereign states are endeavoring to simultaneously wield a kind of biopower—to make life itself the object of politics. Whether classical conditioning has anything to do with this biopolitical ambition, the routine process of excluding subjects from the trappings of their politically qualified status—their citizenship—transforms how they understand themselves vis-à-vis non-citizens. Moreover, routine exclusion has a biopolitical effect on a broader public, who witness the exclusions taking place largely through mass media. In short, deciding on the exception establishes the conditions for processes of subjectivization, but it also establishes the conditions for creating and employing political technologies that discipline.

Connecting Citizenship to Bare Life

Certainly legal exclusions of particular segments of the population did not begin with the War on Terror. One can trace a legal-judicial genealogy of exclusion back to the very founding

⁸ Not surprisingly, Guantánamo Bay has also been discussed as a space of exception, where experimentation regularly occurs. Colonel Brittain P. Mallow, who headed the Army's Criminal Investigation Task Force, which was charged with building legal cases against Guantánamo detainees wrote in 2006 to Michigan Senator Carl M. Levin of the Senate Armed Services Committee that Guantánamo was a "battle lab." Mallow noted that "interrogations and other procedures there were to some degree experimental, and their lessons, would benefit [the DOD] in other places" (Nazaryan 2015).

of the United States as a self-declared sovereign nation-state (Ngai 2004). From the Black Codes of 1865, which restricted the freedom of Black Americans, to the Chinese Exclusion Act of 1882, which made Chinese people ineligible for citizenship, to Roosevelt's Executive Order 9066, which imprisoned approximately 120,000 ethnic Japanese in camps, not all legal exclusions are, strictly speaking, decisions on the exception, but they demonstrate the power of law as a fundamental instrument for initiating processes of containment and removal.

I am particularly interested in exploring how law, and how decisions on the exception in particular, create and foster boundaries between subjects and the groups to which they belong, and how processes of exclusion and inclusion form citizen-subjects. Just as moving a geographical border may transform a citizen into a non-citizen, declaring new exceptions to law changes who law protects, who it abandons, and under what circumstances it is applied. Insofar as citizenship is a status occupied by those who law is said to provide guarantees in the form of rights, then decisions on the exception have the capacity to redefine what citizenship means and who it protects.

The men captured and detained by the United States in the War on Terror have been with few exceptions described and represented as Arab and Muslim men. In detaining many of these men at Guantánamo Bay, the U.S. sets them beyond the partition where law is said to apply, a partition that to be sure defines the outer limits of a statute or norm surrounding a field of legal knowledge, but the partition is also represented in physical space by the razor wire and towers of armed soldiers used to enforce the exclusion. Note that in its capacity to declare a state of emergency and decide on legal exceptions, the sovereign state is not simply an entity that is powerful because it may be able to arbitrarily imprison populations behind such partitions or

because it may be immune to legal sanctions from doing so; rather, the relations of power that sovereignty describes are relations that constitute (or de-constitute) citizen-subjects.

In their capacity to wield sovereign power, states are implicated in constituting citizens because citizenship is in part a body of state-granted political rights. The logics of who may receive the rights of citizenship differ. Some nation-states appear to be more exclusive in terms of who can claim citizenship, while other states, such as France and the United States, follow more of an assimilationist logic. Whatever the particular criteria defining eligibility for citizenship, Rogers Brubaker (1992) has shown that a system of civil equality known as citizenship became formally defined following the French Revolution. The rights of citizenship entailed became codified in law and institutionalized, as did the ideological distinctions between citizens and non-citizens.

Despite the fact that the alleged militants indefinitely detained at Guantánamo Bay, in CIA dark sites, and in other facilities have not been U.S. citizens, citizenship remains a centrally important concept. As a legal concept, citizenship can be understood as being anchored in the global state system as well. Here, the rights one might claim may not have been codified within a nation-state's constitution; nor even put down as elaborations in any other form of domestic law. Instead, the rights and privileges of international citizenship can be said to be founded in treaties and other agreements between states on the geopolitical stage. The four treaties and three protocols that comprise the Geneva Conventions and the Universal Declaration of Human Rights are but two ready examples. In these terms, an international citizenship is still something granted by states, but the decision to grant such "universal" rights is the result of negotiations with other sovereign entities.

However, to constitute a person or group as a citizen implies more than simply granting or withholding rights and privileges. On this point, it is useful recall Foucault's discussion of disciplinary power. Foucault (1977) draws attention to the philosopher Jeremy Bentham and his panopticon as a paradigm for understanding how subjects are constituted through a disciplinary power. The panopticon was an architectural feature of the late eighteenth century that allowed prison guards to efficiently surveil the prison population, but the true genius of its design was that, properly executed, the design held the possibility prisoners never being able to discern whether they were being watched. Under these circumstances, the prisoners would presumably discipline themselves to behave as if they were always being watched. Foucault's point was not to suggest that the panopticon has become dominant as an architectural feature of prisons, but that its design marks an important manifestation of power, one that endeavors to discipline populations outside the prison system and seems to be pervasive in modernity. For Agamben, the camps are also a paradigm, a perspicuous example of the changing configuration of power relations and where modern citizen subjects may be living increasingly precarious lives.

But the type of disciplinary power described by Foucault's panopticon is very different than the power Agamben attempts to describe with reference to concentration camps, and so too are Agamben's insights about how subjects are constituted. Foucault is describing a power capable of making bodies docile; while Agamben is concerned with subjects who have been excluded, and as a consequence, undergo a suspension of their ontological status. In other words, Agamben is describing how subjects are deprived of the rights of citizenship, which includes formal political rights and deprivations of liberty, but it also includes deprivations of the basic protections, comforts, and dignities, many of which are not specified in law, yet make life worth

living. The camps are instructive for understanding the potential of sovereign power to make life itself the object of politics and to reduce it to something Agamben refers to as *bare life*.

To lend greater specificity to his notion of bare life and elaborate upon this idea of how sovereign power constitutes life, Agamben (2002) returns to the Nazi concentration camps and points to what he calls a limit figure, who suffered the debilitating effects of malnutrition earlier than others, who not only lost all will but consciousness, and who became known in the jargon of the camp as *der Muselmann*, literally “the Muslim.” Agamben speculates on the etymology of this designation as having an affinity with the literal meaning of the Arabic word muslim: the one who submits unconditionally to the will of God. In order, Agamben synthesizes various accounts of the Muselmann from the writings of Holocaust survivors:

The Muselmann is an indefinite being in whom not only humanity and non-humanity, but also vegetative existence and relation, physiology and ethnics, medicine and politics, and life and death continuously pass through each other. This is why the Muselmann’s “third realm” is the perfect cipher of the camp, the non-place in which all disciplinary barriers are destroyed and all embankments flooded (p. 48).

Muselmänner were living, in the sense that biological processes functioned well enough for them to sometimes stand on their own and even move about, but they were no longer living as people who were connected to the other inmates. For the SS they were “useless garbage” and next in line for extermination, and for other inmates, their presence was a source of anger and worry, as they were an unwanted reminder of what was to come (Ryn et al. 1987; quoted in Agamben 2002). As bare life, they were barely prevented from crossing the threshold of death, but they existed in a liminal space that would not afford them humanity.

Scholars working with Agamben's concept of bare life have distilled a number of qualities that describe precisely what makes such life bare, but few have noted that in addition to being made vulnerable to physical deprivations, those individuals who are in the process of being reduced to bare life are also undergoing a process of alienation. That is, they are being socially transformed in advance of their physical death. As the stories of survivors have suggested, *Muselmänner* became both invisible to the other inmates, but paradoxically, they were also objectified as sources of worry and even anger. Thus, to say that people in the camps have been reduced to bare life is to say that sovereignty has reconstituted life for these people.

But just as Foucault's panopticon was not limited to understanding disciplinary technologies in the prisons, Agamben's discussion is not limited to the life behind the barbed wire at Auschwitz, Heart Mountain, or Guantánamo Bay. Concentration camps are merely paradigmatic spaces where power relations most clearly reveal themselves. The preoccupation of sovereign power is to reinterpret or recreate the terms of citizenship, whether those terms are found in domestic or international law. Sovereignty, then, is concerned with the continuum between a politically qualified existence and the kind of bare existence most easily found in the reports of people who survive the camps, or to put it differently, between citizenship and bare life. From the perspective of resistance, the struggle to have one's civil rights affirmed are directly tied to the struggles against being reduced to bare life; both are biopolitical struggles.

Agamben's theory provides a useful framework for thinking about oppression and inequality, but in my view, it is incomplete. There is a sense in Agamben's writing that all citizen subjects are equally vulnerable before sovereign power. A more historically-grounded claim would be that while all life may be targeted by an ambitious sovereign power, it has not been targeted in a uniform manner. As intersectional feminists point out, depending on where one

resides at intersections of race, ethnicity, social class, gender, and religion, the nominal protections of citizenship may be more or less precarious. In short, certain lives may be more susceptible to routine and systematic exclusion than other lives (see Crenshaw 1991, Collins 2000).

Sovereignty, then, describes a power relation, but it is one that is entangled within a field of other power relations, which are themselves organized by distinct logics of inequality around constructs such as race, ethnicity, and religion. In order to put these relations of power into greater relief, and begin to theorize how they articulate with sovereignty, it is necessary to revisit the concept of citizenship. As social scientists have long argued, citizenship refers to something more than state-granted rights or one's ability to obtain a state-issued passport, and it even applies to something more than the formal protections which stem from the agreement between sovereign states. For instance, T. H. Marshall's (1950; p. 14) definition of citizenship as "a status bestowed on those who are full members of a community" is useful because, as Nira Yuval-Davis (1997, 2007) has also observed, such a definition acknowledges that citizenship is a multi-tiered construct, where having something like full status might depend on one's location at the intersection of race, religion, gender, and nationality. The state-granted rights I have focused on thus far refer to the rights of a political community, but this is just one of many communities to which a person might belong⁹.

Restated, the question becomes how multiple citizenships—which is to say, multiple communities upon which individuals found politically qualified lives—are impacted by the

⁹ Insofar as the basis of a community is always at risk of becoming the target of power, all communities are "political communities"; however, for the purpose of clarity, I use the term "political community" to refer to communities based on the common set of rights, privileges, and obligations that accompany formal citizenship.

structure of the exception. In other words, if Agamben's claim is that sovereignty is able to powerfully constitute the citizen subject, what happens when it is revealed that there is no monolithic citizen subject and no single target; instead, there are multiple targets. As if shot out of a canon, Agamben's sovereign power pierces the atmosphere, but to borrow a phrase, it disappears into a "blind spot" and then apparently reemerges suddenly capable of hitting multiple targets. As Hannah Arendt (1993) argued in relation to the phenomenon of statelessness, the right to belong to a formal political community is a precursor for further rights, or the "right to have rights," so perhaps sovereignty could do worse than choose to target subjects through their formal political citizenship, which claims to span across race, religion, gender and other categories; however, the question remains as to whether sovereignty ever forges linkages into other discourses which constitute citizen subjects along the lines of race or religion. In this dissertation I am interested in illuminating how sovereignty endeavors to constitute (or de-constitute) multiple citizen subjects, but before describing the linkages between sovereignty and other discourses, it is important to briefly sketch how discourses on race and religion connect in the United States.

Connecting Race to Religion in the Arab-Muslim

In the early years of the War on Terror, the structure of the exception set its sights on the citizenship of Arab and Muslim men. A new Department of Homeland Security was founded, which by its very name seemed to underscore the specter of another attack on American soil, as well as the possibility that the attackers were already hiding among average Americans. There were also daily press briefings from Secretary of Defense Donald Rumsfeld, and later from the military officials speaking from the United States Central Command (CENTCOM) forward headquarters in Qatar. There was a steady trickle of details on the unfolding conflict in

Afghanistan, but above all, these reports communicated that the terrorist threat was clear and present. Thus from the standpoint of anyone following U.S. news, America's enemies were scattered abroad in places like Afghanistan, Pakistan and Iraq, and enemies were very likely already living within U.S. national borders.

Wherever the next terror event would occur, there was little disagreement that the culprits would look like Arabs, and their violence would be inspired by the precepts of their radical Islamic faith. In part, this anxiety is reflected in the FBI's 2001 Hate Crime Statistics (2001), which reported that the category of hate crimes, which most likely includes crimes directed toward Arabs, quadrupled from the previous year.¹⁰ Reports of Anti-Islamic incidents grew by more than 1,600 percent from the previous year. In part, the fear of the Arab-Muslim terrorist stemmed from the fact that of the 19 men who carried out the attack on September 11, 15 were from Saudi Arabia, two were from the United Arab Emirates, one was from Egypt and one was from Lebanon. All were affiliated with the Islamic militant organization named al Qaeda. However, the Islamophobia and racial prejudice in the aftermath of the 2001 attacks were not merely the result of rational prejudice. Scratch the surface and one finds that anti-Arab and anti-Islam discourses existed long before September 11. The particular representations of Arabs and Muslims, including the speculative essences about what type of people they are in their private lives, have been centuries in the making.

Categories of analysis are not necessarily categories of practice, and while in the context of the contemporary U.S.-centered discourses it may be analytically convenient to designate

¹⁰ The category used in the FBI's report is "anti-other ethnicity/national origin."

“Arab” as a racial category and “Muslim” as a religious category, in historical practice, the terms have become intertwined (Brubaker 2000). “Muslim,” as a category of practice, describes followers of the Islamic faith, but the term has the capacity to hold racial connotations, as though phenotypical characteristics could mark a person as Muslim. The evidence for this racial formation is varied, but it can be discerned from cases of hate crimes committed against people of color, where the perpetrator admits to believing the victim was “Muslim-looking” (Ahmad 2004).

But this particular racial formation was not forged from the tragedy of 9/11; instead, the principle of this particular social vision and division was timeworn and only needed to be redeployed. Although nailing down absolute origins is always difficult endeavor, according to Junaid Rana (2011), in order to understand how “Muslim” became a racialized signifier, one can begin with the Moors of the Iberian Peninsula. The Moors followed an Islamic faith, but in terms of ethnicity, they were largely Arab and Berber. By the late fourteenth and early fifteenth centuries, a religious tension was discernible between the Islamic Moors and Catholic Spain. The spread of Catholicism kept pace with the territorial ambitions of empire, and at the same time, there was a growing concern with the containment of competing ideologies. While there was very likely variation in open displays of Catholicism, just as there were variations in schemes to contain the displays of Islam, the historical record leaves little doubt that there was a growing suspicion that there were large and perhaps growing numbers of Muslims and Jews on the peninsula who had claimed to convert to Catholicism but were secretly still following the tenets of their earlier devotions.

This suspicion of crypto-Muslims or crypto-Jews spurred the sovereign to set in motion the Spanish Inquisition, which sought to ensure Catholic orthodoxy, and then in 1492, to order

by royal decree that Jews and Muslims convert or leave Spain. It was in this milieu, where imposters were said to live among the truthful, where there was guilt by association, and where one's associates might be imposters, new ideas emerged about how one could discern a person's religious devotion from the way they dressed, stood, or walked. Having established the basic principle that religious devotion, even a secret one, could be visible, it was a much simpler matter to innovate on what type of visual evidence could hold the truth, and on this point, dark skin and other physical characteristics became markers and the basis for othering. But this emergent race concept was versatile and should not be oversimplified. As Rana notes, "Phenotype was never really everything; rather it represented a number of discursive logics that connected culture to appearance, skin color, and all of the features that normally were presumed to stand in for race" (p. 36).

Thus, strictly speaking, Spaniards did not have their first face-to-face encounters with the Other during the Age of Exploration; the idea of the Other as animalistic, deceitful, barbaric, and as an unqualified threat to Christianity, already existed based in part on Spanish Catholics' encounters with Islamic Moors¹¹. Once in the New World, Spaniards needed to only redirect prefabricated Muslim stereotypes onto the Native People they encountered. As a knowledge that established difference and justified exclusion, the Spanish, then, "knew" of the Moors in a way that was relatively indistinct from the way they "knew" of the Native People in the New World, and this homogenizing view of the Other spread to other empires, which had their own designs for the New World. The British, for instance, similarly projected a homogenizing view of Muslims and American Indians, but this was due in large part to the fact that the British

¹¹ I capitalize "the Other" to emphasize it as a monolithic construction, conjured in the West and designed to consolidate diverse range of people and culture into a single, racialized formula.

knowledge of Muslims was in part based on Spanish ethnologies of Native Americans (Matar 1999).

This racial discourse, which features a ready connection between Arabs and Muslims, would in time prove to be a redoubtable feature in the affairs of Empire. In the aftermath of the conquest of the Americas, even in spaces where resistances to that conquest have been recorded as successes, a racial thinking which is simultaneously a religious thinking, and which establishes the Christian true believer in opposition to the Muslim heathen and Christian civilization against Islamic barbarism, has persisted. The relations of power, which are organized around the ideas of race and religion, describe a knowledge spread by Empire, but this discursive expansion is also the place where the modern state has emerged and where the United States resides (Goldberg 2002).

I want to avoid conveying the idea that Arab-Muslims occupied a fixed and deprived status, and neither do I want to overstate how consistently intertwined Arab representations were with Muslim representations¹². As Louise Cainkar (2009) argues, in the first half of the twentieth century it is hard to find a consistent pattern of deprivation or institutional discrimination against Arab Americans. Moreover, during this time the ready connection between Arabs and Muslims is sometimes discernible and sometimes absent. What is important is to note that it was a tenuous connection, certainly not an inevitable or determined one. With notable exceptions, Arabs were in fact a relatively advantaged group up until the 1960s and had largely attained the

¹² It is important to emphasize here that, like Muslims, ideas about who Arabs are and how one might be identified as Arab have changed over time. In the words of Omi and Winant (1999), Arabs, as racial category, has been created and has been transformed over time. My aim, therefore, is to avoid misrepresenting Arabs as a timeless racial descriptor. I am simply tracking the changes and continuities of representations associated with the concept through time.

socioeconomic and political privileges associated with whiteness (Cainkar 2009). Nadine Naber (2000) echoes this view when she describes Arabs in the United States at the early part of the twentieth century as “ambiguous insiders.”

A fair amount of scholarly research has demonstrated that whiteness had by the late nineteenth century and certainly by the early twentieth century become tied up with notions of civilization, which was itself constructed in diametric opposition to barbarism (see Bederman 1995). While there were twists and turns in the contours of the Arab-Muslim racial formation, there is evidence that Arab proximity to whiteness was buttressed by an imagined proximity to the idea of civilization. In fact, the explicit inclusion of Arab Americans under the protective shroud of a state-granted citizenship is in fact vividly illustrated by the policies of the Immigration and Naturalization Service (INS), which formally articulated its view on Arab proximity to whiteness and the bearing it had on its decisions regarding immigration visas (Smith 2002). In one emblematic case from the 1940s, the INS needed to consider Majid Ramsey Sharif’s appeal for an immigration visa after initially being denied as an Arab alien ineligible for citizenship. In their decision, the Board of Immigration Appeals noted that Western civilization includes “so much of the Near East as contributed to, and was assimilable with, the development of Western Civilization of Greece and Rome,” and that the statute barring Sharif’s immigration “certainly” did not intend that “Arabians be excluded from the group of ‘white persons’” (quoted in Smith 2002).

Even while greater inclusion for Arabs appeared to be on the horizon from the standpoint of formal policy, there were regular appearances of orientalist tropes in mass media, many of which bore a striking resemblance to the stereotypes that first emerged in Catholic Spain’s encounter with the Moors (Said 1979). As Jack Shaheen (2009) has shown in his exhaustive

catalogue of more than 1,000 Hollywood films from 1896 to 2001, in the first half of the twentieth century, Arab representations were as predictable as the Hollywood sets used for creating scenes from the Middle East. For instance, at nearly the same time that Sharif's visa was being processed by the INS, Looney Tunes released a cartoon titled "Ali-Baba Bound," and in it, Porky Pig runs up against Ali-Baba and his gang of "Dirty Sleeves" (Multi Keys. 2014). The humor is constructed around Porky Pig's fearful stammering during his interactions with various Arab caricatures, all of which are depicted as dirty, sneaky, and fanatical. As an extension of the fanaticism, Ali-Baba's Arab underlings are also suicidal. In the cartoon, they are shown to be too primitive to competently use rockets, and so they must run as suicide bombers, headlong toward a colonial fort with explosives strapped to their heads.

When examining the deployment and spread of the representations that pertain to Arab and Muslims in the United States, it is easy to overlook the importance of World War II. Whether discussing the enemies on the Eastern Front or those in the Pacific Theater, by sheer happenstance of geopolitics, neither Arabs nor Muslims featured prominently in the American imagination, but while the deployment of Arab and Muslim representations was dampened, World War II is important to examine because the tumult of the War appears to have given rise to new ways of imagining the Other, which ultimately proved to be transferrable to the War on Terror a half century later.

Here it is tempting to amend Tilly's (1992) classic formula about "wars making states and states making wars" to include the observation that wars make representations and representations are involved in making war. The historian Omar Bartov (1996) explores this recursion in his work on industrial killing of World War II, to include the Nazi concentration camps. For Bartov the unprecedented scale of the violence and dehumanization of the First

World War ultimately made the Holocaust of the Second World War “thinkable.” But the violence of the Second World War can also be understood by examining the innovations and articulations made to the representational repertoire during the Second World War. John Dower (1986) explores the process of “demonization” in the Pacific Theater, which further established the Japanese enemy as subhuman, but as a demon of sorts, the Japanese could also be understood as having superhuman qualities. What is new here is that the enemy was not just unworthy of the empathy reserved for people who are in every respect fully human, but they were so willing and able to commit atrocities against “us,” that the normal rules of civilized conduct must be suspended (see Kassimeris 2006). The presumed suicidal devotion of the Japanese enemy toward their Emperor buttressed the opinion among the Allies that surrender was unlikely, and it contributed to the decision of U.S. military planners to fire bomb many of Japan’s wooden cities, just as it contributed to the decision to drop two nuclear bombs over civilian targets (Dower 1986).

As stated above, the deployment of Arab and Muslim representations was relatively subdued for the duration of World War II and the ensuing decade, but again, geopolitics eventually intervened. The Israeli-Arab War of June 1967 marks the moment that many Arab and Muslim Americans note a change in the amount prejudice and discrimination leveled toward Arab and Muslim Americans in public. U.S. state support for Israel and its occupation of East Jerusalem, the West Bank, Gaza, and parts of Egypt and Syria was largely echoed in U.S. mass media. Before long, a narrative emerged of the Israel as marching toward a legitimate conquest, and standing in the way were the barbarous Arab and Muslim enemies. As sociologist Louise Cainkar (2009) observes,

The American media overwhelmingly portrayed the outcome of the 1967 war as a victory that Americans should identify with and be elated about. This sense of shared triumph was accomplished through the use of an “us-and-them” dichotomy: Americans and Israelis stood together on one side representing power, success, and another step forward for civilized humanity; on the other side were the Arabs, who were weak, incompetent, backward, and morally undeserving of controlling their own destiny.

In the ensuing years leading to the 2001 attacks, each time conflict flared up between Palestinians and Israelis, or when Middle Eastern men were implicated in the skyjacking of a flight, or when Islamic militants exploded a bomb beneath Tower 1 of the World Trade Center in 1993, or when al Qaeda militants executed an attack against the USS Cole while it was docked in a Yemeni port, the old stereotypes and prejudices seemed to reemerge in media coverage¹³. Not surprising, after the 9/11 attacks they emerged again. Remembering the gaffe of wrongly assuming the Oklahoma City bombers were radical Muslims, newscasters’ suspicions that Islamic militants were involved were often qualified, but once such suspicions proved true, news broadcasts frequently featured analysts and government officials who regularly deployed tropes of the Arab-Muslim Other in their account of the attacks and in their sensemaking of the new War on Terror.

Thus following the 2001 attacks, political entrepreneurs, by which I mean news media politicians and state officials, began making growing number of claims suggesting that Islam was intrinsically faulty and promoted violence. Muslims who opposed or threatened American interests received substantial press, film, and literary coverage, while all else related to Muslims

¹³ Hijacking is the new term for what was once referred to as skyjacking.

became somewhat invisible, a phenomenon that the literary scholar Edward Said (1997) referred to as “covering Islam.” The tropes and allegations these entrepreneurs used to describe Muslims were so similar to those used for Arabs that many Americans could not distinguish between them. The idea of a fundamental civilizational difference reemerged, as did ideas about inherent barbarism. But the racial formation that endeavors to synch Arabs and Muslims as an indistinguishable amalgamation, has proven to be a useful combination for those in power because it combines a dark, demonized evil with assumptions about inner, devotional essences. The atrocious Other is not just demonized and made subhuman, but the Arab-Muslim Other’s fanaticism, born from an incomprehensible religious devotion, contributes a superhuman demonization to the construction, not seen since the Second World War.

Connecting the Juridical Dimension to the Representational Dimension

As I have mentioned at the outset, I am interested in understanding how sovereignty intersects with the discourses on race and religion and what implications this holds for citizenship and subject formation. Sovereignty reconstitutes itself through decisions on the exception, and in making those decisions, sovereignty reformulates the criteria for citizenship, for being included or excluded in the political community and the bearer of inalienable rights. However, I have also argued that citizenship is a multi-tiered construct. There are instead multiple citizenships based on various organizing principles, including race and religion, and bestowed upon people who are recognized as full members of these different communities. It is unlikely that sovereign power is only concerned with formal, state-granted citizenship.

The important question I want to consider in this section is: How does a sovereign state effect exclusion from these other citizenships? By answering this question, I am attempting to

point to a place within power relations where the state strategically positions itself and at times is able to emerge as an entity capable of wielding an influence in the politics of the exclusion across a diverse array of political communities. My claim is that ability of the state to impact the politics of exclusion across multiple communities still stems from the state's use of sovereign power to decide on legal exceptions, but it also involves the state's deployment of representations. In the context of the War on Terror, the important representations to note are those that pertain to the Arab-Muslim Other. I further argue that the sovereign state's work in the juridical dimension is not separate and discrete from its work in representational dimension. The sovereign state simultaneously engages both, and its work in one dimension is related to its work in the other dimension. Although political theorists have focused almost exclusively on the juridical dimension, both dimensions are important for reconstituting sovereignty.

In her own characterization of Agamben's work, Judith Butler (2006) understands sovereignty as an "aggressive anachronism" that gets reanimated within a field of governmentality, and by her estimation, this means that amidst the regulation and control of populations and bodies that characterize the preoccupation of modern states, state agents are occasionally elevated as petty sovereigns, who are endowed with the authority to make decisions on the exception. For instance, In 2002 Secretary of Defense Donald Rumsfeld stood as one such petty sovereign when he declared that the alleged enemies of the United States captured in Afghanistan and Iraq would be regarded as a new, exceptional legal category known as "unlawful combatants," and unlike prisoners of war, unlawful combatants are not afforded protections under the Geneva Convention (Seelye 2002). Butler reminds readers that as with the sovereign monarchs of an earlier epoch, the exceptional decisions of these petty sovereigns

reanimate sovereign power. That is, “The rule of law, in the act of being suspended, produces sovereignty *in its action and as its effect*” (Butler 2004, p. 66). This specification of Agamben is useful and bears resemblance to Butler’s earlier work on performativity, which similarly captures the simultaneity of *constituting* and *constituted* power. Crucially, she concludes that “we have to consider the act of suspending the law as a *performative* one which brings a contemporary configuration of sovereignty into being” (Butler 2004, p. 61; italics mine).

Although Butler employs specific examples of sovereign performativity in her analysis of indefinite detention, she appears to be working at a fairly high level of generality which would accommodate a broad range of performance types. If the sovereign’s decision on the exception is a performative one, then such performances might include the instance in January 2002 of Guantánamo officials releasing photos of shackled prisoners in black goggles kneeling before their captors. The image conveys absolute enemy submission, which is always an affirmation of power, but given that the rules under the Geneva Convention normally prohibit states from making a public spectacle of prisoners in this way, the distribution of the photos is equally a performance of a sovereign power unmoved by the dictates of international law. In another example, such sovereign performances might also be intended for a smaller audience of government officials, as when lawyers working for the Department of Justice composed a series of memos which reinterpreted the law to effectively clear the way for Guantánamo officials to begin administering interrogation techniques that were long prohibited as forms of torture¹⁴.

¹⁴ Here I mean to reference to the torture memos drafted by John Yoo, who was Deputy Assistant Attorney General of the United States and signed in August 2002 by Assistant Attorney General Jay S. Bybee, head of the Office of Legal Counsel of the United States Department of Justice. The memos interpreted the legality of treatment and interrogation methods, given that interrogations would not take place on U.S. soil and that the U.S. was bound by the U.N. Convention Against Torture and 18 U.S.C. section 2340 and the interrogation of al Qaeda operatives.

Finally, such performative moments might also take shape as a press briefing intended for an audience of millions, where a military official publicly emphasizes that detainees acquitted under a military tribunal may not be repatriated or even released. The court merely serves an advisory function¹⁵.

The attention Butler gives to the performativity of sovereignty—the representational dimension of sovereignty—is crucial and provides a means of overcoming the sorts of critiques that have trailed theories of sovereignty. For Enlightenment theorists, including Hobbes, Locke, and Rousseau, the notion of sovereignty was something founded in a social contract, but this vision of sovereignty raises epistemological questions regarding how subjects actually confront and come to understand the social contracts of which they were said to be signatories. If the social contract is imagined to be an implied agreement, then how was it that subjects residing in the far corners of a sovereign’s territorial expanse came to understand that they were implicated in an agreement with the sovereign? How would this notion of such a contract be widely communicated? Drawing on Schmitt, Agamben argues that the ability of the sovereign to consolidate power through declaring states of emergency precludes the possibility of any such social contract. Instead, sovereignty is founded on the structure of the exception, and to this, Butler adds that the exception must be understood as a performative act. However, Butler fails to acknowledge the role played by the mass media in communicating performative acts.

Although not explicitly theorized by Agamben or Butler, in this dissertation I argue that the mass media, in its capacity to create and widely disperse new forms of knowledge, is an

¹⁵ Speaking at a news conference in March 2002, Department of Defense General Counsel Haynes responded to a reporter’s question about whether detainees who were acquitted by a military tribunal would be released: “If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but might not automatically be released” (Department of Defense March 21, 2002; quoted from Butler 2004).

essential feature of modern sovereignty and must be included in accounts, which have tended to focus almost exclusively on the moment of the sovereign decision on the exception and on the agents who act on behalf of the sovereign to reconstitute sovereign power. There has been a predilection among theorists for charting the sovereign's manipulations of law and how the sovereign structure of power is directly tied to corporeal machinations visited on vulnerable subjects confined within spaces of exception, such as war prisons (see Bargu 2014). I share this concern, but by theorizing how mass media fits within workings of the structure of the exception and by exploring how the exercise of sovereign power is also an exercise in reconstituting the ideological basis for that power, I am also drawing attention to the principle means by which sovereign power is able to reach outside spaces of exception.

In addition to drawing attention to mass media, it is also important at this juncture to formally define what I mean by *terror events* and *security events*. Junaid Rana (2011) notes that racial events, such as a race riot, constitute moments that can spur profound changes in discourse, including changes to the discourse pertaining to citizenship and how particular groups are imagined to exist within the national community. Drawing on the idea of racial events, Rana argues that events like the attacks against the U.S. on September 11, 2001 constitute terror events, which similarly spur the development of new sensemaking discourses. Terror events often give rise to unsettled times, which Ann Swidler (1986) has argued are periods where rapid social and cultural change are possible. As one of the pressing concerns following a terror event is to identify the threat (e.g., terrorism), identify the enemy (e.g., al Qaeda), and by extension, identify who should be regarded with suspicion (e.g., Muslim men), terror events can spur communities to activate stereotypes, such events can inspire prejudices, and they can catalyze the national community to reevaluate the status of those claiming membership.

Moreover, this sensemaking process is never really complete. As touchstones in public memory, political agents continually reference and rearticulate terror events to suit new political strategies and to strategically position themselves for wielding greater political influence in the future. But the terror event concept is somewhat misleading because while claiming to describe an event, it actually describes a series of cascading events, and only the original event is the actual moment of terrorist violence. In this dissertation, I refer to security events as describing the cascading series of subsequent events, which refer back to the terror event. Like terror events, security events are moments that can introduce fears and risks, thereby spurring changes in discourses pertaining to the ideas of sovereignty and citizenship. Unlike terror events, security events are planned and orchestrated. Security events are, as the name implies, events where state agents work through mass media in order to relate a terror event to the current moment and make the case for why new security measures are necessary in order to stave off comparable tragedies in the future. When decisions on the exception are publicly communicated through mass media, they become security events.

The question at this junction becomes: How then do agents, in a performative capacity and speaking on behalf of the state, draw upon a nominally autonomous mass media in order to communicate decisions on the exception, disseminate information about who is to be subject to the sovereign ban, and nurture particular understandings of why exceptions must be made to law. Answering this question depends on explicating how mass media coordinates with state institutions to promote ideologies that ultimately serve the state's interest in reconstituting and deploying sovereign power. The importance of the state-media nexus cannot be overstated, for as Stuart Hall (1985) once poignantly observed, "People who work in the media are producing,

reproducing and transforming the field of ideological representation itself. They stand in a different relationship to ideology in general from others.”

On this score, Herman and Chomsky’s (2010) work on identifying a propaganda model, which specifies the way modern liberal democratic states shape and constrain media production, is instructive. Briefly, their propaganda model identifies five filters through which all potential news stories must pass. The first filter attends to the characteristics of media ownership. The corporate ownership of a media publication is important insofar as it filters out content which does not align with corporate interests. Given the long term trend in media consolidation, which has resulted in a dwindling field of competitors, corporations may be becoming ever more bold in excluding or elevating news stories, not as journalistic practice aimed at disclosing important information, but as a strategic calculation aimed at profitability.

A second filter refers to the advertising structure of mass media. Given that media corporations are dependent on advertising revenue, these corporations often acquiesce to the real or perceived demands of their advertisers. Thus advertisers are also able to exert a power to filter the type of stories published. In some cases, stories are pulled from publication if they do not depict advertisers in a positive light or if they do not otherwise align with advertisers’ interests. In other cases, the imperative to attract advertising revenue may work as a disciplinary regime leading reporters to avoid such potentially offensive stories in the first place.

Although one can imagine ways in which states might attempt to wield control over media, either through coercion or by providing substantial streams of advertising revenue, the third, fourth, and fifth filters described by Herman and Chomsky’s propaganda model most clearly articulate the means by which state officials partner with private mass media corporations

in order to communicate decisions on the exception¹⁶. The third filter for Herman and Chomsky refers to the ability of the state agents to discipline journalists and news agencies through “flak,” or the negative responses the state unleashes in order to counter media statements that contradict official state narratives. Herman and Chomsky note that “The government is a major producer of flak, regularly assailing, threatening, and “correcting” the media, trying to contain any deviations from the established line” (p. 28). It is worth noting that flak is likely effective, not only as a retaliatory tool, but also as a standing threat that affects the manner in which journalists practice their craft.

The fourth filter is ideology itself. Journalists are just as susceptible to ideology as anyone else, or to put it differently, the dominant narratives in media discourse about particular events inform the narratives journalists craft in subsequent reporting. Ideology can be said to work as a filter because it filters out less biased reporting practices. The available nationalist, Islamophobic, and otherwise state-sponsored ideologies internalized by those who produce news media necessarily inform the frames and narratives they produce as news. However, it is also the case that journalists will be more likely to accept particular narratives as the “truth” when such narratives comport with dominant ideologies.

The filter I draw upon most heavily in this dissertation is what Herman and Chomsky refer to as “sourcing.” In detailing their sourcing filter, Herman and Chomsky note that news organizations are dependent on government as a source for news stories because journalists and cameras simply cannot be in all places at all times. To be sure, this limitation is largely due to the prohibitive cost associated with trying to maintain offices everywhere in the world, but the

¹⁶ Note that the order in which I present the Herman and Chomsky’s media filters is not the order they presented the filters when originally describing their propaganda model.

dependency is also manufactured by the state. For instance, in regards to Guantánamo Bay, news agencies are not allowed free access to the site, often rendering them dependent on state officials for information about what is happening there. When journalists are allowed to tour the facility they are expressly prohibited from interacting with detainees or interviewing the Filipino guest workers on the base. Photos of the camps and nearby facilities are largely prohibited (Crabapple 2013).

The state further manufactures the media's dependency on the state for framing stories because the state often plays a direct role in creating the body of experts the media must turn to in order to understand a particular phenomenon. For instance, in the case of terrorism, terrorist experts are relied on precisely because they are often former or retired state officials who are known to have a familiarity with the state bureaucracy, intelligence, counterintelligence, and other programs pertaining to national security. These experts are presented as objective sources, but their professional socialization has taken place within government institutions that promote a particular worldview. Moreover, these experts are funded by think tanks and other organizations that have a revolving-door relationship with the State Department and CIA (Herman et al. 2002, p. 24). Lisa Stampnitzky (2013) has recently shown in her genealogy of the terrorism discourse that the U.S. government has played an important role in cultivating the growth and development of a field of terrorism studies, which is staffed with a network of experts who have been reluctant to break ties with the political arm of the state by studying terrorism as an objective type of political violence in which states also engage.

Herman and Chomsky's propaganda model presents a way of thinking about how the state is directly implicated in influencing the production of media discourse, and their propaganda model is often contrasted with the model of discourse formation put forth by Jürgen

Habermas (1991). In contrast to Habermas' exploration of the French salons and British coffee houses of the eighteenth century, where he imagined that critically important ideas about the world bubbled to the surface and entered a rational-critical discourse, Herman and Chomsky suggest that politically consequential ideas are unable to simply bubble to the surface without passing through a series of filters. Indeed, given that direct experience with Guantánamo Bay is severely restricted, ideas about the indefinite detention there can hardly be understood except as filtered information. But it needs to be stated that Habermas was neither arguing for the inevitability of such a rationally conceived public sphere, nor its permanency. Habermas' public sphere emerged in a particular historical context, and Habermas himself never rejected the possibility of state and economic entities colonizing such a sphere. What differs significantly from the eighteenth century is the existence of efficient mass media, its consolidation, and its reach.

To summarize, I have been articulating a theoretical connection between sovereignty and subject formation. I have discussed subject formation as largely, though not exclusively, a problem of citizenship. In contrast to the influential work of theorists working in the tradition of Carl Schmitt and Giorgio Agamben, I am arguing that sovereign power does not strictly reconstitute itself through tactically changing law. In making a decision on the exception, the sovereign state is also involved in the representational dimension—both attending to representations of sovereignty and citizenship. Specifically with respect to the War on Terror, I am interested in the changing citizenship of Arabs and Muslims. The 9/11 attacks led to a state of emergency, which in turn led to a cascading series of decisions on the legal exception. In Carl Schmitt's terms, these decisions created a state of exception. The exceptional decisions, and specifically, the communication of these decisions to the public via mass media, can be

understood as security events, which did more than simply outline new security measures.

Security events are also moments where state officials acted as political entrepreneurs by keying 9/11 in order to justify legal exceptions, but they also used security events to deploy frames and narratives about the role of the sovereign state during this state of emergency, and they also used these events to forge connections between terrorism, race, religion, and civilization¹⁷.

¹⁷ I borrow the concept of keying from sociologist Erving Goffman (1974).

The Case of Guantánamo Bay and Method of Analysis

In the previous chapter, I have noted that I am interested in the relationship between sovereignty and the Arab-Muslim subject formation in the U.S.-led global War on Terrorism, and specifically, the way sovereign power reconstitutes itself through making decisions on the exception, which, as I have argued, involve the state simultaneously making tactical changes in the juridical dimension and the representational dimension. Drawing on this theoretical foundation, I have proposed that the juridical dimension is in fact connected to the representational dimension. One important aim of this dissertation is to examine both of these dimensions in order to further explore the way in which they are connected.

I have also alluded to the fact that I intend to specifically analyze the indefinite detention and torture at Guantánamo Bay as a case that will help elucidate the connection between these two dimensions. In this chapter, I offer a brief sketch of the history of the detention camps at Guantánamo. Then I specify why I have chosen to examine Guantánamo Bay as an important case for providing insight on connection between the juridical and representational dimensions. I conclude by providing details about a two-pronged analysis I undertake, which involves 1) an analysis of the legal documentation that comprises the rationale and wording of key decisions on the exception and the creation of indefinite detention, and 2) a textual analysis of newspaper articles written about Guantánamo Bay in order to discern the frames, narratives, and representations deployed by state officials.

Guantánamo Bay and the War on Terror

The Guantánamo Bay Naval Base in Cuba existed long before the U.S.-led Global War on Terrorism, before the U.S. invaded Afghanistan on October 2001, before it captured approximately 10,000 prisoners, and announced it intended to hold the “most hardened” prisoners for further interrogation at the base (Golden et al. 2004). “Gitmo” is comprised of about forty five square miles of land on the southeastern tip of Cuba, and under terms established in the Cuban-American Treaty of 1903, it is an area under “permanent lease” to the United States, which originally envisioned it as a fueling station for naval vessels. For most of its history, the base was merely one of scores of Navy bases located around the world; however, it has occasionally operated as a holding station for Haitian refugees (Lipman 2009).

In the early days of the War on Terror, the U.S. captured and held militants in or near Afghanistan, and after triage, an initial batch of about 100 prisoners were transferred to Guantánamo and eventually wound up in one of three main detention camps at the base—Camp Delta, Camp Iguana, and Camp X-Ray¹⁸. As Vice President Dick Cheney asserted, “the worst of a very bad lot” were relocated to Cuba, which state officials claimed was chosen because it was far enough from Afghanistan to preclude the possibility of a terrorist rescue operation and far enough away from the U.S. mainland so that no American civilians would put in danger (Golden et al. 2004). A leaked classified report created by lawyers in the Department of Defense for Secretary Donald Rumsfeld attests to the fact that Guantánamo Bay was also chosen because the remote location offered a measure of legal ambiguity as to whether U.S. courts would have any

¹⁸ The three camps are comprised of seven smaller units with varying levels of security. Camp X-Ray was closed in April 2002.

jurisdiction over the affairs of the prisoners being held there. The “affairs” of particular concern were, first, the privilege of habeas corpus, or the prisoner’s ability to question the basis for his detention, and second, the legality of new “enhanced interrogation techniques,” which were only a handful of months earlier understood to be torture (Arnesen 2004).

However, the details about the architecture and construction of the camp are, in a sense, beside the point. Located where it is, the Guantánamo Bay Naval Base, as with other spaces of indefinite detention throughout history, only exists because a relatively small group of people say it exists and a carefully vetted series of photographs seem to attest to its existence. Journalists, for instance, are able to visit the camps and write about them, but they are required to sign contracts which specify that they will not interview the Filipino guest workers on the base. Journalists are also barred from speaking directly to prisoners, they can only photograph or sketch approved locations, and all photos and sketches must ultimately be approved. This aggressive effort to control knowledge about the workers of the camps is reflected in the way camp officials use the word “contraband.” Writing for *Vice*, Molly Crabapple (2013) notes that the word contraband does not refer to prohibited objects like guns or drugs. Instead, contraband refers to knowledge. For instance, “informational contraband” might refer the kind of information that prisoners are unable to share with their lawyers. Such contraband might also refer to the poems written by Guantánamo prisoners, which were either destroyed or confiscated, and in any case, not allowed to be published or even passed onto human rights workers (Falkoff 2007).

The Guantánamo Bay Naval Base and the detention camps have been carefully constructed in the public imaginary. What the U.S. public knows about the camps may not have anything to do with what actually happens there, but for the vast majority of people who have not

been imprisoned behind the razor wire, the imagined Guantánamo Bay is the *only* Guantánamo Bay. For most, direct experience can offer no basis for confirming or contradicting the purpose of these camps or the people being held there. For instance, many in the U.S. public believe that the camps hold hardened al Qaeda militants. In fact, piecing together leaked and released information about the detainee population, only 8 percent of the detainees at Guantánamo Bay were members of al Qaeda. Many in the U.S. public also believe that the alleged militants were captured on the battlefield while trying to kill American soldiers, but in fact about 86 percent of the alleged militants were originally taken into custody by either Pakistan or the Northern Alliance and were sold to American forces for about \$5,000 each (Denbeaux 2006).

I point out this distinction between a “real” Guantánamo and an advertised Guantánamo, not to entertain the idea that the existence of camps has been fabricated as part of a grand conspiracy, but because it is important to be clear that I am interested in both the “real” Guantánamo and the advertised one. In terms of the “real” Guantánamo, which can be ascertained by the legal decisions on the exception, I am interested in understanding how the camps emerged from such decisions. That is, how was indefinite detention at Guantánamo Bay made possible due to formal changes in law and how did these and other changes set the stage for subjecting prisoners to torture. In terms of the advertised Guantánamo, which can be ascertained by an analysis of media discourse, I want to understand how sovereignty, race, and religion are discussed and understood, irrespective of what has been created by the force of law. This includes the representations that are deployed in that discussion, which also made it possible for Guantánamo Bay to emerge. In short, this means that in this dissertation I analyze law and representations and the way these two dimensions interrelate.

Why Guantánamo Bay?

My decision to analyze the discourse surrounding the Guantánamo Bay detention camps stems from both theoretical and methodological concerns. In creating his theoretical framework, Giorgio Agamben (1998) refers to the concentration camps as the absolute paradigm of modern politics. His use of the term paradigm is important here, and he knowingly borrows it from Foucault, who most famously employed it in his own analysis of the panopticon. Like Foucault, Agamben draws attention to the camps because they are a concrete manifestation of a particular set of power relations.

There are many features of concentration camps, which render them distinct from other enclaves or places of confinement. As a place of confinement, concentration camps bear an obvious resemblance to prisons, but as I will argue in Chapter 3, the camps are also very different. Unlike prisons, which stand as destinations for people processed by a criminal justice system that exists within the juridical sphere, the camps are born from a state of exception and exist outside law. Inside the juridical sphere, suspected criminals are supposed to experience due process, but in the camps there is no pretense of due process rights and the accused are indefinitely detained. Unlike prisons, the camps are places where torture and neglect are either permissible, or where conditions are created so that their otherwise impermissibility cannot be independently verified (unless secret information is leaked or prisoners escape).

Indefinite detention and torture, then, are two definitional features of concentration camps, which are themselves manifestations of power relations that constitute sovereignty and citizenship. These two features—these two political technologies—clearly exist outside law and outside the normal situation. By this definition, concentration camps may be a much more fluid

concept than what is suggested by typical use of the term. When most people imagine concentration camps, they often imagine black and white, fossilized images from Auschwitz or Dachau. Some imagine scenes from the concentration camps that confined Japanese Americans in remote locations within the U.S. interior. But while the atrocities and outrages committed in these spaces deserve to be analyzed on their own terms, they are connected as a family of phenomena that employ a recognizable repertoire of technologies. If in looking for concentration camps one looks for the particular set of political technologies to come together in a particular way, then the World War II archetypes are limiting.

As I have made clear, as spaces of exception where people have been indefinitely detained and tortured, I see the Guantánamo Bay detention camps as belonging to the phenomenon of concentration camps. But just as Foucault's panopticon took on many forms and became a widely disseminated feature of an emergent disciplinary society, the political technologies of the camps have also become dispersed and have reappeared in various places that are not generally identified as camps. If, as I have argued, the power to indefinitely detain individuals without recourse is the mark of a camp, then analysts must also consider the case of José Padilla, an American citizen who was apprehended in Chicago, denied the ability to petition for a writ of habeas corpus, and indefinitely detained in a military brig in Charleston, South Carolina under dubious legal reasoning. Padilla spent much of his time in solitary confinement, and has maintained that he was subjected to a number of torture techniques that the Bush Administration has euphemistically discussed as "enhanced interrogation" (I explore this case in greater detail in Chapter 3.). Although Padilla was not a part of a concentrated population of prisoners in a single geographic location, he was one of scores—perhaps hundreds—of alleged

terrorist militants kept in solitary confinement and tortured in secret CIA black sites around the globe.

Drawing on the above examples, it is apparent that individuals are sometimes indefinitely detained in concentrations, as is the case of Guantánamo Bay. Sometimes they are geographically dispersed in undisclosed locations and likely only concentrated in large numbers in the sense that they exist together on a list or in a database. Those who are physically concentrated are sometimes allowed to see each other; sometimes they are merely kept in the same facility, but spend their time in solitary confinement. Whether individuals are held within the same facility or are geographically dispersed, and whether they are isolated from each other or packed tightly into small rooms, the above are all examples of indefinite detention, where prisoner's bodies are most clearly subjected to the power of "taking life or letting it live," on the one hand (e.g., torture interrogations), and "making it live or letting it die," on the other (e.g., forced-feeding to end hunger strikes). Auschwitz, Guantánamo Bay, the site of José Padilla's indefinite detention—concentration camp technologies exist in all these spaces.

Guantánamo Bay is the emblematic case of indefinite detention I am analyzing in this dissertation, but to clarify, I am not strictly limited to what happens in that space on the southeastern tip of Cuba. As I will discuss in greater detail below, I examine the legal decisions on the exception that made spaces like Guantánamo Bay a legal possibility. Guantánamo Bay is an excellent case, but the legal reasoning that made indefinite detention a legal possibility has had implications for spaces beyond Cuba. I also examine the symbolic representations found in news articles related to Guantánamo Bay, but again, the analysis is not strictly limited to news articles containing references to Guantánamo Bay. The Guantánamo Bay detention camps were referenced in articles that were not limited to discussing those prisoners inside the razor wire.

Thus Guantánamo Bay is a placeholder that stands for a larger system of indefinite detention, and it is a concrete symbol for which thousands of pages worth of legal reasoning have been devoted in order to entrench and justify its existence. It is also a symbol, or a paradigm, for the reassertion of sovereign power and the simultaneous emergence of new understandings of citizenship.

Why José Padilla?

The involvement of José Padilla in the analysis may strike the reader as out of place, but his name first came to my attention because for a time state officials seriously contemplated transferring him to Guantánamo Bay. Although he ultimately remained in a military brig in South Carolina, I have also included him because, much like the men imprisoned at Guantánamo, Padilla was subjected to both indefinite detention and torture. Padilla's experience also illustrates a key moment in U.S. sovereignty and subject formation. Unlike the prisoners at Guantánamo, Padilla was an American citizen arrested on American soil, then indefinitely detained, and tortured on American soil. Thus his case represents an attempt at expanding sovereign power and excluding American citizens anytime and anywhere.

Why Torture?

As I have already indicated, I intend to analyze the legal decisions that paved the way for torture, or what has been euphemistically referred to as “enhanced interrogation” or “aggressive interrogation.” I also examine the representations dealing with the presumed importance of torture and the type of people who could be tortured. I regard my examination of torture as important because it provides a fuller picture of the process of reconstituting sovereign power and how this process relates to subject formation. Including torture in the analysis underscores

the fact that subjects are not simply being made susceptible to indefinite detention, but that the incursions on prisoners' presumed rights and protections opens up the possibility of a whole host of corporeal machinations as well. I seek to draw attention to the fact that concentration camps and other spaces of exception are not merely descriptions of unjust imprisonment; they are spaces where individuals become vulnerable to more than simply passing time. As Giorgio Agamben understood in his attention to way subjects are reduced to bare life in the camps, it is important to remember that these are also spaces of experimentation, and where the sovereign state exercises a power to kill or make bodies live.

Indefinite detention almost automatically sets the stage for torture, as it is necessarily a space outside law and therefore beyond the reach of independent monitoring agencies. However, in the case of Guantánamo Bay, torture did not automatically flow from the creation of the camps. From the very beginning, the United States has allowed occasional, albeit heavily restricted, visits from journalists and other sorts of independent monitoring agencies. While there have certainly been efforts to hide instances of torture, at least in the early years of the War on Terror, torture occurred because the definition of torture in domestic and international law was reinterpreted. The sovereign state used law tactically in order to make torture a *legal* possibility.

Structure of the Analysis

Legal Analysis

As I have suggested, the first part of my methodology involves analyzing the legal decisions on the exception. This is an analysis of the way law was changed in order to give rise to Guantánamo Bay and spaces like it. I focus on legal documents created during the first several years of the War on Terror. This focus on legal documentation may appear to take the analysis

away from Guantánamo Bay because many of the documents I analyze do not mention Guantánamo Bay by name. However, appearances can be deceiving. The documents I analyze all represent the legal reasoning or codification of new interpretations of law that in whole or in part make indefinite detention and torture possible. For instance, in order to analyze the structure of the exception, I examine, among other documents, the Authorization for the Use of Military Force Joint Resolution passed by Congress, President George W. Bush's Military Order, a string of "torture memos" written by lawyers working at the U.S. Department of Justice, a petition for a writ of habeas corpus submitted on behalf of José Padilla, and the decision by the United States Supreme Court in *Rumsfeld v. Padilla*.

Textual Analysis

As I have already noted, a second component of my method is an analysis of the representations of the subjects captured and imprisoned in the War on Terror. Since sovereignty is bound up with subject formation, it follows that I have also analyzed representations of sovereignty. For instance, when officials discussed why they sought to indefinitely detain alleged militants in the War on Terror, they were implicitly making claims about sovereign power. When those same officials discussed the barbaric nature of Islamic terrorists, they were implicitly making claims about the civility of the sovereign United States.

As I argued in the introduction, the decision on the exception often doubles as an orchestrated security event, where security challenges and proposed changes are communicated to the public. These events often take shape as press briefings, but they might also take shape as a single reporter's exclusive interview with a high-level state official. In still other cases, state officials might pose as confidential sources and provide media outlets with information that

telegraphs policy changes looming on the horizon. I focus primary on articles from *The New York Times*, a publication that has been consistently ranked as one of the top three newspapers in the United States based on circulation during time period of this study (Editor & Publisher 2001, 2002, 2003, 2004). *The New York Times* is also widely respected as the paper of record for the United States, and this reputation was particularly strong during the years immediately following the 9/11 attacks when the internet and competing online news sources were still in their early stages of development.

In total I conducted textual analyses of 40 articles. I selected the articles by performing a Google search of the term “Guantánamo Bay” separately for each year between 2001 and 2004 and chose the top 10 results for each year. The algorithm Google uses to return search results is confidential, but it is broadly understood that one criterion for ranking search results is the number of times that “result” has been linked by other websites. Thus the top search results I used in my textual analysis are arguably among the most widely read search results for each of the four years I analyzed. It is also the case that Google uses the browsing history of individual users when returning results. Again, it is impossible to know how Google’s algorithm would incorporate information about my browsing history, but to guard against the risk of bias, I created a list of search results using a new computer, which was not affiliated with any known online identity. I also used a newly installed browser with no previous browsing history.

In my textual analysis, I was especially attentive to comments made by public officials. I was aware of the findings of earlier research regarding the specific representations and tropes claiming to describe Arabs and Muslims throughout U.S. history, so I began reading these articles with the knowledge that I was likely to encounter certain tropes and stereotypes more

than others. However, to the extent possible, I tried to pursue a grounded strategy of qualitative analysis by remaining open to new and unexpected representations.

My textual analysis of representations might be recognizable to other researchers as a discourse analysis. In his book on discourse analysis, Norman Fairclough (2003) broadly defines discourse as “an element of social life which is closely interconnected with other elements.” I use the term “textual analysis” only because *The New York Times* articles I analyzed are texts, and following Fairclough’s definition, texts are discourse. Within these texts, I analyze representations, which also fit the definition of discourse. By the term “representation,” I mean the culturally-formed image, which claims to stand for a particular entity or group and which is often bound up with other images to form what has been referred to as a “regime of representations” (Hall 2003). These representations are historically constructed but they must be activated, contextualized, and deployed. Thus I conceive of these representations as comprising a kind of tool-kit, and like tools, representations are used strategically. Just as different tools can be innovatively fashioned into a new tool in order to accomplish a given task, different representations can be combined and deployed in order to offer a new explanation for a given phenomenon. I am particular attentive to the way state officials combine representations to form frames and narratives.

After a close reading of each article, and while paying particular attention to the comments from state officials, I created a set of broad codes that corresponded to common themes, such as “sovereignty,” “civilization,” “barbarism,” and “fanaticism.” Each code was associated with a block of quoted text from the article, as well as notes I made to myself that provided additional context. Once I had a fairly extensive list of representations, I began investigating how these different representations related to one another, and whether they were

being consistently deployed as elements in a larger narrative. I was particular attentive to how representations of the Arab-Muslim enemy were being placed beside representations of the sovereign state in a single narrative.

Chapter 3. Law and Representation in the Structure of the Exception

The structure of the exception delineates a process that unfolds within the confines of a legal discourse and is driven by those who have formal authority to direct that discourse, but the decisions on the exception also inspires the development of a broader, parallel discourse about citizenship and sovereignty that is not exclusively contained by the legal discourse. As I have been arguing, the structure of the exception cannot be fully explained by what happens within the juridical dimension; it cannot be reduced to a history of moments where sovereignty has shrugged off the strictures of law or abrogates law through dramatic declarations. What has been largely unexplored by theorists is how ideological innovations track with the decisions on the exception, just as they track with the security events that correspond to those decisions. Thus in this chapter I explore two distinct but related trajectories opened by the decision on the exception in late 2001, following the September 11th attacks.

I begin with an analysis of the legal documentation that describes the formal decisions on the legal exception, which form the basis for the creation of Guantánamo Bay and the basis for formally excluding alleged militants captured in the War on Terror from the body of “inalienable” rights and privileges that are said protect individuals. Specifically, I analyze how the sovereign carves out what would under the normal situation be considered an illegal denial of habeas corpus and a violation of the torture prohibition.

It is important to note here that there is no single sovereign decision that inaugurates the state of exception; instead there are generally cascading series of decisions, each new decision made possible by the innovations and uncertainty forged by the prior one. President George W. Bush’s Military Order after September 11, 2001, a decision on the exception *par excellence*,

established that prisoners in Guantánamo would not be subject to the processes of the federal court system of the United States nor even the military code of justice. Building from this scaffolding, sovereignty further asserted itself in the form of a series of “torture memos” drafted by legal counsel at the Justice Department. The memos spelled out the way the U.S. state would reconfigure law in order to detain alleged militants indefinitely, they offered new interpretations of anti-torture legislation, and they paved the way for a transformation of the norms governing the treatment of prisoners. The crucial point here is that the bold decisions formulated in the torture memos were only possible because of the exceptional decisions first outlined in the Military Order.

The Juridical Dimension

The Executive made two major decisions that can be considered together as establishing the exception to the normal situation, and each decision was the result of an enormous amount of legal planning and maneuvering. The decisions were, first, the President’s Military Order on November 13, 2001, and second, an Executive memo on February 7, 2002. One decision occurred after the other, but in legal space-time, the decisions are mutually constitutive, as if simultaneously conceived to clarify and reinforce the other. In the wake of each decision, one can track a cascade of policies and practices visited on the alleged militants captured by U.S. forces in the War on Terror, some of which were more publicly known than others.

The first decision on the exception involves the sovereign state’s ambition to create a new system of justice, which is no longer beholden to the practices of existing courts. The second trajectory involves the state’s ambitions to establish that existing domestic and international law do not and cannot protect alleged militants captured in the War on Terror. Thus one trajectory

dealt with the sovereign's ability to control the procedures of justice, while the other dealt with the applicability of the law that was designed to protect individuals from being subjected to arbitrary court proceedings in the first place¹⁹. Taken together, these two decisions on the exception forged the possibility of indefinite detention, which is to say, they made the camps at Guantánamo Bay possible, both the existence of the institution and the practices associated with it. Specifically, the decisions had a profound impact on the constitutionally granted privilege of habeas corpus and protections against cruel and unusual punishment.

Habeas Corpus

Three days after the September 11th attacks, President George W. Bush declared a national emergency²⁰. Four days after that, Congress passed the Authorization for Use of Military Force Joint Resolution (AUMF), which endowed the President with the relatively broad and ambiguous authority to “use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks...in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons²¹” (AUMF 2001; emphasis mine).

Drawing on this clear mandate from Congress, on October 7th the United States declared war on Afghanistan and began its offensive, which planners dubbed Operation Enduring Freedom. The most consequential decision on the exception arrived a little more than a month into the war when President Bush announced his Military Order, titled "Detention, Treatment,

¹⁹ While rolling out the provisions of the new military commissions, Secretary of Defense Donald Rumsfeld routinely admonished those reporters who would deign to reference the term “kangaroo courts” in their reporting (DoD News Briefing on Military Commissions; March 21, 2002)

²⁰ Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks

²¹ Public Law 107-40, 115 Stat. 224

and Trial of Certain Non-Citizens in the War Against Terrorism²²” (Bush 2001b). If the AUMF and the decision to invade Afghanistan telegraphed the kind of overwhelming sovereign power the state was willing to wield in the name of security, the Military Order began to codify the specific sovereign incursions it would take with respect to the treatment of persons captured in the War on Terror.

The Military Order was a clear illustration of sovereign state power establishing a state of exception, wherein it could paradoxically work with law in order to further suspend those areas where law might apply. In this case, the aim was to reformulate procedures of justice to include juridical standards of due process for different categories of persons. The Order begins with references to the security emergency, the continued urgency of the threat of terrorism, and the measures the Executive intends to initiate in order to address to restore security:

"In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, I proclaimed a national emergency on September 14, 2001..Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government. The ability of the United States to protect the United States and its citizens..from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or

²² "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833

support such attacks and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks. To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order..be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals. *Given the danger to the safety of the United States and the nature of international terrorism..I find..that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts*” [emphasis mine].

The Order can be seen as a sovereign pronouncement; sovereign because the executive is invoking a power that is not bound by law in order to suspend law. In this case, President Bush suspended the supposed legal imperative to adhere to established procedures of justice as they pertain to non-citizens because it was not “practicable” to apply generally recognized principles of law and rules of evidence. It is worth noting that the Order stopped just short of suspending the application of generally recognized principles of law for U.S. citizens in its delineation of the subjects the Order covers: “The term ‘individual subject to this order’ shall mean any individual who is not a United States citizen”²³. In plain terms, the Military Order allowed the state, and by extension the military, to avoid trying prisoners under either the federal court system or the military code of justice. Instead, the Executive established new military commissions that would follow newly fashioned principles of law and new rules of evidence.

²³ In multiple places, the Order states that its purpose is to protect citizens of the United States, but only in Section 2(a) does it specify that U.S. are not subject to the Order.

The Military Order, then, held profound implications for the privilege to petition for a writ of habeas corpus, which represents the idea that a person who has been accused of a crime can stand before a court to hear the charges against them and to have an opportunity to respond to those charges. Habeas corpus appears to have been conceived, or has at least been subsequently incorporated, as a basic right of citizenship²⁴. Article 1, Section 9 of the U.S. Constitution reads “the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” (CULS).

The suspension of habeas corpus is notable, for its suspension is fundamentally what made the detention camp at Guantánamo Bay possible. A justice system that forbids the accused the right to petition for a writ of habeas corpus necessitates the creation of a holding camp for those who stand accused but may never be charged. On this basis, Guantánamo Bay must be properly understood as a concentration camp that exists outside law, and as discussed in Chapter 2, not simply a penitentiary, prison, or any other institution which is said to exist within law. But while the power to indefinitely detain has long been within the sovereign’s grasp as a potentiality, the creation of a concentration camp can be seen as evidence that, following the Order, it was becoming institutionalized; the inability of law to protect individuals from being reduced to bare life was becoming standard operating procedure.

A little more than a month after the Military Order and the day after Secretary of Defense Donald Rumsfeld first announced that the U.S. military would be sending al Qaeda and Taliban “detainees” to the United States naval base at Guantánamo Bay, Cuba, which he described as “the least worst place we could have selected,” Deputy Assistant Attorneys General Patrick

²⁴ Strictly speaking, habeas corpus has been enshrined as a privilege, not a right, but for the purposes of understanding the logic of the exception, the distinction makes little difference.

Philbin and John Yoo drafted and sent a memo to the Defense Department, entitled “Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba” (Seelye 2001, Philbin et al. 2001). Then, two weeks later on January 9, 2002, Yoo sent a second memo to the Department of Defense, entitled, “Application of Treaties and Law to al Qaeda and Taliban Detainees” (Yoo 2002). In the first memo, the attorneys write, “This memorandum addresses the question whether a federal district court would properly have jurisdiction to entertain a petition for a writ of habeas corpus filed on behalf of an alien detained at the U.S. naval base at Guantánamo Bay, Cuba” (Yoo 2001, p.1). In the second memo, Yoo begins, “You have asked our Office’s views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan” (Yoo 2002, p. 1). Taken together, both memos signal that high-level discussions were underway regarding the applicability of domestic and international law as it pertained to the detainment of militants captured in the War on Terror. Thus although the Military Order set in motion a creation of a court system that would not provide for habeas corpus, this discussion involving the Department of Justice signals that the state is pursuing a second trajectory of exceptions that seek to address and remake existing law, so that it cannot operate as a basis from which the accused might challenge the new military commissions and their imprisonment at Guantánamo.

After the attorneys at the Department of Justice opine about the jurisdiction of federal district courts regarding habeas corpus and argue that Guantánamo Bay is sufficiently outside the territorial jurisdiction of the United States, so that no federal court could hear such a case, Yoo turns to examining the legal recourse of prisoners in the War on Terror based on the rights afforded them under international law. At this juncture, Yoo’s legal analysis is taken up and echoed in a series of memos signed by Assistant Attorney General Jay S. Bybee, who focuses on

the War Crimes Act (WCA) under U.S. law, a section of the U.S. code that incorporates the four Geneva Conventions of 1949²⁵ (see Bybee 2002). Yoo and Bybee are addressing issues of both international and domestic law to an audience that includes high-level officials from multiple branches of government, and these memos, which were never intended for general public consumption, should be seen as a sovereign state's draft decision on the exception.

Working as instruments of the state, the attorneys of these memos begin to formulate what would become the legal logic of the exclusion regarding alleged al Qaeda and Taliban militants, and to that end, they pursue three basic strategies. First, the attorneys argue that the existing law does not apply to the unique context of the War on Terror. Second, the attorneys argue that the law does not apply to the unique type of combatants the U.S. confronts in the War on Terror. Third, the attorneys argue that even where the law may apply, under the terms of another law—namely, the U.S. Constitution—the first law can be suspended, rendering it unable to protect alleged combatants. Irrespective of the legal strategy pursued, the attorneys are attempting in all cases to formulate a legal rationale that precludes alleged members of al Qaeda and the Taliban from being recognized as prisoners of war, which by the terms of the Geneva Convention and the WCA, is a legal status that would provide a basis for them to have access to the “judicial guarantees” of a “a regularly constituted court²⁶” (Geneva, Article 3(1)(d)). Indeed, violations against people who occupy a prisoner-of-war status are prosecutable as “grave breaches²⁷”

²⁵ Specifically, the War Crimes Act, 18, U.S.C., Section 2441. (Supp. III 1997) criminalizes violations of common Article 3 or grave breaches of the Conventions.

²⁶ Geneva III, Article 3(1)(d) prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

²⁷ Article 130 of the Geneva Convention defines grave breaches as “those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment,

The memos systematically address the relevant Articles common to the four Geneva Conventions. Yoo and Bybee begin by addressing common Article 2 of the Convention, which states clearly that the terms of the Convention are intended to apply to armed conflict between “two or more of the High Contracting Parties...[and even if] one of the Powers in conflict [is] not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it” (Geneva, Article 2). Seizing on the term “High Contracting Parties,” Yoo and Bybee argue that the term can only refer to nation-states, thereby revealing a gap in Article 2: members of non-state entities, such as al Qaeda would not be considered prisoners of war if captured and are therefore not protected by the bulk of the terms laid out in the Conventions.

Yoo and Bybee then turn to common Article 3 and note that it is written to require High Contracting Parties to follow less stringent rules when an armed conflict involves non-state actors, which one might interpret as including an organization like al Qaeda. However, as the attorneys note, the Article appears to begin with a clause that specifies its applicability as only involving “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” and the attorneys argue that under these terms, Article 3 can only refer to the special case of war that does not involve cross-border attacks, which is to say, civil war (Geneva, Article 3). Since the War on Terror, which is principally being waged against al Qaeda, is characteristically international in scope, they argue that common Article 3 cannot be referring to members of al Qaeda. Such members are not covered as prisoners, and again, the Convention fails to protect them²⁸.

including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”

²⁸ It is important to underscore the fact that although the language of the Convention may seem relatively straightforward, Yoo and Bybee are making bold interpretations of the law. In one memo, the Bybee (2002) admits

Yoo and Bybee then turn to common Article 4, which holds that prisoners of war are not only those captured members of the armed forces of High Contracting Parties, but are also irregular forces such as “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied” (Article 4(A)(2)). The attorneys argue that Article 4 does not protect members of al Qaeda under a prisoner-of-war status because, among other reasons, al Qaeda is not a part of the armed forces of a state; nor can it be considered to be a part of volunteer force, or even a militia of a party to the conflict.

As the Taliban are normally considered members of a High Contracting Party, the memos discuss them separately²⁹. Here, Yoo and Bybee focus again on the term High Contracting Party and assert that the President of the United States could reasonably assert his view that Afghanistan is a failed state. As such, Afghanistan would be viewed as a state in such disrepair that it is unable to fulfill its international treaty obligations, and on this basis, the President could invoke the powers granted to him by Article 2 of the U.S. Constitution and suspend U.S. obligations under the Geneva Convention altogether³⁰.

In the event that the President does not hold that Afghanistan is a failed state and does not opt for an outright suspension of the Convention, the Taliban would remain a High Contracting Party in the eyes of the United States. Article 3 would not apply, as the conflict with Afghanistan

that the interpretation of common Article 3 departs from what was a relatively recent interpretation offered by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*. The Tribunal took the position that common Article 3 is a catch-all that establishes standards for any armed conflict not already covered under common Article 2.

²⁹ Afghanistan has been a party to all four Geneva Conventions since September 1956.

³⁰ Article 2 of the U.S. Constitution establishes that the President “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur” (CULS). While the Constitution does not specifically mention the power to suspend or terminate treaties, Yoo and Bybee argue that such an authority has been understood by the courts as an authority of the President.

is an international one, so Yoo and Bybee turn to Article 2 which covers the treatment of persons during international armed conflict. They then argue that the President could still determine that Taliban militants are not covered by the legal definition of prisoners of war. To be recognized as a member of a High Contracting Party, but not afforded the prisoner-of-war status, Bybee (2002) suggests that Article 4 prescribes that the President would need to raise doubts about whether the Taliban satisfy the conditions of a prisoner-of-war status as it has been outlined in Article 4³¹.

Finally, on February 7, 2002 Bybee submits yet another memo directly to the General Counsel of the President. While two weeks earlier he highlighted that a prisoner-of-war status for the Taliban would hinge on a set of specific criteria detailed in Article 4, in this new memo Bybee explains why members of the Taliban do not fit with that criteria, or why, in his terms, “the President has reasonable factual grounds to determine that no members of the Taliban militia are entitled” (Bybee 2002b). He methodically checks off the qualifications in Article 4, and among other reasons, suggests that the President could claim that the Taliban do not qualify because they are not actually members of the armed forces of Afghanistan, they lack a command structure, and they do not wear a distinctive sign recognizable from a distance.

But by raising doubts about the status of militants, Article 5 becomes relevant, which specifies that if there exist doubts about whether captured militants qualify as prisoners of war, then “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal” (Geneva, Article 5). Bybee is aware of this remaining issue and presents the Executive with a solution. He writes, “The President may interpret the [1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War] in

³¹ Article 4 is comprised of eight sections and four subsections and casts a fairly broad net in describing the range of persons who qualify for prisoner-of-war status (ICRC 2016).

light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all Taliban forces do not fall within the legal definition of POW. A presidential determination of this nature...would therefore obviate the need for Article 5 tribunal” (Bybee 2002b).

At this juncture of Bybee’s communications with the Executive there are two distinct moves in legal reasoning which become clear and eventually appear as features of the official decision on the exception. First, whereas in the January memo, Bybee is suggesting that the President could “raise doubts” about the status of Taliban detainees, in the February memo he is stating his view that the President could make a determination by his own reasoning that the Taliban are not eligible for prisoner-or-war status. In other words, he is advising the President against “raising doubts,” and to instead *determine*, without any doubt, that Taliban militants do not qualify as prisoners of war. Since there is no doubt about the status of the militants because the President has deemed that they do not satisfy the criteria outlined in Article 4, waiting for the judgment of a competent tribunal is unnecessary³². Second, in the February memo Bybee begins arguing that the President could deem combatants captured in Afghanistan—both al Qaeda and Taliban—as unlawful. That is, he is advising the President that militants are not simply unprotected by the Convention (i.e., they exist beyond the reach of law), they are “illegal” (i.e., they exist within the reach of law and are guilty of violating it).

³² Some analysts point to the fact that President Bush was following a doctrine of preemption in the War on Terror (Wirz, et al. 2003, Frontline 2003). One might conclude that his adoption of a legal perspective that precluded the use of “competent tribunals” and allowed Bush to determine the status of militants ahead of time tracks with a larger strategy of preemption. However, preemption—to act *before* the machinery of law can take effect or to act early in order to disqualify one from the protection of law—is just one of many strategies employed by the U.S. in the War on Terror. The U.S. state remained just as interested in exercising a power to overrule legal and quasi-legal verdicts. Recall that President Bush included in his Military Order the power to overrule any decisions made by his military commissions.

On February 7, 2002, almost immediately after receiving Bybee's legal conclusions on behalf of the Department of Justice, President Bush communicated the official decision on the exception to various high-level government officials, including the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, and the Director of the CIA. Following the logic and conclusions outlined by Yoo and Bybee, the President advised that: 1) none of the provisions of Geneva will apply to the conflict with al Qaeda anywhere in the world because al Qaeda is not a High Contracting Party; 2) the provisions of Geneva will apply to the Taliban, but the President has the authority under the Constitution and legal grounds to suspend Geneva, should he choose to do so; 3) neither al Qaeda or the Taliban are protected by Article 3 of the Convention; and 4) based on "facts" from the Department of Defense, the Taliban are "unlawful combatants," who therefore do not have prisoner-of-war status under Article 4 of Geneva³³ (Bush 2002). On its face, Bush's announcement seems to affirm for the Taliban the existence of legal protections under the Convention, but in fact, the Taliban are no better off than al Qaeda. By declaring both Articles 3 and 4 as inapplicable, the Geneva Convention offers no protection for anyone captured by the U.S. in the War on Terror.

The Case of José Padilla

Abu Zubaydah was one of the alleged militants captured in the War on Terror. In early April 2002 at a black site in Thailand, FBI special agents began interrogating him through what are typically described as methods that seek to build rapport between the interrogator and prisoner. Although such rapport-building methods would be abruptly ended more than three

³³ By the reasoning offered in the memo, al Qaeda would also be "unlawful combatants," and in fact, they were often subsequently referred to as such by state officials. Oddly, the President does not explicitly state this in the February memo.

months later by agents of the CIA and psychologists intent on employing “enhanced” techniques, back in April Zubaydah’s FBI interrogator offered him a Coca-Cola, at which point, Zubaydah mentioned something about a plot to explode a radiological or “dirty bomb” in the United States. (Eban 2007, Feinstein 2014). He did not, however, provide the names of the Qaeda operatives but he apparently provided enough information for interrogators to identify the affiliate as an American citizen named José Padilla.

The following month, on May 8, when Padilla’s flight landed in Chicago’s O’Hare International Airport from Pakistan, officials arrested him executing a material witness arrest warrant. On those grounds, he was detained and appointed a public defender, while the state claimed to be engaged in a process of determining what secret evidence it was willing to show a grand jury (CNN.com 2004). Then on June 9, two days before a district court judge was to rule on whether the state could continue holding Padilla without charge, the president declared him to be an “enemy combatant,” a term the court system interpreted to mean “unlawful combatant. As U.S. District Judge Michael Mukasey reasoned: “When the president designated Padilla and ‘enemy combatant,’ he necessarily meant that he was an unlawful combatant” (Padilla ex rel. Newman 2002).

Padilla’s new status dramatically called to question the right to due process afforded U.S. citizens. Remade as an unlawful combatant, Padilla was transferred to a military brig in Charleston, South Carolina. To those who were not privy to the strategy of the Bush Administration, the basis for his detainment had merely changed. He was no longer being held based on a material witness arrest warrant, nor was he waiting to be formally charged. Instead, a new judicial process started to determine whether an American citizen arrested on American soil could be simply deemed an unlawful combatant and indefinitely detained on those grounds.

Padilla's appointed lawyer filed a petition for a writ of habeas corpus to the United States District Court for the Southern District of New York. At that point, attorneys for the state began to reveal a two-pronged procedural and substantive strategy aimed at prolonging Padilla's detention and upholding the president's power to indefinitely detain U.S. citizens. The first prong was a procedural argument that sought to persuade the court to dismiss the petition on grounds that Padilla's lawyer was not the appropriate person to file the petition, his lawyer named the wrong respondent to the petition, and the petition was filed in the wrong state. In contrast, the state's substantive argument revealed more clearly the decision on the exception as it pertains to U.S. citizens. The state argued that Congress' 2001 Authorization for use of Military Force (AUMF 2001) authorized the President to detain United States citizens based on the Executive deeming them to be enemy combatants³⁴.

On April 28, 2004, the state argued its case before the United States Supreme Court, and in making its substantive argument it noted that especially with Congressional approval the Executive has the power during times of war to deem U.S. citizens unlawful combatants and deny them the rights normally provided criminal defendants under the Sixth Amendment, including the right to be charged, provided with legal counsel, and the right to a speedy trial (542 U.S. 426 (2004)). The state claimed that the basis for this extraordinary power was further established in the case of *Ex parte Quirin* (317 U.S. 1 (1942)). In contrast, the attorney who argued on behalf of Padilla pointed out that earlier cases, notably *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), conformed more closely to the circumstances of Padilla's case and suggested the

³⁴ Recall that the AUMF Joint Resolution affirms that the Executive shall have "all necessary and appropriate force against 'nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.'" Bush's 2001 Military Order explicitly exempts U.S. citizens, which is why the state does not refer to it as a basis of Executive power in the Padilla case.

state was overreaching. Moreover, the state was in direct violation of federal statute, which appears to clearly bar the detention of American citizens “except pursuant to an Act of Congress”³⁵ (18 U.S.C., Section 4001(a)).

A month later the Supreme Court punted. Rather than rule on the legality of substantive issue, it returned a ruling that Padilla’s lawyer had improperly filed the habeas petition. To the uninterested observer, the Padilla case had the veneer of being processed within a system that was working as it was intended, which is to say that whether the Padilla was guilty or innocent of a crime, his inviolable rights were being upheld, and the evidence of this was that the courts were processing his case. But of course, such a view is a misreading of what actually occurred. By the time the Supreme Court heard the case bearing his name, Padilla had already languished in solitary confinement without direct access to a lawyer for nearly two years. The decision on the exception was the moment the Executive subjected Padilla to the ban by simply deeming him an unlawful combatant. Irrespective of what would ultimately happen to Padilla the person, his case demonstrates the plain fact that U.S. citizenship did not and could not necessarily offer more protections than what could be accessed by non-citizens captured abroad.

In the Padilla case, one can discern a different way in which the law—or rather, legal procedure—was being used tactically. As I have already noted, in many ways, Padilla shared the vulnerability of the non-citizens captured abroad in that his state-designated status as an unlawful combatant was designed to remove him from the protections of law, while paradoxically accusing him of breaking it. But in both cases, exceptions pertaining to citizens and non-citizens,

³⁵ In its entirety, 18 U.S.C., Section 4001(a) reads, “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The lawyer who argued on Padilla’s behalf argued that the statute should be read as “a legislative response to the outrage over the executive internment of Japanese Americans during World War II, detentions carried out pursuant only to a presidential order (542 U.S. 426 (2004)).

courts have responded in their nominal status as the formal entity that checks the potential excesses of the Executive, the one entity in this case who was wielding sovereign power. Through the oscillation between judgment and appeal, the courts have scrutinized the innumerable details that will ultimately comprise a particular legal context: Was he arrested on U.S. soil or in the theater of war? Was congressional authorization too vague? Does *Ex parte Quirin* or *Ex parte Milligan* apply here? Does it matter where the habeas petition was filed? Legal procedures and the time it takes to navigate them are within the field of governmentality and included in sovereignty's calculations. *While the courts considered the Executive's ability to hold Padilla indefinitely, he was in fact being held indefinitely*—a period long enough to isolate him and render him absolutely dependent on his interrogators.

On February 28, 2005, more than six months after the Supreme Court's avoided ruling on the substantive question, a Federal District Judge again attempted to force officials to bring the matter to a conclusion, and in his ruling he appeared to grasp that the government was relying on legal procedures as a tactic: "There were no impediments whatsoever to the government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing" (Lewis 2005). Still, through appeals and other procedural maneuvers, the state continued to hold Padilla in an indefinite limbo. Then in September 2005, the Richmond-based Court of Appeals for the Fourth Circuit ruled that the government had the authority to detain Padilla as an unlawful combatant. Padilla's lawyers again kicked the problem of indefinitely detaining American citizens captured on American soil back to the United States Supreme Court.

In November 2005, only days before the Supreme Court was scheduled to issue a ruling on Padilla's fate, the government finally indicted Padilla on charges that had virtually nothing to

do with the charges for which he had been indefinitely detained. The Bush Administration charged him with conspiring to murder, kidnap, and maim people overseas. By charging Padilla, the Supreme Court no longer needed to rule on Padilla's indefinite detention, which means that the decision from Court of Appeals for the Fourth Circuit has been allowed to stand: the United States has legal grounds to indefinitely detain American citizens without charges and without hearing petitions for habeas corpus.

On June 1, 2004, while awaiting the verdict in *Padilla v. Rumsfeld*, Deputy Attorney General James Comey delivered a public speech, which purported to describe José Padilla's terrorist activity in training while living in Afghanistan and Pakistan. When asked by a reporter, "Why don't you bring criminal charges against him now?" Comey replied, "Well, what we're going to do is use all legal tools available to protect the American people from José Padilla. I'm not ruling out that criminal charges might not be an option someday. We, obviously, can't use any of the statements he's made in military custody, which will make that option challenging" (CNN.com 2004). Here Comey has summarized the Padilla case, and he seems to touch on a predicament that the sovereign state confronts. Citing national security, the state claims it needed to interrogate Padilla without legal counsel, which is to say, the state finds it necessary to exercise an exceptional power over the normal legal protections that describe political citizenship. The decision to deny Padilla legal counsel, however, means that Padilla's admissions may not be admissible in a court of law. However, rather than leaving the state in a weaker position that might result in Padilla's exoneration and release, the case illustrate another instance of the state making a decision on the exception and how the courts are not necessarily able to protect U.S. citizens against sovereign power.

To summarize, in the Padilla case the Executive's initial decision on the exception on the exception was to indefinitely detain Padilla. As with the decisions on the exception regarding non-citizens captured abroad, the state claimed that law—in this case, the AUMF—granted it the authority to remove Padilla from the protections of law. As the state saw it, Padilla did not qualify for the protections of domestic law because he was an unlawful combatant, just as the non-citizens did not qualify for the protections of international law because they were unlawful combatants. It is important to underscore the absolute vulnerability of citizens before sovereign power, which Padilla's case also illustrates. José Padilla's U.S. citizenship was not protecting him until such time as the state could prove that it had the power to indefinitely detain him. In fact, the reverse was true. Padilla was indefinitely detained in solitary confinement for years while courts contemplated whether indefinite detention was legal. When a decision was finally handed down, sovereignty had long since reduced Padilla to bare life. Given that there is now a precedent for indefinitely detaining American citizens captured on American soil, and that this incursion on citizenship was not rebuked by the U.S. Supreme Court, Padilla's case also illustrates the way sovereign decisions on the exception reconstitute citizenship in lasting ways.

Padilla pleaded not guilty to the charges he faced of conspiring to murder, kidnap, and maim people overseas. His trial lasted for three months in 2007, but after more than a day of deliberation, the jury found Padilla guilty on all counts. He is currently serving a 21-year prison sentence. However, long before he was charged and sentenced, Padilla's lawyers claimed the government kept him in solitary confinement, exposed him to sensory deprivation, threatened him with imminent execution, and injected him with "truth serums" during interrogations. In other words, his captors experimented on him as bare life. They tortured him (Sontag 2006).

Torture

One common refrain found in analyses of U.S. torture during the War on Terror is that in order to formalize a set of torture procedures, the CIA collaborated with psychologists to “reverse-engineer” the techniques they would eventually use (Mayer 2005, Eban 2007, Feinstein 2014). This is an attractive frame because it suggests that the knowledge of how to torture was something U.S. interrogators learned from unnamed, “real torturers” elsewhere, but this frame is misleading. To be sure, the history of U.S. torture predates the War on Terror. A wide range of historical accounts attest to the fact that U.S. slaveholders regularly employed an entire repertoire of torture techniques³⁶ (see Brown 1855). By the turn of the twentieth century there are photographs and written accounts documenting the U.S. military’s use of water to torture Filipino resistance fighters during what it billed as a campaign to promote freedom in the Philippines³⁷ (Kramer 2008). And more than a half century later the U.S. military regularly tortured the people it captured during the war in Vietnam³⁸ (Rejali 2007). By any reasonable assessment the U.S. is a torture state. That is, in its relatively short history as a sovereign entity, state agents have been observed routinely using torture as a means of interrogation and punishment. More to the point, torture is an institutionalized feature of the U.S. state, which is to say that the skill set necessary to produce severe physical or mental pain without killing is not held by a single individual. Rather, torture skills comprise a knowledge that is shared among a

³⁶ John Brown’s autobiographic account is particularly descriptive. In it he recounts instances of various torture techniques, such as “whipping,” “cobbing,” “flopping,” “the picket,” and “bucking.” (Brown 1854).

³⁷ One soldier wrote a letter home in 1900 describing how he and other soldiers administered the “water cure.” He wrote, “Lay them on their backs, a man standing on each hand and each foot, then put a round stick in the mouth and pour a pail of water in the mouth and nose, and if they don’t give up pour in another pail. They swell up like toads. I’ll tell you it is a terrible torture” (Kramer 2008).

³⁸ In January 1968, *The Washington Post* published a photograph featuring a member of the First Air Cavalry Division “pinning a Vietnamese to the ground while two other Vietnamese placed a towel over his face and poured water into his nose” (cited in Rejali 2007).

group of people, who are able to discuss and teach the methods within spaces that are relatively safe for them to do so³⁹.

In the context of the War on Terror, torture continues to figure centrally into U.S. sovereign ambitions. It is now known that the United States has tortured the prisoners it has indefinitely detained in war prisons all over the world, from Bagram Air Base in Afghanistan, Abu Ghraib in Iraq, Guantánamo Bay, and at numerous CIA black sites. The U.S. is still a torture state despite the claims of the Defense Secretary, the warden of Guantánamo Bay, and other state officials in the wake of the invasion of Afghanistan that the United States has only been interested in detaining prisoners in a humane manner, questioning them for intelligence, and above all, preventing them from returning to the fight in order to kill American soldiers (see for example Seelye 2002, Golden 2006). Placed in its proper historical perspective, the question is not about how the United States suddenly became a torture state during the War on Terror; a better question is: What prompted an old knowledge about how to torture to reemerge in its current form?

I briefly examine torture in this dissertation because it provides a fuller picture of the kind of vulnerability subjects face once they are subjected to the sovereign prerogative to either remove them from law or remove the protections of law from them. Moreover, I examine torture because it captures an important distinction introduced by Foucault in his delineation of the modalities of power. In the torture conducted by the United States, there is, on the one hand, a discernible juridico-sovereign power at work which seeks a corporeal obedience and asserts itself

³⁹ The Survival, Evasion, Resistance, and Escape (SERE) program, which ostensibly teaches U.S. military personnel and some civilians working for the Department of Defense how to resist being tortured is one example where a torture skill set is practiced and taught.

as primarily a power that “takes life or lets it live.” But on the other hand, there is discernible biopolitical power that violently forces subjects to stay alive as confessing instruments for the state—a fact that is illustrated by requiring medical personnel to be present during interrogations⁴⁰. Thus analyzing torture offers a more complete picture of the relationship between sovereign power and subject formation; however, it should be noted that torture is not the whole picture either. Torture exists as just one of many biopolitical treatments the sovereign state contemplated for the individuals it indefinitely detained. For instance, as early as November of 2001, the Military Order had already established that upon the concurrence of two-thirds of the members, the military commissions would hand down sentences to include the death penalty, and in fact, early in 2003 preparations were already underway to renovate buildings in the Guantánamo Bay Naval Base to include death chambers for executions⁴¹ (Bush 2001b, Teather 2003). It is also the case that Guantánamo officials have force-fed prisoners on hunger strike, as process a number of human rights organizations have described as a form of torture.

Examining other sources of information, much of which was the result of investigative journalism, it is now apparent that in the months following the 9/11 attacks officials expressed interest in ramping up the violence used in their interrogations by developing a set of “new” techniques. Leaked communications between CIA officials and other high-level officials in government also attest to the fact that the CIA was trying to get legal cover for employing the proposed techniques. In some cases intelligence officials simply began talking to the Justice Department in order to determine where the line was between harsh interrogation and torture, but

⁴⁰ In her capacity as head of the United States Senate Select Committee on Intelligence, Senator Dianne Feinstein (2014) notes that in many cases medical personnel were relieved of their participation in an interrogation once they expressed concerns about the aggressive techniques being used.

⁴¹ The President of the United States has the final power to decide on the sentences of the military commissions, unless he specifies that the Secretary of Defense has such power.

in other cases, military officials seemed to be asking the Justice Department a slightly different question: How can law be read so that this highly questionable technique can be understood to be legal?

Within a matter of weeks following the 9/11 attacks, it is now a matter of public record that officials from the Central Intelligence Agency began contracting with psychologists in order to begin formalizing a repertoire of “enhanced interrogation” techniques that were tantamount to torture⁴² (Feinstein 2014). At the same time, some military intelligence officers took stock of the exceptions the U.S. state outlined regarding the Geneva Convention and began arguing that suspensions presented opportunities for experimenting with more coercive methods of interrogation. While the calls for coercive interrogations were met with some controversy between military intelligence members and the military criminal investigators who were assigned to prepare cases for the tribunals, as time went on, the call for harsher interrogations grew louder (Golden et al. 2004). By May 2002 and perhaps earlier, a number of high-level state officials, including CIA Director George Tenet and the Secretary of Defense were discussing whether the CIA could legally use “harsh” techniques while interrogating Abu Zubaydah (Mazzetti 2008). During this same time, the CIA was in consultation with the Department of Justice to determine whether “certain proposed conduct would violate the prohibition against torture” (Bybee 2002c).

At this juncture, I want to outline the specific decision on the exception that would make torture a legal possibility, and given that the Geneva Convention had already been suspended for the alleged al Qaeda and Taliban militants captured on the War on Terror, I will contain my

⁴² One psychologist, James Elmer Mitchell continues to deny that he had anything to do with the torture in Guantánamo, “The whole Guantánamo issue that came up ... all of the abuses that they did in Guantánamo they tried to attribute to me and Bruce. It wasn't us” (Leopold 2014).

analysis to the prohibitions against torture outlined in domestic law⁴³. To start, it is important to first be clear about what torture meant prior to the attacks on 9/11 and before there was any discussion of a War on Terror. The definition of torture in U.S. Code is “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering...upon another person within his custody or physical control⁴⁴ (18 U.S.C., Section 2340). As a comparison, murder is legally defined as “the unlawful killing of a human being” (18 U.S.C, Section 1111). The goal of torture is often to cause severe pain without killing, so if a victim dies while being tortured, the torturer has likely failed. To put it differently, there is a threshold in law between intentionally causing someone to experience severe pain and suffering and intentionally causing someone’s life processes to cease.

But there are two thresholds that are important to the current analysis. First, to state the obvious, law recognizes a threshold between torturing and not torturing, or put differently, law attempts to define the moment that an interrogation becomes an illegal instance of torture. As described above, law also recognizes the threshold between torture and murder. It attempts to define these two crimes differently because it also seeks to punish the perpetrators of the crimes with different penalties. Because the law recognizes these thresholds, the sovereign state, as an entity that uses law tactically, is also interested in these thresholds. What this means is that the

⁴³ The original Geneva Convention of 1949 and the Additional Protocols of June 8, 1977 would be relevant here. In addition to Article 3, Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention, Article 32 of the Fourth Convention, Article 75 (2 a and e) of Additional Protocol I and Article 4 (2 a and h) of Additional Protocol II. It worth noting that the Geneva Convention is not the only international treaty the U.S. rendered inapplicable to its War on Terror. In 1988, the United States joined 158 other states in becoming a signatory to the U.N. Convention Against Torture and ratified this Convention on October 21, 1994 (United Nations 2015). The legal maneuvering that rendered U.S. obligations under this Convention are important, but for analytical purposes, such an analysis does not add anything more to the argument of this dissertation.

⁴⁴ U.S. courts have handed down rulings that have identified a number of specific practices that constitute torture: severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person.

U.S. state has been interested in reinterpreting law in order to *move* the threshold between “normal” interrogations and those involving torture. The U.S. has also been interested in biopolitically *managing* the threshold. “Mental pain or suffering” is a part of the definition of torture, so the torture threshold is managed by working with psychologists to develop a torture repertoire and by including psychologists in rooms where torture is occurring. Similarly, medical professionals were present during interrogations to biopolitically manage the threshold between torture and murder.

Returning to the federal torture statute where it is a criminal offense for any person outside the United States to commit or attempt to commit torture, where torture is defined as an act “intended to commit severe physical or mental pain or suffering,” In the documentary evidence of lawyers working for the Justice Department it is clear that the state made a decision on the exception, which is to say that it sought to move the threshold between interrogation and torture by simply redefining the normal understanding of the word “severe.” Specifically, the series of “torture memos,” which lawyers composed for high-level state officials strategically drew on cases considered under the Torture Victim Protection Act, in order to arrive at a definition of “severe” that specifies it as a term reserved for the kind of “physical pain...equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” (Bybee 2002d).⁴⁵

⁴⁵ In August 2002, as a result of the torture exceptions, new techniques of interrogation were created and included attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and waterboarding.

In sum, the initial decisions on the exception, which effectively suspended the Geneva Convention and paved the way for a new court system, cast alleged non-citizen militants detained by the U.S. military outside the sphere of protective law⁴⁶. By tactically redefining the legal definition of severe, the sovereign state also showed that it could force law to abandon these non-citizens. As this redefinition of torture pertained to domestic law, and as is apparent in the case of José Padilla, it held consequences for the treatment of U.S. citizens as well, particularly those who were deemed by the President of the United States as unlawful combatants and held indefinitely.

As I have argued, these decisions on the exception often doubled as security events, where state officials stood before a national audience and constructed narratives in order to help average people make sense of all that was happening in the unsettled times in which the nation was embroiled. The U.S. suspension of its “obligations” under the Geneva Convention and its treatment of the people it imprisoned raised a series of questions and pressing concerns about the dangers of terrorism, the security threat posed by the enemy abroad, the threat posed by the enemy living among us, and what this all meant for the civil liberties of “average” Americans. Each of these questions was addressed by state agents speaking openly or anonymously; in press briefings or in exclusive interviews with reporters. In their comments, these political entrepreneurs drew upon a consistent set of representations, including racialized ideas of Muslims which first took shape in fifteenth century Spain. In the next section I want to explore

⁴⁶ It is worth noting by deeming that the Geneva Convention was irrelevant for the purposes of the U.S.-led war in Afghanistan, the United States demonstrated that its sovereignty would be unperturbed by the Convention’s strong language against torture, which it outlined as a grave breach. Article 50 of the Convention (1949) defines “grave breaches” as acts that include: “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

these commonly deployed representations, and outline any connections they have to the legal decisions on the exception I have explored thus far.

The Representational Dimension

Who attacked our country?

President George W. Bush, State of the Union Address, Sept. 20, 2001.

I've said before, and I'll say it again: What we're engaged in is something that is very, very different from World War II, Korea, Vietnam, the Gulf War, Kosovo, Bosnia, the kinds of things that people think of when they use the word "war" or "campaign" or "conflict." We really, almost, are going to have to fashion a new vocabulary and different constructs for thinking about what it is we're doing.

Donald Rumsfeld, Secretary of Defense, Sept. 20, 2001.

Recall that Agamben (1998, p. 41) notes that “sovereign power divides itself into constituting power and constituted power, and maintains itself in relation to both, positioning itself at their point of indistinction.” This is to say, sovereignty thrives in a zone where, in one sense, its operations function to continually reaffirm and even expand its claims of being a truly exceptional power capable of suspending law, especially in the name of national security. In another sense, it is a power that claims to be *already* legislatively constituted, as if the juridical always already grants those who wield sovereign power the statutory cover to do so. Sovereign power thrives, or perhaps it is vitalized, in this zone where it is impossible to discern whether sovereignty is in the process of constituting itself or revealing itself to be a constituted power.

As I have argued, examining this zone of sovereign power, it is possible to discern two distinct dimensions. Insofar as a sovereign declaration, such as President Bush’s Military Order,

becomes a legal document that holds sway in official legal judgements, it is apparent that sovereignty works in an exceptional or juridical dimension. Insofar as sovereignty endeavors to constitute itself as a righteous power, or one that has been legitimized, then sovereignty can also be observed to be working in a representational dimension. The latter is what Judith Butler (2006) was pointing to when she observed that the sovereign's act of suspending the law is a "performative one which brings a contemporary configuration of sovereignty into being," (p. 61). The concrete act of suspending and manipulating law are tied to sovereignty, but Butler is suggesting that this manipulation is not enough. To constitute itself, sovereignty must be seen. It must be recognized, and although sovereignty does not stem from a contractual agreement, on some level, it involves an agreement to see things in a particular way.

This performative, representational dimension of sovereignty has far reaching implications. For instance, statecraft is popularly conceived as something that occurs through the covert work of intelligence agencies and secret agents⁴⁷. While the United States certainly engages in a fair amount of covert behavior, sovereign decisions on the exception, which are undeniably components of statecraft, are necessarily visible. While covert operations attempt to break agreed upon rules without people noticing, or noticing but not being able to attribute fault, the consequential work of sovereignty attempts to openly remake the rules.

In this section, I explore more than just the representations of sovereignty. I have argued that in the case of the War on Terror, the U.S. state can be observed strategically positioning itself—or at least chasing a position—within historically-contingent power relations organized

⁴⁷ For a recent example of this widely held impression, see *Mission Impossible: Rogue Nation* (2015), where a corrupted MI6 operative explains the nature of their covert trade, "There are no allies in statecraft, only common interests."

by race, religion, and civilization. One of the ways the state actively positioned itself in the early years of the war was through declaring what I have described as a cascading series of decisions on the exception, the result of which created Guantánamo Bay as a legal and physical reality. The state further positioned itself to have a profound impact on the discourse pertaining to sovereignty and subject formation by orchestrating a series of security events that were broadcast across news media outlets. In these events state agents framed what was happening, they offered narratives, and deployed representations, all in an effort to impact the public's sensemaking of war. The sovereign is the one who both decides on the exception, but in this section I explore how the sovereign is also the one who seeks to shape how the public understands that decision. In wielding sovereign power, state agents do not always succeed in making representations and narratives take hold, but the security event is a virtual guarantee that their message will be heard, and it is an important place to begin the analysis.

The Civilized State

While making bold exceptions to domestic and international law, state agents often attempted to portray the United States as the guardian of civilization. It presented itself as the bearer of the traditions associated with modern civilization and often attempted to draw on this status as the basis for the legitimacy and discretionary authority to exercise sovereign power. In order to sharpen its claims that it should be counted as a leader among civilized nations, U.S. state officials routinely drew sharp distinctions between themselves and what they claimed were barbaric terrorists bent on destroying the U.S. The United States, according to these agents, was not only a leader of the civilized world but doing the difficult and often thankless work of defending civilization against barbaric, terrorist outsiders who hated the West and Western civilization. In his first State of the Union address following the attacks on 9/11, president Bush

(2002) framed the war for his audience, “This is civilization’s fight.” Then, telegraphing what would become an increasingly common sentiment in the months and years to follow, the president invoked the idea the idea that civilization was very closely tied to progress, and more than anything, the enemy wanted to hinder the progress of the U.S. nation. As the president put it, the United States would need to bravely engage in a fight for “all who believe in progress and pluralism, tolerance and freedom” (Bush 2001).

But the United States’ status as a civilized nation was never a settled matter, particular in the early years of the war. Even before 2001 drew to a close, one can easily find recurring efforts by state officials trying to reassert and reaffirm the idea that the U.S. remains a member and leader of the civilized world. This seeming civilizational insecurity and the efforts to resolve it are illustrated well in comments U.S. officials make about the law. This dissertation has of course looked closely at the juridical dimension and how law figures into the process of constituting sovereign power, but that is an analysis of how the sovereign state uses law or what law does. Here I am interested in how law is discussed and represented, and in analyzing the comments of officials commenting on issues pertaining to the war and Guantánamo Bay, there can be little doubt that the rule of law is widely regarded to be a marker of civilization⁴⁸. In reading the transcripts of press briefings and the comments made in news articles, journalists and state officials alike accepted a basic premise that goes something like this: “*Despite our anger*

⁴⁸ It is worth noting here that state agents very rarely attempt to represent the sovereign state as an entity that is capable of using the law tactically. The notion that the state is bound by law, even when it is openly invoking itself as a sovereign entity, is largely a taken-for-granted premise of most public conversations. A good example of this comes from a 2006 radio interview discussing the topic of torture and whether CIA agents should be prosecuted for crimes committed under the 1996 War Crimes Act. During the discussion, a former Justice Department official explained that CIA agents should not be bound by the law because the crimes must be well known in advance. As he put it, “As a matter of due process, you don’t surprise people with liability.” Thus in the interview, by omitting from the discussion the fact that reinterpretations of the law were made in order to make torture possible, the official is able to put forward the idea that the state was always bound by the law and had every intention of following it. being followed (Due Process and the Trial of Terrorism Suspects 2006).

and grievances, since we are a nation of civilized people, will we continue to observe the rule of law?" This sentiment, which so clearly attaches respect for the rule of law to the notion of civilization, presented something of a paradox for state officials: If U.S. power and authority are legitimated through the state's respect for and its adherence to the rule of law, then how could the state remain civilized while also declaring domestic and international laws inapplicable. Put in even simpler terms, was it civilized to dismiss the Geneva Convention, to indefinitely detain people in concentration camps, and to torture them?

Thus by declaring the Geneva Convention to be inapplicable to the War on Terror, the United States was signaling that it was preparing to unleash an unrestrained power, but this bold exercise of power also stirred up criticisms that the United States was exercising an illegitimate power and one unbecoming of a civilized nation. Given the potential of such criticisms to disrupt the state's preferred narrative, a familiar and widely repeated storyline began to take shape which attempted to resolve the paradox, at least in regards to the state's suspension of its Geneva obligations. The first claim was that the Executive's determination that the Geneva Convention was inapplicable was actually based on a respect for the rule of law. Put in these terms, state agents were asserting that the law simply did not afford rights and privileges for al Qaeda and Taliban militants. The second claim was that even if for those who sought to debate whether militants captured in the War on Terrorism were protected by the Geneva Convention, the point was moot since the United States was bending over backwards to conform with the requirements of the Convention. As Donald Rumsfeld intimated on a number of occasions, "We have indicated that we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions" (Seelye 2002).

Over and over again, officials assured the public that it worked hard to comply with the demands of Geneva. In response to allegations and impressions that alleged militants were being mistreated in Guantánamo, Defense Secretary Donald Rumsfeld was adamant that after personally scrutinizing the secure video at the camp he was unable to find a “single scrap of any kind of information that suggests that anyone has been treated anything other than humanely” (Seelye 2002c). More than two years later, officials were still adding to the chorus of support for the rule of a law. For instance, the new Warden of Guantánamo, Colonel Michael Bumgarner, discussed at length how carefully he studied the Third Geneva Convention regarding the treatment of prisoners of war because he wanted to continue moving Guantánamo into line with its rules (Golden 2006).

Rumsfeld, Bumgarner, and countless other officials returned to the word humane and emphasized their “humane treatment” of detainees. On the one hand, the term is a nod to the Geneva obligations regarding the treatment of prisoners of war, so again the term figured prominently in an effort to buttress U.S. claims that it stands firmly within the ranks of other civilized nations who follow the rule of law. But even while denying prisoners habeas corpus, public officials were often adamant that the policies of the state and the conditions of the Guantánamo camps were, above all, humane. The term was about something more than signaling compliance with law; it became useful because it suggested a humanitarian benevolence.

This secondary meaning conveyed by the term humane is particularly evident when reading through the accounts of journalists who have visited Guantánamo Bay in the early years of the war. Admittedly, the restrictions journalists faced while visiting the naval base meant that reporting on the camps tended to feature interviews with the same people, make reference to the same procedures, and make note of the same landmarks. One place journalists regularly visited

were Guantánamo's medical facilities and they were often allowed to interview the medical personnel who worked there. One common theme that can be distilled from these interviews is, again, the humane treatment given to detainees. However, in providing details of what is humane about detainee medical treatment, many interviewees made reference to Guantánamo as a "world class" facility with exceptional health care. As one medical professional put it, the treatment at Guantánamo was "better than most of the detainees ever received in their lives" (Conover 2003). According to a number of state officials at the camps, the medical treatment detainees receive is also better than what they deserve. In interviews, public officials often speculated that if the roles were reversed, al Qaeda and Taliban would never offer medical assistance to a wounded American soldier, even if they had the medical knowledge to do so.

Thus during the security events following the major decisions on the exception—that moment of anxious sensemaking during the unsettled times after 9/11—state officials invested an enormous amount of rhetorical energy attempting to position the state as a leader of the civilized world. It sought to forge this representational affinity with civilization by referring to its compliance to law and by playing up its respect for the rule of law in general. But a close reading of these comments also suggests that these state agents also claimed the United States was a leader of the civilized world because even without the guidance of law, the U.S. placed a premium on treating prisoners humanely by providing them access to all of the advanced technology one would expect a civilized, modern state to have. Whether implied or stated directly, one can also find interspersed throughout many of these statements about the U.S. willingness to treat prisoners humanely suggestions that Guantánamo prisoners are undeserving of the civilized treatment the U.S. military was so eager to provide. In these terms, the U.S. portrayed itself as a paternalistic entity, making the hard choices the civilization requires of it.

The reasons put forth by state agents explaining why the Guantánamo prisoners were undeserving of the humanitarian benevolence of the U.S. is the topic of the next section.

The Uncivilized Enemy

Unlike others who have devoted a great deal of analytical attention to the representations of the sovereign state, I focus here on the representations deployed by state agents about the subjects over which sovereignty claims to rule (see Butler 2006, Wagner-Pacifici 2005). As I have argued, when the sovereign state declares an exception to law, it is subjecting entire categories of people to the ban, which denotes an ontological existence outside the reach of citizenship. In what follows I want to draw attention to a parallel process of transforming the image of subjects, so that the ban is justified and even welcomed. Specifically, I focus on the way in which state officials represented the enemy other as uncivilized, primitive, barbaric, fanatical, and echoing a pattern of representations characteristic of the Second World War, demonic.

While *New York Times* reporters and those working for other publications were often savvy enough to draw initial distinctions between al Qaeda militants and the Taliban at the top of their articles, state officials who delivered comments on the people sought and captured by the U.S. military in the early years of the War in Afghanistan appeared to use the identifiers interchangeably. In most cases, officials simply used al Qaeda as a catch-all phrase for the militants the United States was confronting abroad. The point here is that at least in the first few years of the war, al Qaeda and Taliban forces, despite having very different legal reasoning that led to their respective exclusion from the protections of Geneva, were effectively collapsed into an undifferentiated, monolithic terrorist threat within U.S. media discourse.

Before al Qaeda became firmly entrenched as a catch-all designation for U.S. terrorist enemies, and while the ink was still drying on legal memos that articulated a means of excluding the Taliban from the Geneva protections by denying them status as a High Contracting Party of the Convention, Donald Rumsfeld stated publicly that the Taliban are "an illegitimate, unelected group of terrorists" (CNN.com 2001). To be clear, Rumsfeld was making a strategic point intended to comport with the language of the decision on the exception Geneva exception, but his intention in invoking the ideas of democracy as a foundation for legitimacy also takes aim at Afghanistan's civilizational standing. As Rumsfeld and other commenters of the time sought to make clear, both the organization known as al Qaeda and Afghanistan, the state that gave al Qaeda refuge, were diametrically opposed to everything civilization represented.

There are two ways in which the enemy was characterized as being incompatible with civilization: First, as already alluded to, state agents consistently discussed the enemy as being determined to destroy Western civilization. "They" hated "our" freedom, our progress, the western way of life, and if left unchecked, the terrorist enemy would burn it all down. State officials also articulated that the belligerents the U.S. military confronted in the War on Terrorism were also incompatible with civilization because they did not and could even comprehend what it would be like to live in a civilized country such as the United States. Here I am pointing to a distinction the state was making between, on the one hand, what the enemy wanted to do, and on the other, who the enemy was. The terrorist foe was prone to violence and destruction against the progress of the civilization, but they were also an uncivilized foe.

This notion of a fundamental civilizational incompatibility was often used in building narratives that suggested the enemy hails from a primitive society. When the member of the Guantánamo medical staff remarked that Guantánamo prisoners were likely receiving the best

medical care in their lives, it was a comment that aligned well with a much larger regime of representations that collectively sought to posit the enemy as primitive and backwards. President Bush was particularly vivid in his depictions of Arab-Muslim primitivism when he repeatedly alluded to smoking the out of holes and caves. But perhaps more than any other topic, the primitiveness of the terrorist enemy emerged in what were often exasperated remarks about the way men in the tribal regions of Afghanistan treated women, and on this score, the press were often active willing collaborators in constructing this primitive sexism. When journalists visited Guantánamo and had an opportunity to speak with women who worked with the prisoners, it was spoken of as a forgone conclusion that the prisoners would be unable to comprehend or take seriously the idea that their jailers were women.

The insinuation of Arab-Muslim primitivism coincides with claims that the enemy does not properly belong to the juridical dimension. Given that respect for the rule of law figured so prominently into U.S. claims of its own civilizational status, it is perhaps unsurprising that state agents frequently remarked about the enemy's blatant disregard of international law, either because it could not follow the laws of war or because it willingly refused to follow them. U.S. military spokesperson Lieutenant Colonel Barry Johnson illustrated this sentiment when he remarked that, "Unlike conventional soldiers who abide by certain laws of war, and who would also be bound by the III Geneva Convention to act in certain ways when confined, the enemy combatants are not obedient soldiers" (Conover 2003).

State agents further rolled out evidence of the enemy's primitivism and its incompatibility with the modern system of law by suggesting that belligerents in Afghanistan routinely used children as human shields. In one case, Rumsfeld noted that militants were strategically placing their tanks and bombs near hospitals and schools (Rumsfeld 2001). Military

psychologists are quoted or referenced in shoring up the idea that many of the unlawful combatants are child soldiers, which is not simply against law but also evidence of psychological dysfunction and immorality of the enemy (see Conover 2003). However, references to the child soldiers in the unfolding narrative of the U.S.-led War on Terrorism stood to disrupt the narrative that the U.S. held civilizational and moral high ground because discussing the use of child soldiers in war almost invariably led to discussion of the child soldiers who were indefinitely detained at Guantánamo. However, in the early years of the war, state agents adroitly redirected what could have been a discussion that opened U.S. policy and practice to criticism by returning to the distinctions between a civilized U.S. and the uncivilized enemy. Again and again, state agents emphasized the depravity of an enemy who would so easily expose the lives of innocent children in order to kill Americans and contrast this depravity with the concern U.S. soldiers had for the lives of these children.

The child soldier narrative was about how the enemy was using the basic humanity of U.S. soldiers against them by banking on the fact that U.S. soldiers would not shoot children. “This is how terrible the enemy is!” state spokespersons seemed to be saying; however, rather than succumb to the designs of this kind of evil, state officials reminded audiences that U.S. soldiers took extraordinary measures to capture these child soldiers alive, so that they could ultimately offer them treatment. Major General Geoffrey D. Miller explained, “We're doing our best to give these juvenile enemy combatants options to be able to be integrated back into their societies...These despicable terrorists have decided to use younger people as a part of their army. They're the ones who decided to impress, kidnap and force them into service. Their treatment program started the day that they came [to Guantánamo]. And so, like anyone freed from an intolerable situation, they're returning to what we'd consider normal” (Conover 2003).

When state officials made comments about the enemy they were confronting on the battlefield, as well as the one they were transporting back to Guantánamo, they devoted an enormous amount of energy toward conveying the idea that the enemy was unusually dangerous—a super threat that needed to be restrained with extraordinary measures. There were occasional suggestions from officials that the prisoners were not nearly as dangerous as they were first led to believe, but in the main, state agents portrayed the Arab-Muslim enemy as a super threat. This first batch of prisoners was considered so dangerous and so bent on destruction that General Richard B. Myers, chairman of the Joint Chiefs of Staff, once famously remarked that he believed they “would gnaw hydraulic lines in the back of a C-17 to bring it down” and then months later reprimanded a journalist who wondered about the treatment of juvenile detainees by saying, “Some have killed. Some have stated they're going to kill again. So they may be juveniles, but they're not on a Little League team anywhere. They're on a Major League team, and it's a terrorist team.” (Seelye 2002, Conover 2003). When a set of controversial photos were released featuring shackled prisoners in black goggles kneeling before their military captors, and when a similar image of José Padilla was released with him in black goggles just before he was to be examined by a dentist, Donald Rumsfeld and other state officials explained that the tight restraints and sensory deprivation were necessary because the men were unusually dangerous. To restrain them in any other way would be irresponsible and put American lives at risk.

What then made this Arab-Muslim enemy so dangerous? The answer state agents peddled had to do with one of the very features that also made the enemy incompatible with Western civilization: Islam. When U.S. military officials portrayed themselves as bending over backwards in order to treat their prisoners in a humane manner, it often involved providing prisoners with

the necessary implements of their religious faith. Early in 2002, Donald Rumsfeld and General Myers remarked that the prisoners at Guantánamo would be receiving “culturally appropriate food” and would be allowed to practice their religion, but similar comments made in the months that followed carried undertones that the U.S. was somehow in over its head and perpetually unfamiliar with the strange traditions of their prisoners (Seelye 2002).

Military spokespersons often preferred to simply refer to the militants in Afghanistan and those imprisoned at Guantánamo as “the enemy,” but belligerents were also discussed as terrorists, al Qaeda, Taliban forces, jihadists, and Islamic extremists. When seeking to convey ideas about the absolute religious fanaticism of the enemy, the latter two terms were favored. At the same time, Islam was presented as exotic, unfamiliar, incomprehensible, and again, incompatible with the American way of life. Yet U.S. spokespersons seemed to be having it both ways; they were unfamiliar with the religion but very familiar with the threat posed by the religion’s devotees. Interspersed throughout casual assurances of overwhelming U.S. military strength and the professionalism of its soldiers, state agents seemed quite certain that “radical Islam”—or sometimes just “Islam”—was a dangerous religion that exacted fanatical devotion from its subscribers. Agents discussed how the fanaticism gave the enemy a tactical advantage, which was expressed in the assertion of a Muslim willingness to commit suicide if doing meant killing Americans. At times, state agents seemed to plead for people not to lose sight of the dangers presented by Islamic fanaticism, which was an element that so defied logic while also being capable of producing an incomprehensible fanaticism, speakers seemed to struggle with quantifying the danger.

Thus one theme that emerges from interviews with state agents is that the Arab-Muslim enemy was unlike any enemy the United States had ever encountered. In taking stock of the

innumerable ways the enemies in the War on Terror are said to be unqualified for civilization, it is apparent that they are being rhetorically (representationally) positioned in a space beyond the reach of the domestic and international laws designed to protect life, but in the discussions of their suicidal fanaticism and their willingness to kill children, one can see the traces of discourse that seeks disqualify the lives of the enemy Other even further. As one particularly illustrative case, recall General Myers' comments about the willingness of the enemy to "gnaw," as if a rat, on the hydraulic lines of transport aircraft. As this remark illustrates, the state-driven narrative about the foes confronted in the War on Terror is one which imputes an animalistic essence to the enemy, but in Myers' story, the animal is also capable of an enormous destruction, for it will kill itself to bring the aircraft down. Thus the narratives told to the American public painted the Arab-Muslim enemy as both subhuman and superhuman, which is a pattern John Dower (1986) also observed in his analysis of representations pertaining to the Japanese during the World War Two. As Dower concluded, the devastation and violence in the Pacific Theater cannot be adequately grasped without understanding how the Japanese enemy was demonized as both subhuman and superhuman. Boiled down, this has proven to be one very compelling formula for convincing a nation, which understands itself to be civilized, to also be a nation goes along with suspending the law, upon which it claims civilization is based. Arguably, this is the representational work in the War on Terrorism that allowed for the construction of Guantánamo Bay and obstructs the efforts to close it.

Chapter 4: Conclusion

This dissertation departs largely from the theory of sovereignty introduced by Giorgio Agamben. In it, Agamben claims to illuminate a blind spot in Michel Foucault's analysis of power, and he synthesizes Foucault's insights with those from Carl Schmitt. Agamben's work on sovereign power, and how it is tied to the production of bare life has proven to be enormously influential in recent years for political theorists.

As I recounted, Agamben can be characterized as picking up where Carl Schmitt left off, who argued that sovereign power can only be defined as the entity that decides on the exception to the rule of law. In contrast to arguments proposed by constitutional scholars, Schmitt observed that the state's legitimacy as a supremely powerful entity cannot be based on a document. It cannot be that the state's legitimacy depends on it adhering to the strictures of contract in the form of a constitution; nor does the state's legitimacy hinge on its consistent application of the rule of law as it has been prescribed by the constitution (Kahn 2011, Croce et al. 2013). Instead, laws and guidelines must always be interpreted vis-à-vis the concrete cases to which they are applied, so there must be a preexisting form of legitimated authority that reads and decides on how to apply those laws as they have been penned. Moreover, many laws exist but are rarely enforced, so there must exist a power that is above law, one which is capable of deciding on when laws are to be enforced or ignored. Thus, according to Schmitt, sovereignty is the legitimated power of the state that stands above the law and even decides on when to suspend law. Despite the efforts of constitutional scholars, sovereignty cannot be removed from the analysis of sovereign power.

Thus begins Agamben's own analysis of sovereignty, but he quickly turns to Michel Foucault's work on sovereignty and Foucault's analysis of different modalities of power more generally. Not only does Agamben draw a connection between Schmitt's and Foucault's conceptions of sovereignty, but he also shows how Foucault's characterizations of juridico-sovereign power and biopower are in fact two sides of the same sovereign coin. In contrast to Foucault's formulation that juridico-sovereign power and biopower exist as two separate forms of power, each with its own historical trajectory and relatively indifferent to one another, Agamben argues juridical power and biopower are both instances of a sovereign structure, which traces its roots to Greek antiquity.

Agamben's theoretical synthesis makes it clear that sovereignty and subject formation are linked, and so any theory that investigates how sovereignty reconstitutes itself is by default also a theory that investigates the way subjects are formed. However, perhaps because Agamben begins with a theoretical insight from Carl Schmitt that deals squarely with law, or what I have more broadly discussed as the juridical dimension, he seems reluctant to investigate other dimensions within which sovereignty manifests and reconstitutes itself. I have been particularly concerned in this dissertation with the representational dimension. Specifically, I have argued that the decision on the legal exception can never be entirely contained within the juridical sphere. Legal exceptions are at once performative opportunities for the entities that wield sovereign power, but I also add that insofar as exceptions constitute incursions on the rights of citizenship, the decision on the exception gives rise to discursive openings where new opportunities arise for deploying representations about the people for whom exceptions must be made. The claim I am making then is that the sovereign state is equally attentive to the juridical and representations and that both are factors in the exercise of sovereignty.

I analyzed the juridical dimension and the representational dimension separately. In my analysis of the former I was attentive the way the sovereign state used law tactically through a cascading series of decisions on the exception. By making these decisions, I argued that the state was able to establish the conditions for indefinite detention, which ultimately made Guantánamo Bay a legal and physical reality of the U.S.-led War on Terrorism. At the same time, the political entrepreneurs, speaking on behalf of the state at a series of security events that loosely corresponded to major decisions on the legal exception were also engaged in actively digging up centuries-old representations regarding racialized Muslim Other, and within the unsettled times that followed 9/11, these state agents redeployed these representations for mass consumption. Importantly, state agents also repackaged them within narratives that served the particular interests of the sovereign-seeking state.

The empirical evidence I consider in this dissertation is of two sorts: first, I examine statutes, case law, internal legal memos, and the Military Order drafted by President George W. Bush in order to track the key legal exceptions declared by state agents in the first few years after the attacks on 9/11. The second form of empirical evidence I examine are the statements of state agents, both civilian and military, who regularly organized press briefings and spoke with journalists in the years following 9/11 in order to assist the public in making sense of the legal exceptions and the unfolding consequences of those decisions. As the detention camps at Guantánamo Bay constituted one particularly vivid and widely known consequence of the decision on the exception, I devoted most of my attention to the news stories and press briefings related to Guantánamo Bay.

My primary aim in the analysis of the juridical and representational dimensions was to explore the way these two dimensions related to one another. Other than my argument that the

decision on the exception provides entrée into manipulating both dimensions, it is clear that each of these dimensions reinforce the other. As my textual analysis of the regime of representations and the narratives within which they were embedded showed, while the state was actively making legal decisions on the exception, it was also directly engaged in putting forth controlling images about Arabs and Muslims that were intended to render them incompatible with civilization. It is also the case that while the United States was asserting for itself the power to arbitrarily ban individuals from the nominal protections of law and to indefinitely detain them, and while the U.S. was also brushing off its tools of torture to openly use them again in interrogations, it was simultaneously involved in constructing an image of the Arab-Muslim enemy as something both subhuman and superhuman, but in any case, so terrible that civilization itself is at stake. The dominant narrative from state agents in the War on Terror is that for the sake of civilization, we must seriously consider a kind violence that law generally forbids.

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