

Biopolitics, Counter-terrorism and Law

After 9/11

**A thesis submitted to the University of Manchester for the
degree of Doctor of Philosophy in the Faculty of Humanities.**

2013

Svetoslav Nenov

School of Social Sciences

Contents

Abstract.....	4
Declaration.....	5
Copyright Statement.....	6
Chapter 1. Introduction	8
1. The impact of 9/11	8
2. Full tilt: (Counter)-terrorism and state power	10
3. Foucault, Schmitt, exception	11
4. Remembering Foucault	16
5. Lines of research	17
6. Methodology	25
Chapter 2. Theorising Security: An History of Biopower	35
1. Introduction	35
2. Life, race, war	36
3. Security, Population, Governmentality	47
4. Conclusion	57
Chapter 3. Terrorising Security: Biopolitics in the 21 st Century.....	59
1. Introduction	59
2. A Topology of Powers	59
3. Exceptionalism after 9/11: the problem of the limit as a problem of war	65
4. Biopolitics after 9/11: governing life through war, exception and race	75
5. Conclusion	82
Chapter 4. Discipline, Security and Law After 9/11: The Doctrine of Pre-emption and the Legacy of the PATRIOT Act.....	84
1. Introduction	84
2. Defining the Threat	85
3. The US Doctrine of Pre-emption	92
4. The PATRIOT Act and the distributed sovereign decision	98
5. Pre-emptive surveillance and the PATRIOT Act: defeating the terrorists' plans	108
6. The biopolitical assay of life and the PATRIOT Act	120
Chapter 5. The Battle for Guantanamo Bay: Sovereignty, Exceptionalism and Shades of Law	128
1. Prelude	128
2. The ties that bind: <i>Rasul v Bush</i> as an expression of the legal prerogative	138

3. Powers, separated.....	148
4. Law without democracy, democracy without ;aw.....	162
5. Conclusion: shades of law	173
Conclusion.....	176
Bibliography of Primary Resources.....	183

Word Count: 79, 895

Abstract

Svetoslav Nenov

The University of Manchester

A thesis submitted towards the degree of Doctor of Philosophy in the Faculty of Humanities

Biopolitics is a concept that, much like the apparatus it refers to, has kept evolving ever since Foucault coined its modern meaning in 1976. Its usage and interpretation have especially changed with the recent publication of *The Birth of Biopolitics* and *Society, Territory, Population*, books that helped expand its perceived field of application, specifically vis-à-vis the modern governmental rationales of neo-liberalism and, by association, neo-conservatism. In a separate development, the Western *dispositif* (apparatus) of biopolitics has undergone a dramatic transformation as a result of the terrorist attacks of 9/11, attacks after which, to quote Donald Rumsfeld, ‘everything changed’.

My thesis takes both of these developments into account and provides a critical exploration of contemporary biopolitical US counter-terrorist measures. Emphasis is placed on a contextual juridico-political analysis that sheds more light on the complex interrelations between the relatively novel biopolitical *dispositif* and the classical legal *dispositif* of sovereignty. This is accomplished by a two-part empirical genealogical study that traces some of the pivotal judicial changes that have resulted from the counter-terrorist measures introduced in the wake of 9/11. It proposes that the PATRIOT Act, one of the primary legislative tools introduced after 9/11, is a distinctively ‘bio-legal’ document that allows for the integration of the biopolitical discourses of pre-emption, exception and contingency within the existing legal framework. I argue that this is a genuinely novel development that significantly alters the intersection of biopolitics, geopolitics and law. The second part of the empirical analysis presents a detailed interrogation of the legal disputes that involve the detention facility at Guantanamo Bay and, over the course of three key legal cases, shows that, even though the logic of biopolitics has now established a foothold within the US juridical system, the classical apparatus of Sovereignty still plays a decisive role in US governance.

My key arguments are preceded and supported by an extensive overview of the notion of biopolitics, both as it was first introduced and developed by Foucault over the course of five publications, and as it is currently being used by key contemporary social theorists, especially insofar as this usage relates to the changes in Western politics after 9/11. Overall, the thesis provides a profound interrogation of the epistemic status of biopolitics, and it supplements this purely theoretical analysis with a detailed overview of how biopolitics and sovereignty interact in practice through the mechanism of the law, in the context of US counter-terrorist policies after 9/11.

Declaration

I, Svetoslav Nenov, hereby declare that no portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

Copyright Statement

COPYRIGHT STATEMENT

i. The author of this thesis (including any appendices and/or schedules to this thesis) owns certain copyright or related rights in it (the “Copyright”) and he has given The University of Manchester certain rights to use such Copyright, including for administrative purposes.

ii. Copies of this thesis, either in full or in extracts and whether in hard or electronic copy, may be made only in accordance with the Copyright, Designs and Patents Act 1988 (as amended) and regulations issued under it or, where appropriate, in accordance with licensing agreements which the University has from time to time. This page must form part of any such copies made.

iii. The ownership of certain Copyright, patents, designs, trade marks and other intellectual property (the “Intellectual Property”) and any reproductions of copyright works in the thesis, for example graphs and tables (“Reproductions”), which may be described in this thesis, may not be owned by the author and may be owned by third parties. Such Intellectual Property and Reproductions cannot and must not be made available for use without the prior written permission of the owner(s) of the relevant Intellectual Property and/or Reproductions.

iv. Further information on the conditions under which disclosure, publication and commercialisation of this thesis, the Copyright and any Intellectual Property and/or Reproductions described in it may take place is available in the University IP Policy (see <http://documents.manchester.ac.uk/DocuInfo.aspx?DocID=487>), in any relevant Thesis restriction declarations deposited in the University Library, The University Library’s regulations (see <http://www.manchester.ac.uk/library/aboutus/regulations>) and in The University’s policy on Presentation of Theses.

Acknowledgements

I would like to thank to the following people:

First and foremost:

My late grandfather, Georgi “Goshkin” Dimitrov, for giving me the courage to write.

My first supervisor, Dr. Nicholas Thoburn. The completion of this thesis would not have been possible without his patient guidance, his understanding and his insight.

My family, for their unyielding support and belief in me.

Professor Brendan Dooley, for the revelation that lecturing is, in fact, storytelling.

Special Thanks:

Ann Cronley, for the consistent and adamant help.

Dr. Crispin Bloomfield, for teaching me to lead by example.

Dr. Brian Heaphy, for being a continuous source of inspiration and support.

Dr. Graeme Kirkpatrick, for the support and advice and for giving me the opportunity to publish my first literature review.

Elisaveta Loginova, for the helping hand.

William Start, with whom it was an absolute pleasure to work during my TA days.

And:

Rauf Akhundov, Donna Berry, Dr. Endre Dányi, Kelli Devine-Woods, Dr. Gemma Edwards, Andrey Evtimov, Anton Georgiev, Dr. Kevin Gillian, Dr. Emmanuel-Pierre Guittet, Dr. Virinder Kalra, Emil Krustev, Stefan Markov, Dr. Vanessa May, Dr. Anelia Nedeva, Atanas Petkov, Lydia Reid, Joshua Richards, Joe Rigby, Dr. Helene Snee, Nikolay Stoyanov, Diana Stypinska, Bogdan Vasile, Dr. Joshua Woods, Bogdan Zahariev.

Chapter 1. Introduction

1. The impact of 9/11

9/11 changed everything. If there is one statement that marks the way in which the West has experienced the 21st century so far, it would be this one. Ever since it was enunciated by Donald Rumsfeld, in an interview given three days after the terrorist attacks of September 11 2001, it has become a catch-phrase used in all sorts of situations to justify, explain, rationalise, describe or even ridicule social relations and relations of power alike. Consequently, it has assumed a quality of generalisation that has gradually stripped it from its capacity as a signifier. In order to analyse the statement in precisely that capacity one has to interrogate it, deconstruct and reconstruct it, until it provides meaning, both in linguistic and logical terms. This can be done by asking two very simple questions – “what is 9/11?” and “what is this ‘everything’ that Rumsfeld refers to?”?

First of all – what is the meaning of 9/11? It is an abbreviation of a date, albeit what it really signifies is an event – the spectacular terrorist attacks which targeted the World Trade Centre twin towers in New York City, the headquarters of the United States Department of Defense in the Pentagon and the United States Capitol in Washington DC, and which caused more than three thousand deaths despite the failure of the third attack. The significance of this explicit association of a day of the year with a particular event is best summarised by Jacques Derrida:

“When you say ‘September 11’ you are already citing, are you not? You are inviting me to speak here by recalling, as if in quotation marks, a date or a dating that has taken over our public space and our private lives for five weeks now... Something marks a date, a date in history; that is always what’s most striking, the very impact of what is at least felt, in an apparently immediate way, to be an event that truly marks a singular and, as they say here, ‘unprecedented’ event... an ineffaceable event in the shared archive of a universal calendar...” (Derrida, 2001).

It is notable that this remark, made less than two months after the attacks, could easily have been made in 2013 – it more than anything signifies the importance of the event itself and its enduring stay in our collective consciousness. In a way, the terrorist attacks of 9/11 represented the first truly global event in history. One could argue that there have been many other global events in terms of repercussions and significance – e.g. the fall of the Berlin wall – but in terms of global reception and immediate effect 9/11 trumped them all.

Jean Baudrillard called it “the mother of all Events” or “the absolute event”, “the pure event uniting within itself all the events that have never taken place” (Baudrillard, 2002: 45). Brian Massumi chose the evocative “there was a gash in the way the world was, and people were agape at it” (Massumi, 2012: 1). Slavoj Žižek remarked that “September 11 is the symbol of the end of this utopia, a return to real history” and he identified the event with the collapse of political utopias and, in particular, Francis Fukuyama’s suggestion that, at the end of the 20th century, the world witnessed the “end of history” (Žižek, 2006). Not only it was a spectacle of epic proportions but it was also immediately relayed, through the media of cable/satellite television and the internet, to a genuinely global audience. What happened on 9/11 got everyone involved; not only in terms of sharing the tragedy but also in terms of the reaction that was to follow; that is, after 9/11, US’ foreign and domestic actions that related to terrorism were scrutinized by a global audience.

Thus, 9/11 stands for a unique, unprecedented and immediate traumatic event that is inscribed in the collective memory of the world, but it also stands for something else. In order to better understand what that is, one needs to consider the only other day comparable to it in the calendar of the United States – the 4th of July. 4th of July has not only come to be associated with the annual commemoration of an event in the history of the US – the signing of the Declaration of Independence of the US – but has transcended this meaning to become explicitly associated with the abstract concept of independence. Similarly, it can be said that 9/11 has come to symbolise something beyond the confines of the spectacular attacks against the twin towers – it now stands for the concept of *terrorism* and, in particular, the day in which terrorism escaped the social and political margins of intelligibility to become one of the primary factors of sociality; it is, then, not 9/11 that changed everything but terrorism and, in particular, the idea of terrorism.

Next, I would like to turn to the second question: what, indeed, is “everything”? Dictionary definitions of the word range: it is defined to mean “all things; all the things of a group or class”, “all things of importance,” “the most important thing or aspect”, “the current situation”, “life in general”, “all things sacred”, “anything that matters”. In the context of the statement that I am analysing I would like to consider its meaning as “life in general,” and “anything that matters” (Oxford Online Dictionary, 2013; Online Dictionary Update, 2013). One could say that what terrorism changed is the way, or one of the ways,

in which we, people in the west, are experiencing our reality – both social and political. To quote Bulent Diken, whose article “From exception to rule: from 9/11 to the comedy of (t)errors” is very beneficial to this analysis: “with the quick but decisive move from 9/11 to the politics of security, terror (and the war against terror) has become the most important factor of sociality, which sustains, rather than shatters, ‘business as usual’” (Diken, 2006: 81). Consequently, I begin this thesis by translating “9/11 changed everything” into “after 9/11 terrorism changed the way people in the West are experiencing their social and political reality”. One of the questions that will be uncovered as I progress is whether after 9/11 terrorism changed one of the factors of sociality – that is whether it has become one tendency among others - or whether it changed the whole matrix of sociality.

2. Full tilt: (Counter)-terrorism and state power

It is now assumed that the attacks of 9/11 mark a radical change in the tactic of terrorism, from the political-oriented, normative, intelligible terrorism into the mass destructive, viral terrorism that does not have any ostensible goals beyond causing maximum casualties and spectacular destruction. However, inserting such a radical break into the historical interpretation of the tactic of terrorism is erroneous – 9/11 was, in fact, a continuation of a trend in terrorism that predated the attacks by many years. The three common assumptions of classic terrorism – that one man’s freedom fighter is another man’s terrorist, that “terrorists want a lot of people watching, not a lot of people dead” and that terrorists want to draw the attention to a political public agenda, began to be steadily challenged during the last three decades of the 20th century (Jenkins, quoted in Hudson, 1999: 1). Rex Hudson, in a revealing report that was published back in 1999, argues that the last two decades of the 20th century witnessed “the emergence of religious fundamentalist and new religious groups espousing the rhetoric of mass-destruction terrorism”; further, he provides an overview of the works of terrorism analysts who have “predicted that the first groups to employ a weapon of mass destruction would be religious sects with a millenarian, messianic, or apocalyptic mindset” as early as the 1970s (1999:1). Finally, he makes the point that such groups have a qualitatively different approach towards violence – “one that is extra-normative and seeks to maximize violence against the perceived enemy...essentially anyone who is not a fundamentalist Muslim... Their outlook is one that divides the world simplistically into ‘them’ and ‘us’”(ibid.,1-2). Thus, what

happened on 9/11 was merely an intensification of trends in terrorism that were already present in the 20th century.

This approach towards the friend/enemy divide was copied by the US Administration in its reaction to the attacks. In the days and months after the attacks the terrorists were portrayed as an evil force, as barbarians, as people who stand outside the boundaries of civilisation and threaten it; consequently the threat of terrorism was framed as the biggest security threat that the nation faced. It is important to note that the resulting geopolitical wars in Afghanistan and Iraq and the numerous exceptional advances in US politics that followed 9/11, such as the PATRIOT Act, came as a reaction to the attacks but were also the realisation of trends that the US Administration had been trying to initiate for a long time – many of the sections of the PATRIOT Act that expanded the power of the US executive had apparently been on the “wish-list” of the congress for quite some time and the US had been long looking for an opportunity to attack Iraq. Returning to Derrida: he notes that the events of 9/11 evoke an “apparently immediate” emotional response, which he clarifies as follows: “I say ‘apparently immediate’ because this ‘feeling’ is actually less spontaneous than it appears: it is to a large extent conditioned, constituted, if not actually constructed, circulated at any rate through the media by means of a prodigious techno-socio-political machine”(Derrida, 2001). One could argue that beyond the immediate shock of the spectacular violence that the attacks of 9/11 constituted, it was the reaction to them of the government and the media that changed everything and inscribed terrorism in everyday life. As a result, the way in which terrorism changed “everything” is three-fold – intensification of the new developments of terrorism as a tactic, corresponding intensification of the way in which terrorism is responded to and a certain reconfiguration of the way in which terrorism is experienced.

3. Foucault, Schmitt, exception

The way in which the attacks were interpreted in the philosophical domain is very much indebted to the work of two people – Michel Foucault and Carl Schmitt – the first for his conceptualisation of biopolitics and the second for his work on exceptionalism.

Carl Schmitt is best known for the way in which he problematized the relationship between law, sovereignty and the exception. He postulated that rather than adhering to the Roman principle of *exception probat regulam in casibus non exceptis* – “the exception confirms the rule in the cases not excepted” – one should recognise that it is the exception

that “proves everything” and the “rule lives off the exception alone” (Oxford Online Dictionary, 2013a; Schmitt, quoted in Agamben, 1998: 18). Further, the sovereign is the one who “decides on the state of exception” and thus holds a power that is external to the law and capable of suspending the normal (Schmitt, 2005: 5). The distinction between the normal and the exceptional is ultimately linked to the Rule of Law and is operationalized through the figure of the sovereign, who is operating within the limits of the law and yet holds the power to exceed them through what Agamben calls “the sovereign ban” (Agamben, 1998: 31).

Biopolitics, a concept that was coined by Foucault, designates a shift in the central focus of politics from territoriality and sovereignty to “life” and, more precisely, to the preservation and regulation of life. Biopolitics, Foucault argues, deals with “the population as a political problem” and aims at the establishment of regulatory mechanisms that are meant to prevent extra-systemic phenomena from disrupting the homeostasis of the system (Foucault, 2004: 254; 245).

Foucault’s work on biopolitics will be given further attention at this point since it is the primary focus of this thesis. Over the course of his work Foucault outlined the existence of two different series of interrogation that bring into the field of analysis two sets of problems and objects of interest. The first one, presented over the course of 1975 to 1976 in *Discipline and Punish* (henceforth *DP*), *History of Sexuality* (henceforth *HS*) and the lecture collection *Society Must Be Defended* (henceforth *SMD*) traces the transition from the philosophico-juridical discourse of sovereignty of the middle ages, in which the “reason for being” of power was the capacity of the sovereign to control death – take life or let live - into the discourse of biopower in which the logic of exercise of power invested the sovereign with the capacity to control life – make live and let die (Foucault, 1978: 138). This second discourse led to the emergence of a distinctively novel organisation of power-knowledge relationships that focused on the regulation and proliferation of species life and the elimination or disallowance of all life threatening to it. The technology of power organised according to the principles of bio-power took two sequential iterations that were complementary and yet heterogeneous – the anatomo-politics of the human body, which saw the emergence of a whole series of disciplinary mechanisms, and the biopolitics of the population, which brought into existence mechanisms that were meant to regulate species life itself.

In the course of analysis Foucault came up with two very interesting problem spaces – that of *war* and that of *racism*. He inverted Clausewitz’ famous aphorism that war is continuation of politics by other means and claimed that, in the beginning of the 18th century, there emerged in Western societies a *historico-political discourse* that placed war as the primary grid of intelligibility in the social and political domain – politics, then, as the continuation of war by other means. War, in other words, constituted a “matrix for techniques of domination” as every social relation was operationalized through the logic of the order of battle (Foucault, 2004: 46). This relationship was later succeeded but not substituted by a grid of intelligibility that placed state universality at the centre of the socio-political spectrum and identified the well-being of the nation as the primary concern of the state. It is very important to note that Foucault speaks of a heterogeneous configuration of power where different discourses, grids of intelligibility and technologies of power interact.

War as a social and political grid of intelligibility and its seeming recession under the biopolitical technology of state universality is also what ultimately led Foucault to come up with his innovative conceptualisation of the function of racism in society. His postulation of racism came as a result of an investigation of the function of death under biopower – state racism, he claimed, returns the death-function to the biopolitical calculations of power as it is a mechanism that allows the state to suppress life that is not worth living and threatening to valued life. Racism, in other words, is a technique of governance correlative to the biopolitical technology of power, that is constantly assaying life and producing a specific *biopolitical imaginary* that defines which life is worth living and should be encouraged, on the one hand, and which life is threatening to life and should be disallowed, on the other.

Foucault’s second series of interrogation, which took place in the lectures delivered over the course of two years, from 1977 to 1979, collected in the books *Security, Territory, Population* (henceforth STP) and *The Birth of Biopolitics* (henceforth BOB), is streamlined around the emergence and development of liberalism and neo-liberalism in the West. In these lectures Foucault construes the liberal regimes of governance to be the contemporary configurations of the biopolitical technology of power. The lectures attempt to explain, via reference to the population, how that type of government functions and, in the process, to answer the question of “how can the phenomena of ‘population,’ with its specific effects and problems, be taken into account in a system concerned about respect for the legal subjects and individual free enterprise?” (Foucault, 2008: 317). Liberalism is posed as “a

principle and method of the rationalisation of the exercise of government”; a principle entirely based on the premise that “government cannot be its own end” (Foucault, 2008: 318). Foucault also makes central to his analysis the claim that under liberalism the market becomes the main principle of veridiction of social and even political relations. Further, in that series, Foucault delineates the existence of three distinctly different apparatuses of power – the juridical one, the disciplinary one and the security one, which are historically sequential and heterogeneous, and yet coexistent in the contemporary Western iteration of power. The neo-liberal security apparatus is posited as the one that utilises the regulatory techniques of biopower and, as a result, exemplifies the biopolitical technology itself. Finally, the key concepts of *war* and *race* that played a pivotal role in Foucault’s pre-1977 analysis of biopower, were completely absent from the second series of analysis. In their stead Foucault pursued different objects of analysis such as the market reality, the principles of the political economy, and civil society.

The work of Schmitt and Foucault has been used and developed by many contemporary philosophers such as Giorgio Agamben, Judith Butler, Bulent Diken, Michael Dillon, Michael Hardt, Antonio Negri, Brian Massumi, Julian Reid and Slavoj Zizek among others – especially with relation to the post-9/11 political and social developments. Further, Walter Benjamin’s intervention in Schmitt’s theory where he claims that “the ‘state of emergency’ in which we live is not the exception but the rule” has been the starting point for many of the analyses of 21st century terrorism and counter-terrorism (Benjamin, 2003: 392). The claim has been made, in many forms and variations, that we are currently living in a permanent state of exception that is organised around the key principles of biopolitics.

In a direct continuation of Schmitt’s thought Agamben states, in *Homo Sacer*, that the exception is not the lack of law but rather it is the law “being in force without significance”; “law that is in force but cannot signify”(Agamben, 1998: 35). Further, he equates Foucault’s concept of biopolitics to the entry of “*zoe* [or biological bare life] into the sphere of the polis” (ibid., 10). However, he insists that in the contemporary society we witness a different process in which the bare life becomes indistinguishable from *bios* – political life – and the two enter a zone of indistinction and permanent exception. He continues his argument in *The State of Exception* where he notes that after 9/11 Benjamin’s proposition has been confirmed as the exceptional now “appears increasingly as a technique of government rather than an exceptional measure” and it has transcended its role as a temporary measure

of necessity to be inscribed in the permanent political state of affairs (Agamben, 2005: 6). He notes that what we are witnessing in Guantanamo Bay, with the indefinite detention of terrorist suspects, is precisely the entry of the detainees in the zone of indistinction between *bios* and *zoe* – what happens is the “[radical erasure] of the juridical status of the individual, thereby producing a being that is juridically unnameable and unclassifiable” (ibid.: 3).

Bulent Diken and Carsten Laustsen have further, in their own words, “radicalised” the claim that “the very distinction between the normal and the exception is dissolving today” (Diken and Larsten, 2005: 6). They do that by saying that one can only postulate an exception if one “presupposes the presence of normality as a background against which the exception can prove itself”; in contrast, nowadays we have witnessed the disappearance of both the norm and the exception: “there is no more camp (as exception): all society today is organised according to the logic of camp” (ibid.6;7). Further, Diken makes the claim that “in the aftermath of 9/11 terror is no longer merely an ‘exceptional’ (real or imagined) catastrophe but has become a *dispositif*, a technique of governance which imposes a particular conduct, a new model of truth and normality, on contemporary sociality by redefining power relations and by unmaking previous realities” (Diken, 2006: 82). Terror, in other words, “produces society” (ibid.).

Finally, Dillon observes that fundamentalist terrorism and contemporary Western governance, the US in particular, are homologous developments. The basis of this homology, Dillon suggests, is to be sought in the definitive principle of operation of terror which is not to be found in the methods that its agents employ, or their goals, or the nature of its victims, or the fact that it operates outside the limits of the law. Instead, this principle lies in the fact that “it is being without law as such” (Dillon, 2007: 19). Terror not only operates outside of the realm of the law but it also has a complete disregard for the grid of intelligibility that this realm constitutes, it is impervious and ignorant to its demands. Terror is thus politics without law, and “it is the very contingency of terror that distinguishes its operational practice” (ibid. 9). In fact, *contingency* as a concept that was extrapolated from the aleatory properties of life, properties that were identified by Foucault, plays key role throughout all of Dillon’s work on security in biopolitics. That is why Dillon is able to say that terror and, in particular, terror as contingency has figured in Western philosophy “as a generative principle of formation for modern political self-hood” long before 9/11 (ibid. 7).

He also focuses his work on the apparatus of security and its biopolitical obsession with life with particular reference to the fact that, as life constantly adapts and changes, so does the biopolitical imaginary of life.

My research is strictly positioned in this field of problematisation and was directly inspired by Diken's proposition that terrorism has become a *dispositif* in contemporary societies. However, I have decided to approach the problem of *exceptionalism* from a strictly Foucaultian perspective and to position my methods of interrogation on Foucaultian grounds for a number of reasons.

4. Remembering Foucault

Many people have worked on the concept of biopolitics and nearly all of them have made positive developments in the field but it is necessary, especially since the recent translation and publication of Foucault's later lectures, to return to the concept in its original form and develop it with a particular reference to the current political and social situation. It is important to pull back both from the assumption that sovereignty and law are determinative and singular principles of exercising power and to distance oneself from using exceptionalism as a primary tool of categorisation of contemporary power relations. Foucault allows one to do that and, as a result, in order to make a genuinely biopolitical analysis of contemporary governance one needs to disregard Baudrillard's advice and, indeed, remember Foucault and adhere to his basic assumptions.

First of all, I want to pull back from Agamben's redefinition of biopolitics as the entry of *zoe* into the *bios*, a definition that places biopoliticisation as "the original activity of sovereign power", and to recognise that Foucault's basic premise is that biopolitics invokes a different relationship between life and law and this relationship is *not* explicitly conditioned by sovereignty¹ (Agamben, 2005:11). Instead, in the contemporary power relations it is not "the juridical existence of sovereignty" that is determinative but "the biological existence of a population" (Foucault, 1978: 137). Further, biopolitical power is "situated and exercised at the level of life, the species, the race, and the large-scale phenomena of race" and as such it permeates society and exceeds the confinement of the sovereign body; in other words, it is "a biopower that is in excess of sovereign right"

¹ Note that I am not disqualifying Agamben's approach but merely observing that it is a change of direction that, somewhere along the lines, stops being Foucaultian and becomes Agambenian.

(Foucault, 2004: 256). Consequently, one “must not assume that the sovereignty of the state, the form of the law, or the over-all unity of a domination are a given at the outset; rather these are only terminal forms power takes” (Foucault, 1978: 92-93). Power, instead, operates strategically on all levels of human interaction, it produces society and is capable of relating *tactically* to both the law and the exception. Thus, in order to make a genuine Foucaultian analysis one must not analyse power relations through the sovereign grid of intelligibility but through the biopolitical grid and arrive at the exceptional through it.

What makes Foucault’s research especially useful for identifying changes in the Western configuration of power after 9/11 is the fact that, in his lecture series *STP* and *BoB*, he traces the development of the modern liberal and neo-liberal “governmentality” with an explicit focus on American neo-liberalism. He posits neo-liberalism as a biopolitical apparatus, or *dispositif*, of security that nevertheless utilises many of the mechanisms and techniques of the previous dominant configurations of power – the juridical *dispositif* and the disciplinary one. Therefore, since he provides an overview of the complex way in which power was configured at the end of the 20th century, his research is an excellent starting point for a modern biopolitical analysis of power relations.

5. Lines of research

This thesis is insistently Foucaultian in another sense too. It does not try to provide an oeuvre, a comprehensive overview, a totalising genealogy or archaeology of contemporary power relations; neither does it try to make totalising or universal claims. What it does, is to provide “lines of research” that explore several distinct problems of post-9/11 modernity and are meant to “advance little by little toward [a contemporary] conception of power” (Foucault, quoted in Davidson, 2004:xxi). The main goal of the project is to provide an insight into the *logic* of modern biopolitical governance with a specific focus on the reconfiguration of power relations after 9/11. It provides an extensive intervention in Foucault’s conceptualisation of biopolitics and follows this by mapping and exploring in detail two problem spaces that are located on the genealogy of the *dispositif* of terrorism.

5.1 Rethinking biopolitics

The thesis begins with an intervention in Foucault’s existing works on biopolitics that is primarily aimed at resolving the perceived rift and the existing discontinuities between his earlier works – *History of Sexuality*, *Discipline and Punish*, and *Society Must Be Defended* –

on the one hand, and the series of lectures that were given in the period between 1977 and 1979 – *Security, Territory, Population* and *The Birth of Biopolitics* – on the other.

There are a number of key problems related to the later lectures. First of all, they represent a significant change of direction in Foucault's approach towards biopolitics – his aim in the 1977-9 lectures is to construct a history of Western *governmentality* – or the “conduct of conduct” – from the 18th century onward with an explicit focus on the development of the economic and political policies of liberalism and neo-liberalism. Meanwhile, the discussion of *war* and *race*, the concepts that were key for his earlier conceptualisation of how bio-power operates, is abandoned. He also does not refer back to the postulation made in *Society Must Be Defended* of the two grids of intelligibility – the historico-political one and the one that purports the universality of the state – which were said to govern contemporary power relations. Further, he makes a significant adjustment in his historical overview of the transition between the different western technologies of power. While in *Society Must Be Defended* the primary shift was from the sovereign juridico-political technology of power to the technology of biopower, which had two complementary forms of expression (anatomo-politics and biopolitics), in the later lectures he identifies three distinct *apparatuses* or *dispositifs* of power, where bio-power seems to be explicitly identified with the apparatus of security.

The philosophical debate surrounding the emergence of the 1977-9 lectures is a very current one and still largely unresolved since the lectures were transcribed and released very recently – the French publication of *STP* and *BoB* came as late as 2004 and the English translations were first published in 2008 and 2009, respectively. Thus, establishing the link between Foucault's earlier and later work on biopower is still very much an ongoing problematic and there is no consensus among philosophers as to the ontological status of the new lectures.

My first intervention consists precisely in an attempt to resolve this tension. It must be noted at the outset that even though the later works were published post-humously and they don't have quite the status of his published books, they show a transformation in the way Foucault perceived and operationalized biopower and their importance cannot be ignored or downplayed. That is, they are especially influential in rethinking biopolitics, especially insofar as it is constitutive of the neo-liberal logic of governance. It should be also added that *SMD* - the book in which biopower is most effectively conceptualised and where

Foucault's ideas on war and racism originate – is also a lecture series. As a result, one cannot claim that the difference of approach can be ascribed to the particular status of the lectures.

In my analysis I am making the point that the absence of war and racism from the second series of lectures is not due to the fact that Foucault has decided that the concepts are no longer useful or relevant but is rather because he is interested in different problems – that of neo-liberalism as an expression of biopolitics and of the market as a key principle of veridiction of social and political relations. He is also creating a new set of tools for the analysis of these problems – the prism of *governmentality* now serves as the main principle of interrogation. As Foucault put it in *SMD*:

“I am not creating on oeuvre.... I am often drawn to problems that I have encountered in one book, that I have not been able to resolve in that book, and I therefore try to deal with them in the next book. There are also conjunctural phenomena which ... make some problem look like ... a politically urgent problem to do with current affairs, and that's why it interests me” (Foucault, quoted in Bertani and Fontana, 2004: 287)

Thus, one should take in account the particularity of Foucault's approach toward his objects of analysis and his specific methods of work and interrogation. The words of Fontana and Bertani regarding the *SMD* lecture series are especially revealing: “it is not a work of scholarship, but rather a way of posing an ‘urgent’ problem – that of racism – and of opening up lines of investigation, of outlining a genealogical trace in order to rethink it” (Bertani and Fontana, 2004: 288). The same can be said about the 1977-9 lecture series and this explains the fact why they ignore previous problems – it is not a question of denouncement but of a change of focus. Once the five books are considered from this non-conflicting perspective, their analysis becomes very beneficial, as they present different aspects of biopower that can all be invoked in the analysis of specific “politically urgent” problems. With that point of departure, I proceed to construct a detailed account of biopower that traverses and, in a way, unifies the ideas of all five books.

My second intervention in Foucault's work has to do with updating and developing his basic concepts so that they can be used for the analysis of the post-9/11 reconfiguration of power relations and, more specifically, the problems that I am investigating. There are two primary reasons as to why the theory that he develops in *STP* and *BoB* is not fully adequate to deal with post-9/11 developments. First of all, in view of the US reaction to the terrorist

attacks and the fact that terrorism now permeates the way in which people in the West experience their existence, the market can no longer be postulated as the singular principle of veridiction of social and political relations. Terrorism has now become an equally important truth-establishing principle that needs to be analysed and positioned within the pre-9/11 power arrangement. Secondly, the regulatory mechanisms of the apparatus of security that Foucault postulates are all based on the premise that danger is the sole organising principle of regulation: “liberalism turns into a mechanism continually having to arbitrate between the freedom and security of individuals by reference to this notion of danger” (Foucault, 2008: 66). However, this “culture of danger” is based upon the premise that the “apocalyptic threats of plague, death and war” have all but disappeared from the political spectrum and the dangers that are regulated and decided upon are manageable: “the horsemen of the Apocalypse disappear and in their place everyday dangers appear, emerge, and spread everywhere, perpetually being brought to life, reactualized, and circulated...” (ibid.). In light of the 9/11 attacks, and the reaction to them, one can claim that no less than three of the horsemen have reappeared in the American political consciousness – war, death and pestilence – which are dealt with in ways that escape classic neo-liberal security calculations.

Consequently, it is necessary to rethink the apparatus of security with reference to the post-9/11 security environment. I argue that in order to make an adequate Foucaultian investigation of current affairs one needs to reinscribe the principles of war and state racism in the analysis of contemporary knowledge-power relations, as this is the only way in which these relationships can be made intelligible. I am still using the theoretical tools for analysis that were made by Foucault in order to analyse certain “urgent” political problems but I am also updating, adapting and recombining these tools. In the process, I have benefited greatly from the theoretical developments made by a number of philosophers: Stephen Collier, for his topological approach to biopolitical power relations; Judith Butler, for her analysis of the tactical use of the law post-9/11; Bulent Diken and Carsten Laustsen, for their work on exceptionalism and especially Diken’s suggestion that there exists a *dispositif* of terrorism; Didier Bigo, for his critical reflections upon Foucault’s later lectures; Michael Dillon, for his lucid elaboration on the function of racism and war in the modern political space; and, finally, Andrew Neal for his suggestion that the current political situation can be viewed through the historico-political prism that was established in *Society Must Be Defended*. In

the process, I have not aimed at making a comprehensive overview of the way in which people have conceptualised biopower – I have merely forged, in a very Foucaultian way, the tools that I need in order to carry out my empirical analysis and have made use of developments that are helpful in operationalizing the theoretical framework of biopower to make sense of modern politics. After I do this, I proceed to investigate two problem spaces, two empirical objects of inquiry, positioned on the reconfigured topology of power relations established after 9/11 – the *bio-legal* Act of Congress that is known as the PATRIOT Act, on the one hand, and the space of *legal exceptionalism* that was established in the detention centre of Guantanamo Bay.

5.2 Bio-legal developments

My analysis of the PATRIOT Act, which constitutes Chapter 4 of this thesis, begins with an overview of the doctrine of pre-emption that began to be instated by the Bush administration following the terrorist attacks. I argue that pre-emption emerges as a novel grid of intelligibility that functions alongside the existing neo-liberal biopolitical grid of intelligibility and allows it to deal with the unprecedented threat posed by contemporary terrorism. I base this premise on the assumption that the existing neo-liberal, market-based approach to dealing with danger before 9/11 was not viable with regard to the threat of terrorism, which necessitated a complete reconfiguration of certain key biopolitical principles.

In the classic neo-liberal apparatus of security, unexpected, threatening events are dealt with after their emergence through regulatory biopolitical mechanisms that work within their reality. The global financial crisis of the beginning of the 21st century is a good example of this – even though there were many predictions by respectable economists that it would irrupt, these were carefully sidelined and the threat was dealt with after it materialised. Pre-emption, on the other hand, goes beyond working within the reality of events and intervenes in the *future* reality of events in a doubly preventive way. Its main premise is that the enemies of the US should not only be prevented from threatening it but that they should be prevented from having any *capacity* for threat – as it was succinctly put in the National Security Strategy of 2002, the new goal was to “prevent our enemies from threatening us” (The White House, 2002). That is how, for example, the invasion of Iraq was justified on the basis of its *capacity* to acquire weapons of mass destruction and not on the

basis of an actual existing threat – pre-emption, then, interferes with the potential for threat.

I argue that the Bush administration constructed the *logic* of pre-emption within the first few months following the 9/11 attacks and finalised it with the release of the PATRIOT Act. The insertion of the discourse in the public domain, on the other hand, took around a year and was finalised with the publication of the National Security Strategy of 2002. I trace the emergence of the discourse in the public domain over the course of a number of speeches and identify its key characteristics. I further argue that these public speeches also established the perception that the US is in an exceptional situation (not an exception) that is likely to last indefinitely. I call this a state of temporary permanence, which is not presented as an exception but as a state of affairs that is “almost normal” (Bush, 2001b).

I proceed to analyse the PATRIOT Act in detail with a particular focus on three fields of functionality that I identify. The first one is a replication of the function that was confirmed by the abovementioned military order and explores the way in which the PATRIOT Act distributes agency, decentralises power and allows a wide variety of “government entities”, or agents of the state, to make pre-emptive legally binding decisions. This, I claim, represents an insertion of the sovereign prerogative – the ability to decide on the boundaries between what is the law and what is the exception – in the juridical domain, and as such alters the biopolitical topology of power. I further postulate that it is a significant modification in the relationship between the law and its enforcement that effectively changes the form of the law – which is to prohibit – and shifts the balance towards a *positive*, empowering function of the law that gives governmental agents the ability to create law on the spot by arresting individuals based on “reasonable grounds” of suspicion. The second field of functionality that I identify within the PATRIOT Act is the way in which it modifies the disciplinary mechanism of surveillance in order to meet pre-emptive biopolitical ends. Surveillance is now carried out to “defeat the enemies’ plans” and to uncover the potential for guilt, in the stead of its classical panoptic function of providing visibility and producing self-disciplining individuals (The White House, 2002). Finally, I outline the ways in which the PATRIOT Act contributes to the biopolitical assay of life. I explore in detail the pre-emptive category of the *terrorist suspect*, who is criminalised based on suspicion of guilt and I investigate the function of racial profiling as a mechanism that provides a pre-emptive assay of life. I conclude the examination of the PATRIOT Act by

confirming that it represents a novel *bio-legal* development that reconfigures the intersection of the sovereign, disciplinary and biopolitical *dispositifs*, inscribes the pre-emptive grid of intelligibility in the legal plane and repurposes some notable disciplinary and sovereign techniques of governance so that they are operationalized in the pursuit of biopolitical goals. Further, I conclude that the PATRIOT Act and the doctrine of pre-emption of the Bush administration do not necessarily create a permanent state of exception but rather add an exceptional domain to the biopolitical topology of power that functions heterogeneously alongside the existing political domain of biopolitical neo-liberalism.

5.3 Legal exceptionalism

The only point at which Foucault directly engages with the exceptional space is through the concept of *heterotopia*, which was coined in a lecture delivered in 1967, many years before he began analysing modern society in the context of biopolitics:

“There are also, probably in every culture, in every civilisation, real places...which are something like counter-sites, a kind of effectively enacted utopia in which the real sites, all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted” (Foucault, 1967).

However, he was already, without realising it, in biopolitical grounds at the time, with reference to his modern postulation of what he called “heterotopias of deviation” – these were the heterotopias “in which individuals whose behaviour is deviant in relation to the required mean or norm are placed” (ibid.). Thus, one could argue that, for Foucault, both exceptionalism and normality are, to an extent, problems of the configurations of space – consider, for example, his description of the way in which the disciplinary apparatus effects power by artificially structuring space.

On the background of such conceptualisation, it is tempting to cast the second empirical object that I am analysing – the detention centre in Guantanamo Bay – as the perfect biopolitical heterotopia that places people threatening to species life in a legal vacuum. The US administration indeed meant for it to be such a place of legal exceptionalism in which all rules are either inversed or suspended. However, with the passage of time it turned out to be something else entirely – a legal battleground where the three branches of government vied for dominance, in a clash that placed under question the foundational aspect of the law, on the one hand, and the sovereign prerogative of exceptionality, on the other.

I begin Chapter 5 with a detailed overview of the history of Guantanamo Bay and its peculiar, unprecedented status as a legally and spatially exceptional facility that is within the

complete jurisdiction of the United States and, at the same time, outside of its sovereignty. Paradoxically, this status of the camp allowed the US admin to exercise the sovereign ban over it and, initially, establish it as a “rights-free” a-legal “anomalous zone” where the US constitution did not apply. From its outset the camp rested in between the space of the law and its complete suspension – the border between the law and its absence. I also note two further peculiarities of the camp: first, the fact that even though most detainees were brought there following the logic of pre-emption, the logic of the camp at its inception was that of legal exceptionalism and not pre-emption; secondly, the function of the camp as a place where individuals could be removed from society by using the sovereign technique of banishment, repurposed to follow biopolitical goals.

Next, I proceed by analysing the American legal system in detail with a particular focus on the tripartite division of governmental power and the provision of habeas corpus. I provide an in-depth analysis of three of the key legal cases that defined the history of the detention camp and transformed the exceptional space at Guantanamo from an a-legal object to an (il)legal object that fails to disassociate itself from the juridical domain of power. I make the preliminary point that on the one hand, it was crucial for the administration to put Guantanamo Bay on a firm legal footing, or at least prove that there is no contradiction whatsoever between the law and the existence of the detention centre while, on the other hand, it was important for the Supreme Court to show that Guantanamo is in violation of all legal principles enshrined in the US constitution, so as to protect not only the integrity of the legal framework but also its place at the origin of governance. This paradoxical relation between security and law formed the basis of the political problem at the heart of Guantanamo Bay, as it caused an unbearable friction that goes beyond the uneasy and yet manageable coexistence of heterogeneous elements in the complex biopolitical topology. In other words, it was a friction that had to be resolved in order for the system to be able to continue its function and a friction that could be easily integrated into the post-9/11 “almost normal” routine of permanent exceptionality.

Through the investigation of the first two cases – *Rasul vs Bush* and *Hamdi vs Rumsfeld* – I show how two individuals, one of them American citizen, the other an alien, were effectively *re-subjectified* by the Supreme court through recourse to their habeas corpus rights. I also illustrate the importance of precedential cases in the US legal system, reveal the way in which certain individuals - Supreme Court judges – have the capacity to change

the course of the law through their personal rhetoric skills, and manage to show that law is a resilient, continuously adapting entity that is not under the exclusive control of the sovereign. The third case I analyse – *Boumediene vs Bush* – carries further relevance due to the fact that in the process of its resolution the Supreme Court managed to declare an act of congress unconstitutional and to successfully argue that, in the case of Guantanamo Bay, *de facto* sovereignty is equivalent to *de jure* sovereignty. As a result, the camp of Guantanamo was legally de-exceptionalised by stripping it of its extraordinary traits and reintegrating it into the framework defined by the existing power-knowledge relationships, without altering that framework or the principle of veridiction that makes it functional. It has, in the process, been transformed from a place of legal exceptionalism into a legal battleground where a number of cases are still waiting to be resolved.

6. Methodology

Foucault was famously flexible with regards to his methodology. It was, much like the objects he analysed, marked by discontinuity, contradictions and crises. He produced his most coherent methodological piece – the *Archaeology of Knowledge* – only to abandon it almost completely and shift, in his later research, to methodological techniques inspired by the general theme of genealogy. As Helen Cixous lucidly observed: “He is a nomad, even in his work: do you believe that he has built his house? Not at all. ‘That’s not it’, he said to me about his last volume, ‘I’ve been mistaken. I have to re-cast everything. Go elsewhere. Do it otherwise’”. (Quoted in O’Leary, 2002: 171).

However, in proposing to approach my research strictly along the lines of a Foucaultian methodology, I would like to emphasise two of its strengths. First of all, what Foucault provides is a set of tools for analysis that can be used selectively, a use that allows the researcher a certain flexibility of approach. To quote Foucault:

“I do not have a methodology that I apply in the same way to different domains. On the contrary, I would say that I try to isolate a single field of objects, a domain of objects, by using the instruments I can find or that I can forge as I am actually doing my research, but without privileging the problem of methodology in any way” (Foucault, quoted in Fontana and Bertani, 2004: 288).

As haphazard this approach seems, it contains something very valuable – if one does not privilege the problem of methodology, one has the freedom to follow the object of inquiry and allow it to become, in reflection, what it is. Methodology then, that does not bind the

researcher with a set of preconceptions, expectations or symbolic rules of representation and allows him or her to make tactical use of techniques.

Secondly, I would like to argue that, despite the many discontinuities in Foucault's work there is a continuity of approach from *Discipline and Punish* onwards, and this continuity flows from the methodological technique of genealogy to the logistically genealogical method of analysis known as the *dispositif*.

6.1 From genealogical problematisation to the *dispositif*

A genealogy is a method of inquiry that denies the historical demands of clear origin or finality, of continuity and linearity, of universals and transcendentals. In the place of origin it sees a descent from "numberless beginnings"; in the place of linearity – dissension, disparities and the "vicissitudes of history"; in the place of universals – chance: "To follow the complex course of descent is to maintain passing events in their proper dispersion; it is to identify the accidents, the minute deviations...the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us" (Foucault, 1991: 81). Once genealogy is done establishing this field of immanent randomness and chaotic interactions of disparate becoming, it fills it with innumerable emergent forces that "leap from the wings to center stage, each in its youthful strength" (ibid. 84).

These forces occupy heterogeneous space where they constantly vie for domination – not the "anticipatory power of meaning, but the hazardous [endlessly repeated] play of dominations" – and, as they do, genealogy "seeks to establish the various systems of subjection" that they engender (Foucault, 1991: 83). The different points of emergence of forces are the result of "substitutions, displacements, disguised conquests, and systematic reversals" (ibid. 86). Finally, genealogy attempts to construct an "effective history" that "deals with events in terms of their most unique characteristics, their most acute manifestations." (ibid. 88). That is, as opposed to archaeology, which is analytical and archival, genealogy is focused on the present and is *diagnostic* in its essence. As Foucault said in an interview, entitled "The Concern for Truth": 'I set out from a problem expressed in the terms current today and I try to work out its genealogy. Genealogy means that I begin my analysis from a question posed in the present.' (Foucault, in Kritzman, 1998: 262).

The primary methods of analysis that I use – the *dispositif* – is a profoundly genealogical entity. Foucault never did a comprehensive outline of what the logic of inquiry behind this

method entails, but one can begin to uncover it through an analysis of the way it was applied in *The Birth of Biopolitics* and *Security, Territory, Population*, through Giles Deleuze's revealing article "What is a *dispositif*" and through the following quote given in an interview in 1977:

"What I'm trying to pick out with this term is, firstly, a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions – in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the system of relations that can be established between these elements." (Foucault, quoted in Gordon, 1980: 194)

The most basic definition of *dispositif* then is that is a "system of relations" between all the elements intrinsic to sociality and, by association, to the political space – for the political is an aspect of sociality (Foucault, 2008: 110). This, however, only begins to scratch the surface of the concept. I argue that the whole logic of operation of the *dispositif* and the method of its analysis, which Foucault termed *politics of truth*, can be derived from a careful reading of *BoB* and *STP*.

When he begins to analyse the *dispositif* of security, Foucault remarks that he is interested in investigating the "set of mechanisms through which the basic biological features of the human species became the object of a political strategy" (Foucault, 2009: 16). He later clarifies this statement by adding that he proposes to do an analysis of power "in terms of mechanisms and procedures that have the role or function of...securing power" (ibid. 17). Next, he adds that said mechanisms of power are "an intrinsic part" of social relations and are "in a circular way" "both their effect and cause"(ibid.). Further, Foucault instigates that it is possible to find in the different mechanisms of power "lateral coordinations, hierarchical subordinations, isomorphic correspondences, technical identities or analogies, and chain effects"; this links back to the initial quote that identified the apparatus as a *heterogeneous ensemble* (ibid.). So, there is a *logical* relation between these mechanisms, however complex it may be. This allows the researcher to "undertake a logical, coherent, and valid investigation of the set of these mechanisms of power and to identify what is specific about them at a given moment, for a given period, in a given field" (ibid.). Foucault decides to name such an investigation "politics of truth" (ibid.). The latter represents a "tactically effective analysis" of the existing "mechanisms of power" that is meant to show the "knowledge effects produced by the struggles, confrontations and

battles that take place within our society, and by the tactics of power that are the elements of this struggle” (ibid. 18). Thus, in *STP*, the *dispositif* is seen as a system of relations between a *set* of mechanisms which are both affected by and effect in turn social relations, which have the function of securing power, which are logically interrelated within a field of power and which can be analysed by undertaking a *politics of truth*.

An apparatus represents such system and is assumed to be providing the organising logic behind the complex interrelation of mechanisms. In *STP* Foucault identifies a “historical schema” of three different historically sequential apparatuses. He is, however, quick to add that these apparatuses are not composed of entirely different mechanisms but constitute different relationships between these mechanisms:

“So, there is not a series of successive elements, the appearance of the new causing the earlier ones to disappear. There is not the legal age, the disciplinary age, and then the age of security... In reality you have a series of complex edifices in which, of course, the techniques themselves change...but in which what above all changes is the dominant characteristic, or more exactly, the system of correlation” (Foucault, 2009: 8)

In summary, Foucault always speaks of the strategic coexistence of heterogeneous elements within the field of power relationships at any point of time; note that their heterogeneity does not preclude them from working together. This is exceptionally well enunciated in Foucault’s discussion of the two heterogeneous conceptions of freedom and law that is present in the *Birth of Biopolitics* and that will be explored in the next chapter:

“We should keep in mind that heterogeneity is never a principle of exclusion; it never prevents coexistence, conjunction, or connection. Dialectical logic puts to work contradictory terms within the homogeneous. I suggest replacing this dialectical logic with what I would call a strategic logic.” (Foucault, 2008: 42)

This kind of strategic logic is precisely what makes Foucault’s tools of analysis infinitely flexible and capable of being adapted to the analysis of a multitude of different problems. It also allows Foucault’s theoretical structure to be considered from the perspective of a topology of power where a number of heterogeneous techniques, mechanisms and technologies interact and coexist.

Foucault further elaborates the intricacies of the *dispositif* in *BoB*. He makes clear, through a series of arguments, that each *dispositif*, apart from constituting a specific relationship between different mechanisms also creates a *regime of truth* that “makes something that does not exist able to become something” and creates within reality the

existence of a “legitimate regime of true and false” (Foucault, 2008: 19; 20). This effectively allows him to come up with a revised definition of the *dispositif*: “the coupling of a set of practices and a regime of truth form an apparatus (*dispositif*) of knowledge-power that effectively marks out in reality that which does not exist and legitimately submits it to the division between true and false” (ibid. 19). This addition of the domain of the *regimes of truth* is crucial as it allows him to really engage in a politics of truth and elucidates the way in which the mechanisms of power affect reality. Next, each regime of truth relies on particular *principles of veridiction* that are meant to establish the relationship between true and false; principles that “make reality intelligible” (ibid. 34). The main principle of intelligibility for the neo-liberal *dispositif* of security for example, is the market.

Another major development in the later lectures is the introduction the term of “governmentality” as an overarching category that encompasses his key objects of analysis. Governmentality is, first “the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics” which make the exercise of the very specific biopolitical power possible – a power that “has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument” (Foucault, 2009: 144). Second, it is “the tendency, the line of force” that brought “governance” to the forefront of social and political relations in the West, a “type of power” that led to the development of a series of specific governmental apparatuses (*appareils*) on the one hand, [and on the other] to the development of a series of knowledges” (ibid.). Finally, it is a descriptive term for the type of power that led to the “governmentalisation” of the state, starting from the 15th century onwards. As a result, governmentality is distinct from both sovereignty and discipline and, in the modern state, overflows and envelops them (ibid.). It is the element that defines “the strategic field of power relations” over which the contemporary governance is carried out and the interplays of the three *dispositifs* of power are carried out (Foucault, quoted in Senellart, 2009: 502).

Finally, I would like to suggest that Foucault’s notion of *dispositif* that he uses in his post-1977 lectures is a direct continuation and amalgamation of two of his key terms used in *Society Must Be Defended* – grid of intelligibility and technology of power. Foucault identifies a grid of intelligibility as that which establishes “a certain regime, a certain division between truth and error that can be applied to Boulainvilliers’s own discourse and that can say that his discourse is wrong”, which is equivalent to the regime of truth/principle of

veridiction combination from *STP* and *BoB* (Foucault, 2004: 164). Technology of power and *dispositif* are almost synonymic in their relationship – indeed, biopolitics was first conceptualised as a technology – but I would like to argue that the *dispositif* as a term, is a term that unites the effects produced by the terms *technology* and *grid of intelligibility* as they were used in *SMBD*. It is not a change in direction or contradiction, merely a relationship that Foucault had not yet paid any attention to – after all, he conceptualises the fact that a *dispositif* includes a regime of truth and apparatuses of power, as late as in the *BoB* series of lectures.

6.2 *Dispositif* and law

Next, I would like to explore the relationship between the *dispositif* and law, since it will be key for the analysis in this thesis and since Foucault’s position on law has been one of the most controversial aspects of Foucaultian analysis. Before the release of *STP* and *BoB*, the dominant interpretation of law in Foucault’s work was the so called “expulsion thesis” which stated that law is inherently linked to sovereignty and that, with the decline of sovereignty as the dominant technology of power, law was subsumed and tactically appropriated by the regulatory, normalizing mechanisms of biopower (Golder and Fitzpatrick, 2009: 12-25). Further, according to this hypothesis, law is instrumentally reduced in its relation to power, as it was used by both sovereignty and biopower in order to pursue means that are beneficial to these technologies of power (ibid. 2 ;55; 79).

In this thesis I am going to construct another approach, another point of entry to the analysis of contemporary legal developments, which is based on Foucault’s conceptualisation of law in *STP* and *BoB* and on Ben Gartner’s interpretation of Foucault’s law in his book *Foucault’s Law*. First of all, in *STP* Foucault states that there exists a “fundamental relationship between the law and the norm, and that every system of law is related to system of norms” (Foucault, 2009: 84). Normativity, further is “intrinsic to any legal imperative” and “any system of laws is related to a system of norms” (ibid.). He takes some care to indicate that this normativity is different from the biopolitical system of normalisation. However, he does not say that the latter employs instrumentally the law but rather that “techniques of normalisation develop from and below a system of law, in its margins and maybe even against it”(ibid.). He further uses the term “system of law” as a synonym to the juridical apparatus and posits the idea that law always “imagines the

negative” and works to prevent it. Law, then, is seen as the key principle of operation of the juridical *dispositif* (ibid. 69).

Nevertheless, in *BoB*, law is given a more productive, determinative function. First of all, Foucault makes the very interesting proposition that every “history of truth is coupled with a history of law”, which can be subject to two important inferences (Foucault, 2008: 35). On the one hand, it assumes that history of truth, which is in essence the history of the *dispositifs*, is related, on equal terms, to the history of law – this allows one to constitute law as an element that is distinct to governmentality and external to it – law released from the confines of the juridical apparatus. Next, the proposition that law has a history allows one to make the assumption that law has the capacity to change and adapt – history presupposes fluidity.

A little later in the book, when discussing the way in which the biopolitical liberal apparatus of power limits governmentality through the truths established by the principle of veridiction of the market, Foucault notes that: “we should not think that the nature of this internal limitation is completely different from law. In spite of everything it is always a juridical limitation, the problem being precisely how to formulate this limitation in legal terms in the regime of this new, self-limiting governmental reason” (Foucault, 2008: 37). He reiterates this statement in the course summary of *BoB* by saying that “in the search for a liberal technology of government, it emerged that the juridical form was a far more effective instrument of regulation than the wisdom or moderation of governors” (ibid. 321). Thus, even the biopolitical regulation *has* to happen through law.

This does not yet deny the hypothesis that law is only ever used tactically by the government but I think that one can safely refute this proposition by analysing Foucault’s definition of the phrase *law and order* in the context of political economy:

“Law and order means that the state, the public authorities, will only ever intervene in the economic order in the form of the law and, if the public authorities really are limited to these legal interventions, within this law an economic order will be able to emerge which will be at the same time both be effect and principle of its own regulation” (Foucault, 2008: 174).

According to this reading, the economic order effectively emerges *within* the system of law. As a result, law enables not only the limitation of governmentality but allows governmentality to effect change. Governmentality and law are further linked through law enforcement, which is “the set of instruments employed to give social and political reality to

the act of prohibition in which the formulation of the law consists” (Foucault, 2008: 254). That is, the link between law and the state apparatus is very complex and operates on multiple levels. The crux is that the state machine gives law an expression, so that law is dependent on the state, but at the same time the state cannot function without law, as governing happens through the law. A very interesting comparison may be made here between this relationship and the relationship between discourse and power that Foucault outlined in 1976: “Discourse is, with respect to relation of forces, not merely a surface of inscription, but something that brings about effects”. In the same way law is not merely a tool but an entity that is productive of power (Foucault, quoted in Davidson, 2004: xx).

Foucault’s best definition of law in the context of the *dispositif*, however, comes not from the lectures featured in *STP* and *BoB* but from notes in his manuscript that were very astutely published by the editor, Michel Senellart, as a footnote to the lectures. In it, Foucault argues that we should change the way we conceptualise the law so as to be able to distinguish between the *form of the law* – “which is always to prohibit and constrain” and the *function of the law* – “which must be that of the rule of the game” (Foucault, 2008: 260). Further, he insists that the biopolitical neo-liberal action on the environment should happen through law and not through the mechanisms of discipline and normalisation – “modifying the terms of the game, not the players’ mentality” (ibid.). That is, Foucault sees law as an indelible, consubstantial correlate to the biopolitical machine of governance and not as a tool. Note, however, that this does not mean that law *cannot* be tactically employed or suspended by the state, it just means that this is not the *primary* relationship between the state and law; instead they are correlates and just like the state logic can override the law at times so can the legal logic override the state imperatives.

Ben Golder and Peter Fitzpatrick’s contemporary reading of Foucault’s law is the closest to my interpretation. In their book, aptly titled *Foucault’s Law*, they emphasise the relational and adaptive aspects of the law and remarks that the relationship between the state and the techniques of power is one of “reciprocal constitution” (Golder and Fitzpatrick, 2009 61). They repurpose a remark that Foucault made about madness and non-madness – “[they are] existing for each other, in relation to each other, in the exchange that separates them” – to argue that the same relationship is valid for the technologies of power and law (Foucault, quoted in Golder and Fitzpatrick, 2009: 60). Further, they argue

that law can be seen as “illimitable”, responsive and open to new possibilities and change (ibid. 39).

In my reading of Foucault’s law I take all of the points discussed above to argue that the endurance of the law has to be sought in the relational heterogeneity of the power space that it inhabits. Law is, in a way, the higgs boson of governmental matter – it gives it mass, it is indelible from it and exists parallel to it. I assume that law relates differently to the different apparatuses, is capable of transformation and can transcend its negative function through its functional capacity of determining the “rules of the game”.

6.3 Approaches

In my thesis I propose that after 9/11 terrorism irrupted as a *principle of veridiction* that altered the dominant system of relations between the existing techniques of governance. It effected changes in some of these relations and also created a regime of truth that allowed for some techniques of the juridical and disciplinary *dispositifs* to be appropriated by the neo-liberal biopolitical apparatus of security and logically repurposed in order to be fit for the pursuit of biopolitical goals.

Chapter 4, which features a detailed analysis of the PATRIOT Act and of the Presidential Military Order of November 14 2001, shows how law is adaptive and how it can work with governmentality in a productive, recombinatory way, which allows it to transcend its juridical boundaries and produce positive effects – even if these positive effects are effects of domination. I also illustrate how the PATRIOT effectively managed to repurpose certain key juridical and disciplinary mechanisms so that they can be used in the pursuit of biopolitical goals. In addition, the act also changed the *logic* of operation of certain disciplinary and juridical techniques of governance – such as surveillance and banishment. Finally, the act not only changed the intersection between the different *dispositifs* but it can be seen to represent a novel fusion of the biopolitical and the legal imperatives. I build my arguments by careful analysis of different sections of the act, group these sections around particular spheres of influence and portray how the interaction between law and its enforcement is productive of the new power-relations. The chapter also features an extensive analysis of the different truth-producing statements and speech acts that helped inscribe in public and political reality the new grid of intelligibility of pre-emption that was ultimately used to justify developments such as the PATRIOT Act.

Chapter 5, which is focused on certain key legal cases in the history of the Guantanamo Bay detention centre, shows how law can be used tactically to grant legitimacy but can also escape the limits of the sovereign and *demand* legitimacy. It also illustrates how law's status as a tool of subjectification can be reversed so that that law itself can demand subjectification – this was exemplified by the way in which some of the Guantanamo Detainees were resubjectified after legal processes that effectively overrode the demands of sovereignty. I provide a thorough analysis of three legal cases, along with the whole array of statements they include, a number of congress acts and various legal documents that reveal how the American legal system works. The approach in the chapter is genealogical in an unexpected way. In the words of Foucault: “examining the history of reason, [one] learns that it was born in an altogether “reasonable” fashion – from chance, devotion to truth and the precision of scientific methods arose from the passion of scholars their reciprocal hatred, their fanatical and unending discussions and their spirit of competition – the personal conflicts that slowly forget the weapons of reason” (Foucault, 1991: 78). In a similar way it is shown that the Guantanamo Bay legal cases exemplify how law is made by people, how this makes it adaptive and responsive to change, and how certain people, through their rhetoric and sometimes through chance, can influence the course of law.

Chapter 2. Theorising Security: An History of Biopower

1. Introduction

Over the next two chapters I will provide a detailed analysis of the way in which Foucault's thought can be and has been employed to make sense of the transformation of Western governance that has come as a result of the terrorist attacks of 9/11. Along the analysis it will become clear that Foucault's concepts are very useful in talking about said transformation, as they not only provide ample tools for the deciphering and problematisation of power/knowledge relationships, but they also feature an excellent insight into the dynamics of 20th century American neo-liberalism.

This chapter will attempt to furnish the reader with an history of the Foucaultian concept of biopower, by providing a detailed analysis of the emergence and development of its key correlatives and principles of intelligibility. It is a recognised fact that Foucault's theories, terms and concepts changed significantly over the time of his writing and that they constantly evolved. He was not afraid to contradict himself or take unexpected new directions in his thought and presenting a unified construct of his overall body of work is an enigmatic task that will not be attempted here. However, his work provides a profound, largely consistent analysis of the power/knowledge relations that underpinned the biopolitical mechanisms of security. He manages to make these relations and mechanisms knowable and, as a result, frames them as a legitimate object of investigation.

The analysis will follow the progression of biopolitics over five key books – *Discipline and Punish* (henceforth *DP*); *History of Sexuality* (henceforth *HS*); *Society Must be Defended* (henceforth *SMD*); *Security, Territory, Population* (henceforth *STP*); *The Birth of Biopolitics* (henceforth *BoB*). Two notable observations must be made at this point. First of all, the last three books of this series were not conceived as academic publications but were rather assembled from lecture notes. As a result they have a different flow, different structure and different pattern of emergence of ideas. To quote Bertani and Fontana's observation on *Society Must Be Defended*: "the manuscript consists of 'blocks of thought' that Foucault used as markers, points of reference, and guidelines... he did not [seem to] work to a pre-

established plan, but tended, rather, to begin with a problem or certain problems, and that the lecture developed ... through a sort of spontaneous generation” (2004: 287). These specific dynamics of the lecture series will be taken into consideration as the analysis progresses.

Secondly, it is of importance to note that these five books do not feature a clearly defined sequence or linear progression of thought as, with the delivery of the lectures featured in *Security, Territory, Population*, Foucault takes a very specific theoretical turn as both his objects of analysis and principles of interrogation change. While the first triptych of books is entirely focused on the emergence of the technology of biopower in the modern political space and in the particular configurations and expressions that this power takes, the lecture series from 1978 and 1979 have as their principle object of analysis the “government of men” and attempt to answer the question of how different technologies of power establish their governmental principles by “[posing] the problem of population in a different way” (Foucault, 2009: 366). It will become clear as the chapter progresses that even though the two different theoretical approaches that Foucault takes are not homogeneous, they are by no means contradictory. They just analyse the same problems through different prisms and, in the process, they manage to delineate the function of two specific modalities that illuminate different facets of the power/knowledge formations of modernity.

2. Life, race, war

“Biopolitics” is a profound analytical concept that attempts to describe a manifold and complex multitude of power relations and, as a result, it warrants a detailed elaboration that must take in account the evolution of the term in the thought of Foucault.

First of all, it must be pointed out that the problem of biopolitics is indelible from the problem of war, which remained, in one way or another, central to Foucault’s thought throughout his career. As Julian Reid shrewdly observes: “the development of Foucault’s conceptualisation of the problem of war establishes the great paradox and crisis of political modernity” (Reid, 2008: 66). It is in *DP* that we are to find the precursor to Foucault’s formulation of biopolitics and it is indeed Foucault’s preoccupation with the development of the military sciences and the resulting disciplining of the body that leads to the inception of his understanding of the formative forces of modern societies.

DP is best known for Foucault's discussion of the disciplinary function of the Panopticon but it was also a book which provided ample insight into the way in which disciplinary power operated through society, by exerting effects on the multitude of individual bodies that constituted society. Such interventions were necessitated in the context of war, as the interests of the sovereign power of states lay in "extracting efficient force from bodies of men for the deployment of organized violence toward rationally grounded and objective political ends" (Reid, 2008: 68). However, Foucault explores not only the way in which soldiers were made through strict training and remodelling of the body, but also the way in which individuals within society were controlled and corrected throughout the course of their lives "in the context of the school, the barracks, the hospital or the workshop", through the use of a "mystical calculus of the infinitesimal and the infinite" in order to become *docile bodies* (Foucault, 1991a: 140). Thus, all of the techniques that were created and implemented in the military domain, techniques that have to do with what Julian Reid calls "disciplining the life of the bodies", were later used throughout society.

The development of these techniques of individualisation and individuation of docile bodies for the purposes of war gradually led to the development of "a new object for the organisation of power relations" (Reid, 1998: 70). The object that was the ultimate goal of the disciplinary techniques and the body-machine complex that these techniques aimed at producing was nothing less than the "natural body", a production of individuality that "is not only analytical and 'cellular', but also natural and 'organic'" (Foucault, 1991a: 156). The organic, cellular naturalness of this body, however, was to be carefully constructed through its subjection to new "mechanisms of power", which were to imbue it with new "forms of knowledge" (ibid. 155). Thus, the "natural" body was a body that was to be "susceptible to specified operations, which have their order, their stages, their internal conditions, their constituent elements"; in reality, it was a "body-machine complex" (ibid. 153). This idea of artificially constructed naturalness, a naturalness that can only remain stable so long as it is acted upon by a government, is a key correlative of modern political rationality and it appears in Foucauldian thought in many instances. Further, as Julian Reid observes, Foucault's analysis of the emergence of modern military science and its relation to the idea of the creation of "docile bodies" enabled "a new evolutionary account of the order of life" that was to be pursued by governments who wanted to establish an "absence of war" in societies (Reid, 2008: 72).

There are two more important trajectories that were introduced in *DP*, which were to be of importance in Foucault's thought on biopolitics. First of all, is the idea that "there is a politics-war series that passes through strategy [and] an army-politics series that passes through tactics" (Foucault, 1991a: 168). This distinction between strategy and tactics was, in its origin, explicitly focused on war: "it is strategy that makes it possible to understand warfare as a way of conducting politics between states; it is tactics that makes it possible to understand the army as a principle for maintaining absence of warfare in civil society" (ibid.). However, at a later stage of his thought, Foucault started using the concepts with reference to governing in general, with tactics used to denote the particular techniques that were used to effect changes within society or control the populace, while the "governmental strategy" being used to refer to overarching logic tying these techniques together; that is, the truth establishing "principle of veridiction" that determined the goals of the government and the parameters of good governance.

The second trajectory presented in *Discipline and Punish* had to do with the nature of power itself and the idea that power does not "exclude", "repress", "censor" or "conceal" human relations but instead it produces: "it produces reality, it produces domains of objects and rituals of truth" (Foucault, 1991a: 194). This idea is also crucial for understanding the nature and the modus operandi of biopower and governmentality, two terms that are explicitly grounded in the assumption that the production of power and the production of knowledge are two complementary processes and that politics is capable of bringing into existence certain conceptual entities that did not exist before.

It is in *HS* that the idea of biopolitics begins to be fleshed out in more detail, alongside Foucault's reconfigured understanding of the role played by war in politics. The very last section of the book, entitled "Right of Death and Power over Life", begins with an exploration of the role of death in the governance of men. Foucault draws a distinction between two political approaches towards death. The traditional sovereign placed death at the origin of his justification for possessing and exercising power: "he evidenced his power over life only through the death he was capable of requiring" (Foucault, 1978: 136). Hence, the modus operandi of sovereign power was "the right to decide life and death" or, in other words, to "take life and let live" (ibid., 135; 138). Further, in this arrangement, power was exercised as "a means of deduction" and as "a subtraction mechanism" where the sovereign possessed "a right to appropriate a portion of the wealth, goods and services,

labour and blood levied on the subjects”, a right of seizure that “culminated in the privilege to seize hold of life in order to suppress it” (ibid., 136).

On the other hand, the new power that Foucault began outlining in *DP* had the function of administering, optimising and multiplying life, as well as “subjecting it to precise controls and comprehensive regulations” (Foucault, 1978: 137). The sovereign’s right to “take life or let live” was replaced by a power to “foster life or disallow it to the point of death” (Foucault, 1978: 138). That is, the transformation that started at the beginning of the 17th century was nothing less than a complete and irreversible transformation of the “reason for being” of power, the “logic of its exercise” and the “highest function of the sovereign”, with the main focus of human existence and sociality shifting from the sovereign who controls death to the sovereign who controls life (ibid., 138; 139). Thus, bio-power brought life into the realm of knowledge-power calculations and made it the primary focus of these calculations; as a result, “for the first time in history... biological existence was reflected in political existence” (ibid., 142).

This biopower, or power over life, evolved in two basic forms that “constituted two poles of development linked together by a whole intermediary cluster of relations”; poles that were not antithetical, but rather complementary (Foucault, 1978: 139). The first of these poles Foucault terms the “anatomo-politics” of the human body and it comprises in the disciplining of the body and the creation of docile bodies, which was outlined in *Discipline and Punish* (ibid.). The second form of bio-power had to do with the social body, which was now perceived as a “species body” “imbued with the mechanics of life and serving as the basis of the bio processes” such as health, birth and death rates and life expectancy, to name but a few (ibid.). The supervision of the mechanics of life necessitated a whole series of interventions and regulatory control through which the knowledge-power complex was to influence and foster life and which constituted the political aspect of bio-power.

The transformation of power from sovereign power to bio-power is what Foucault calls a society’s “threshold of modernity” at which point “the life of the species is wagered on its own political strategies” (Foucault, 1978: 143). It is at this point that we come back to the question of death, which has assumed a dual function in this new arrangement of power. First of all, in bio-political terms death is nothing more than an expression of the “reverse of the right of the social body to ensure, maintain, or develop its life”. As such, it is also the limit of the knowledge-power complex, the point at which life escapes the hold of the

sovereign. Consequently, “death becomes the most secret aspect of existence, the most ‘private’”. (Foucault, 1978: 138).

The other function of death is significantly more interesting and re-invokes Foucault’s emphasis on war as being one of the key imperatives and logical footings of Western modern governance. The reasoning for this is simple – since the number one goal and the highest function of power is the preservation and the propagation of life, then “the principle underlying the tactics of battle – that one has to be capable of killing in order to go on living – has become the principle that defines the strategy of states” (Foucault, 1978: 137). In other words, at the heart of bio-power lies nothing else than Kipling’s law of the jungle – kill or be killed. Killing, however, is only to be allowed if it is done in order to preserve the integrity of the species being. Thus, wars are:

“...no longer waged in the name of a sovereign who must be defended; they are waged on behalf of the existence of everyone; entire populations are mobilised for the purpose of wholesale slaughter in the name of life necessity: massacres have become vital. *It is as managers of life and survival*, of bodies and the race, that so many regimes have been able to wage so many wars” (Foucault, 1978: 137, emphasis added).

And more: “the existence in question is no longer the juridical existence of sovereignty; at stake is the biological existence of *the population*...power is situated and exercised at the *level of life*, the species, the race, and the large-scale phenomena of population” (ibid., emphasis added). Thus, starting from the 17th century the sovereign undergoes a transformation to become a *manager of life*, the primary goal of governments becomes the preservation of the biological existence the people under its jurisdiction, and the focus of power shifts from the individual to the population. The concept of the *population*, when considered in the context of biopolitics, as it was first done in the *History of Sexuality*, is of great significance. It is precisely at the level of the population that life is managed and species life finds its political expression and it is the population that is to become the focal point of governmental techniques of intervention. This concept will be analysed at greater detail later in the chapter.

A final point has to be made regarding the role of the law and the legal constructs in this bio-power. This role is not yet fully explored in the *HS* and *SMD* but, nevertheless, the basics of the transformation of law as a result of the bio-power are laid out. In short, the law is the par excellence tool of the sovereign technology of power, as it “always refers to the sword”

Foucault, 1978: 144). It is the entity that brought death into play in the realm of sovereign power and, thus, an entity that could not retain its function in a world where the function of death in governance had undergone a complete transformation. Instead, “a power whose task is to take charge of life” needed regulative mechanisms in order to control the population and corrective mechanisms in order to control the individual: “such a power has to qualify, measure, appraise, and hierarchize, rather than display itself in its murderous splendour; it does not have to draw the line that separates the enemies of the sovereign from his obedient subjects; it effects distributions around the norm” (ibid.). In the process, said power “[distributes] the living in the domain of value and utility” (ibid.)² Consequently, Western societies experience what Foucault calls a “juridical regression”, as the juridical system is forced to operate as one of the multiple apparatuses put in place in order to enforce different norms and whose functions are mostly regulative (ibid.).

It is in *SMD*, the collection of Foucault’s lectures of 1975 and 1976 in which Foucault expands his analysis of war and explores the profound impact that war has on social relations and, as a result, on the formation of the technology of biopower. The basic idea of the lectures is to present the idea that “politics is the continuation of war by other means” (Foucault, 2004: 48) and to trace the evolution of this idea. The kernel of the idea is simple – politics is, in its essence, the expression of a power, and “what is at work beneath political power is essentially and above all a warlike relation” (ibid., 17) – a direct reversal of Clausewitz’ famous principle.

Foucault suggests that war has provided a “matrix for techniques of domination” in society, or a grid of intelligibility of social relations ever since the State acquired a monopoly of war, a monopoly which brought war, in its most basic definition, to the outer limits of the state (Foucault, 2004: 46). When that happened a new, somewhat paradoxical discourse appeared within society, what Foucault calls the “historico-political discourse on society”, a discourse that “makes war the basis of social relations” (ibid., 49). This is the idea that everything that happens within a society, every social relation, is made sense of and operationalized through the logic of the order of battle – here Foucault borrows Boulainvilliers idea that “it is war that makes a society intelligible” (ibid., 163). Of course, in the world of Foucault, where there is power, there is knowledge and, since knowledge is

² These last concepts are only mentioned in passing in the book, but they will come to play a very significant role in Foucault’s later framing of biopolitics, as it will become evident.

integral component of relations of power, it also plays an active role in war's infiltration of the social spectrum: "knowledge is never anything more than a weapon in war, a tactical deployment within war" (ibid., 173). As a result, there is a historical and political discourse that "lays a claim to truth and legitimate right on the basis of a relationship of force, and in order to develop that very relationship of force by therefore excluding the speaking subject – the subject who speaks of right and seeks the truth – from juridico-philosophical universality" (ibid., 53).

It is important to deconstruct this set of statements further. The basic idea underlying it is that roughly in the beginning of the 18th century when the "disciplinarization" (Foucault, 2004: 173) of knowledges occurs and the idea of universal truth is more or less abandoned, politics becomes decentred and a plethora of different claims to truth emerge, claims that oppose each other and that ultimately plunge society into a state of social turmoil, governed by the logic of the order of battle: "Either the truth makes you stronger, or the truth shifts the balance, accentuates the dissymmetries, and finally gives the victory to one side rather than the other. Truth is an additional force, and it can be deployed only on the basis of a relationship of force" (ibid., 53). Consequently, there is a continuous struggle within society between different discourses of what is right and wrong, different takes on both the ends and means of governing, and constant shifts in the balance between "subjugated knowledges" and "subjugating knowledges" – this struggle is war³ (ibid.,7). However, this historico-political discourse was to undergo a dramatic transformation during the 19th century, a transformation that did not remove war from the social order but completely transformed its role in it – "its role is no longer to constitute history but to protect and preserve society; war is no longer a condition of existence for society and political relations, but the precondition for its survival in its political relations" (Foucault, 2004: 216). This, as all Foucauldian statements, has to be unpacked in order to be understood. Foucault's line of reasoning is as follows: the element of war which made up historical intelligibility in the 18th century was gradually "reduced, restricted, colonized, settled, scattered, civilized if you like, and up to a point pacified" (ibid.). That is, war, in the sense of a confrontation within society, was gradually eliminated and replaced by something else, which was... war. This

³ The emergence of historico-political discourses allow for the elaboration of forms of knowledge and claims to truth that challenge the state's insinuations that knowledge and truth are necessarily aligned to justice and peace and that the sovereignty of the state is a precondition of knowledge and truth. (Reid, 2008).

war, however, was qualitatively different in its operational logic and, as a result, it created a qualitatively different grid of intelligibility.

In order to understand this grid we must look at the development and the transformation of the concept of the nation, for a complete political reworking of this concept took place after the French Revolution and with the inception of the Third Estate. The nation was no longer tied to the physico-juridical relationship between the king and his subjects but constituted something else entirely – a unity of its own. Foucault picks up here the analysis of Sieyès, who stipulates that in order for a nation to be a nation in historical terms it must be more than a juridical entity – it must, on top of this, “have the capacity for commerce, handicrafts, and agriculture... the ability to form an army, a magistrature and so on” (Foucault, 2004: 220). All these various functions are to be ran by various apparatuses (the army, the church, the administration, the system of justice) of the state, and since in the case of the Third Estate - and the case of all modern states - the state is the nation, the latter has full control of its plight:

“The nation is no longer a partner in barbarous and warlike relations of domination. [It] is the active, constituent core of the state.” (ibid., 223) The nation, in order to be successful, must coincide with the state and, as a result, the primary interest of the state should be the well-being of the nation. Here we have a return to the universality of the state: “the state, and the universality of the state, become both what is at stake in the struggle and the battlefield” (ibid.). That is, since the state coincides with the nation we are now dealing with a historicity that is meant to translate “the functional totality” of the nation into a “real universality of the state” (ibid., 227). The history of the state is no longer a history of intra-state war-like relations between different competing groups but the history of a unified nation that works together to promote the best interests of the state, a condition that entails intra-state relations of purely civilian nature.

This condition manufactures a grid of intelligibility that is qualitatively different from the grid of intelligibility developed in the 18th century. The first grid interprets the history of social relations as a “never-ending substratum of war and domination” that has war as its origin, both in terms of historical sense of identity – “the first war, the first invasion, the first national duality” - and in terms of the logical of function of the state, which is constant strife (Foucault, 2004: 225; 227). This grid takes the present as the “negative moment [of] forgetfulness” (ibid., 227) and remains focused on the past, with each group in society

having a claim to power and a claim to truth based on an imagined point of origin, grounded in war. In the new grid of intelligibility, on the other hand, “the present becomes the fullest moment, the moment of the greatest intensity, the solemn moment when the universal makes its entry into the real” and, as a result, the totalizing ideology of the nation is translated into the universality of the state (ibid.). This observation is of paramount importance regarding the theorisation of biopolitics since the governmental mechanisms peculiar to it, function precisely on the basis of this idea that the “emergence of the state exists...in the present” (ibid., 228). As a result, governmental control should not only be fully focused on the “real of the present” but should be rationalised by it (ibid., 227). Further, understanding the congruence between the concept of the present, the universality of the state and the principle of utility – which is made operable with reference to the present – is key to understanding the modus operandi of biopolitics itself. It must be noted that the two grids of intelligibility that were just outlined never function alone: “They are always used almost concurrently, always overlap, are more or less superimposed, and to some extent intersect at the edges.” (Foucault, 2008: 228). That being said, it is clear that Foucault believes that ever since the French Revolution the second grid has clearly been the dominant one as the fundamental relationship, the essential element of governance, is no longer a relationship of domination but a relationship of and for the state.

It is at that point of analysis that biopower should be reintroduced since the power of the state and, as a result, the power of the nation is expressed in its control of the biological. As a result, all techniques and mechanisms of state control are ultimately aimed at the proliferation of life and the well-being of the population; a population that is understood not in terms of a mass of individual subjects of right but as the living body that is the expression of man-as-species being.

Here we have a rephrasing and refining of the ideas presented in the *History of Sexuality*, but this time there is a slight difference. Anato-mo-politics and bio-politics are now not only presented as the two complementary poles of the biological and bio-logical technology of power⁴ but they are also viewed as a sequence of historical developments, and as distinct technologies of power that are functional on their own. The first technology was focused on man-as-body, on “techniques of power that were essentially focused on the ... individual

⁴ That discipline is bio-logical too, or in other words, that it also follows the logic of life is evidenced by its focus on exerting control over the (living) body and perfecting it.

body”, techniques that were individualising and were “used to ensure the spatial distribution of individual bodies” (Foucault, 2004: 242) – in short, everything that was explored in *Discipline and Punish*.

Bio-politics, on the other hand, is a technology of power that emerged in the second half of the 18th century and that “applied not to man-as-body but to the living man, to man-as-living being; ultimately, if you like, to man-as-species” (Foucault, 2004: 242). It is also a power that addresses the multiplicity of men to the extent that they form “a global mass that is affected by overall processes characteristic of birth, death, production, illness, and so on” – the population (Foucault, 2008: 242-3). Thus we see “the emergence of something that is no longer an anatomo-politics of the human body, but what I would call a ‘biopolitics’ of the human race” (ibid. 243). In other words, this is a repeat of the ideas presented in the *History of Sexuality*, only this time there is an important distinction between anatomo- and bio-politics, a divide that introduces them as two manifestations of bio-power that are not complementary but sequential, both in terms of time and in terms of logic.

Thus, in *SMD* Foucault differentiates between two series: “the body-organism-discipline-institutions series” that corresponds to an “organic institutional set” and the “population-biological processes-regulatory mechanisms-State” one, which is focused on a “biological or Statist set” of bio-regulation (Foucault, 2004: 250). It is interesting to note (an observation that Foucault does not make but that he, nevertheless, implies) that each of these series roughly corresponds to the two grids of intelligibility that interpret the history of social relations – the disciplinary series is aligned with the grid of permanent intra-social war, while the second series is an expression of the grid that is focused on the present and on the development of the nation/state compound.

These series and their corresponding technologies of power, however, are not mutually exclusive and coexist, often in a state of mutual dependence. This is necessitated by the fact that they operate on different levels (the statist and the institutional) and some apparatuses of governance, such as the police, often have both disciplinary and regulatory dimensions. Further, both of these series “aim to maximise and extract [the] forces” of the state, even if they follow a different logic (Foucault, 2008: 246). Further, and most importantly, there is one element that circulates between the disciplinary and regulatory, an element that is applied both to the “disciplinary order of the body” and the “aleatory events that occur in the biological multiplicity” and this element is the norm (ibid.,252). As a result, “the

normalising society is a society in which the norm of discipline and the norm of regulation intersect along an orthogonal articulation” (ibid., 253). It is here that Foucault yet again makes the assertion that “we are in a power that has taken control of both the body and life or that has, if you like, taken control of life in general, with the body as one pole and the population on the other” (ibid., 255). So, we are still in the realm of a bio-power that has two different expressions, although in *SMD* Foucault recognises that these two expressions are two distinct technologies of power that follow a different logic and that sometimes intersect. Further, the bio-logical necessity of preserving life, with an explicit focus on the present, which is found in the bio-political technology of power, is the entity that underlies the overall logic of governance. And, of course, this logic is always directly contrasted to the logic of sovereignty.

So far I have established as follows: in the realm of modern politics society is the nation is the state is the population; it is all these things and it must be protected and fostered at all cost – that is the new end of governance. Consequently, it is society and not the sovereign that must be defended. It is at that point that war makes a re-entry in the modern grid of intelligibility that relates social relations. This time however, war does not take the guise of a series of intra-social confrontations of the state against groups within it that have different claims to the truth; instead it is a war, or more precisely, a logic of war, that is meant to protect the State and the biological existence of the population, of man-as-species against both outside and inside threats. A war, then, for the State, and not of the State; a war that is biopolitical in both logic and functionality; a war that assumes the biopolitical universality of man-as-species and that postulates that the species must be protected: “At this point we see the emergence of the idea of an internal war that defends society against threats born of and in its own body. The idea of social war makes, if you like, a great retreat from the historical to the biological, from the constituent to the medical” (Foucault, 2004: 216)

Society Must Be Defended, but how? The answer, surprisingly, comes with racism and, in particular, State racism, which reinstates the death-function in the economy of biopower “by appealing to the principle that the death of others makes one biologically stronger insofar as one is a member of a race or a population, insofar as one is an element in a unitary living plurality” (Foucault, 2004: 258). Thus, racism becomes a mechanism under the control of the biopolitical technology of power that enables biopower to work as it gives it

the capacity to “suppress” life which is threatening to the species⁵ (Foucault, 1978: 136). Racism takes the basic function of the logic of the order of war – “if you want to live, the other must die” – and introduces it in the ranks of bio-power in a way that is compatible with its exercise and that allows it to kill in order to let live. The underside to this function is the fact that in protecting and defending life, a State is exposing its own citizens to war, but since this is done in order to guarantee the future existence of these very citizens, it is considered acceptable.

Two important qualifiers must be inserted here. First of all, “killing” is not necessarily “killing” in the biological definition of the term but more in line with the idea of “disallowing life” that was introduced in HoS:

“When I say ‘killing’, I obviously do not mean simply murder as such, but also every form of indirect murder: the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on” (Foucault, 2004: 256)

That is, killing constitutes everything that removes the potential of an entity to pose a biological threat to the population. Secondly, bio-political racism can have a very broad definition, especially in contemporary societies which accommodate people of all races among the ranks of their citizens. There are different dimensions of racism and it would be best to define it as the capacity of the nation/population/society/species compound to disallow any life that threatens its integrity, even if this life is lodged within this very compound.

The profound significance of the Foucauldian concept of racism, in its biopolitical operationalization, cannot be stressed enough. Race is not only the element that re-introduces the theme of war to biopolitics but, as the underside of the power to make live, ensures that biopolitics is fully functional and can take control of both life and death. In other words, killing is justified and operationalized in the strategy of power known as biopolitics, through racism. Consequently, race, along with the nation, the population and society, becomes the last significant correlative of the species being, and, by association, of life itself.

3. Security, Population, Governmentality

⁵ Foucault also expresses similar idea in the History of Sexuality where he notes that the power of life over dead is ultimately the power “to seize hold of life in order to suppress it” (Foucault, 1978: 136).

At some point in *Society Must Be Defended*, amidst the discussion of the biopolitical grid of intelligibility and the emergence of the universal state that it entails, Foucault poses a very interesting question: “How can we understand a struggle in purely civilian terms? Can what we call struggle – the economic struggle, the political struggle, the struggle for the state - actually be analysed not in terms of war, but in truly economico-political terms?” (2004: 225). He asks this in passing and he does not return to the question for the remainder of the lecture series. However, the problem that the question flags, seems to have been burned in Foucault’s mind as the theoretical turn taken by him in the lecture series of 1976-7 *STP* and of 1977-8 *BoB* is dedicated precisely to providing an answer to this query.

This couplet of lecture series approaches the analysis of power-knowledge relations in a way that is qualitatively different from the first triptych of books – Foucault not only changes his strategy of investigation but his terminology as well. In the new series, he focuses on the delineation of three different *apparatuses* or *dispositifs* of power – the juridical *apparatus*, the disciplinary *apparatus* and the *apparatus* of security. The differences between these apparatuses and their unique characteristics are illustrated by reference not to life but to the “government of men”.

Foucault further situates the existence of the three different apparatuses on the same logical plane, as they are all seen as expressions of *raison d’etat*, which is the driving rationality behind the modern state and which will be my point of departure for the analysis of the lecture series. *Raison d’etat* is a specific rationality that establishes “the field of politics as its domain, its set of objects, and its type of organisation” (Foucault, 2009: 233). In the process it deals away with the pre-modern, religiously informed, conceptions of the appropriate conduct and guidance of men. The emergence of *Raison d’etat* signifies and follows a “de-governmentalisation of the cosmos” (ibid., 234), which is the severing of both nature (*principa naturae*) and God from the governmental theme. It also necessitates and gives rise to a particular art of government, which places the state in “firm domination over peoples” and constitutes “the knowledge of the appropriate means for founding, preserving, and expanding such domination” (Botero, quoted in Foucault, 2009: 238). Further, Foucault argues that, with *raison d’etat*, a power-knowledge construct is, for the first time in history, explicitly defined and thus brought not only to the field of theory but

also to the field of practice (ibid., 256). Finally, *raison d'état* identifies what are to become the two major actors of politics - the state and the people (later, the population).

At this point, it is important to define and outline the function of the mirror-concept of *raison d'état*, which is *coup d'état*. This concept, as it was defined in the 17th century, and as it will be used later in the project, had a completely different meaning than the one it has acquired in the present. It was complementary to *raison d'état* and an indelible component of it:

“In the first place it is a suspension of, a temporary departure from, laws and legality. The *coup d'état* goes beyond ordinary law... Or again, it is an extraordinary practice against ordinary law, an action retaining no order or form of justice” (Foucault, 2009: 261)

Coup d'état is a necessary suspension of the law that responds to an urgent necessity for the preservation of the state and the *raison d'état*. It is a violation of the rules that the state posits for itself, and since the state cannot take part of this violation *coup d'état* is perceived in direct opposition of the state. “The *coup d'état* is the state acting of itself on itself, swiftly, immediately, without rule, with urgency and necessity, and dramatically” (ibid.,264). It does not, therefore, constitute or act in favour of a different rationality.

What follows is a brief outline of the two apparatuses that came before the currently dominant the apparatus of security - the juridical apparatus and the apparatus of discipline. The juridical apparatus in many ways predated *raison d'état* and originated in the legal relations that bound a sovereign with his or her subjects of right. Its main principle of verification and what was to become its strategic grid of governance, once it was underpinned by the *raison d'état*, is the law, the system of law. There are two important things to be said about it. First, every system of laws is related to a system of norms, and the law functions to codify a norm or a set of norms (Foucault, 2009: 56). Secondly, the juridical apparatus is dual in the way it constructs and makes sense of reality. In it, the relation between the state (or, previously, the sovereign) and the people is expressed through a certain intangible social contract that binds all individuals, who belong to a particular social arrangement. If a person is to violate a law, he or she breaks the social contract and “thereby becomes a foreigner in his own land, consequently falling under the jurisdiction of the penal laws that punish him, exile him, and in a way kill him” (ibid., 44). Thus, there is the distinction between those who follow the law, who belong to society, and those who challenge the law, who are either cast out or incarcerated. Moreover, and related to that,

the juridical apparatus is explicitly preventive, in the sense that the laws that it employs stipulate what is forbidden and what is not to be done. That is, it imagines the negative: “the law works in the imaginary, since the law imagines and can only formulate all the things that could and must not be done by imagining them”(ibid., p47).

The juridical grid of intelligibility was gradually transformed from the 16th century onwards and soon gave way to another strategy of power, which was expressed in a distinctive apparatus of discipline. The point of origin of the disciplinary governmental rationality is derived from the obedient subject/delinquent distinction that the system of jurisdiction employs. The apparatus of discipline, however, instead of banishing, incarcerating or disposing of the subject who has wronged, puts said subject through a series of corrective procedures, which are meant to re-integrate them in society: two notable examples, which occupied Foucault for a long time, are the mental institution and the prison system -a system in which the person is not only incarcerated but corrected. Further, the obedience of the subjects is to be ensured by another set of disciplining institutions which are to teach them the rules of what is acceptable and desirable in terms of behaviour; the epitome of this being the school institution. This also applies to and is related to the way in which discipline structures space. Here we have the ideal example of Bentham’s Panopticon which represented the ultimate fantasy of a disciplining society. What the apparatus of discipline aimed at was complete control and intense regulation of every aspect of society - from to the way people were brought up and socialised, through the economy, to the careful and structured organisation of space.

“Discipline is essentially centripetal...to the extent that it isolates a space, that it determines a segment. Discipline concentrates, focuses, and encloses. The first action of discipline is in fact to circumscribe a space in which its power and the mechanisms of its power will function fully and without a limit” (Foucault, 2009: 45).

That is, while the relation of law to an event is negative (i.e. it tries to imagine everything that should not be done), the relation of discipline to an event is positive, insofar as it tries to instruct (or even construct) individuals in what should be done - it constructs an artificial, isolated space in which all the rules are explicitly stipulated. Everything that is not thus stipulated is, by default, wrong. Discipline also differs from the juridical strategy of power in the way it establishes the norm. We saw that in the system of laws the norm predates the law and provides it with substance. Discipline works the other way around - it posits an

optimal model as the norm and the process of normalisation “consists in trying to get people, movements, and actions to conform to this model, the normal being precisely that which can conform to this norm, and the abnormal that which is incapable of conforming to the norm”(ibid., 57). It is thus imperative to reform delinquents, re-structure space and re-shape all aspects of reality that do not conform to the artificially constructed rules, so that they are made to fit in the disciplinary realm.

Correlative to the function of both of these *dispositifs* were the two dominant “assemblages of power” of *raison d’etat* at the time - the military-diplomatic apparatus and the police (Foucault, 2009: 365). The military-diplomatic apparatus pertains to a European system of power relations which was meant to ensure that there is always a certain balance in European state-relations. The police, on the other hand, was responsible for “the growth of the internal forces of each element [e.g. each state]” (ibid.). Until the 18th century police was a disciplinary apparatus which had a theoretically unlimited domestic scope of intervention and which was meant to infiltrate and regulate all aspects of people’s existence: it had to ensure that the subjects are in good health, that their basic needs are satisfied, that they are not idle and that they are able to gain the necessary knowledge and skills needed for the production of goods (ibid., : 324-328).

Finally, this police did not work through the judicial apparatus, but through a series of regulations that were not subject to a normative or legal imperative. True, these regulations still had juridical form, the form of the law, but the causality was inverse - the amoral, organising logic of discipline preceded the normative logic of the law. As a result, police functioned as a “permanent coup d’etat”, as it was independent from the legal framework, it was partially suspending said framework, and its goal was to act “promptly and immediately” on all details that needed to be controlled in order to ensure the proper functioning of the state (Foucault, 2009: 340).

Foucault proceeds to analyse the basic tenements of the theoretical school that led to the emergence of the *dispositif* of security – the school of the *physiocrats*. These were a French group of (economic) thinkers who were in direct opposition to the strictly regulative approach towards trade that was prevalent in the economic theory of the late 17th century. They were directly opposed to the postulate of the disciplinary regime that things are “indefinitely flexible” and that governmental interference in every aspect of sociality is thus called for (Foucault, 2009: 343). Instead they argued that there is “a certain course of things

that cannot be modified” (ibid.). Based on the detailed and structured knowledge, which was being produced by statistics, the physiocrats were able to conclude that there is a certain flow to human relations and processes, which is both “stubborn”, meaning that it is not always subject to artificial state regulation, and “natural”, which refers to “processes of naturalness specific to relations between men, to what happens spontaneously when they cohabit, come together, exchange, work and produce” (Foucault, 2009: 348).

Henceforth, there is “a spontaneous regulation of the course of things” that should be allowed to unravel (Foucault, 2009: 344). The only governmental interventions allowed would be to ensure that this spontaneous, recalcitrant course of social events follows its natural path, a regulation “based upon and in accordance with the course of things” (ibid.). That is how the state began to transform from the all-controlling omni-structural entity known as the police-state to the *laissez faire* modern state in which governing is always governing too much; in which things should be left alone; in which good governance is an informed governance of “concerted interventions” that work within the reality of events, rather than trying to structure an artificial reality; in which regulation is only done to allow “the well-being”, the interest of each to adjust itself in such a way that it can actually serve all” (ibid., 346).

So, in order to govern properly, one should get to understand a certain social reality. This reality, which is created through the self-interested actions of a plethora of individuals, should be allowed to take place and any governmental interventions should be aimed at ensuring that nothing gets in its way. That is, there should be a number of *security mechanisms* in place to guarantee that: a) people know what their best interests are; b) people act in accordance with these interests; c) any extraneous events that might hamper the realisation of these interests are checked accordingly. These mechanisms are not to interfere with but aid the “natural” market and social mechanisms, which are both collective and individual, and which generally tend to cancel out and keep in check negative occurrences (Foucault, 2009: 40). To quote Foucault: “by working within the reality of fluctuations between abundance/scarcity, dearness/cheapness, and not by trying to prevent it in advance, an apparatus is installed...and apparatus of security and no longer a juridical-disciplinary system” (ibid., 37). That is, there is an apparatus in place, which is meant to connect with the reality of events and by working within this reality to “establish[] a series of connections with other elements of reality”, ensure that negative developments are

compensated for and positive developments are encouraged (ibid.). These natural flows are to become the primary datum that should inform the good sovereign. Further, if the analysis of this datum is to be reliable it should encompass a whole series of events and be able to identify the patterns that are peculiar to these series. Thus, the most important knowledge relevant to governing becomes the statistical knowledge, which provides the *evidence* for the reality of events. A sovereign who does not take this knowledge is not a bad (moral qualifier) sovereign or a transgressive (legal qualifier) sovereign but, and what is worse, an *ignorant* sovereign, who disregards what is good for the state.

I will now proceed to analyse the key principles and characteristics of that new strategy of governance and delve more on the nature of the security mechanisms that accompany it. What we have established so far is that the main principle of this governmentality is *laissez faire*, which postulates that governing is, by definition, always governing too much. Further, any governmental limitation put in place in order to address this problem should be based on reference to “a whole domain of [social] processes” that have their own flow and are thus considered natural (Foucault, 2009: 349). Natural, of course, not in the biological sense, but in the sense that relations between men have some logic and some recognisable pattern to them that is akin to the biologically natural processes. So the 18th century witnessed the emergence of a whole new domain of analysis that had its own field of objects and processes, constituted its own frames of reference and discourses of knowledge and required substantially different methods of intervention.

The next principle relevant to the apparatuses of security has to do with knowledge and with acquiring the knowledge necessary in order to carry out the necessary interventions. This knowledge was first and foremost considered to be *scientific* and originated with and within the foothold that statistics began to carry in the West in the beginning of the 18th century. However, this knowledge was not limited to statistics - it had statistics as its framework and scientific origin but it soon developed into something more. What we are witnessing here is nothing less than the birth of the modern *political economy*, along with the science of *economics*, which was to replace the universal rules of the theological cosmos with the universal rules of the invisible hand of the market. Economics was not a knowledge of the art of governance (such as Machiavelli's *The Prince*) but rather a knowledge that is internal to government: not “a science external to government but a science needed by the government” (Foucault, 2009: 351). This was the knowledge that was to dictate the action

of correct governance and the knowledge that provided the evidence that is instrumental to governing well and that “claims the right to be taken into consideration” by any good government (ibid.).

The third principle of the Security Strategy of power, and one which is directly related to the previous three, is that the market became the truth establishing principle, or the *principle of veridiction*, of the new governmentality. That is, the market becomes the primary knowledge-structuring mechanism, which dictates the correct and erroneous approaches to governmentality. This, of course, does not imply that the market did not exist as such before that. What it does imply, however, is that the role and the function of the market has drastically changed from what it was during the disciplinary and juridical regimes. It used to be, first and foremost, a “privileged site of distributive justice” with the primary function of ensuring the “absence of fraud and the protection of the buyer”, as opposed to the site of veridiction that it became (ibid., 30).

Next, and this is crucial, Foucault’s focus comes on the primary mover of all of these mechanisms - the population, which emerges as the key correlative of this new governmentality. I will begin with a few basic notes. First, Foucault continuously stresses that the most important change that arrives with and through the mechanisms of security is the emergence of the population as a political subject, as *the* political subject, but also at the same time as a political object of concerted governmental interventions. The “people” from the disciplinary technology of power are now split into two distinctive levels that are important for security: the population, which is the *pertinent* level and the multiplicity of individuals, which is the *instrumental* level. The second level, which is also the level of the series, is important insofar as it “[when it is] properly managed, maintained, and encouraged...will make possible to obtain at the level that is pertinent” (Foucault, 2009: 42).

The final objective of governance is the population and the primary concern of the government is to ensure the security and prosperity of the population, as in the new technology of power this is what defines the strength of the state. However, in order to reach this objective one has to intervene at the level of individuals so as to obtain what they want at the level of the population by informing governmental mechanisms. What is more, it is inevitable that part of that multiplicity will be people who are trying either willingly (e.g. criminals) or unwillingly, based on their own ignorance of what is to their best interest (for example a person who hoards grain at a time when it will be most profitable for him/her to

sell it), to disrupt the system and “resist the regulation of the population”. Their actions and the knowledge/statistics gathered about them are also crucial in informing mechanisms of security.

Related to that, we see a complete transformation from the subject of right of the disciplinary regime to the newly born subject of interest, or “homo economicus”. The primary thing that characterises the subject of rights is obedience to the sovereign, an obedience that is legally defined and exacted. He has certain natural rights but he only becomes “a subject of right in a positive system...when he has agreed at least to the principle of ceding these rights...when he has subscribed to their limitation and has accepted the principle of their transfer” (Foucault, 2008: 274). The newly emerged subject of interest, on the other hand, cedes nothing. The only thing that is required of him is that he pursues his self-interest to the best of his abilities. “homo economicus is the person who must be let alone... he is someone who responds systematically to systematic modifications artificially introduced into the environment” (Foucault, 2008: 270). He is an active part of a population that should be managed, and as such, as long as he remains manageable he should be left alone. Following from this, freedom doesn’t consist in observing certain basic, inalienable rights (all rights are inalienable by default here), but in letting the individual members of the population pursue their economic interests. That is, freedom is economic freedom. What is more, homo economicus is a “consumer of freedom”; he “is not satisfied with respecting this or that freedom, with guaranteeing this or that freedom” and he “can only function insofar as a number of freedoms actually exist: freedom of the market, freedom to buy and sell, the free exercise of property rights ...[et cetera]” (ibid., 63).

As a result, the sovereign/the government will be preoccupied with assuring that the proper mechanisms are in place to produce all of these freedoms, and these too are mechanisms of security. Further, the limit of the sovereign becomes a certain economic and statistical evidence and not the disciplinary conception of freedom of individuals. It should be noted straight away that the subject of right neither disappears completely nor is transmuted into the new subject of interest - it remains in the background and supplements it, just as the juridical and disciplinary technologies of power were never absorbed by the mechanisms of security but rather appropriated by them. These two different approaches towards the individual coexist in a state of permanent tension, never twinning, and yet, never the same: “[The subject of interest] overflows him [the subject of right], surrounds

him, and is the permanent condition of him functioning. So, interest constitutes something irreducible in relation to the juridical will” (Foucault, 2008: 274).

Next, I want to talk a little bit more about the principle of working within the reality of events and, in particular, the key characteristic that operationalized it. This characteristic was to be found in the statistical conceptualization of the so called *normal distributions*. That is, through statistics, as people began to uncover certain constant flows at all levels of sociality - i.e. there is a “normal morbidity” for each inhabited place, which is likely to remain constant, normal crime rate, or even a normal suicide rate. So, these distributions that are considered more normal than others become the basis for distinguishing between the normal and abnormal in the security technology of power: “the norm is an interplay of different normalities, and the operation of normalisation consists in establishing an interplay between these different distributions of normality” (ibid., 63).

All of the principles, techniques and characteristics outlined above constitute the backbone of the security technology of power. I will now proceed to explore two of these developments, that were operationalized by the successors to the physiocrats - the liberal and neo-liberal schools of economic and political thought.

The first major development I am going to talk about is the crystallisation of the *principle of utility* as an expression of the self-limitation of governmentality, a principle which was already hinted in the physiocratic doctrine. Basically, one of the most pressing questions that the state had to answer under the new technology of power was the question of how to find a basis for a law that delimits “at least one region where government non-intervention is absolutely necessary, not for legal but for factual reasons” (Foucault, 2008: 38) In other words, the problem at hand was to impose certain internal limitations of government by the means of law that does not follow the juridical imperative but rather follows a respect for the (market) *truth*. Thus, the problem consisted in providing adequate justifications for public law. Now, we already know the way in which this problem is approached in the disciplinary regime - the subjects of right have certain original and inalienable rights that they have the legitimate right to assert against the sovereign. This is what Foucault calls the “axiomatic, juridico-deductive approach” (ibid). On the other side we have the approach of the security regime, which does not originate with law but with governmental practice itself: “it distinguishes those things it would be either contradictory or absurd for government to tamper with.....government’s sphere of competence will be

defined on the basis of what it would or would not be useful to do” (Foucault, 2008: 40). So, here we have the problem of utility (usefulness); Foucault calls this “the radical approach” - radical insofar as it presents a perspective in which governmentality is continually questioned on the basis of its utility or non-utility to furthering the interests of the population and, by proxy, the interests of the state (ibid.43).

The liberalism that develops from the 19th century onward also has to deal with the concept of danger - among other things the government is to ensure that the individuals have the least exposure to all kinds of threats that are likely to hamper their ordinary lives and, consequently, the pursuit of their self-interest. This danger has many faces - crime, diseases, extra-systemic events and crises, et cetera. Basically, it is all kinds of natural processes (well, processes with a natural flow) Liberalism also becomes forced to continuously arbitrate between freedom and security, as sometimes the case is that preventing danger results in providing obstacles for self-interested functioning of individuals. What is more important however is that liberalism successfully develops a certain “culture of danger” a culture that “[stimulates] the fear of danger which is, as it were, the condition, the internal psychological and cultural correlative of liberalism” (Foucault, 2008:67). So a certain danger, which is both controlled and omnipresent becomes the constant companion of liberalist policies. Foucault proceeds to explore liberalism and neo-liberalism at greater length but none of his other lines of inquiry are beneficial to this thesis and as a result will not be discussed.

4. Conclusion

It is true that the differences between the two series are significant, and they have been explored in detail in this chapter, but perhaps more revealing to a genealogy of biopower is not how they twin but how they are alike. It is essential to note that biopolitics and the regulatory mechanisms of security that it makes use of are still important themes that run throughout both of the later lecture series. Only this time the analysis is guided by reference to the *government of men* and the *population*. At the very beginning of the *Security, Territory, Population* lectures Foucault states that his intention is to “begin studying something that I have called, somewhat vaguely, bio-power” (Foucault, 2009: 1) He further notes that the analysis of the mechanisms of bio-power was started “some years ago” and is to be continued in the lectures. Thus, *Security, Territory, Population* and the *Birth of Biopolitics* were meant as a logical continuation of Foucault’s efforts from the previous

years. This is confirmed at the beginning of *The Birth of Biopolitics*, at the point in which Foucault posits the stakes of analysis. He says: “only when we know what this governmental regime called liberalism was, will we be able to grasp what biopolitics is” (Foucault, 2008: 22). Liberalism needs to be analysed not only because it is “a problem of our times”, but also because it, according to Foucault, “is the new governmental reason from the eighteenth century [onwards]” (ibid.). Further, he concludes the lectures with the following proposition: “what should now be studied, therefore, is the way in which the specific problems of life and the population have been posed within a technology of government which...since the end of the eighteenth century has been constantly haunted by the problem of liberalism” (Foucault, 2008: 323).

That is, the lectures from 1977 present a functional analysis of bio-power through the prism of the new concept of “governmentality”. Thus, one could argue that the same set of problems, that of bio-power and of the shift from sovereign governance to biopolitics, is analysed with different tools and through different set of objects. There are, indeed, no contradictions between the historical and logical (con)sequences of developments of power-knowledge relations that Foucault illustrates. In the first triptych of books, he notes the transition from the juridico-philosophical discourse of sovereignty to the historico-political discourse of war, to the biopolitical discourse of state universality. In the post-1977 series of lectures he notes the existence of the sovereign juridical apparatus of power, which was later dominated by the disciplinary apparatus of control, which was subsequently dominated by the security apparatus of regulation. The two linearities are functionally the same, the only difference is the perspective and the alternative points of analytical entry.

The only point of contention with Foucault would be the pronounced absence of the concepts of war and racism in the later lectures, a silence that does not necessarily mean that Foucault was no longer interested in them or that he didn't find them relevant, but rather that his mind was preoccupied with different problems. At this point it should be reiterated that the lecture series of 1977 and 1978 are precisely that – series of lectures. Thus, it should be taken into consideration that in his lectures of 1977 and 1978 Foucault was only concerned about a limited set of problems, and any omission of objects that he had been previously interested in is not to be interpreted as his rejection of them.

Chapter 3. Terrorising Security: Biopolitics in the 21st Century

1. Introduction

The last chapter served to provide a detailed overview of the development of the concept of biopolitics in Foucault's thought, as well as an attempt to answer the question of the discontinuities between his earlier works and his lectures. It was concluded that these discontinuities do not represent a rift within his work but rather a change of interest in the objects of analysis. This view is congruent with the idea, offered at the end of the chapter, that biopolitics represents a problem space that contains a number of heterogeneous elements.

In this chapter I will turn my attention to the significance of Foucault's work for the analysis of contemporary problems. I will explore a number of theorists who have employed and developed Foucault's conceptualisation of biopolitics and will, in the process, update the notions presented over the last chapter, so that they can be applied to problems that occur within the current biopolitical power-knowledge configuration – most significantly, the problem of terrorism after 9/11. I will argue that, in order for this to happen, it is no longer possible to ignore the function that the conceptual objects of *race* and *war* perform within the political and social realms of Western biopolitical neo-liberalism. Consequently the chapter will explore the function of state racism as a key biopolitical principle and as the locus of intersection between the logic of biopolitics and the logic of war. In the course of this analysis the relationship between the sovereign prerogative of the exception and the biopolitical prerogative of life will be elucidated and it will be shown how biopolitics is capable of disentangling itself from the realm of the law and of creating and functioning within places of legal exceptionalism.

2. A Topology of Powers

I would like to begin the analysis in this chapter by returning to the point at which the previous chapter concluded – a reading of Foucault's books on biopower that posits the existence of a dynamic strategic interaction between the different mechanisms and apparatuses of power and the idea that these effectively constitute a fluid, heterogeneous

matrix of power. The work of Stephen Collier is exceptionally helpful in further developing this idea.

While I disagree with Collier's argument that Foucault's later lectures signify a momentous rift in his theory and ideologically rearrange and replace the paradigm presented in the first triptych of books, his comments on STP and BoB are helpful in operationalizing Foucault's key assumptions. At some point in his article Collier turns his attention to the sovereignty – discipline – security series that is established in STP and BoB and to Foucault's observation that the new technologies of power do not simply displace the old ones but rather coexist with them. Based on Foucault's statements to this end, Collier makes the inference that there exists "a series of complex edifices in which ... what above all changes is the dominant characteristic, or more exactly the system of correlation between juridico-legal mechanisms, disciplinary mechanisms, and mechanisms of security" (Collier, 2009: 88).

In conjunction with this analysis Foucault, of course, stipulates that there are two different histories that can be traced – a history of the three technologies of power and a history of their corresponding techniques (mechanisms) of governance. I have already illustrated how different technologies of power are prone to use the techniques of governance interchangeably and how the logic of each technology is, to some extent, always present (even if it has a latent function) in each configuration of power and knowledge.

Thus, we have a multitude of possible power-knowledge constructs that combine different elements of the three technologies of power, even if there is "one technology of power [that] may provide guiding norms and the orienting telos" (Collier, 2009: 89). This system of correlation Collier calls "a topology of power". I think that this is a very fruitful definition that is in line with the overall mechanics of Foucauldian theory so I want to expand on it a bit more. The mathematical definition of topology is as follows: "a family of open subsets of an abstract space such that the union and the intersection of any two of them are members of the family, and which includes the space itself and the empty set" (Online Oxford Dictionary, 2013b). According to Collier, a topological analysis allows us to treat every power-knowledge construct as an open and abstract problem space, where different elements of power intersect and interact with each other. Power, in that sense, represents a process or a series of recombinatorial processes which are in constant flux. Consequently, biopolitics "should not be understood as a logic of power but as a problem-

space” that is “to be analysed by tracing the recombinatorial processes through which techniques and technologies are reworked and redeployed” (Collier, 2009: 90; 94). What Foucault does in his analysis of biopolitics, in other words, is to draw “distinctions among the different registers of techniques, technologies of power and systems of correlation” and to provide “a vocabulary for describing how, ‘in different sectors, at a given moment, in a given society, in a given country’, they are linked in a topological space” (ibid. 90). This problem space, then, allows us to analyse the multitude of heterogeneous techniques of power that are brought into a relationship based on the particular problems that society faces at any point in time: “the elements under observation ... are understood as they take shape in diverse configurations that arise in relation to historically situated problems” (ibid. 93).

Power adapts and responds to problems; power is a process of readjustment that runs through society and that allows for the governing body to manufacture new conditions of possibility in response to specific, emergent, challenges and demands, conditions that allow for new ways of acting and, more importantly, reacting. Power is not situated in stable regimes of knowledge-power but is always situated “amid upheaval, in sites of problematization in which existing forms have lost their coherence and their purchase in addressing present problems, and in which new forms of understanding and action have to be invented” (Collier, 2009: 95). Such an analysis is especially fruitful with regards to biopolitics and the different guises and shapes which it takes and which were already discussed – physiocracy, ordoliberalism, liberalism and neo-liberalism – all of these can be interpreted to be different recombinatorial manifestations of power that occurred in the same problem space. Here Collier makes use of Foucault’s term of governmentality and imbues it with new meaning – according to him: “governmentality designates the genus of which the specific political rationalities, such as advanced liberalism are the species” (ibid. 99). Nevertheless, he makes the point that Foucault’s concept of governmentality cannot be used to explain relations of power on its own and is often misinterpreted by scholars who “commit the synecdochal error of confusing the ‘parts’ (techniques and so on) with some mysterious neoliberal ‘whole’” (ibid. 98). In order to avoid such a reading, Collier argues, one needs to add to it a topological analysis that is meant to bring to light “a heterogeneous space, constituted through multiple determinations, and not reducible to a given form of knowledge-power” (ibid. 99). This analysis is further going to illustrate how “different

techniques and forms of reasoning” that are associated with neo-liberalism are “being recombined with other forms”, thus enabling us “to diagnose the governmental ensembles that emerge from these recombinations” (ibid.).

Collier uses this framing of Foucault’s idea in order to bring forward the argument that, while *STP* and *BoB* identify a tripartite series of sovereignty-discipline-security, *SMD* is still grounded in the old dialectical division between sovereign power and normalising power. However, here I would like to make the argument that the division presented in *STP* has never really worked for Foucault and, in fact, the dialectic presented in *SMD* has proved to be much more enduring and suitable to the analysis of biopower. I would like to take Collier’s argument in a direction that he doesn’t quite take it but a direction that is, I think, immediately obvious, by saying that what we are dealing with, historically and politically, are two different topologies of power that have their own master categories and that constitute their own governmentalities, their own genus.

Based on the previous discussion I would like to argue that the disciplinary *dispositif* and the *dispositif* of security are two distinct technologies of power, that are situated within the same problem space/topology of power – the one that takes life and the propagation of life as its referent object. In the process, I would like to engage with the work of Didier Bigo, who also makes the claim that in *STP* Foucault fails to “organise a tryptich of strategic configurations disrupting the so-called essence of the state as sovereign” (Bigo, 2011: 105). Bigo argues that Foucault was not able to “produce the explanation of discourses (epistemes) and practices (strategies)” specific to the security configuration of power and as a result was forced to abandon it in favour of a study of governmentality, biopolitics and pastoral power (ibid.). However, Bigo’s argument is not that this *dispositif* of security does not exist but rather that Foucault failed to flesh it out in its entirety. Consequently, in the second part of his article he attempts to reinstate said *dispositif* in a way that would enable us to diagnose and make sense of contemporary power-knowledge relations.

Bigo’s argument against the tryptich of strategic configurations does not argue against the idea that Foucault discovered a way of conceptualisation that makes contemporary government “more than sovereignty, more than reigning, more than imperium” (Bigo, 2011: 114). That is, he doesn’t challenge the idea of “political governmentality as exceeding sovereignty” but, instead, claims that contemporary thinkers need to expand and develop it (ibid. 115). One of his main concerns is how in *STP* Foucault unsuccessfully tries to establish

a distinction between disciplinary surveillance and security surveillance, a distinction that would enable the *dispositif* of security to stand on its own. The knowledge mechanism of security that derives from statistical probability and from the notions of category and risk is not, Bigo says, to be contrasted to the panoptical surveillance of discipline because such contrast obscures the workings of power. “Surveillance is not the equivalent of discipline” and shouldn’t be confined to the workings of the *dispositif* of discipline (Bigo, 2011: 125). In fact, “Foucault has not understood that surveillance joins what he has disjoined by differentiating security on one side and discipline on the other side” (ibid.). I think that this is unnecessarily harsh attack on Foucault, as he most certainly understood the significance of surveillance for the *dispositif* of security – after all, at one point in BoB he does say that liberalism is panoptic in its function. However, Foucault certainly did not dwell upon this observation and the fact that Bigo uses it for his a reinterpretation of the discipline-security problematic is actually in line with the argument that the *dispositifs* of discipline and security operate within the same problem space. Surveillance, and what I would like to call *statistical surveillance* is, according to Bigo, at the heart of the security mechanism of governance and the *category* that is at the basis of its operation is also a defining element of the security technology of power.

Judith Butler, in her book *Precarious Life*, also grounds her analysis in what is essentially the same Foucauldian dichotomy of topologies of powers that was discussed. She doesn’t speak about a *dispositif* of biopolitics, or biopower, or neo-liberalism, but rather uses Foucault’s concept of governmentality to designate the genus of this new topology of power(s) - much like Collier does. She also decides to focus on Foucault’s idea that the state is “vitalised” rather than legitimised by this new form of power relations:

“Foucault suggests that the state used to be vitalised by sovereign power, where sovereignty is understood, traditionally, as providing legitimacy for the rule of law and offering a guarantor for the representational claims of state power. But as sovereignty in that traditional sense has lost its credibility and function, governmentality has emerged as a form of power not only distinct from sovereignty, but characteristically late modern” (Butler, 2004: 52).

Governmentality, for Butler, is for all intents and purposes, biopolitics: “a mode of power concerned with the maintenance and control of bodies and persons, the production and regulation of persons and populations, and the circulation of goods insofar as they maintain and restrict the life of the population” (ibid). Moreover, and here is where Butler reaches

the topological ground, governmentality is “marked by a diffuse set of strategies and tactics” and as such, “it gains its meaning and purpose from no single source, no unified sovereign subject” (ibid.)

Butler, however, reminds us that Foucault never said that the emergence of this new *dispositif*, this new governmentality, completely devitalises, obscures and/or replaces (in historical terms) sovereignty. While his work suggests that there is a constant overlap and exchange between the two topologies/*dispositifs* (with firm emphasis on the dominance of biopower), Butler chooses to interpret this in a slightly different manner: “Sovereignty... no longer operates to support or vitalize the state, but this does not foreclose the possibility that it might emerge as a reanimated anachronism within the political field unmoored from its traditional anchors” (Butler, 2004: 53) This postulate is very rich in meaning and deserves unpacking. What Butler means is that sovereignty has lost its power to *produce political meaning* and is, thus, powerless to bring into effect a grid of intelligibility that would guide social relations. It has, concomitantly, lost its say in determining what the end of governance should be. This, however, does not rule out the possibility of concrete manifestations of this power emerging as “reanimated anachronisms” within the dominant knowledge-power construct (i.e. “governmentality” according to Butler’s interpretation) (ibid). In strictly Foucauldian terms this simply means that certain *techniques* of governance that belonged to the sovereign technology of power can be reappropriated and used by the biopolitical technology of power to meet its own ends. In my interpretation of Collier’s topological terms this is equivalent to the idea that the biopolitical problem space can and does appropriate elements that used to belong to the sovereign topology of power and uses these elements in reconfiguring power relations, without this leading to changes in the overall topological genus (biopolitics/governmentality).

All of these homologous interpretations contradict and negate the teleological/epochal notion of “history as a continuum” (Butler, 2004: 53). This is in line with what Walter Benjamin sees as the task of the critic, which is to “blast a specific era out of the homogeneous course of history” and to “grasp...the constellation which his own era has formed with a definite earlier one” (quoted in Butler, 2004: 53). As we can see, Benjamin too is on topological grounds.

Diken and Laustsen also appear to agree with such a topological interpretation, although, according to them the topological field features a “complex interplay between

sovereignty (abandonment), discipline, control and terror”, four *dispositifs* that “co-exist” and whose “topologies often overlap/clash” as they “contain within themselves elements of one another, which is why it is difficult to ‘distinguish’ one form of power from another and why the space of power must be that of a zone of indistinction” (Diken and Laustsen, 2005: 11).

I want to wrap up this analysis with a return to this idea that biopower constitutes a problem space that features an orthogonal intersection of the disciplinary and the security *dispositifs* of power. There are many dimensions of this space and many different configurations. It is in constant flux. This topology presents an opportunity to approach the realm of biopower from a multitude of different perspectives and to problematize different parts of it – what Foucault does in *STP* and *BOB*.

3. Exceptionalism after 9/11: the problem of the limit as a problem of war

One of the more interesting aspects of Foucault’s later works, as it was already mentioned, is that they seem to forget war and by forgetting it, to effectively disqualify it from the problem-space of biopolitics. Biopolitics, as it was outlined in *BoB*, is not a form of war and, in fact, through the manufacturing of the entity of civil society it effectively removes war from the calculations of politics, or at least allows one to consider biopolitics without an explicit reference to war. Struggle was effectively confined to the margins and war had experienced a double-displacement as something that happens beyond the limits of society. For the majority of Foucauldian theorists security was related “to the population, it is a question of ‘internal’ security, not a question of ‘external security’, of war and survival” (Bigo, quoted in Bigo, 2011: 119). One of the underlying ideas of *BoB* was then the suggestion that it is possible “thanks to security, to see an end to struggle and war” (Bigo, 2011: 121).

However, after 9/11, the need to re-inscribe the problems of war and race in the analysis of the contemporary biopolitical configuration of power became palpable⁶. 9/11 was, among other things, an ideological challenge to the utopia of a politics of security that could ignore war. It represented, if you will, the re-entry of war into the problem space of biopower, its reactivation as a grid of intelligibility and principle of veridiction, parallel to

⁶ This is not to say that military violence was not prevalent in international relations over the 20th century. Here, however, I am more interested in the intensive mobilisation of the concept of war as a grid of intelligibility of social relations – not only foreign but domestic as well.

those of the market. I would like to argue that as the problem of war was reinscribed (or reactivated) into the realm of politics, so was the problem of the limit and that these are two of the key aspects that should be explored in relation to the contemporary configuration of the power-knowledge construct of biopolitics.

I will start the analysis of the exceptional and the limit by returning to Bigo, according to whom the problem of exception in contemporary societies is identical with the problem of the marginal. Each biopolitical question, Bigo claims, is a “question of space and the management of frontiers” (Bigo, 2011: 117). Security, Bigo argues, operates on the basis of a centrifugal dynamic which normalises the abnormal and aims “to provide a freedom of circulation within a life environment” (ibid. 122). Power operates at the margins and the *dispositif* of security is “the result of a process which relies on the statistical majority of a class of events, of a statistical population”; a process which normalises through the use of statistical distribution (ibid. 120). It is only by securing the margins that one can guarantee the freedom of circulation at the “centre of the life environment” (ibid.). Bigo is also interested in the ways in which security actually produces insecurity through the implementation of the categories of risk and danger as categories of normality, but this insecurity is yet again only found along the margins: “a centrifugal dynamic producing an unlimited (in)security” through the ab-normalisation of those on the margins (ibid. 124). The exceptional is at the border, at the margin, and the border is to be defined by disembodied techniques of normalisation (techniques that pertain to the population as a multiplicity and not to individuals) and by the knowledge produced by statistical surveillance. Such an analysis allows Bigo to reach to the controversial conclusion, that:

“When the state declares a state of exception or emergency, it is not the enactment of a security claim or practice, but its end. In that sense ... September 11 is not an hypersecurity era. On the contrary, it signifies the death of the security era, and of any idea of protection. It creates a different articulation between sovereignty, surveillance and discipline, and security cannot be read only as a liberal freedom of circulation” (ibid. 122)

Now, there are two parts to this claim and the current analysis only supports one of them. The idea that post 9/11 developments signify the death of the security era is, of course, unreasonable and exaggerated. If we have learned anything from the analysis of the different biopolitical configurations is that biopolitics adapts much faster than sovereignty; the political configuration itself is able to respond to different, novel problems in a life-like

manner, in order to meet their challenge. The second part of the statement, however – that post 9/11 developments have created a different articulation between sovereignty, surveillance and discipline – is what this project is all about. 9/11 has triggered nothing less than a complete reconfiguration and recombination of the elements within the biopolitical topology of power and exploring this reconfiguration is crucial for the understanding of the modus operandi of contemporary western societies.

Here we are in very different ground from Hobbes, Clausewitz, Schmitt and Agamben, who would rather postulate that the exception is a decision to be made by the sovereign. For Schmitt, for example, “exception is a limit concept that presupposes a ‘normal’ situation as its background” and “the state of exception aims at the preservation of this normality with extraordinary means” (quoted in Diken and Laustsen, 2005: 76; 160). Schmitt further insists that the sovereign is within his *right* to suspend the law, which suggests that his project is one that aims to “legitimize the state of exception, or, to normalize what is exceptional” (ibid. 165). This is very much in line with the principle of operation of coup d’etat that was discussed by Foucault in STP. The ability of the sovereign to make the decision on the exception, to declare what is exceptional and what is not, is the essence of his sovereignty. Thus, we are able to say that for Schmitt “exception is the political kernel of the law” (ibid. 161). Agamben agrees and reifies such a definition on the exceptional as the par excellence of sovereign power. He takes as a starting point Schmitt’s postulate that the sovereign decision “proves itself not to need law to create law” and comes to the conclusion that “what is at issue in the sovereign exception is not so much the control or neutralisation of an excess as the *creation and definition of the very space in which the juridico-political order can have validity*” (Schmitt, quoted in Agamben, 1998: 17; Agamben, 1998: 19, emphasis added). Exception is therefore seen the “structure of sovereignty” (28), or in other words “the act by which the state annuls its own law has to be understood as an operation of sovereign power” (Agamben, 1998: 19; Butler, 2004: 61).

What is key to both of these interpretations of exception is that “if the state of exception relates itself to the law and its suspension, declaring a state of exception is an implicit acknowledgement of the primacy of the law” (Diken and Laustsen, 2005: 134). That is, sovereignty has the ultimate say on designating the limits of the law but the price that it pays is that it cannot afford to non-relate to the law, it cannot disentangle itself from the legal plane, it is inseparable from the law.

Returning to the exceptionality of the post-9/11 developments, Judith Butler provides an excellent, if sporadically flawed, Foucaultian analysis that builds upon her interpretation of the concept of governmentality and the role that law and sovereignty play in relation to it. She takes the indefinite detention of prisoners in Guantanamo Bay as the staple expression of the politics of exceptionalism after 9/11 and tries to identify the power-knowledge relations that enable such an exceptional practice. She builds her argumentation around several important assumptions. First of all, her interpretation of the *dispositif* of biopolitics, or what she calls *governmentality*, framing Foucault's term in her own way, is that it "designates a field of political power in which tactics and aims have become diffuse, and in which political power fails to take on a unitary and casual form" (Butler, 2004: 56). Further, it is a field that encompasses and surpasses the state, overflows it if you will, as it operates through both state and non-state institutions and is marked by a "diffuse set of strategies and tactics" that cannot be exclusively confined to the entity of the state (ibid. 52). The term *tactics* is key to her interpretation and it is used to denote governmental actions that "operate diffusely, to dispose and order population, and to produce and reproduce subjects, their practices and beliefs, in relation to specific policy aims" (ibid.).

This leads to her second assumption, which postulates that in the biopolitical arrangement of governmentality law operates precisely as a tactic: "the state is not subject to the rule of law, but law can be suspended or deployed tactically and partially to suit the requirements of a state that seeks more and more to allocate sovereign power to its executive and administrative powers" (Butler, 2004: 55). That is, the biopolitical state does not derive its legitimacy from the law and is as a result free to use it as a tactic that has an instrumental value.

The final set of Butler's assumptions that I would like to consider is related to sovereignty. I already explored her analysis of the sovereign power as being all but superseded by the power of governmentality in defining the primary needs, goals and logic of operation of the state, what Butler calls the "vitalisation" of the state (Butler, 2004: 52). However, beyond that her conceptualisation of the sovereign power is entirely equivalent to the Agamben/Schmitt interpretation that "contemporary forms of sovereignty exist in a structurally inverse relation to the rule of law, emerging precisely at that moment when the rule of law is suspended and withdrawn" (Butler, 2004: 60). As such, Butler concludes, the sovereign power is irreducible to law, as it ultimately produces law and defines its margins:

“sovereignty names the power that withdraws and suspends the law” (ibid.). She tries to combine this view of sovereignty with Foucault’s understanding that sovereignty, as opposed to biopolitics, is primarily concerned with “preserving [its] goods and territory” and maintaining what Machiavelli calls its own “principality” (Foucault, quoted in Butler, 2004: 93). For Foucault this ultimately results in a “self-referring circularity of sovereignty” as “in every case, what characterises the end of sovereignty, this common and general good, is in sum nothing other than the submission to sovereignty...this means that the end of sovereignty is the exercise of sovereignty” (ibid.). Consequently, sovereignty provides a “legitimizing ground for law”, without being reduced to law, ie “law is grounded in something other than itself, in sovereignty, but sovereignty is grounded in nothing besides itself” (ibid. 94). This is precisely where Butler finds a convergence between Foucault and Agamben, in the power of sovereignty to abstract itself from the limits of the law when it needs to, to constitute a field of legal indistinction where the needs of the state can potentially legitimise a course of action that outstrips the confines of the law.

Butler proceeds to apply her understanding of the interplay between sovereignty and governmentality to the particular case of post-9/11 indefinite detentions. Her main argument is that “the current configuration of state power, in relation both to the management of populations and the exercise of sovereignty in the acts that suspend and limit the jurisdiction of law itself, are reconfigured in terms of the new war prison [ie Guantanamo Bay]” (Butler, 2004: 53). They are reconfigured in the sense that sovereignty makes an anachronistic re-emergence in the field of governmentality under the “emergency conditions in which the law is suspended” (Butler, 2004: 54). With Guantanamo Bay, Butler claims, the state dons a “mantle of sovereignty” under which it extends its power so as to “imprison indefinitely a group of people without trial (Butler, 2004: 57). It does that by constituting an extra-legal sphere, where a “lawless” and “prerogatory” sovereign power is allowed to operate (ibid. 59). The exceptionality of this sphere is established and maintained through the use of numerous speech acts and decisions made by various government officials. These officials, or agents of the state, have the power to extend the grasp of extra-legal sovereign power by making binding judgements on who is dangerous and who is not; ie by “deeming” someone to be dangerous they extend the reach of the sovereign power over him/her (ibid. 70). Thus, Butler claims, in the new configuration of power “petty sovereigns abound, reigning in the midst of bureaucratic army institutions mobilized by aims

and tactics of power they do not inaugurate or fully control” (ibid. 56). These petty sovereigns are invested with the power to make *unilateral* law-producing decisions that are, de facto, beyond the law and unaccountable to it. That is, these decisions are conditioned by the overarching logic of power but at the same time are “unconditional in the sense that they are final, not subject to review, and not subject to appeal” (ibid. 65) . Such an extra-legal exercise of power heralds the return of sovereignty to the executive and, as a result, “the separation of powers is eclipsed” (ibid. 62).

Butler admits that these anachronistic resurgences of sovereignty, as she calls them, take “contemporary form as they assume shape within the field of governmentality”, but she nevertheless insists that even in its contemporary form the rejuvenated sovereignty follows its own logic as it “asserts a lawless sovereign power over life and death” (Butler, 2004: 95). It is true, she says, that this logic is used to manage populations in the context of the “new war prison”, which is a move of governmentality, but it is also true that “sovereignty still drives and animates the state in some important aspects” (ibid. 97). In other words, governmentality becomes “the site for the reanimation of that lost ground, the reconstellation of sovereignty in a new form” (ibid.). That is, what we witness is a resurgence of sovereignty that is necessitated and brought into life by governmental tactics with the ultimate aim of managing populations outside of the law, but it is nevertheless a sovereignty that aims “to continue to exercise and augment its power to exercise itself” (ibid. 98). Thus, all the speech acts and the discursive acts by which agents of the state “deem” people to be dangerous, are merely expressions of a contemporary version of sovereignty, an expression of power that is self-grounding and self-augmenting:

“[Sovereignty] offers no ground, it has no ground, so it becomes radically, if not manically and tautologically, self-grounding in an effort to maintain and extend its own power... it can be mobilised as one of the tactics of governmentality both to manage populations, to preserve the national state, and to do both while suspending the question of legitimacy” (Butler, 2004: 96-7).

Butler’s interpretation is consistently revealing, insofar as it does an excellent job in providing a detailed analysis of complex interrelation between law, sovereignty and biopolitics. However, it is not without its pitfalls, upon which I will proceed to comment. To begin with, her exact stance on the role of the resurgent sovereignty in the field of governmentality is conflicting. On the one hand she acknowledges that it is exclusively used as a tactic or an instrument of power, which is employed entirely with the interests of

biopolitical governance in mind. However, at the same time, she is unable to extricate herself from the realm of Schmittian exceptionalism, where sovereignty is employed as the means to its own end – sovereignty begets sovereignty and the end of sovereignty is the sovereign. Such an interpretation contradicts the idea that the sovereign form of power is only tactically employed by the biopolitical government and instead suggests that the whole logic of the technology/*dispositif* of sovereignty is reinstated on par with the already overarching logic of governmentality. And yet, all her argumentation contradicts such a reading - in a way she deploys all the right arguments but ultimately fails to draw the right conclusion. I would like to argue, based on Butler's ideas, that after 9/11 the whole technology of sovereignty becomes a technique in the hands of the biopolitical governing power; ie what we are witnessing is sovereignty without sovereignty, as the sovereign acts are stripped bare of the underlying logic of sovereignty and are utilised with biopolitical aims in mind – aims such as the successful management and the *preservation* of the population. Thus, we do not have a resurgence of sovereign power as such, as the sovereign technique used to produce an extra-legal space of intervention is operationalized and legitimised through the biopolitical grid of intelligibility.

Consequently, we need to re-examine the idea that the sovereign power is not grounded in law that runs throughout Butler's analysis. I think that both in the Schmittian interpretation of the sovereign prerogative and the Foucaultian conception of the sovereign/juridical technology of power we can see that sovereignty is defined by law and related to it in more than one ways and I would like to claim that sovereignty, as opposed to biopolitics, cannot disentangle itself from the legal domain. Even in Schmittian terms, where the sovereign power cannot be reduced to the law, it comes into being "in an inverse relation to the suspension of the law" – i.e. it is still defined by the way it relates to the law (Butler, 2004: 61). Thus, sovereignty is above the law and able to decide on the boundaries of the law but exists only insofar as this couplet of sovereign/law is present. This is precisely the big difference between the *dispositif* of sovereignty and the *dispositif* of biopolitics – biopolitics can afford to completely distance itself from the legal sphere, it can *non-relate* to the law and the logic of the law and that is why it can employ both the law and the sovereign extra-legal prerogative as one of its many biopolitical tactics.

This is a good point in the narrative to suggest that perhaps we need to completely rethink our definition of what the *exceptional* is, as, currently, the exceptional in the realm

of politics is always defined vis-à-vis the state's relation to the law and the state's (ab)use of the law. It would make sense to argue that what is considered to be ontologically exceptional in the sovereign legal realm is not exceptional in the realm of biopolitics – i.e. the suspension of the law, when done with a biopolitical end in mind (the preservation of the population and the market) can just be interpreted as business as usual from a biopolitical perspective. This idea will be very important for the analysis of the two key objects of empirical interest – Guantanamo Bay and the PATRIOT Act.

Next, it is also crucial to disqualify Butler's statement that sovereignty, as employed by the biopolitical technology of power, "asserts a lawless sovereign power over life and death" (quoted above, Butler, 2004: 95). I would like to propose that, instead, the "lawless sovereign power" that is utilised by the state is vitalised by the biopolitical logic of letting live and disallowing life not worth living (as Foucault proposes as early as *The History of Sexuality*). This is very much confirmed by the plethora of administrative statements that Butler uses to illustrate her arguments. All of these statements point to the conclusion that the people detained indefinitely by the US are individuals who are "exceptional" and who "must be constrained in order not to kill" as it is their detention that effectively stops the killing" (Butler, 2004: 78).

Butler's analysis provides a lot of useful tools for the analysis of the post-9/11 situation in the US. Her focus on the use of law as tactic is very useful, as well as her elaboration of the power of governmentality as a *managerial* power the legitimacy of which is based on effectiveness rather than legality, and that uses *rules* instead of *laws* as the basis of its modus operandi. Also, regarding her analysis of exceptionality as related to indefinite detention, it is important to note one of the more important conclusions that she makes:

"'Indefinite detention' does not signify an exceptional circumstance, but, rather, the means by which the exceptional becomes established as a naturalised norm. It becomes the occasion and the means by which the extra-legal exercise of state power justifies itself indefinitely, installing itself as a potentially permanent feature of political life in the US" (Butler, 2004: 67).

This is in line with Diken's and Laustsen's idea that after 9/11 politics of exception *gradually* becomes the norm and becomes indistinguishable from business as usual: "It is said that frogs are unable to sense small changes in temperature. If they are put in an open pot and placed on a heater, they will normally jump out. But if the temperature is increased only slowly they will be boiled alive" (Diken and Laustsen, 2005: 143). Similarly, extra-legal

biopolitical moves can incrementally lead to drastic social changes that would eventually make “denial of fundamental rights and freedoms” acceptable simply by means of our indifference to them (ibid.). What I would like to suggest is that the biopolitical technology of power has indeed introduced an exceptional extra-legal domain that is integrated within the social framework and permeates it throughout, but that nevertheless this domain does not interfere with the function of the state and it only adds to support and protect its biopolitical imperatives. Thus, there is an exceptionality that becomes integrated in the daily, business-as-usual, functionality of the state but that does not necessarily imply that exceptionality has become the primary way in which power operates.

Next, I would like to talk about the biopolitical prerogative or, if you will, the ontology of the biopolitical technology of power. In order to do that I would like to come back to the problem of war, especially insofar as it is related to the problem of the limit, since a good grasp on it is essential for understanding the post-9/11 biopolitical governmental developments. Andrew Neal’s article “Goodbye war on terror?” raises important points related to that problem that I would like to elaborate upon.

Throughout the article his main goal is to “supplement Butler’s work on the role of governmentality and performativity in constituting discourses, practices and subjectivities of exceptionalism” as related to 9/11 (Neal, 2011: 35-6). This goal is to be achieved by unpacking the implications of the Foucaultian ideas presented in *Society Must Be Defended*, and most prominently the idea that politics is a continuation of war by other means. Neal makes the point that SMD’s “study of a ‘politics as war’ discourse opens up new analytical terrain” which is “of great value for the critique of the ‘war on terror’ and the problem of exceptionalism” (ibid. 35).

Neal argues that Butler’s ideas are on the right course but what she has done is not enough as her work leaves unexplored “important dimensions in the relationship between law, exceptionalism and subjectivity” (ibid. 45). Neal suggests that Butler hasn’t taken into consideration some of the basic premises of *Society Must Be Defended* and as a result has ignored the *constitutive historicity* that is an integral part of the discourses of law and war. Neal proceeds to trace Foucault’s elaboration of the historico-political discourse until he reaches the point where this discourse was overshadowed by a “claim to national universality through the vehicle of the state” and Foucault’s argument that “this synthesis of particularity into universality represents the end of the discourse of ‘politics as war’”, or, in

Foucault's words it marks "the elimination of war's function as an analyser of historico-political processes, or at least its strict curtailment" (Neal, 2011: 51; Foucault, 2003: 236).

Neal also makes a very interesting observation when he says that the discourse of war can be mobilised not only for the protection of the sovereign or a monarch but "in defense of an idealised, unified social whole": "[the discourse of war] can be turned against threats born within the social body, against enemies of race, class or religion" (Neal, 2011: 51). Further, Neal says, statist discourses of war can be utilised by both the left and the right and are discourses that bear historicity but nevertheless ultimately come to "permeate discourses of universality" (ibid., 52). Neal's ultimate message is that both law and war are discourses that bear certain historicity and that these discourses are "highly transposable and open to profound tactical innovation themselves" (ibid., 53).

Next, he brings to the forefront of his analysis the discourse on the "war of terror" which "is now a part of a discursive formation, not a singular discourse, but a 'grid of intelligibility' upon which multiple positions are possible" (ibid., 61). He claims that it is this formation that has helped governments to justify practices of exceptionalism and that it is a formation that mirrors the logic exceptionalism, which "exceeds its signifiers and their enunciation" (ibid. 62). Moreover, Neal points out that "the danger of the 'war on terror' discourse is that it both undermines the inclusive moral, legal and political high ground of purportedly liberal states, and works to constitute collective subjectivities that identify with that 'war'" (ibid. 58).

I would like to build upon Neal's argumentation and to argue that after 9/11 the problem of war becomes re-inscribed into the fabric of society and that sees the development of new historical discourse of war that is devoid of any historicity and that is situated strictly within the biopolitical grid of intelligibility and the biopolitical technology of power that awards primacy to the universality of the species. This is not a return of the juridico-philosophical universality of sovereignty, nor to the genealogy of the historico-political era of the 18th c. This, of course, does not mean that the historico-political grid of intelligibility and the historicity of the law are abandoned – the biopolitical field is still historical and it operates on the background of certain historicity and certain juridical framework, since it ultimately governs through law. However, these grids are not the dominant ones.

We are, instead, dealing with a relatively new genealogy of knowledges that is also biopolitical. According to it there is one ultimate truth/goal that drives societies – the

protection of the species - but many different means to achieving it, ie many different claims to truth/power based on it. The question underlying this genealogy is: how does the state decide what is necessary and what is best for the preservation of the species? What emerges, as a result, is a war that strictly follows the biopolitical imperative – it is also not “war” in the sense of the metaphorical signifier of war but a violent form of war that aims to disallow life that posits danger to the species life. I am talking then about war led according to the logic of state racism.

I further argue that the grid of intelligibility on which one should plot all discursive formations that have emerged after 9/11 is a version of the biopolitical grid of intelligibility which is vitalised by the logic of racism. It is still a grid that is focused on the present and on the preservation of the nation/population/state/species series but it is a grid that postulates that this preservation is impossible without violent strife. The sovereign decision on the enemy is transposed into a biopolitical assay of life and a decision on the life that posits threat to the species - this is the life not worth living that should be made sparse and if exceptional legislature is needed in order to do that, so be it. This is in line with what Neal and Butler have identified as the “performative constitution of ‘a rival form of political legitimacy’ to the rule of law, ‘one with no structures of accountability built in.’ (Butler 2004: 66)” (Neal, 2009: 44). However, the exceptionalism that we witness is not based on Neal’s constitutive historicity, nor on Butler’s anachronistically resurgent sovereignty; instead, it is exceptionalism that is pursued in line with the biopolitical imperative. Consequently, the ontology of biopolitics after 9/11 is inseparable from the ideas of war, exception and race. I would now like to consider in more detail this idea of social war led according to the principles of state racism and to, very importantly, functionally distinguish it from the Foucaultian concept of *race war*.

4. Biopolitics after 9/11: governing life through war, exception and race

Foucault’s lecture of March 17, 1976, as published in *SMD*, is considered to be the linchpin of Foucault’s conceptualisation of biopolitics. What is interesting about it, and relevant vis-a-vis the current analysis, is that it was not meant as a lecture about biopolitics per se, but, instead, its focal point was the transition from race war to state racism. Biopolitics in that lecture served more as a correlative to racism than as an entity of its own.

In fact, *SMD* is a book that is as much about war as it is about race, as the idea of race war is explored side-by-side with the idea of politics being a continuation of war. The historico-

political discourse of war which forms the political grid of intelligibility of war is also presented as a counterhistorical discourse of *race struggle* that was “essentially an instrument used in the struggles waged by decentred camps” (Foucault, 2004: 61).

The discourse of race-war was positioned strictly along the grid of intelligibility that posited the existence of a permanent war within the social body. It was still technically a historical discourse, of course, but it served as a complete “anti-thesis” to the history of sovereignty and as a result Foucault calls it counterhistorical (Foucault, 2004: 69). That is, it served to strip history of its power-reproducing function and it challenges it on both levels of its operation. On the one hand, it breaks up the unity of sovereign power by portraying showing that “this power, the mighty, the kings, and the laws have concealed the fact that they were born of the contingency and injustice of battles” (ibid. 72); thus, sovereignty does not unite, it enslaves. On the other hand, it disrupted the memorialisation function of history by positing it as a history that “has been carefully, deliberately, and wickedly misrepresented” (ibid.). “The role of history will, then, be to show that laws deceive, that kings wear masks, that power creates illusions, and that historians tell lies” (ibid).

Consequently this new historical counter-historical discourse opened up to interrogation a certain historico-political divide and revealed history to be a field not of unity but of confrontations, and more particularly, a constant confrontation between races. This was a discourse that fit well with the prevailing grid of intelligibility of the 18th century, as it was “essentially an instrument used in the struggles waged by decentered camps” (Foucault, 2004: 61). Finally, it understood race to be not a biologically defined divide between people but rather a grouping of different people around a particular understanding of truth and a particular claim to power. This is a definition that is neither congruent with the classical schematic racism which is interested in physical and biological properties⁷ - which is a sort of evolutionism - nor with the definition of the term that refers to culturally different ethnicities. It most certainly relates to these two, and at times overlaps with them, but it primarily refers to political and ideological assemblages – or decentered camps - of people.

This short detour was necessary in order to show that the war that emerged as “grid of understanding historical processes” in the beginning of the 18th century was a race war (Foucault, 2004: 239). I already discussed how this grid of intelligibility was eventually

⁷ “the fact or condition of belonging to a racial division or group” (Oxford English Dictionary)

“eliminated from historical analysis by the principle of national universality” (ibid). What didn’t disappear, however, is the theme of race and race war, although it was qualitatively transformed:

“It will become the discourse of a centered, centralised, and centralising power. It will become the discourse of a battle that has to be waged not between races, but by a race that is portrayed as the one true race, the race that holds power and is entitled to define the norm...”. (Foucault, 2004: 61)

That is how the biopolitical discourse of state racism is born. It is a discourse that is the underside of the biopolitical technology of power as it completes the picture of how the state takes control of the biological – ie by not only making life live but also by, what Foucault calls, “letting die”(Foucault, 2004: 247). Racism is in fact a violent process that entails “introducing a break into the domain of life that is under power’s control: the break between what must live and what must die...it is a way of separating out the groups that exist within the population” (ibid. 254; 255). It is the answer to the question of how the function of death can be made sense of in the logic of biopower. Further, Foucault argues, the very emergence of biopower inscribes the logic of racism in the mechanism of the state and the latter can “scarcely function without being involved in racism at some point” (ibid. 254).

Racism’s second function is to introduce a relation of the type “if you want to live, you must take lives, you must be able to kill” (Foucault, 2004: 255). This, Foucault notes, is nothing else than the relationship of war, i.e. “in order to live you must destroy your enemies” (ibid.). What changes, however, in state racism, is the way in which the enemies are defined – “the enemies who have to be done away with are not adversaries in the political sense of the term; they are threats, either external or internal, of the population and for the population” (ibid. 256). Thus, the new enemy of the state is everything that can potentially challenge the species existence, any life that is biologically threatening to it; and it is racism alone that can justify the necessity to kill that life. It is here that we come, yet again, to Foucault’s famous postulate on killing: “When I say “killing,” I obviously do not mean simply murder as such, but also every form of indirect murder: the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on.” (ibid.). Killing thus can be also equated to *every form of indirect* murder and is meant to represent the fact that racism’s main goal, within the framework of biopolitics, is to assay life, insert a break in the population continuum and, if

necessary, disqualify life that is threatening. This is a completely novel way of thinking, a tool that mobilises and underlies a whole set of domains of power – criminality, war, and colonialism to name but a few. If that threat is prevented by imprisoning, containing in any way, or exiling the entity that’s threatening, this is also constituted as “killing” in state racism terms as it serves its purpose. Thus I come back to the original suggestion, as presented in *HS* that biopolitics is not just about making life live but also about *disallowing* life. Racism thus operates as both the ontological tool that can prescribe which life is worth living and the mechanism through which this life is *disallowed*. Consequently, it is essential and inseparable from the locus of the biopolitical technology of power

Before continuing, I would like to turn my attention to the function of war in relation to the biopolitical state, as described by Foucault, which is something of a paradox, even within the confines of *SMD*. On the one hand he says that the grid of intelligibility that posits the universality of the state and the species “eliminates” war from “historical analysis” and spells an end to the intra-social perpetual war that characterised 18th c. politics (Foucault, 2004: 237). And yet, on the other hand, he says that state racism, which works on the basis of the logic of war, is one of the key movers of the biopolitical state. It is a peculiar mismatch and the best way to get out of it is to argue that war has never really left the field of politics, although the ontological basis for waging it has qualitatively changed from the 18th to the 19th century (18th c. us – the nation – against our political enemies who have different claims to truth and power; 19th c. us – species life – against anything that is threatening to the promotion of life). It also explains the fact that Foucault does not bring war and racism to the forefront in his analysis of Biopolitics from 1977 to 1978 – they are implicitly there but they are not needed for his analysis of the state, the market, *homo economicus*, or the enterprise. So what we are witnessing after 9/11, is not necessarily irruption of war in the realm of biopolitics, but the coming to the forefront of a principle of war (state racism) that has always been present in the background.

What will be especially beneficial to this discussion is Michael Dillon’s development of Foucault’s work on biopolitics, and in particular his article “Security, Race, and War” which sheds more light on the function of both racism and war in the calculations of biopolitics. Dillon starts his exploration of the connection between biopolitics, race and war with an overview of the basics that we have already discussed, although his account helps crystallise and expand Foucault’s basic notions - after all, Foucault only devotes a dozen pages to state

racism and a lot of his observations are so tightly packed that one can only benefit from a profound reconstruction.

The point of origin of Dillon's analysis is the idea that "biopolitical governance has sorted life into racially inscribed categories because that is what the *operational logic of biopolitics* obliged it to do" (Dillon, 2011: 201). He further elaborates that "making life live is evidently a lethal business... it makes war on life which does not fit the template of biopoliticised life and its ways of making life live...especially against life which endangers life's biopoliticization" (ibid.). Thus, we have outlined the two objects of biopolitics – to make live and to make die – but with the very explicit addition of the word "war" and the fact that biopolitics "*makes war*" on life that escapes its "calculations" (ibid. 215). Foucault implies that but he never states it outright and it is important to fully recognise the function that war has in the logic of biopolitics.

Here, Dillon makes two very important observations. First of all, he notes that: "what differentiates biopolitics from sovereign politics is a change in the correlation of life and death, not some escape from the inevitability of that configuration" (Dillon, 2011: 202) This mirrors Foucault's own statement that "life and death were *newly linked* in biopolitics" (Foucault, 2004: 244) but Dillon takes it further by stating that biopolitics does not "simply refigure death in the process of refiguring life" but, in addition, "begins to establish a new economy of life and death" (ibid. 204). This new economy entails a novel instrumentalisation of killing and death and "systematically instils what Mbembe has called a necropolitics of dead life" (ibid. 205). The latter phrase is merely an unnecessary convoluted term to describe biopolitics' obverse function – making die – so it will not be used further in this thesis.

It is at this point that racism intervenes and it functions on both the ontologising and technologizing levels: it "sub-divides the species, according to which forms of life are more fit, more eligible or more disposed to life and which are not; and which are indeed inimical to life and in need of extermination" – thus creating an ontology – and it puts into place mechanisms/techniques of governance that help eliminate or disallow that life that is inimical to life (Dillon, 2011: 217). In other words, race functions as a "sorting device", "adjudicator", "pivotal mechanism", or a "palimpsest of discursive practices" that help create and maintain the biopolitical reality (Dillon, 2011: 218; 242; 219; 227). It is important to note that this assay functions alongside the market sorting mechanisms which are based

on the subject of interest and the juridical logic of the subject of right. It is a sorting of life which inserts a break within the logic of the population and it is carried through the apparatus of security, but is only one of the many organising principles of security.

It becomes imperative at this point, since all of this analysis really belongs to life and death and since I have already established the function of death, to answer the most basic of questions – what is life? And, more precisely, what is biopolitical life? Dillon is useful in this department. First, and most importantly, he contends that life is a “biopoliticised reduction of life” (Dillon, 2011: 203). That is, biopolitically relevant “life” is not just any life, not even any human life, but a specific selection of life that is to become the object of the biopolitical calculative regulation, ie governmentality; thus, biopolitical life is different from biological life – it both includes it and surpasses it by making it one of its objects.

Life, of course, is also the life that is threatening to the biopolitical species life, and that must be accounted for or disallowed. Determining what this life is, is also a subject to biopolitical reduction - a reduction that takes place through racism. Next, Dillon states that “the biopoliticized reduction of life is not an accomplishment... it is a contested and contestable form of rule”(Dillon, 2011: 203). Thus, the biopolitical account of life that is worth living and life that is not is subject to continuous contestation and herein lies the “political” element in biopolitics. I would like to go further than that and complement Dillon’s idea by suggesting that herein also lies the *biopolitical prerogative* – in deciding what is worth living and what is not worth living. That is, in the same way in which the sovereign prerogative decides what is law and what is beyond the limits of the law (the exception), biopolitics decides what is to be made live and what is to be made die. We can go even further than this by suggesting that this calls for a reconceptualization of the whole idea of “exceptionalism” since, this is a term that is heavily invested with the ontology created by law and sovereignty. What I mean to say is that what is exceptional in sovereign juridical terms is not always exceptional in biopolitical terms; in fact, what is ontologically exceptional in sovereign terms can sometimes be construed as the desirable/utile course of action for biopolitics.

The third important point that Dillon makes in regard of the biopolitical life is that, just like racism, the “biopoliticised understanding of life as species existence” also has a history (Dillon, 2011: 206). That history “tracks changing racial as well as biological accounts of what it is to be a living thing” (ibid.) Biopolitics adapts, evolves and produces different

understandings of what life is. Biopolitical governance, as a result, is what Dillon calls “a calculative challenge, which takes place within a complex matrix of species existence” (ibid. 223). The knowledge that informs the basis for this calculation is to be gathered through “statistical analysis, probability analysis, market behaviour, distribution and risk management” and other devices that I would like to cumulatively group under the category of “statistical surveillance” (ibid.).

I have already established that racism is organically, inseparably linked to the biopolitical ontology, as well as to its corresponding techniques of intervention, so we must further elaborate on its role in establishing the difference between the life that is worth living and the life that is not. The first point we need to consider is the most obvious one – the fact that biopoliticised state racism “does not so much take place via political rationalities which proclaim the ‘realism’ of racial supremacy” – this is, indeed, along the lines of the 18th c. logic of race wars. Instead, it “more regularly occurs...through the socio-technical systems which comprise the governing technologies of biopolitics...it is these which more regularly exercise that everyday discrimination against lives required, biopolitically to make life live” (Dillon, 2011: 235). There are many things to unpack about this statement but I would like to bring to the forefront this idea of biopolitical technologies exercising everyday discrimination – what is crucial about it is that it posits biopolitical racism as a *process* that adjudicates between life worth living and threatening life; as a process, it is subject to adaptation and change, in order to reflect the evolution/adaptation/change of species life itself; the politics of race constantly changes to meet the demands of species life and the calculations and categories instituted by racism change as well (ibid. 230). Racism, thus, as tactics, a mechanism that is contained within the biopolitical apparatus of power but one that is also foundational to it.

As you can see, such a flexible interpretation of racism is exceptionally useful vis-à-vis the biopolitical developments after 9/11, and this will become clear in the analysis of the developments that I have termed *biolegal*, such as the PATRIOT act. It would be also fruitful now to return to Butler’s, as well as Neal’s, analysis of post 9/11 exception and see how state racism reflects upon it. Near the end of her analysis of indefinite detention she makes the very shrewd observation that “‘managing’ a population is thus not only a process through which regulatory power produces a set of subjects. It is also the process of their de-subjectification, one with enormous political and legal consequences...the subject who is no

subject is neither alive nor dead, neither fully constituted as subject nor fully deconstituted in death” (Butler, 2004: 98). What we witness with the indefinite detentions after 9/11 is indeed de-subjectification of certain individuals that is operationalized through the techniques of state racism and that is meant to strip the subjects of their political sovereign rights, so as to expose them to the full extent of biopolitical regulation. That is, indefinite detention, is merely a biopolitical technique of governance of state racism that means to take full hold of life that has been ontologised as dangerous and make it die. Butler is wrong, in formal Foucaultian terms, when she says that the subject is neither alive nor dead, because subjects who have been indefinitely detained are biopolitically dead – i.e. they can no longer pose threat to the species being, they have been disallowed.

5. Conclusion

This chapter served to update Foucault’s terminology so as to make it congruent with the contemporary social and political developments, especially insofar as they are related to the post-9/11 reconfiguration of power relations. It started with the proposition that the biopolitical governmentality can be seen as an open, fluid domain within which heterogeneous grids of intelligibility, principles of veridiction, techniques and apparatuses of governance are involved in a process of continuous interaction and reconfiguration. Thus, contemporary biopolitics represents a topology or a problem space which is adaptive and amenable to a multitude of different power-knowledge figurations.

Next, the point was made that the early Foucaultian notions of war and state racism are very valuable in discerning the dynamics of the contemporary, post-9/11, configuration of the biopolitical problem space and that they have to be re-inscribed within and reunited with Foucault’s later notions of biopolitics and neo-liberalism. Once that course of analysis was established, the problem of exceptionalism was explored within the context of such a topology of biopower. Butler’s ideas that biopolitical governmentality employs a tactical or strategic use of the sovereign exceptionalism were analysed in detail and used to build the argument that the sovereign and biopolitical prerogative are qualitatively different and that the two configurations of power have a different understanding of what constitutes the exceptional. Further, the biopolitical *dispositif* has the capacity to disentangle itself from the legal realm and constitute extra-legal spaces – this is an act that is essentially different from the sovereign legal exceptionalism, as the latter cannot non-relate to the law - that is, it cannot function a-legally.

Subsequently, it was argued that war functions within the biopolitical topology of power through the principle of state racism, which serves to insert a break within the domain of life and distinguish between life that has to be propagated and protected and life that has to be disallowed. As a result state racism is key to understanding any biopolitical configuration, as it creates what Dillon calls “the biopolitical imaginary of life” and works towards sorting life in accordance with it. This idea was used to finalise the definition of the biopolitical prerogative as the decision on what life is worth living and what life is not – thus, just like sovereignty cannot disentangle itself from the realm of the law so biopolitics cannot escape from the realm of life.

Finally, the whole chapter was permeated by the idea that the biopolitical configuration of power has been visibly altered as a result of events of 9/11 and the reaction to them. My thesis will proceed by exploring two different problems, or, if you will, objects of interrogation that are related to this reconfiguration of power. The first of these is the enactment by the US Congress of the so-called PATRIOT Act, which I argue to be a *bio-legal* document that serves to introduce biopolitical principles of operation within the legal domain. The second problematic has to do with the extra-legal biopolitical space that was construed with the inception of the Guantanamo Bay detention camp, the subsequent attempt of the US executive branch of power to establish a permanent field of legal exceptionalism in the space of the camp and the ensuing legal clash between the president and the congress on the one side, and the Supreme court, on the other.

Chapter 4. Discipline, Security and Law After 9/11: The Doctrine of Pre-emption and the Legacy of the PATRIOT Act.

1. Introduction

The key adjustment in the logic of governance after 9/11 was expressed in the *doctrine of pre-emption*, as instituted by the Bush administration in the months after 9/11, and was operationalized and legitimised through the “war on terrorism” that was officially declared on the 20th of September, 2001. The main premise of the doctrine of pre-emption, which will be analysed in detail in the next section, is that the (terrorist) enemy should not be allowed to strike first and has to be stalled with pre-emptive action – action that occurs before the threat has materialised, while it is still in formation.

Pre-emption, in essence, is doubly preventive as it is meant to “prevent our enemies from threatening us” (US Congress, 2002); since the action of threatening someone merely encapsulates the potentiality of an attack, by preventing the threat itself, pre-emption makes sure that said threat does not emerge at all. In other words, the government is expected not only to act within the reality of events but to also act within a range of potential future realities, nor all of which are knowable, so as to prevent their emergence. The key underlying principles of this doctrine are permanent vigilance, anticipatory action in the stead of reaction, and pre-emptive prevention of potentialities; all of these aim at taking control of threat before it has materialised. It should be noted that this is done with a biopolitical end in mind – namely, the preservation of the population (that part of it which falls under the category of valued life) and the functional integrity of the market environment.

Nevertheless, pre-emption is quite different from the function of the everyday regulation of the market-oriented, neo-liberal biopolitics. Biopolitical regulation works within the reality of events and responds to that reality by the institution of mechanisms that are reactive in their nature – i.e. they respond positively to negative developments, but only after these negative developments have emerged. Similarly, as it was already discussed, law in its essence works by imagining a negative reality and working towards its prevention, by

literally *creating* crimes and prescribing what is to happen to people who perpetrate them. Most importantly, its regular operation is based on the presumption of innocence, which puts the *burden of proof* on the prosecution, leading to the assumption that one is *innocent until proven guilty*. Neo-liberal biopolitics is regulatory, law is preventive and both of them are virtually inoperable when it comes to the logic of pre-emption. That is why, after this logic was instituted by the administration, new developments were required in order to make the system better able to respond to the goals necessitated by the post-9/11 threat of international terrorism, with specific reference to the governmental framing of the threat.

Pre-emption, as it was postulated by the US administration, is a novel grid of intelligibility/logic of governance that functions alongside and in accord with the neo-liberal biopolitical grid of intelligibility - i.e. it still follows its goals and understandings of what valuable life is - although it is in direct conflict with the geopolitical grid. This resulted in a change of the intersection between the geopolitical, juridico-sovereign grid and the biopolitical one after 9/11. The US foreign pre-emptive policies that led to the invasion of Afghanistan and Iraq and represent part of that change, are beyond the scope of this project, which will instead focus on the domestic counter-terrorist developments. The most important of these developments, in legal terms, was the institution of the PATRIOT Act, which, I argue, is a distinctly novel bio-legal development that works to re-form the classic principle of operation of the law so that it becomes imbued with and responsive to the bio-political discourses of exception and contingency, as well as the new bio-political discourse of pre-emption. It is a piece of legislation that effectively changes the form of the law, while retaining its function (i.e. the rules of the game) so that anticipatory action is effectively legitimised and, to an extent, rationalised and expressed through the logic of the law. Hence, the document is bio-legal, since it effectively inserts the bio-political imperative within the legal framework and since it uses law tactically, ignoring and even contradicting its foundational status. The chapter will consider in detail the way in which the Act operates as well as its ramifications both for the functioning of the neo-liberal biopolitical regime and for the legal order.

2. Defining the Threat

Both in the biopolitical and the geopolitical grids of intelligibility, the act of defining the security threats that a country faces is also an act of power. The specific way in which threat is conceptualised and translated into discursive formations not only determines the type and

intensity of the appropriate responses, but can also be used to set governmental priorities and legitimise actions that would otherwise be seen as illegal, uncharacteristic, and/or inappropriate. The pattern is as follows – recognition, definition, response – first, the threat has to be recognised, next it has to be defined, for without definition it remains inoperable and, finally, it has to be responded to in what the definition recognises to be an appropriate manner. In Foucaultian terms, the act of defining the threat makes present a certain reality that was not there before and creates certain truths that effect new power relationships and affect the existing ones.

The new threat was framed and change was effected through a wide variety of acts of speech, presidential proclamations, congress resolutions and the introduction of new legislation, most notably the PATRIOT Act. It took the administration nearly a year to crystallise its definition and understanding of the threat and its preferred responses. It was all finalised with the release of the National Security Strategy of 2002, which featured a precise overview of all the elements of the US post-9/11 strategy. However, as it will become clear, even though it took a while for these elements to be introduced and stabilised in the public and political domain they were already fully formed over the month following the attack.

2.1 Framing the conflict

With the very first sentence of the speech on the evening of the attacks President Bush framed the attacks biopolitically: “Today, our fellow citizens, our *way of life*, our very *freedom* came under attack in a series of deliberate and deadly terrorist acts....America was targeted for attack because we are the brightest beacon for freedom” (Bush, 2001). America’s way of life, which is based on the value freedom came under attack by terrorists who were evil – “evil” is mentioned three times in what is a relatively short speech – and who hate that freedom. The mention of the fact that they want to change the “way of life” of the US people is crucial because this is a distinctly biopolitical sentiment – the terrorists did not attack for resources, for territory, even for whatever political reason but because they hate not only the freedoms of the American people, but their very existence. Hence, no negotiation is possible as the enemy is not only the manifestation of absolute evil, but they also stand for a way of life that is incompatible with the American way of life, and threatening to it to the point of extinction; co-existence is unthinkable.

It is very important to note that this is not necessarily the way in which the attacks were meant to be understood, but it is the way in which they were perceived and framed by the Bush administration – a conceptualisation which has been steadily maintained ever since. It was also a framing that was immediately understandable by the American public – the discursive dialectic of good versus inexplicable evil enmity was already successfully used during the Second World War and the Cold War, and was also ingrained in the imagination of the public through numerous popular culture artefacts – e.g. the Star Wars movie saga, the Lord of the Rings book series, or the Independence Day film. In a sense, it is easy to see why Osama bin Laden’s statements that openly contradict this postulation – “The road to safety begins by ending aggression. Reciprocal treatment is a part of justice” (quoted in O’Neill, 2008: 47) – or political sentiments arguing the case that the US is being punished for its aggressive politics in the Middle East, were practically rendered inoperable by the good versus evil narrative.

2.2 Producing the enemy, setting the stakes

Bush’s second speech further continues along the line of extraordinarity by invoking God and seeking his justification and guidance: “This world He created is of moral design. Grief and tragedy and hatred are only for a time. Goodness, remembrance, and love have no end” (Bush, 2001a). Ridding the world of evil, and protecting freedom is, by association, the morally good thing to do and in line with the Christian guidance. To quote Massumi:

“[The terrorists] are just plain ‘evil’, capable of the worst ‘crimes against humanity.’ They are simply ‘inhuman.’ The only way to identify the enemy collectively is as an ‘axis of evil.’ [That characterisation concentrates] ‘humanity’ entirely on one side in order to legitimate acts on ‘our’ side that would be considered crimes against humanity were the enemy given the benefit of being considered human...the ostensibly moral judgement of ‘evil’ functions very pragmatically as a device for giving oneself unlimited tactical options *freed* from moral constraint.” (Massumi 14, 2007)

Two things follow: a) morality is completely taken out of the equation since it is on the side of the US by definition, as it represents the Christian force of good against a threat of indeterminate evil; b) the enemy, the terrorists, are denied civilised status, they are framed as barbarians which makes it easier for the US to perpetrate actions against them that would be considered unlawful, should they have been civilised beings. The assay of life that this categorisation represented was further elaborated upon by the statement that America is united as a nation and it is “a unity of every faith and every background” (Bush, 2001a). This was needed in order to make sure that the demarcation between valued life and threatening

life is strictly along the lines of terrorist/barbarians on the one hand and Americans/civilised people on the other.

The speech further defined the goals of the United States: “Our *responsibility to history* is already clear: to answer these attacks and rid the world of evil” (Bush, 2001a) Further, it recognises the fact that “war has been waged against us by stealth and deceit and murder” and the US’ “purpose as a nation” is to respond to the challenge, protect freedom – “we are freedom’s home and defender” – and bring justice to the “enemies of human freedom”, as “the commitment of our fathers is now the calling of our time” (ibid.). Notice that the language is decidedly epic and heroic in its scope and imagery – “calling of our time,” “responsibility to history,” “purpose as a nation” these phrases fit the classic literary definition of epic as something that “[surpasses] the usual or ordinary, particularly in scope or size” and invoke the image of a hero, a heroic nation, that is born to a calling (heroes are usually born to their role) and this calling is to rid the world of evil (ibid.). There are two properties of this language. First of all, it is alluring (the addressees are part of the heroic entity), affective (there are a lot of emotional detours in the speeches), comforting (justice will be done) and presented in a way that defies contradiction – it clearly indicates who the forces of good are and everything beyond their scope is, by association, evil – that is the essence of the “you are either with us or against us rhetoric” (i.e. neutrality is not an option) (Bush, cited in CNN, 2001). Secondly, and much more importantly – this is a language of exceptionality; by invoking the general structure of the Homeric epic it foreshadows a permanent change in the everyday course of events. Thus, even before there was a hint of exceptionality in US post 9/11 policies and intents, it was already weaved in the US discourse. This was done very subtly and yet it was very powerful, to the extent that when it became clear what US “had” to do in order to respond to the evil threat, the majority of the people did not question it.

Bush’s third significant speech, the Presidential Address to Joint Session of Congress, which was delivered on the 20th of September, further supports that view. In it he makes a lot of allusions to the unity of American people of all ethnic backgrounds and religious beliefs and further demarcates the lines of enmity to be along the civilisation-barbarian divide: “The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them” (Bush, 2001b). Those terrorists “hate our [Western] freedoms” and their only goal is

that of “remaking the the world – and imposing radical beliefs on people everywhere” and of “[disrupting] and [ending] way of life”; the fight against them is “civilisation’s fight” and “every nation, in every region now has a decision to make” about which side they are going to take (ibid.). These repetitive statements reinforce the moral high ground that the US is taking, the understanding that there can be no neutral side in the conflict, the demarcation between good and bad life, and the biopolitical understanding that the stakes are nothing less than preserving the civilised way of life of the US and its allies.

2.3 Defining the rules of engagement

Over the course of the few months following the attacks, the US administration discourse further refined the exact parameters of the threat that was faced by the Western world and it also began to flesh out the acceptable responses to it, along with providing a distinct friend-enemy distinction that envisioned a change of the established assay of life – that is, of the distinction between good and bad life.

The conflict was further presented as a battle between freedom and fear, freedom and danger, and, finally, as a war that will have no clear end in sight. The latter was reiterated through phrases such as “continuing threat”, “lengthy campaign unlike anything we’ve ever seen” and the sentiment that the conflict will not end until “every terrorist group of global reach has been found, stopped and defeated” (Bush, 2001b; Bush, 2001a; Bush, 2001b). In the meantime, “things will return almost to normal” and the citizens were asked for their “continued participation and confidence in the American economy” (Bush, 2001b). With these statements the following narrative was established – the exceptional situation in which the US found itself after 9/11 was to be prolonged indefinitely as the threat that was faced was not likely to subside in the foreseeable future; however, the market environment had to be preserved and take its natural course as the strength of the state is always dependent on it. Thus, a situation of permanent exceptionality had to be integrated into the ordinary course of events. Finally, within that third speech, after the parameters of the threat and the extent of the conflict were clarified, the key goals of the US domestic policy were laid out. To begin with, a great deal of these goals aimed at restoring the US life back to the “almost normal” level and at regulating things back to their everyday flow. The Office of Homeland Security was established to help forge a “comprehensive national strategy to safeguard our country against terrorism”, flights are to be made more secure, New York City is to be rebuilt and measures are to be taken to “strengthen America’s economy” (Bush,

2001b). All of these goals fall within the classic regulatory mechanisms of neo-liberal biopolitics but there were two more goals which hinted at the new elements which were to be used:

“We will come together to give law enforcement the additional tools it needs to track down terror here at home. We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act, and find them before they strike” (Bush, 2001b).

It was implied that the legal framework that was operable at the time didn't have the proper “tools” to deal with the exceptional situation already presented and it was also implied that these new tools would somehow be congruent with the new intelligence capabilities of knowing the plans of terrorists *before* they act and stopping them *before* they strike; this initial statement of intent was to later crystallise in the pre-emptive policy of the US.

2.4 A conflict akin to war

Beyond laying the discursive framework for the war on terror, however, these speeches served the function of actually initiating and legitimising this war – they were used as the legal substitute for a declaration of war. In lieu of official declaration of war, the speeches were used to single out the nature of the conflict and the identity of the enemy. In doing this, they were supplemented by two documents. The first one was Proclamation 7463, declared on September 14, 2001 in which the President recognised that -“A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the US” – and used the proclamation to extend his authority with regards to the distribution of emergency funds and military personnel (Bush, 2001c). The second document, and the key one, was Senate Joint Resolution 23, which featured a very peculiar wording and provided an unprecedented military authorisation. Its aim was “to authorise the use of United States Armed Forces against those responsible for the recent attacks launched against the United sites”; such authorisation was required because such acts “continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States” and as a result they “render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad” (107th Congress of the USA, 2001). Finally, the Resolution stated that:

“That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent

any future acts of international terrorism against the United States by such nations, organizations or persons” (ibid.)

This is a statutory authorisation for the use of military force that is in compliance with section 4(a)(1), 5(b) and section of the War Powers Resolution; these sections of the War Powers Resolution allow the president, with the explicit support of the Congress to initiate hostilities and make use of the US Armed Forces without an official declaration of war (50 U.S.C. 1541-1548). The only limiting factor included in it is that it had to be renewed every 60 days, which, however, was not problematic given that both the executive branch of governance and the congress were in accord. Such a war-like use of military forces without an official declaration of war was further enabled by the fact that the US came under enemy attack and was, thus, merely acting in self-defense: “Self-defense ... does not require advanced Congressional approval. After all, if one is already at war, then the declaration simply recognises the obvious” (White House, 2006: 53).

There are two important consequences from this quasi-declaration-of-war. First, of all force was to be used against *nations, organisations, or persons* which the president *determines* to have planned, authorised, committed, or aided the terrorist attacks *or*, equally importantly, against entities that have *harbored* such nations, organisations or persons. This effectively means that war can be waged indiscriminately and the enemy is to be continuously redefined; the US preserves its right of an emergent categorisation of the enemy. Further, the enemy is not confined to nation states but can also involve people and organisations. This further increases the flexibility and de-territorialises the reach of the US in dealing with the terrorist threat, as it can now safely designate any entity on the planet as being a terrorist enemy – even a US citizen. As a result, threat recognition capacities of the US become as indiscriminate, emergent and de-territorialised as the terrorists they are fighting. The second function of this quasi-declaration is that it put in writing the permanent state of exception that was already hinted at in the Presidential speeches – the United States was not officially at war, but it was not at a state of peace either. Things were then bound to be kept at the “almost normal” state which Bush so well characterised.

All of these communications, speeches and resolutions culminated with the deployment of troops “to a number of foreign nations in the Central and Pacific Command areas of

Operations⁸” and the subsequent “Operation of Enduring Freedom” that was carried out in Afghanistan (Bush, 2001d; 107th Congress, 2001a). These forces were deployed “to prevent and deter terrorism” and were needed in “response to these attacks on our territory, our citizens, and our way of life” (Bush, 2001d) This is a reiteration and affirmation of the biopolitical sentiment already expressed on multiple occasions after 9/11 – territory, a geopolitical concern, is put on equal footing with protecting the population and the way of life, thus recognising that the conflict was not going to be a purely geopolitical one. Further, in the report the President notes that “it is not now possible to predict the scope and the duration of these deployments” and that “it is likely that the American campaign against terrorism will be a lengthy one” – a repetition of the notion that America is facing a long period of extraordinary, exceptional conflict, a “campaign” that equates to war for all intents and purposes, except for the paradoxical fact that it is waged against an indiscriminate emergent enemy and the only way to end it is via a complete annihilation of this enemy (ibid.).

It must be noted at this point that it would not have been out of order for the neo-liberal regime to conceptualise the terrorist attacks of 9/11 as a one-off severe economic disruption, a misfortune, a momentary punctuation of the market equilibrium of no lasting effect. After all, this is how the event was eventually dealt with – the reaction of the biopolitical regulatory mechanisms was immediate and the negative economic developments were neutralised and brought back to an ordinary flow in the matter of weeks. However, 9/11 changed everything - not only the event itself but the way in which it was reacted to. The effects of the attacks went beyond the shock of their unprecedented intensity and brutality and beyond the severe economic momentary impact they caused, as they also posed a challenge to the governmental control of the culture of danger and its ability to define the level of threat that individuals within society were experiencing. Thus, a reaction was necessitated and the way in which the US chose to react carried the exceptionality of 9/11 into everyday politics and everyday life.

3. The US Doctrine of Pre-emption

3.1 Laying the foundations

⁸ As stated in the Presidential Report On Actions Taken To Respond To The Threat Of Terrorism of September 25, 2001 (House Document 107-127).

With regards to the initial declaration of the war on terror and the early occupation of Afghanistan, the conflict was mostly framed in terms of preventive intervention, self-defense and, to an extent, deterrence – all of which were logics of confrontation that were already familiar. The use of force was authorised on the premise that it is done as a retaliation and in order to protect the US from further attacks: “We there [in Afghanistan] engaged non-state actors and unrecognised regime to eliminate a base from which force was projected against us, rather than to compromise the territorial integrity of the Afghan state. From an American perspective, few would challenge the attack as anything other than self-defense.” (O’Neill, 2008: 68)

However, there was already presence of new undercurrents that did not fit in with this logic – the way in which the friend and foe were distinguished was genuinely novel in its parameters. It utilised the well-known cold-war vernacular of “good-versus-evil”, placing the US at a moral high-ground where it could do no wrong, but this time the conflict was framed as *civilisation’s war*, which would only end with the complete obliteration of the enemy (a notion foreign to the logic of deterrence of the cold-war era). This was further complicated by the fact that the enemy was defined as a continuously emergent set of nations, organisations and individuals and that the war was not over territory or resources, but over a particular “way of life”. What is more, the elimination of the neutral ground (“you are either with us or with the terrorist”) and the claim that everyone supportive of the terrorists is to be regarded as a terrorist, intensified the conflict and granted the US executive an incredible amount of power, by virtue of allowing it an absolute monopoly on the continuous re-definition of the friend-enemy distinction. Related to that, the undetermined status of the war meant that the US was in a state of permanent exception, the “almost normal” state of existence where the rules were in constant flux.

All these elements were weaved into a new pre-emptive discursive formation that began to emerge in the late months of 2001 and was developed through 2002 until it finally crystallised with the National Security Strategy of 2002 and the pre-emptive invasion of Iraq. There were hints of this discursive formation in Bush’s early speeches and, as it will become clear, the PATRIOT Act, which was released in October 2001, was already a fully operational pre-emptive document, but the public assembly of the discourse took longer. In his January 2002 State of the Union speech Bush further reified the terrorist status of “parasites” (again, a bio-political postulate) and made two novel formulations which were to become the

backbone for the doctrine of pre-emption. First of all, he stressed the need for *decisive action*:

“My hope is that all nations will heed our call and eliminate the terrorist parasites who threaten their countries and our own. [Some] governments will be timid in the face of terror. And make no mistake: If they do not act, America will” (Bush, 2002).

The opposite of action, would be indifference, and its price would be “catastrophic” – the assumption is that if the US does not move first the enemy will and the result would be nothing short of disaster, much like 9/11 (ibid). The second important idea conveyed by Bush in his January speech comes after he makes the well-known classification of certain regimes – North Korea, Iraq and Iran - as the Axis of Evil. He said that these regimes are “arming to threaten the peace of the world” and that the goal of the civilised world is to “prevent regimes that sponsor terror from threatening” the rest of the world (ibid.). At a first glance this does not appear to be so different from previous condemning speeches the US has made but with the benefit of historical hindsight it is easy to identify the new construct – the goal is now not to prevent an attack or aggression, not even contain or deter it, but, rather to “prevent” the terrorists from “threatening”, prevent the threat itself, or, more specifically, prevent the regimes that are part of the Axis of Evil from building or having the capacity for threat, because accumulating such a capacity was in their “true nature” and was already catastrophic (ibid.).

3.2 The doctrine of pre-emption

It was in the West Point speech delivered nearly six months later – in June 2002 - that the logic of pre-emption was finally fleshed out. In order to do this Bush first distanced himself from the “cold war doctrines of deterrence and containment” which were the building blocks of America’s defence “for much of the last century”, pointing out that “new threats...require new thinking” (Bush, 2002a):

“Deterrence...means nothing against shadowy terrorist networks with nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies” (Bush, 2002a)

In the stead of these strategies, which were now rendered impractical by the emergent catastrophic threat of terrorism, Bush proclaimed the necessity of “pre-emptive action”, since “the only path to safety is action” and “if we wait for threats to fully materialise we will have waited too long” (ibid.). Further definition of what exactly pre-emption is, was not provided, but the phrasing of the latter statements encapsulates the essence of the pre-

emptive doctrine – it is a strategy of *action* that is to prevent a threat from fully materialising and, by association, prevent the enemy from building the capacity for threat. The rest of the speech, just like the January speech was very cleverly intertwined with and reinforced by Bush’s already established vocabulary of “moral purpose”, “civilised nations”, “our nation’s cause” and “calling, “political/economic freedom”, “justice”, “just peace”, “security” and “hope”, which were juxtaposed against the “evil” (used six times in the January speech and four times in the June one) , “uncivilised”, “murderous” terrorists (ibid.).

The doctrine of pre-emption was semantically finalised and formalised with the publication of the National Security Strategy of 2002. It justified the need for pre-emptive policies as a “matter of common sense and self-defense”, reified America’s intention to “act against...emerging threats before they are fully formed” and postulated that the US should be prepared to “defeat our enemies’ plans, using the best intelligence and proceeding with deliberation” (White House, 2002). This was all to be done, of course, in the pursuit of peace and human freedom. Throughout the Strategy the pre-emptive tactics of *action* and *prevention of emerging threat* were supplemented by the idea of pre-emptive information gathering (which was to lead to the defeat of the enemies plans) and the determination of the US to act alone if necessary – as expressed in its policy of unilateralism (ibid). All of this was buttressed by multiple reiterations of the threats posed by Weapons of Mass Destruction and the need to prevent regimes who could potentially acquire such military capabilities from threatening the US and its allies - again, the emphasis was on preventing the threat from occurring. Finally, the Strategy contained the key notion that “the distinction between domestic and foreign affairs is diminishing,” which, according to it, necessitated the “fusion of information between [foreign] intelligence and [domestic] law enforcement” – a sentiment which, as it will become clear, was one of the key principles of operation of the PATRIOT Act (ibid.).

Around the time of the implementation of the NSS 2002, Bush delivered a speech to the United Nations on September 12, 2002, in which he insisted on the need to attack Iraq pre-emptively – it was this speech that triggered the first foreign implementation of the strategy of pre-emption. This speech used the already established language of moral superiority and freedom and, whereas it was very light in terms of facts to prove that Iraq posed any threat to the US it was said that “Saddam Hussein’s regime is a grave and gathering danger” – that is the capacity for threat was present and increasing, a “fact” which necessitated action: “we

cannot stand by and do nothing while dangers gather” (Bush, 2002b). The speech warned against the assumption that Saddam Hussein had stopped pursuing weapons of mass destruction – which was implicitly substituted by the assumption that he is. This was, as O’Neill observed astutely, the replacement of the standard legal category of the “absence of evidence”, which presumes innocence, with the new pre-emptive category of the “evidence of the absence of WMD”, which presumes guilt and shifts the burden of proof in favour of the accusing party (O’Neill, 2008: 9).

3.3 Pre-emption: precedents and modus operandi

Before continuing I would like to make two points. First of all, the strategy of self-defensive pre-emption and anticipatory action is technically nothing new in historical and legal terms. Article 51 of the UN Charter authorises “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”, a right that is further understood to grant a state the ability to pre-emptively strike when it is under “imminent threat”, as postulated in the legal-binding judgements made in the *Caroline* case of 1841 (UN Charter, 1945; Oneill, 2008: 71). In other words there must be “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moments for deliberation” (Webster, quoted in O’Neill, 2008: 70). What the Bush administration did was to take this doctrine of anticipatory action to the extreme by completely redefining both of its carrying concepts – “threat” and “imminence”. The pre-emptive doctrine is a strategy with a logic of operation based on the conflation of the action and the potential for an action, the terrorist and the suspect, the enemy entities and those who are seen as “supporters”, threat and the capacity for threat, present and future, or between a plan and its resolution. In other words, its logic of operation is technically based on the enforced inability of the regime in power to distinguish between these concepts.

Related to that, the second point I would like to make is connected to Massumi’s crucial distinction between prevention and pre-emption, which is very revealing in terms of how pre-emption works. Prevention, in its essence, “assumes an ability to assess threats empirically and identify their causes” and postulates that “uncertainty is a function of a lack of information”; it presumes that future is linear and can be deducted (Massumi, 2007: 5). Pre-emption, on the other hand, “operates in the present on a future threat” and, in the process, makes “the present futurity” of the event the key mover of its operationalization (ibid. 13). That is, since the threat has not yet emerged, it is “indeterminately in potential”

and “[its] nature cannot be specified” (ibid.). Consequently, unlike in prevention’s case, the future is not linear, uncertainty cannot be overcome and neither can the “lack of knowledge” about the threat. As a result, pre-emption has no choice but to “move first”, “go kinetic”, and prevent the actual emergence of the threat – this can only happen if one takes action first and effects a certain reality: “Preemption is an effective operative logic rather than a causal operative logic. Since its ground is potential, there is no actual cause for it to organise itself around. It compensates for the absence of an actual cause by producing an actual effect in its place” (ibid. 16; 18; 23). That is, pre-emption, by acting first, creates a future in which a potential threat is prevented from materialising. However, since this threat has not even emerged it can only prevent it by imagining it first - it is still biopolitical in its nature but it doesn’t work within the reality of events, it works within an imagined, future reality of events, as it brings the future into the present. This results in what Massumi calls a “conditional” logic of governance:

“A conditional statement cannot be wrong. First because it only asserts a potential, and second because, especially in the case of something so slippery as a potential, you can’t prove the negative. Even if it wasn’t actually there, it will always still have been there potentially. Saddam could have restarted his weapons projects at any moment.” (Massumi, 2007: 17)

That is why and how the Bush doctrine of pre-emption is different from pre-9/11 anticipatory action. The necessity of imminence of threat to justify anticipatory action that was the norm in the 20th century, carried the basic assumptions of the preventive logic of power, according to which the future and the nature of the threat can be known for sure and the action is necessary to prevent a specific materialisation of a threat, the emergence of which is known and expected. 21st century pre-emption, on the other hand, works by “establishing the presence of ‘what has not happened and may never happen” and acts as if this presence of the future is a present reality (Massumi, quoted in Anderson, 2010: 783; Anderson, 2010: 783). Finally, the role of intelligence also becomes clear as it is intelligence that does the job of imagining the future and of “defeating the plans” of the terrorists (White House, 2002).

The purpose of this section was to provide an overview of the novel US strategy of power/grid of intelligibility that emerged after 9/11 and began to function alongside the biopolitical and sovereign grids that were coexisting before it. Note that I call this grid biopolitical as well, since it has the same goals and the same end as the biopolitical grid,

which is, however, coupled with a distinctly novel logic of operation. Such an overview was required in order to provide the context for the implementation of the PATRIOT Act, a legal document that I claim to be “bio-legal” in the sense that it represents what in Massumi’s terminology would be called “conditional law” (Massumi, 2007: 17); in other words, the PATRIOT Act denotes the tactical implementation of the biopolitical pre-emptive strategy of governance within the legal framework, which is sovereign by design – in effect, a fusion between the three grids of intelligibility. This resulted not only in a change between the relationship of the law and the enforcement of the law but in the tactical implementation of the form of the law (to prohibit and constrain) in the pursuit of an alternate function (the function of the law represents the rules of the game). Said rules of the game were changed in order to meet the requirements and answer the logic of the pre-emptive grid of intelligibility.

4. The PATRIOT Act and the distributed sovereign decision

This section will introduce the PATRIOT Act and will show how it has incorporated in legislature both the principle of biopolitical pre-emption and the power of the sovereign to decide on the exceptional – in effect inscribing the logic of the police state in legislature. It will be also shown how the Act effectively distributes this sovereign power between the agents of the state so that the pre-emptive, biopolitical, sovereign decision-making power permeates society. Finally, it will be argued that there is a distinct congruence between pre-emption and the exceptional sovereign decision, as they can be easily activated so as to function in uniformity. What is of interest for the sake of the current discussion is the genuinely novel fusion of sovereign, biopolitical and pre-emptive elements that are all brought together in this order – i.e. the sovereign decision is invoked to serve a pre-emptive mechanism that pursues biopolitical goals - a fusion which I have chosen to call *bio-legal*, and which is found in preponderance in the PATRIOT Act.

4.1 Preamble

The PATRIOT Act is an Act of the US Congress that was signed by the President on October 26, 2001. It is a lengthy document that is divided into ten sections, each revealing a particular set of tools and approaches to dealing with terrorism, albeit its uses were not confined to that sole purpose. The name of the act itself – PATRIOT – is very suggestive of its overall purpose: the word Patriot gives an overt nationalist tinge to the whole act, setting the background for the depiction of a United America that has to deal with a threat from the

outside. In fact this inside/outside distinction is preserved throughout the whole act: the difference in treatment of citizens and non-citizens is repeatedly stressed upon and the main targets for most of the sections in the act are precisely the immigrants, the “foreign agents”, and the “aliens”. However, it is important to note that this “outside” is not based on a territorial distinction but rather on the citizen/alien, civilized/barbarian set of distinctions that the President was already establishing in his numerous speeches – that is, the enemy within is also, conceptually, an “outsider” that has infiltrated the social structure in the capacity of a parasite. To quote Bush: “In the attacks on America a year ago, we saw the destructive intentions of our enemies. This threat hides within many nations, including my own” (Bush, 2002c).

Further, the fact that the title USA PATRIOT Act is an acronym of - Uniting (and) Strengthening America (by) Providing Appropriate Tools Required (to) Intercept (and) Obstruct Terrorism Act of 2001 - makes the impact even stronger, as the intended meaning of the Act and the subtle suggestion of its title is made explicit - this Act will help to unite and strengthen America, and the unity and strength are going to be achieved by devising better ways to intercept and obstruct terrorism; the acronym also requires the word to be spelled out in capital letters, thus giving a sense of urgency.

Before the start of the act there is a short statement of the 107th Congress of the USA that identifies the main goal of the document: “to deter and punish Terrorist acts in the US and around the world, to enhance law enforcement investigatory tools and for other purposes” (PATRIOT Act, 2001: Preamble). The words “for other purposes” are especially significant. Broad, abstract and intangible, the phrase can refer to practically anything and grants to the congress and the president unlimited freedom to implement the act for any purpose they like if they deem that it is even remotely connected to domestic or foreign terrorism.

4.2 Definition, recognition, response

It was already stated at the beginning of the current chapter that the usual approach to dealing with threat followed the pattern of recognition, definition, and response. One of the peculiar properties of pre-emption, as inscribed in the PATRIOT Act, is the fact that it effectually reverses this order into the causal pattern of “definition, recognition, response”. That is, by defining what acts constitute terrorism the government gains power over these acts and brings their abnormal properties into existence – i.e. certain acts that could be construed to be ordinary/normal before the new legislation are criminalised and made

abnormal. In that sense, recognising the new forms of terrorism and threat becomes only possible after they are defined and legislated upon. This is not so dissimilar from the regular operation of the law, a primary function of which is to create new crimes by imagining the negative. However, where it differs is in its pre-emptive recognition of terrorism, which works by identifying that there is a capacity for crime and attempts to intervene before this capacity is realised. As a result the definitions are broad and functionally adaptive, and a significant amount of judgemental power is vested in the agents of the state.

I will, hence, begin discussion of the PATRIOT Act with a reference to its redefinition of terrorism and its introduction of the category of “domestic terrorism”, definitions that provide the basis for its logic of operation. The first set of definitions is found in Section 411 of Title IV of the act. The Title is named Protecting the Border and, among other things, establishes provisions for the mandatory detention of suspected terrorists, authorises the appropriation of up to fifty million dollars for the tripling of the US personnel among the Northern border, creates a foreign student monitoring program, and, finally, deals with the expulsion from the country who are deemed to be related to terrorism. Section 411 – Definitions Relating to Terrorism – amends clause IV of the Immigration and Nationality Act (8 USC 1182[a]3[B][iv]) to read: “ENGAGE IN TERRORIST ACTIVITY DEFINED”, which is followed by an extensive definition of what activities and intentions such activity encapsulates. Engaging in a terrorist activity is, first and foremost, “in an individual capacity or as a member of organisation – (I) to commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity” or “(II) to prepare or plan a terrorist activity” – this is congruent with pre-9/11 definitions of terrorism and, as such, is not of interest to the current discussion⁹ (ibid.).

What is of interest, however, is the vague addition of “(III) to gather information on potential targets for terrorist activity”, which is notable for two reasons (ibid). First, the use of the word “potential”, which was already firmly established in the US presidential rhetoric; and, secondly, the excessive broadness of the category – any monument or building in the US can be in theory conceived as a potential target for terrorism and the range of activities that encompass the act of information gathering are just as broad. Further, it is left to the

⁹ Terrorist activity as defined by 18 USC 2331 (1) involves “those criminal acts of violence, committed primarily overseas or internationally, that appear to be intended to intimidate or coerce a civilian population, or to influence a governmental policy by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping”.

discretion of the agents of the state to make legally-binding judgement calls on who is gathering information with terrorist intent, thus bestowing upon them the sovereign decision-making power. Next, the Section makes aliens deportable from the country even if they have unknowingly associated with a person involved in terrorist activities. For example, it authorizes the exclusion of the “spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be inadmissible occurred within the last 5 years” (PATRIOT Act, 2001: Sec.411(a)). It is presumed that these aliens have greater capacity for threat or potential for threat than other aliens, thus making a presumption of guilt that is not characteristic of the ordinary function of the law – i.e. it is equivalent to a reversal of the burden of proof – but fits well within the pre-emptive framework of the PATRIOT Act.

The section also includes clauses that “[resurrect] the practice of ‘ideological exclusion’, keeping people out of the country not for their past or current conduct, not even based on any reasonable concern that they might engage in criminal or terrorist conduct once here, but based solely on their speech” (Cole, 2006, 516). The sub-section in question is 411(a)(1)(A)(iii) which stipulates that if an alien has used his or her “position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines US efforts to reduce or eliminate terrorist activities”, said alien may be refused entry/expelled from the country (Patriot Act, 2001).

What is especially relevant in this section is the amount of power that is vested in the Attorney General and the Secretary of State to make subjective judgmental calls whether one is a terrorist suspect or not, and whether certain activities endorse terrorism or not. This is indicative of the distribution of the sovereign power as there are now multiple people who can make judgmental calls of exceptional nature. This represents a relative departure from the way law usually works as, in this case, the word of the Attorney General and the Secretary of State is, quite literally, the law. For example, both of them have the power, “after a consultation” with one another, to conclude “in [their] sole unreviewable discretion, that this clause [8 USC 1182(a)(3)(B)(iv)] should not apply” to a particular individual, just like they have the power to “determine” that an alien who “has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible [to the US]” (8 USC 1182(a)(3)(B)(iv)(VI); 8 USC 1182(a)(3)(F)). The use of

“incidentally” is especially revealing, as by definition, an incidental association is one of which the person is not aware of, or one which has occurred by chance, thus allowing the Executive to operate on the basis of very spurious links. What is more, the Secretary of State and the Attorney General have the ability to deport any such alien that they suspect of such activities, and they also have the authority to designate certain organisations as terrorist, making their members suspect of terrorism by association (8 USC 1182[a]3[G]).

Section 802 of the PATRIOT Act, supplements the definition of international terrorism with the definition of "domestic terrorism". The latter includes any act that is "dangerous to human life," involves a violation of any state or federal law and is intended to influence governmental policy:

“The term ‘domestic terrorism’ means activities that – A) Involve acts dangerous to human life that are a violation of the criminal laws of the US or of any state B) Appear to be intended – i. to intimidate or coerce a civilian population ii. to affect the conduct of a government by mass destruction, assassination, or kidnapping and C) Occur primarily within the territorial jurisdiction of the US” (PATRIOT Act, 2001: Sec 802.[a]).

This definition is very broad – it concerns a wide variety of acts that are in violation of the criminal laws and that *appear* to be intended to be terrorist in their nature. Thus, any criminal act perpetrated on the territory of the US that is considered to be terrorist by the agents of the law -that is, the word “appear” allows, yet again, for personal subjective judgements to come into play in defining an act as a terrorist – can be punished in accordance with the provisions of the PATRIOT Act, which allow for harsher punishment than ordinary criminal law. To quote James Dempsey:

“It essentially amounts as a transfer of discretion to the Executive Branch, which can pick and choose what it will treat as terrorism, not only in charging decisions but also in the selection of investigative techniques and in the questioning of individuals” (2005, 551)

From classic legal standpoint, with an emphasis on the rhetoric of civil liberties, the problem of these sections is that by creating the unnecessarily broad crime of “domestic terrorism” (section 802) and by denying entry to noncitizens on the basis of ideology (Sec. 411) the Act blurs the line between ideology and terrorism and “places our First Amendment rights to freedom of speech and political association in jeopardy” (Chang, 2009: 44) Chang’s fear is that sec. 802 will allow the government to target peaceful activists (e.g. environmental, anti-globalization, and anti-abortion activists), who “use direct action to

further their political agendas [and] are particularly vulnerable to prosecution as ‘domestic terrorists’” (ibid.: p.45).

Thus, armed with the new definitions of terrorism, multiple agents of the Executive branch were extraordinarily empowered to make legally binding judgements regarding the plight of any alien on the territory of the US or any alien who was trying to enter said territory. These judgements were authorised by the legal framework following the adaptive logic of pre-emptive intervention, aimed at reducing the potential or the capacity for threat of individuals that could be reasonably believed to have such a capacity.

Again, this is indicative of the existence of a distinct congruence between the exceptional sovereign power of decision and the executive logic of pre-emption. Pre-emption is dependent upon the availability of the absolute sovereign power – after all, one can only pre-empt something if they can imagine it, and since the US Executive and US agents have to work within an imagined reality and prevent imagined events, they have to rely on their subjective decisions – they have to make a decision on the event before it has happened, or in Massumi’s terms, to bring the future into the present.

4.3 Pre-emptive detentions

The pinnacle of the pre-emptive sovereign decision power, and the pinnacle of the PATRIOT Act itself, resides in section 412. It is titled – Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial review – and its provisions follow directly from the section preceding it. The Provisions set forth in Section 412 allow the Attorney General or the Deputy Attorney General to detain any alien that they have reasonable ground to suspect of having engaged in terrorist activities for up to seven days without bringing up charges. Further, the section stipulates that an alien detained due to being involved (or being suspected of being involved) in a terrorist organization or in an activity that might endanger the security of the US, whose removal is “unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the US or the safety of the community or any person.” (PATRIOT Act, 2001: Sec.412.(a)). This practically means that a person can be held in custody, for an unlimited period of time (once the six months are over they can be extended by six months and so on), based on suspicion for wrongdoing alone.

On first sight, this section, apart from being a troubling infringement of the civil rights of noncitizens, is in accordance with the general impetus of the Act to establish a clear

distinction between ordinary citizens and alien terrorists and to act in what is considered to be the best interest of the citizens of the Homeland. However, even that distinction fails to be observed as some of the detainees under this section were actually US citizens – many of whom were indefinitely detained in Guantanamo Bay, as will become clear from the discussion in the next chapter. Further, and very important, the section limits the ability of people detained under the provisions of the PA to initiate habeas corpus proceedings – such proceedings may now only be initiated by an application filed with the Supreme Court or with the US Court of Appeals for the District of Columbia. This provision severely limits the amount of judicial review that can be exercised over the detentions of aliens and/or citizens under the PA and, by association, further increases the executive decision-making power. As a result, it eventually played a big role in early Guantanamo Bay cases.

A final point of interest in this section is that once again the Attorney General and the Secretary of State are given unlimited power to decide (and or authorize decisions of other agents of the state) whether a person is a suspected terrorist or not. They are also allowed to decide the duration of time for which a person is to be detained, if he or she is found guilty of an immigration violation or guilty of a criminal offence. Further, “the law does not require any showing that the foreign national poses a danger to the community or a risk of flight – the only two constitutionally valid reasons for preventive detention” (Cole, 2006: 516). It is also important to note that this section is, by association, empowering the agents of the state with the same decision-making, legally determinative powers that it bestows to the executive. After all, it is the agents of the state who make stop and search checks and who arrest people based on the grounds of *reasonable suspicion* – the Attorney General merely ascertains their decision-making process and thus his or her power is automatically delegated to the agents of the state.

The consequences of this section are numerous. First of all, it is implied that the Attorney General and the Secretary of State are granted powers that equal the exceptional war powers of the President and the Secretary of the State, in deciding who represents a threat, or an enemy, to the country. Secondly, by virtue of the very title of the section and the actions that it makes possible, there is a complete linguistic and legal *erasure* of the distinction between a *terrorist* and a *terrorist suspect* – the terrorist suspects are to be treated as terrorists and detained until they can prove that they are, in fact, not (as further evidenced in the Guantanamo Bay cases). This is congruent with the overall shift of the

burden of proof which the President established, a year later, with regards to the invasion of Iraq – a shift that effectively transformed the “innocent until proven guilty” maxim into “guilty until proven innocent”. It is easy to see how this serves the logic of pre-emption – since pre-emption necessitates a person to deal with events that have not yet taken place, the classic presumption of innocence becomes inoperable as it can only serve a reactionary legal doctrine – the suspect becomes, for all purposes and intents, the criminal. Finally, the circumstances of detention that the section invokes bring into existence a situation of *temporary permanence* that mirrors the permanent exceptionality which was established by the strength of Bush’s speeches, as well as by the Authorisation for the Use of Military Force, that was already discussed. What I mean is that, according to section 412 “if the alien is held, the determination must be reexamined every six months to confirm that the alien’s release would threaten national security or endanger some individual or the general public” (Doyle, 2001: 35). Hence, these detentions are, in immediate terms, only temporary, but since they can be continuously renewed with the authority of the Attorney General, they have the practical status of permanence.

4.4 Justifications for pre-emption – of errors and liberty

There is an interesting section in the so called Patriot Act Reader, a document written in defence of the act by a number of legal and political experts and issued by the Heritage Foundation in 2004, which provides a very revealing example of the governmental justification for the pre-emptive logic of pre-emption. The reader proceeds from the assumption that the harsh measures of the PATRIOT Act are required due to the high level of danger that the terrorists pose and the easiness with which they can hide within the nation – it somehow manages to estimate that there are no less than 100,000 potential terrorists in the US). The pre-emptive measures that are provided in the PATRIOT Act, the reader says, are necessitated because reactive punishment would not work against terrorists: “there is less value in punishing terrorists after the fact when, in some instances, they are willing to perish in the attack” (Rozenzweig et al, 2004: 26). That is, pre-emption is justified by the apocalyptic proportion of the threat, a concept that was already ingrained in the psyche of the US population via the numerous presidential speeches of 2001 and 2002. The reader further adds that in the given situation it is “a fundamentally moral judgement” to prefer the so called type I errors (false positives) to the type II errors (false negatives), as even one terrorist is capable of inflicting massive amount of damage (ibid.). In statistics a type I error is

what is known as a false alarm, which leads a person to find a relationship between two entities when, in actuality, no such relationship exists. A type II error, on the other hand, would be a failure to detect such a relationship, when it is in fact present. Thus, what the Reader is stipulating here is that it is much better to blame innocent people of being terrorists, or, in other words, to manufacture terrorist suspects, if that will reduce the chance of failure to apprehend real terrorists. Another issue concerning these type I and type II errors in regards to terrorism is well elucidated by Waldron, as follows: "...the balance we ought to be talking about is not so much a balance between one thing we all like (liberty) and another thing we all like (security). It is more like the balance that is sometimes referred to when we say we should balance the interests of a dissident individual or minority against the interests of a community as a whole" (Waldron, 2010: 34). That is, what the pre-emptive logic of locking up a suspected terrorist ultimately amounts to is the following trade-off: the liberty of the select suspect individuals is to be reduced in order to provide for an increased aggregate security. It is immediately obvious that such a calculation goes strictly against the logic of the subject of rights, a subject who is always innocent until proven guilty, and whose inviolability is enshrined in the juridical framework. However, and this is what matters, this calculation is perfectly rationalised under the bio-political logic of the neo-liberalism, where the principle of utility and the preservation of the economic network are superior to concerns about the rights of the individual. This was especially true in the years after 9/11, when the disciplinary logic of complete prevention resurfaced, as the terrorists were considered to pose too great a danger: "The traditional way we balance these things is with the maxim, 'it's better that 10 guilty men go free than one innocent man be in jail.' I think people are a little nervous about applying that maxim where the 10 guilty men who are going to go free could have biological weapons" (Michael Dorf, quoted in Waldron, 2010: 37).

4.5 Pre-emption, law and the police state

I have already established that the pre-emptive logic, despite overriding the sovereign category of the subject of right, is well aligned with the sovereign principle of the exception. It can be further said that the pre-emptive logic also finds purchase in the disciplinary construct of the *police state*. The substantially augmented ability of the Executive personnel to make legally binding decisions based on their subjective interpretation of the law and on their personal judgements is very interesting from a Foucaultian point of view. It is worth it

here to consider the distinction that Foucault makes between the logic of the rule of law and the logic of the police state that are defined in opposition to each other. As it was established in Chapter 2, a state that acts under the imperatives of the rule of law is a state where the actions of the public authorities have value only insofar as they are framed into laws that limit them in advance. That is, public authorities can only legitimately become coercive and interfere in the social framework when they are acting within the framework established by the law.

Further to that, this is a system which allows every citizen the “concrete, institutionalised and effective possibility of recourse against the public authorities” – thus, citizens can always challenge a particular act of sovereignty with the claim that said act is in breach of the legal framework that precedes it and justifies it. Diametrically opposed to this we find the logic of the police state, which postulates a system “in which there is no difference between the general and permanent prescriptions of the public authorities (the law) and the conjectural temporary, local and individual decisions of the same authorities...An administrative continuum is established that, from the general law to the particular measure, makes the public authorities and the injunctions they give one and the same type of principle...[thus] according it the same type of coercive rule.” (Foucault, 2008: 168). What does this mean? It means that any decision, any judgement made by an agent of the state automatically carries the same legitimacy as the laws that are part of the legal framework. Therefore, the law no longer precedes and binds the public authorities – instead, the public authorities become the law and their particular “acts of sovereignty”, their subjective decisions become as significant as the legal postulates.

As it has already been illustrated multiple times this logic of the police state permeates and to a large extent informs the PATRIOT Act as it grants the public authorities, in the face of the Attorney General and the Secretary of State, and the police force the power to make arrests based on suspicion alone and based on subjective decisions that the suspected citizen might pose danger to society. Thus, not only the function of the law is altered, but also, to an extent, its form (to prohibit and constrain), since the prohibition and constraint happen based on events that have not yet transpired and which are to be imagined by the agents of the state, the President, the Attorney General, etc.

It is important to note that following the logic of the police state to a large extent provides a substitute for the rule of law, as it is not entirely compatible with that rule, albeit

it is perfectly compatible with the sovereign logic of exception. So, with the introduction of the PATRIOT Act the system of law becomes altered in a way that gives direct powers to the public authorities and to the specific agents of the public authorities (ie a policeman has the power to make the law by arresting an individual that he finds suspicious) and all this comes at the price of independent judicial arbitration. To conclude this strand of argument we can argue that the PATRIOT Act is meant to strengthen the Executive, especially with reference to its power to carry out a permanent coup d'état in order to protect the state. Along with this, we witness the manufacturing of a new legislative framework that is supposedly able to give the public administration the necessary powers to address the problems at hand. What is more, the logic of the police state provides the framework that enables the logic of pre-emption to function, thus establishing a synergy between the two. That is, the logic of pre-emption would never be able to work in the post-9/11 context if the agents of the law were not allowed to make the necessary pre-emptive decisions .

5. Pre-emptive surveillance and the PATRIOT Act: defeating the terrorists' plans

5.1 Surveillance in the context of the pre-emptive doctrine

While the sections that were already discussed primarily dealt with the treatment of immigrants and “aliens” who fall within the jurisdiction of the US - be it on its territory or on its foreign battlegrounds - the PATRIOT Act also went to a great length to change the way in which information was gathered and processed on the territory of the US, with regards to both citizens and foreign nationals. It established rules for surveillance that were qualitatively different from those already in operation, both in terms of their function and of their purpose – that is, the PATRIOT Act effectively changed the logic of operation of surveillance so as to make it pre-emptively functional.

This was necessitated by the new terrorist threat, as framed by the US Administration, for a number of reasons. First of all, neither the classic disciplinary panoptical logic of operation of surveillance, nor the biopolitical logic of statistical surveillance, were sufficient to address the new pre-emptive needs of the government. Disciplinary surveillance, first and foremost, works according to the panoptical understanding that the subjects of scrutiny are going to end up self-disciplining themselves, just by virtue of the knowledge that they are being observed. It deters and disciplines, so as to be able to make functional an artificial reality of its own choosing. The biopolitical statistical surveillance, on the other hand, meant to enable the government to work within the reality of events and to regulate them. Thus, the

biopolitical government used the knowledge gathered through surveillance to help it understand better the reality of events, to uncover the linearity of certain flows and circulations and correct any negative developments in a way that was reactionary.

However, waiting for the events to take their course, waiting for them to develop, was unthinkable in the context of the post-9/11 framing of the terrorist threat; just as unthinkable were any expectations that any terrorists might be deterred from the knowledge that they are being observed, or from any potential reactionary retribution. The threat, as Bush made it clear, had to be prevented before its emergence, the US had to act first – pre-emptive action in the stead of reaction. This, of course, had to be reflected in its surveillance procedures – as Bush promised less than a fortnight after the attack: “We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act, and find them before they strike” (Bush, 2001b). In other words, put a stop to the terrorist plans not only before they have been realised (which is still reactionary) but before they have been fully formed; a logic according to which the *capacity* for threat equals threat. Along with that, it became necessary for the government to be able to distinguish between good and bad circulations, and, where possible, to prevent the bad circulations from happening in the first place (as opposed to regulating them).

5.2 Re-defining intelligence

Most of the novel surveillance techniques were found in Title II of the PATRIOT Act – Enhanced Surveillance Procedures. Section 203 of that Title outlines the conditions that allow for an otherwise prohibited disclosure of grand jury information to other agencies, and enables the different government agencies to share electronic, wire, and oral interception information. Grand Jury Information can be shared with, for example, CIA officials if it will assist the recipients with their duties or if it will reveal a violation of the State criminal law. Prior to the PATRIOT Act, there was a communications barrier between law enforcement officers and intelligence officers and they were not always able to freely pass information between each other. This was necessitated by Rule 6(e) of the Federal Rules of Criminal Procedures, which prohibited “disclosure of matters occurring before a federal grand jury” (Doyle, 2001: 5).

Section 203 of the PATRIOT Act, however, redefines the meaning of foreign intelligence information and allows US governmental officials access to it if it will help them with their duties. The new definition is exceptionally interesting:

“The term ‘foreign intelligence information’ means

(I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of foreign power.[part omitted]

(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(aa) the national defense or the security of the United States; or

(bb) the conduct of the foreign affairs of the United States” [Federal Rules of Criminal Procedure, 6(e)(3)(C)(iv)]

To begin with, the phrase “actual or potential attack or other grave hostile acts” is very revealing, linguistically (*ibid*). What it does, in practice, is to equate, in a synonymic couplet, the meaning of an actual attack with the meaning of a potential attack. It reifies this equanimity not once but twice – first in the statement “actual or potential attack”, itself, but also by virtue that this category is made equal to “other grave hostile acts” with the use of “or”; consequently, this statement indicates that a potential attack is semantically equal to “a grave hostile act” (*ibid.*). This equation is strictly pre-emptive in the way it can be operationalized, since any potential information that could potentially be related to an attack is of interest and able to be collected; what is more, the definition of what could be potentially threatening is again left to the governmental officers. It seems like this is a rather low threshold for the sharing of confidential private information, especially one collected by a grand jury, which has practically unlimited powers to subpoena records and witnesses (Chang, 2002: 60).

Prior to 9/11 there has always been a resistance to such a motion with the presumption that the circulation of such sensitive information without court supervision is more likely to harm, rather than further, the cause of justice, as well as the privacy of ordinary citizens, especially since the second part of the definition allows for the intelligence information to be acquired from a “United States person”. This is ultimately conducive to unlimited and unimpeded circulation of information between the foreign intelligence institutions and the governmental ones – a move that is pre-emptively necessary, since the immediate circulation of information, as well as its gathering, is imperative if the plans of the terrorists are to be disrupted before they become threatening. The section is further enhanced by Section 201 of Title II, which grants the foreign intelligence officers the authority to

“intercept wire, oral, and electronic communications relating to terrorism” by adding several new terrorism offenses to those that were already present. Among these novel offenses are a few which are related to the circulation of capital – “financial transactions with countries which support terrorism” (18 USC 2332d), “material support of terrorists” (18 USC 2339A) and “material support of terrorist organizations” (18 USC 2339B). In other words, said section enables intelligence officers to detect “bad circulations” of both people and money, as they emerge. The section also serves the function of creating new financial crimes and linking them to terrorism. After all, as Foucault has noted on many occasions, one of the primary functions of the law is to create crimes by imagining the negative, and this is exactly what is done here, only this time the emphasis is on the prevention of circulations.

These few sections of the PATRIOT Act managed to introduce sweeping changes that would be very questionable and, most probably, impossible to pass in time of peace. However, they were considered not only acceptable but also necessary in the exceptional environment that was manufactured by the Bush administration in the few months after 9/11. The sections not only redefined, with a pre-emptive slant, what is considered to be foreign intelligence information, but in the process removed a lot of the boundaries between foreign and domestic information gathering, thus greatly improving the capacity of the governmental agents for the circulation and use of information and also their ability to detect harmful flows of money and people in their wake.

The next step of the PATRIOT Act was to ease the capability of the governmental agents to collect information on potential suspects, so as to be better able to predict their plans and future actions. Notable is section 206, which extends the use of roving wiretaps to intelligence gathering operations. Roving wiretaps refers to “multi-point electronic surveillance targeted at *persons* rather than particular communications devices (e.g., telephones or computers)” (McCarthy, 2006: 572). This section is understandably one of the most controversial sections of the PATRIOT act as it grants law enforcement agents unlimited surveillance freedom that affects not only the main surveillance target, but also “targets [whose actions] might have the effect of thwarting the identification of a specified person” (PATRIOT Act, 2001: Sec.206).

That is, the FBI is allowed to tap any phone that is within the range of the surveillance target, whether or not the target is actually using this phone. This gives the capacity of federal agents to collect private information from people who are not connected to the

surveillance target and are, technically, innocent. Thus, it potentially represents a violation of the Fourth Amendment to the Constitution¹⁰. This potential violation is intensified by the fact that these are issued without “particularly describing the place to be searched” and as a result they constitute a potential violation of a safeguard found in the criminal wiretap statute called the “ascertainment requirement” (McCarthy, 2006: 573).

The counter-argument to this is that a roving wiretap is sufficiently hard to acquire and that the information obtained through its use is handled discreetly and unobtrusively insofar as innocent people are concerned. Further, supporters of the PATRIOT Act argue that the section is helpful in dealing with international terrorism, since the subjects of investigation change location often in order to avoid detection. In order to counter this “the amendment permits the court to issue a generic order that can be presented to the new carrier, landlord or custodian directing their assistance to assure that the surveillance may be undertaken as soon as technically possible” (House of Representatives, cited in Doyle, 2001: 7). Thus, this section effectively de-territorialises the use of roving wire-taps and removes the surveillance delay – information is able to be procured instantly, over the territory of the US, with the use of a “generic order”.

Section 212, Emergency Disclosure of Electronic Communications to Protect Life and Limb, adds yet another tool that aids the governmental institutions to access private data and personal records. This time the data is customer communications or records that are to be furnished by providers of a remote computer service or an electronic communication service. Such a disclosure is outlined as allowed only under exceptional circumstances in which “the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of such information” (PATRIOT Act, 2001: Sec.212.(a)(1)). Alternatively the government is allowed to require access to such information in case a “governmental entity” expresses similar suspicions. The use of the term “governmental entity” is notable as it authorises a wide range of governmental agents to request such information, a distribution of agency which effectively spreads the reach of executive power. Further, since these agents are left to use their judgements – the clause of *reasonable suspicion* is invoked again – it allows for another

¹⁰ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (United States Constitution Amendment 4).

instance of sovereign decision-making that *effects* legal measures. It should have become clear by now that this is a trend that permeates the whole PATRIOT Act.

The next section - section 213: Authority for Delaying notice of the Execution of a Warrant - is arguably much more intrusive than the sections that were already discussed. It postulates that warrants required for the search and seizure of any property or materials that constitute evidence of criminal offence may be delayed, should the court consider that "providing immediate notification of the execution of the warrant will have an adverse result" (PATRIOT Act, 2001: Sec.213.[2][b][1]). The so called "sneak and peak"¹¹ searches have been successfully used for a long time in collecting evidence for drug-related cases and this seems to be a reasonable argument that there is nothing wrong with applying them to terrorist suspects. The problem of course is that in the US agents are often dealing with potentialities and "suspects," not with confirmed criminals and are acting on the grounds of reasonable suspicion, and this can easily result in yet another violation of the fourth Amendment of the Bill of Rights (doing a sneak and peak search on an innocent person. Furthermore, at the inception of the section it wasn't made clear as to how long these delays in providing notice for sneak and peak searches would be, although the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005 stated that notification should be given within thirty days of the execution of the search warrant, which is still an unreasonably long period of time. The standard for the initiation of sneak and peek searches is similar to the one used in Section 212 – in case of reasonable suspicion of "endangering the life or physical safety of an individual", "flight from prosecution", "destruction of or tampering with evidence", "intimidation of potential witnesses", or "otherwise seriously jeopardize an investigation or unduly delay a trial" (Doyle, 2001: 10; 18 USC 2705). It can, in other words, be used not only for cases of terrorism but for ordinary criminal acts as well and again rests on the evidentiary standard of reasonable suspicion.

This group of sections is obviously linked to the intent of the US Admin to disrupt the enemy's plans and reduce their capacity for threat, before said threat is fully formed. It also gives preponderance to the evidentiary standard of reasonable suspicion and vests the agents of the state with significant powers in deciding who could be a potential terrorist;

¹¹ "A sneak and peek warrant is one that authorizes officers to secretly enter (either physically or electronically), conduct a search, observe, take measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files and the like; and depart without taking any tangible evidence or leaving notice of their presence." (Doyle, 2001: 9)

further, once this decision is made said agents are enabled to collect a disproportionate amount of information “on-the-go”. These sections synchronise well with the sections that authorise pre-emptive detention based on reasonable suspicion as people who have been subjected to sneak and peek searches can easily be arrested at the slightest suspicion that the information gathered on them is evidentiary of potential terrorist activity.

5.3 Emergency surveillance – gauging the capacity for threat

The PATRIOT Act features a number of even more intrusive provisions that allow for the intrusive investigation of technically legal activities, should there be a reason to believe that such activities are potentially related to terrorism. Sections 214-216 of the Act authorize the use of trap and trace devices¹² and also give green light for the secret procurement of business and library records by law enforcement agents. These actions are deemed legal provided that the investigation aims at “obtaining foreign intelligence information not concerning a US person or [at] protect[ing] against international terrorism or clandestine intelligence activities, provided that such investigation of a US person is not conducted solely upon the basis of activities protected by the first amendment to the constitution.” (PATRIOT Act, 2001: Sec.214.[a][1]). That is, the section implicitly authorises the use of trap and trace devices and the procurement of library records on US citizens as well, as long as the governmental agent in charge certifies that “the information likely to be obtained is foreign intelligence information” (PATRIOT Act, 2001: Sec. 214 [a][2]). Further, with regards to the procurement of business records, everything is to be done in secrecy as: “no person shall disclose to any other person that the FBI has sought or obtained tangible things under this section...a person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such information.”(PATRIOT Act, 2001: Sec. 215[d]).

These articles further increase the freedom of the law enforcement agents in procuring personal information without necessarily obtaining a court order, solely based on suspicions. As long as everything is done “in good faith”, all such procurements are considered to be legal. In the case of obtaining business records the business owners might not be told what the records are needed for, which would have been seen as unacceptable before 9/11. The

¹² “‘Trap and trace device’ means a device that captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.” (Revised Code of Washington, 2002: Section 9.73.260)

provision that refers to the first amendment of the constitution practically serves no purpose in providing limitations to the law since obtaining any information that concerns foreign intelligence would be seen as necessary for the protection of the homeland and thus beyond the protections of this amendment, which serves to protect peaceful dissent. What is more, the amendment that is most likely to be violated here is not the first but the fourth one, which deals with searches and seizures of artefacts/information.

Section 215 proved to be exceptionally controversial and is one of the sections in the Act that caused a significant public backlash. It amended a specific authority under the Foreign Intelligence Surveillance Act to “seize rental car, self-storage and airline records for national security records for national security investigations,” an authority that was applicable to a very limited subset of businesses and that required “the showing of ‘specific and articulable facts’ that the individual target was in fact an agent of a foreign power” (PATRIOT Act, 2001: Sec.215) (Barr, 2006: 506). It also required the application for seizure to be made by the Federal Bureau of Investigation itself. Section 215 proceeded to remove any limits to the applicability of this authority and stated that the Director of the FBI OR any “designee” of his “may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items)” (PATRIOT Act, 2001: Sec.215). Thus, authority was yet again distributed as now any “Assistant Special Agent in Charge” could apply for an order of seizure (ibid.). In addition the items sought “need not relate to an identified foreign agent or foreign power” as was the case before, as long as they “are sought as part of an investigation to protect the United States from international terrorism or clandestine intelligence activities” (Doyle, 2001:11) That is, virtually any business can be affected by this section and the range of items that can be accessed is virtually unlimited – “membership lists of political organisations, gun purchase records, medical records, genetic information and any other document, item or record that the government contends is a ‘tangible thing’” (Barr, 2006: 507).

Section 215 also lowered the evidentiary standards required for the issuing of such an order; as Barr notes: “if certification is made that the records are sought for any intelligence or terrorism inquiry the judge has no power under the law to challenge that certification” (Barr, ibid). As a result, all it takes for Section 215 to be put in motion is for an agent of the FBI to say that certain documents are “sought for” an investigation – this is a very interesting phenomenon in which the word of an agent of a governmental institution is as legally

binding and commanding as the established written laws. Section 215, by the nature of its wording, also allows the FBI to investigate purely legal activities by those who are suspected of being agents of a foreign power. Finally, it is important to note that Section 215 explicitly prohibits the recipient of a disclosure order from telling the person who is being investigated, which means that the people whose privacy has been breached have no way of knowing that and are thus unable to protect their privacy or assert their rights against potential abuse.

Section 215 was, in fact, one of the few Sections of the PATRIOT Act that was eventually amended. It sparked a very vocal protest of librarians around the country – by 2005, in all, seven state legislatures, 44 state library associations and 381 cities and towns had passed resolutions expressing their concerns with Section 215¹³. As a result the congress was forced to limit the Patriot Act's access to library records, in an amendment that was passed in June 2005, which "prohibited the Justice Department from using appropriated funds to access the reading records of US citizens without a traditional search warrant" (ibid). This represents one of the few compromises that have been made since the inception of the act.

Section 216 represents another interesting modification on the rules for the use of trap and trace devices. Before the PATRIOT Act, USC 3121 (b) authorised law enforcement agents, "upon certification that the information to be obtained is relevant to a pending criminal investigation" to use a trap and trace device on a particular telephone (Doyle, 2001: 11). Section 216 of the PATRIOT Act amends USC 3121 to authorise "the installation and use of a pen register or trap and trace device anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." (PATRIOT Act, Sec.216 [b]). That is to say that the court having a "jurisdiction over the offense" is able to issue a single order which would allow the tracing of multiple telephone devices across multiple jurisdictions in the US, provided that these telephones are related to the same offense/crime. This results in what Doyle calls a "streamlining" of the investigation and in further de-territorialisation and speeding up the potential of the US law enforcement agents for information gathering.

¹³ <http://www.out-law.com/page-5829>

The interesting thing about these sections is that they allow for the operation of surveillance procedures that have as their primary purpose the general collection of information that is not necessarily connected to any particular crime, as long as the agents of the state believe that the information might prove to be of use. The sections further illustrate the increased executive authority, the low amount of judicial oversight and the pre-emptive nature of information gathering that is meant to gauge the capacity for threat of select individuals – all of these are properties that are spread throughout the PATRIOT Act.

5.4 Emergency surveillance: pre-emptive search warrants

Another set of sections of the PATRIOT Act related to pre-emptive surveillance that I want to discuss are sections 505, 506, 507 and 219. Section 505 – Miscellaneous National Security Authorities - greatly expands the power of the FBI to acquire National Security Letters. A National Security Letter (NSL) can be served on a communications provider to allow for “an extraordinary search procedure which gives the FBI the power to compel the disclosure of customer records held by banks, telephone companies, Internet Service Providers, and others” (Epic Online, 2013). Further to that, the recipients of said letters are subject to a gag order that forbids them from disclosing any information whatsoever regarding the letters to their friends, family or co-workers, thus making judicial oversight impossible. Section 505 allows for the FBI to issue NSLs in the process of making terrorist investigations which practically means that “[it] could get any records from any entity by claiming that they were relevant to that investigation” (Dempsey, 2006, 544). The definition of what investigations are applicable for the issuing of NSLs is as follows: “an authorised investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the US” (PATRIOT Act, 2001: Sec.505[a][2][B]). This mirrors the language used in Title II of the PATRIOT Act, and it is just as broad, since any investigation authorised by the Attorney General or the President can become a terrorist investigation. Further, it complements Section II in the sense that allows for even more information to be gathered on select terrorist suspects. In addition, Sections 506, 507 and 508 of the same title further extend the secret service jurisdiction by allowing the FBI and the Attorney General to request the disclosure of Educational Records and information from National Education Statistics surveys.

Section 219 - Single-Jurisdiction Search Warrants for Terrorism – deserves further attention. Section 219 expands on the previous sections by granting the Federal magistrate judge in any district the right to issue search warrants related to the investigation of domestic and international terrorism. The warrants allow for a search of property or a person within and outside the district where the activities related to terrorism have occurred. This has two consequences. First, and what has been mentioned more than once so far, is that the judgement of what “activities related to the terrorism” might be is to be made by law enforcement agents, which grants significant freedom for procuring search warrants. Second, it appears that the judge of a district can procure a warrant for the search of a person who resides in any other district, which creates a window for violation of the law as federal agents may exact such warrants without significant evidence of a crime from judges that they know well or judges that are known to be lax with the issuing of warrants.

This set of sections follows the already established pattern of lowering judicial review, increasing executive decision-making power and the enabling of pre-emptive surveillance with the hope that the plans of the *potential* terrorists will be revealed before they are brought to fruition.

5.5 Streamlining surveillance

The next relevant section in title II, Section 218, is only one sentence long but nevertheless is one of the most significant in the act. Prior to the implementation of this section any sort of application made under the Foreign Intelligence Surveillance Agency “had to contain a certification that ‘the purpose’ of the surveillance’ is to obtain foreign intelligence information’ 50 USC 1804(a)(7)(B)” (Collins, 2006: 537). This meant that there was clear distinction between the workings of the FBI and the domestic law agents (ie criminal investigators) and that the two institutions were practically barred from sharing confidential information. This obstruction was known as the “wall” and was theoretically aimed at protecting civil liberties. It came as a result of domestic-intelligence abuses related to Vietnam and the Watergate scandal. Further, the logic behind the wall is based on the fact that while ordinary domestic legal investigations are governed by criminal law, FISA investigations are immune from that law and are often related to “electronic surveillance and physical searches in the context of national security investigations” (McCarthy, 2006: 569). Thus, the theoretical divide between criminal and intelligence matters was translated

into a practical distinction, with different rules of operation applicable to the two institutions.

The argument against such a divide is that, especially in the modern world, the distinction between national security issues and felonies is blurred, especially when concerning espionage and terrorism: “Espionage, for example is both a dire national security issue and a felony... similarly terrorists commit many crimes (e.g., immigration fraud, identity theft, money laundering, [etc...])in the course of plotting and attacking” (McCarthy, 2006: 570). Further, there is a direct consequence of the wall for the pre-9/11 terrorist investigations as the FBI declined the assistance of criminal investigators in locating Khalid al-Midhar and Nawaf al-Hazmi, the pair that helped hijack Flight 77, which was piloted into the Pentagon. Section 218 only adds one word to the legislation relevant to FISA (50 USC 1804) but it is enough to bring down the wall – it alters the phrase “the purpose” to “a significant purpose”, meaning that an application for FISA surveillance can now have purposes different from obtaining “foreign intelligence information” (ibid.).

A significant purpose can now be read to include a possible criminal prosecution meaning that the flow of information between the FBI and domestic criminal authorities is no longer obstructed. This section works in accord with the already discussed Section 203 and both sections manage to completely demolish any information sharing barriers between foreign intelligence agents and domestic intelligence agents, thus responding to the capacity of the terrorist threat to emerge both within the territory of the US and outside of it.

5.6 Defeating Plans

It has been duly illustrated in this section how the novel information gathering techniques enabled by the PATRIOT Act function to imbue the law enforcement institutions with the capacity to institute pre-emptive surveillance in a number of ways. It allows said institutions to collect information that is only potentially related to terrorist activities and procure a wide array of documents and communications that are hoped to reveal the terrorist plans before their emergence, while they are literally in-formation. It also puts a lot of emphasis on the evidentiary standard of reasonable suspicion which enables law enforcement agents (both foreign and domestic) to not only adaptively decide what information is to be sought for the unveiling of the plans of (potential) terrorist suspects but also act upon these decisions. Next, it allows agents of the law to better address the *capacity* for threat of certain entities by acting in order to prevent *potential* attacks and enabling them to gather

information that is only *likely* to be connected to said potential threat. Further, it removes the boundaries for the circulation of information between domestic, foreign and financial institutions, thus enabling the government to quickly detect the *formation* of bad circulations and flows of people or capital and stop this formation before it is too late. Finally, the PATRIOT Act manages, to a great extent, to remove territorial boundaries that generally confine the investigation of crimes to particular US jurisdiction. All of these developments meet the need for predictive surveillance that the logic of pre-emption necessitates and not only enable law enforcement agents to work within an imaginary reality, but also gives them the power to effect changes within that reality. As a result, these developments tie in with those outlined in the previous section to make law enforcement capable of mirroring the sudden emergence of the capacity for threat. As a result, law is enabled to respond to the terrorist threat in a way that mirrors its logic – to paraphrase President Bush – sudden law enforcement to respond to a “world of sudden terror.” (Bush, 2002d).

6. The biopolitical assay of life and the PATRIOT Act

5.3 (Dis)allowing life: of men and aliens

I have already discussed at length, in Chapters 2 and 3, how the assay of life is a key feature of the bio-political governance. The decision on which life is to be protected and nourished and which life is threatening and is to be disallowed has been one of the key principles of formation of political meaning since the 18th century and that has not changed for neoliberalism. In the weeks and months after the attacks of 9/11, Bush took an exceptional care to establish that the American nation stands united and that the Arabs and the Muslims, whether American citizens or not, are its friends. Such a qualification was necessitated by the series of revenge/hate crimes that transpired during the weeks following 9/11 and it had to be continuously reiterated for many years after the attacks: “The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them.” (Bush, 2001b)

The divide between valued life and threatening life was, instead, established along the lines of good and evil, freedom-loving citizens and murderous terrorists, civilization and barbarians, civilized nations and the axis of evil. To quote Foucault:

“The barbarian...is someone who can be understood, characterized, and defined only in relation to a civilization, and by the fact that he exists outside it... And the barbarian's

relationship with that speck of civilization...is one of hostility and per-manent warfare. The barbarian cannot exist without the civilization he is trying to destroy and appropriate.” (Foucault,2004: 195).

This is unanimous with the way in which President Bush framed the terrorists after 9/11, with the difference that Bush added the biopolitical layer of preserving the United States’ way of life, which the barbarians wanted to corrupt - their goal, after all, was one of “re-making the world”. (Bush, 2001b).

The PATRIOT Act followed the Administrative logic of delineation and it made it very clear that it does not aim at discriminating between Americans of different ethnicity of creed. This is elaborated upon in one of the very opening sections of the Act - Section 102: Sense of Congress Condemning Discrimination Against Arab and Muslim Americans. It revolves around the understanding that: “Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American” (PATRITO Act, 2001: Section 102[a][1]). In addition, all acts of violence conducted against Arab and Muslim Americans after 9/11 “should be and are condemned by all Americans who value freedom”. Finally, the nation is called upon to “recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds” (PATRIOT Act, 2001: Sec. 102.[b][3]). The wording in Section 102 is assertive and in line with both the freedom-versus-evil discourse and the friend-versus-foe distinction that were established post-9/11. The message is unequivocal – every American citizen is entitled to the same rights and the same protections.

However, as Foucault often remind us, the unsaid is often more important and more meaningful than the said, and this is true for the PATRIOT Act as well. It is very revealing that Section 102 implicitly denies the protections and support that it grants to Muslim and Arab Americans, to those Muslims and Arabs who are immigrants – the protective line is drawn at the citizen category. All the non-citizens who are present in the US fall in the very interesting legal category of “aliens”. This category is a very broad one and encompasses “any person not a citizen or national of the United States” – that includes legal and illegal immigrants, residents and non-residents of the US and also allows for the differentiation of both friend and enemy aliens (8USC § 1101[a][3]). The fact that the PATRIOT Act makes no protective provision for aliens, a category which encompasses all of the legal resident immigrants, is

very revealing of the divide that is enabled by the act - between life that must be protected and life that *can* be disallowed.

This divide holds true even for the sections found in Title II of the Act, which provide a seemingly indiscriminate security of all US residents with the clause that any investigation “of a United States person” should not be conducted “solely upon the activities protected by the first amendment to the constitution” (Patriot Act, 2001: Sec 214[a][1]). This appears to be legally and constitutionally protective of all US residents until one considers the legal meaning of a “United States person”, which “includes American citizens and legally admitted permanent residents; it does not include non-resident aliens legally present in the United States” (Waldron, 2010: 33). As a result, despite all of the assurances of Section 1 of the PATRIOT Act that everybody is to be treated equally, some people, namely the US citizens, are still more equal than others. At the same time the “aliens” are more easily subjected to the arbitrary decisions of the agents of the law that they represent clear and present danger to the US population, or *will* represent such danger at some point in the future.

Indeed, most of the provisions in the Act are explicitly directed against aliens. After all, section 412, which includes the most controversial provision allowing the indefinite detention of suspected terrorists is targeted against aliens – “The Attorney General shall take into custody any alien who is certified under paragraph (3) [to be a terrorist suspect]” (412 [1]). It does not say any illegal alien or enemy alien, just “alien” which already reduces the protections bestowed upon legal alien residents in the US to the absolute minimum – they could be effectively arrested without any evidence that they have done (or, for that matter, that they will do) anything wrong based on reasonable suspicion alone.

Further, the PATRIOT Act includes a number of sections that exclusively give the US Government increased authority, both in terms of surveillance and apprehension, against aliens. Most of these have already been discussed in the other sections of this chapter, but there are a few more that are of importance and have not been analysed yet. Section 403, for example – Access by the Department of State and the INS¹⁴ to Certain Identifying Information in the criminal History Records of Visa Applicants for Admission to the United States) – provides the Department of State and the Service access to the criminal history record information contained in the National Crime Information Center’s Interstate

¹⁴ Immigration and Naturalization Service.

Identification index for the purposes of determining whether an applicant for a visa has a criminal record. It also promulgates financial regulations to implement procedures for the taking of fingerprints and calls for an establishment, within two years of the enactment of the PATRIOT Act, of a technology standard that can be used to verify the identity of people applying for a Visa (labeled as “aliens”).

An interesting question that the Act does not address is whether the American citizens stop being citizens once they are condemned as terrorist, a question that will be explored in detail in the following chapter. It is important to note, that despite the fact that most of the Act is targeted against aliens, there are multiple provisions that allow US law enforcement agents to enforce almost any section of the Act – be it one related to surveillance or detention – against US citizens themselves, if said agents have reasonable suspicion of the citizens being terrorist or have reasonable suspicion that the information that they might gather on them is related to potential acts of terrorism. Even the provision which reinforces the protection of the US citizens granted by the First Amendment, leaves to the agents of the law to decide what is in accord of the amendment and what violates it.

5.4 (Dis)allowing life: a question of judgement

This leads me to the key function regarding the bio-political assay of life that the PATRIOT Act performs. It is one of the most important and overreaching functions and also the most interesting and peculiar one in legal terms. I have already discussed how the pre-emptive functionality of the Act was enabled by the ability of the agents of the Executive branch of the state to make legally binding decisions on the basis of the evidentiary standard of reasonable suspicions; decisions which were made possible via the sovereign decision-making power with which they were invested by virtue of the Act. This power was further complemented by the inversion of the classical assumption of the burden of proof, which was re-configured so as to fall on the defendant.

This tactical and instrumental use of the law is what allowed the law enforcement agents to use the PATRIOT Act for purposes that were not explicitly authorised by the Act but were nevertheless *enabled* by it. Some of these purposes had to do with the operationalization of a very classic type of racial discrimination which was made functional via the use of racial profiling. The definition of this technique is as follows: “Racial profiling refers to the practice followed by law-enforcement officers of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity” (US Legal Dictionary, 2013). The PATRIOT Act enabled

agents of the state to arrest and gather surveillance on people (on some accounts, American citizens) on the basis of the evidentiary standards of reasonable suspicion, thus allowing for the employment of racial profiling as a substitute for tangible evidence in arrests and surveillance. That is, the field law enforcement agents were allowed to use their own judgement in the stead of the legal prerogative. When this judgement was informed by racial discrimination and assumptions that certain individuals have greater capacity for threat just based on their looks, this led to the preponderance of racial profiling in the uses of the PATRIOT Act, especially during the first few years after its implementation. To quote a statement by the National Conference for Community and Justice released in 2002:

“NCCJ is opposed to the USA PATRIOT Act because it has resulted in: Increase of reports and acceptance of racial, ethnic and religious profiling. Following September 11th, many Arabs, South Asians and Muslims along with Americans of Arab decent reported being questioned by the FBI and other law enforcement agencies, and an increase of racial and ethnic profiling from airport security officers. There were also reports of the FBI collecting data and conducting surveillance on mosques and Islamic centers” (Cited in ProCon, 2013)

In accord with this statement ACLU estimated that the FBI has “rounded up over a thousand immigrants as 'special interest' detainees, holding many of them without charges for months” in the years after the release of the PATRIOT Act (ibid.)¹⁵. Further, such attitude did not seem to alleviate over time – every year there are multiple instances of complains and numerous reports of uses of the PATRIOT Act in conjunction with racial profiling. One internal Justice Department report, obtained by a news site in 2009, for example, suggests that:

“The inspector general [has] found "significant problems" in the Bush administration's actions toward 762 foreigners held on immigration violations after Sept. 11. The FBI took too long to determine whether they were involved with terrorism, as dozens endured "lock-down" conditions 23 hours each day and slept under bright lights, the report found.” (Murphy, 2009)

Other studies have further evidenced that PATRIOT Act related stop and search checks are more likely to be initiated on a non-white person (US Department of Justice, 2005), that

¹⁵ “Most notably, numerous incidents perpetrated by the US PATRIOT Act have targeted Muslim Americans as profiled terrorists in airport security searches, banking, investments, and expressing freedom of religion as a means of providing national security (Delflem 2004; Ellmann 2003; Gross & Livingston 2002; Lund 2002; Kleiner 2010)” (Pitt, 2011: 54)

a majority of the sneak and peak searches that have been done between 2006 and 2009 have been done in the pursuit of drug-related offences (Kain, 2011), and that the majority of the hundred-and-fifty-thousand National Security Letters that were authorised by the PATRIOT Act and that were issued between 2003 and 2005 were related to money laundering, immigration and fraud, as opposed to terrorism (Khaki, 2011).

The majority of these studies, reports and assessment are mostly guess-work since there is very little official information released by the government but the overwhelming trend is clear: the provisions of the PATRIOT Act have been used tactically and adaptively to fit numerous requirements, one of which has been the continuous, bio-political assay of life. A lot of these uses have been pre-emptive in their logic of operation, since they included the selective surveillance and apprehension of individuals based on suspicion that they have the capacity for threat, and the use of the method of racial profiling as a substitute for tangible evidence. This further solidifies the PATRIOT Act as a novel, bio-legal document that adds an *enabling* aspect to the classic *prohibitive* form of the law, an addition that was only made possible by virtue of the expansion of the sovereign decision-making power within the legal framework. That is, the only way to make the law adaptive to sudden changes and emergent in its function is to imbue the enforcement element of the law with the necessary predictive, emergent and, indeed, pre-emptive powers, a task that is successfully accomplished by the PATRIOT Act.

6. Conclusion

It has been illustrated throughout this chapter how the United States responded to the terrorist attacks of 9/11 with the construction and operationalization of a very particular discursive formation which led to the emergence of a novel pre-emptive grid of intelligibility. This grid was substantiated both in the public and the political domains, through the numerous speeches given by the President Bush and his Administration in the years following the attacks, and in the legal domain, through the implementation of the PATRIOT Act. The discursive framework that set the rules of formation for the pre-emptive grid of intelligibility was manufactured by the Bush administration through the continuous enunciation of a number of key *statements* that helped define the unique threat that the US was facing, and determine some of the key truths that were to be accepted by the government and the public alike. These truths included but were not limited to: the particular distinction between friend and foe after 9/11, the inapplicability of the concept of

neutrality (with us or against us), the biopolitical formulation of the conflict (the war was over the American way of life), the emergent apocalyptic nature of the threat and the need for decisive pre-emptive action that this nature necessitated. It was also postulated a number of times that said pre-emptive action requires new governmental tools that were to enable the United States to stop the threat before it has emerged, or in other words, to hamper the capacity for threat of the terrorists, who were, to invoke Bush's qualification of Iraq, "gathering danger" (Bush, 2002c).

The primary of these governmental tools was the PATRIOT Act, which was put in legislation by the Congress and signed by the President in October 2001, less than two months after the attacks of 9/11. The PATRIOT Act was a novel type of legal document, both in its form and its function, and it significantly altered the relationship between law and law enforcement. It followed the pre-emptive biopolitical logic of operation that the government introduced after 9/11 and, for that purpose, it appropriated, re-defined and used *tactically* a few key techniques of governance and legislation that were historically a part of the sovereign juridico-political sovereign grid of intelligibility and of the disciplinary grid of intelligibility.

First, it adapted the sovereign power for decision making by legally empowering the executive branch in a way which enabled it to effectively merge law enforcement and law formation; next, it adapted the disciplinary technique of surveillance, as well as the regulative biopolitical technique of regulative statistical surveillance, into a pre-emptive surveillance technique that was meant to enhance the administrative capacity to "defeat the terrorists plans" and to "connect the dots" in relation to the terrorist activities (White House, 2002); finally, it not only provided the government with a number of tools to carry out the biopolitical assay of life but also made possible the operationalization of the mechanism of *racial profiling*, which was enabled by the unprecedented power that the Act vested in governmental entities.

As a result, it is indeed true that "the Patriot Act updated the law to reflect new technologies and new threats", as it was announced on the Department of Justice website shortly after the release of the Act (Department of Justice, 2001). This update to the law represents a fusion of a number of different techniques of governance taken from all previously existing grids of intelligibility. These techniques were combined in order to make possible the operation of a pre-emptive logic of power, which did not exist before 9/11 and

which became part of the overall governmental strategy of power of the US. It is important to note here that it did not come as a replacement of any of the already existing grids of intelligibility but rather worked alongside them in a heterogeneous topology. Thus, the discursive formation that enabled the existence of the pre-emptive grid of intelligibility also enabled the fusion of different techniques of governance which were adapted to follow the logic of operation of this new grid.

Finally, I would like to consider the fact that the Act itself, in its validity and existence, follows the logic of temporary permanence that was employed by the government on many occasions since 9/11 – from the establishment of a situation of permanent exception of “almost normal” everyday state, to the logic of operation of the indefinite detention, which enables 6-month detentions that get perpetually reauthorized. In a similar fashion most of the provisions of the PATRIOT Act were supposed to sunset in 2005, at which point they were reauthorized by President Bush with a new sunset date of 2011, at which point they were, yet again, reauthorized by President Obama with a new sunset date of December 2013. All expectations are that the provisions of the PATRIOT Act will keep getting reauthorized for the foreseeable future.

Chapter 5. The Battle for Guantanamo Bay: Sovereignty, Exceptionalism and Shades of Law

1. Prelude

1.1 Historical overview

This chapter shall focus on the exceptional character of Guantanamo Bay and on the repercussions that it has for post 9/11 US governance. To begin with, one should note that spaces of legal exceptionalism, which feature extraordinary rendition, inhumane treatment of prisoners (i.e. torture by proxy) and suspension of legal rights, have been created and utilized by the US many times prior to 9/11. Nevertheless, the US has always managed to keep them in the background and vehemently deny their existence. This represented what Žižek calls the obscene superego underside of the law (1994: 61) – the transgressive, violent side of the law that ensures its function, so long as it remains hidden: “in order to assert itself, public law has to resist its own foundation, to render it invisible” (ibid.). However, such an outcome – forging a space of exception that remains both transgressive and hidden - was untenable after 9/11. What happened on 9/11 got everyone involved; not only in terms of sharing the tragedy but also in terms of the reaction that was to follow; that is, after 9/11, US’ foreign and domestic actions that related to terrorism were scrutinized by a global audience and the US was bound to be held accountable. As a result, it was impossible to keep the treatment of detainees a secret, especially given the large number of people that were apprehended as terrorist suspects in Afghanistan and around the world. Secondly, and what was really decisive in bolstering the conflict between the US executive and legal branches, was the prevalence of what Foucault calls “subjugated knowledges” – this term denotes an influx into the dominant discourse of power of knowledge strains that would have in other circumstances be confined to the margins:

“it is a way of playing local, discontinuous, disqualified or nonlegitimised knowledges off against the unitary theoretical instance that claims to be able to filter them, organize them into a hierarchy, organize them in the name of a true body of knowledge, in the name of the rights of a science that is in the hands of the few” (Foucault, 2004: 9)

In the case of Guantanamo, these strains of knowledge were provided by eyewitnesses of the way detainees were apprehended and treated, detainees themselves who managed to

get their story out, relatives and friends of the detainees, independent news organizations and other sources such as Wikileaks. These sources were responsible for the stories that revealed to a large audience the exceptional character of Guantanamo Bay and the disregard of international, customary and domestic law that was practiced there. As a result, the hidden underside of the US law was exposed to the world and the US administrative branch was forced to confront and redact this image. The only way for it to do this was to attempt to work through the law and to try to justify the exceptional measures in Guantanamo. This is, of course, more of a theoretical (rather than axiomatic) approach towards explaining the meaning and significance of the legal confrontations that were prompted by the establishment of Guantanamo Bay, but it is nevertheless important to note its significance and central stage in determining the scope and nature of the particular US exceptionalism that followed the 9/11 terrorist attacks.

Guantanamo Bay is a self-sufficient US naval base, which is located in Cuba and is perpetually leased to the US by virtue of the Cuban-American treaty signed in 1903, the latter being a direct result of the Spanish-American war of 1898. The US is, on paper, not the exclusive sovereign over this territory (Cuba is), and yet it has been granted “complete jurisdiction and control over and within said areas” during the period of its occupancy¹⁶ (Palma and Roosevelt, 1903). The terms of the lease are indefinite and it can be only terminated if both parties agree to it, which, given US' interests, does not seem to be a likely outcome. The most striking result of these peculiar lease arrangements is the fact that the constitution of the US is not valid within the perimeter of Guantanamo Bay, even though the US is the de-facto sovereign in the area. This, in practice, turns the naval base into a space without a pre-determined legal framework, a blank slate (*tabula rasa*) on which novel laws and regulations can be inscribed, without the need for them to be in line with any constitution. This particular legal arrangement is coupled with the fact that Guantanamo Bay is situated in an area that is spatially excluded from any other human activity and is completely self-sufficient. As a result the spatial and legal arrangements of the camp mirror each other and turn Guantanamo bay into a historical and legal precedent, which the US Executive has used to its advantage.

¹⁶ Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb 23, 1903.

Since early 2002 Guantanamo Bay has been operating as a temporary detention centre, exclusive to “unlawful combatants”/ “enemy combatants”, suspected of terrorism. The fact that it is both in the US and outside of it in legal terms, allows the US government to implement exceptional measures which would not be acceptable on American soil. As long as the prisoners never touch US soil - and the naval base is not considered part of the territory of the US - they are denied the rights guaranteed to criminals under the American constitution, such as a presumption of innocence and a trial by jury. Further, according to the US executive, the prisoners have not been classified as prisoners of war, and thus are not subject to the protections of the Geneva Convention.

A little known fact is that this is not the first time in which the US uses Guantanamo Bay as a *lex specialis* playground¹⁷. During the late eighties and throughout the nineties the naval base was used as a refugee processing center and, from 1991 onwards, as a refugee camp. This followed the 1991 overthrow of the Haitian president Jean-Bertrand Aristide, which resulted into scores of Haitians attempting to flee to the US. A large number of these were intercepted by the US Coastal Guard and interdicted in the camp. At the time the US exercised complete control over the news and the legal advice which was available to Haitian refugees; this information was heavily tampered with so as to persuade the Haitian refugees to return home. The attempts by the independent Florida lawyers to challenge and change this legal limbo resulted in the first real precedent that granted the US executive the final say in what the legal arrangements are to be in Guantanamo. The Eleventh Circuit of Florida concluded that Haitians interned at Guantanamo had no constitutional rights due to the fact that “Guantanamo was ‘outside of the United States’ and rejected the argument that aliens there have extraterritorial constitutional rights” (Neuman, 1996: 1200). This position was reified three years later in response to a challenge made by the Second Circuit; the agreement that was reached at the time was that the refugees held at the Naval Base have no constitutional rights whatsoever due to the fact that the base is not on US territory. As Neuman summed up the situation: “An enclave exists over which the United States is all but sovereign, but within which aliens have no constitutional rights” (ibid. pp.1200-1). Neuman came up with the term “anomalous zone” to describe the situation at GITMO, a term which very much resembles Agamben’s camp, or Foucault’s heterotopia. In this

¹⁷ Lex Specialis - a legal principle according to which special rules derive from general ones; also “law governing a specific subject matter” (USLegal, 2012).

anomalous zone, we have a complete overhaul of the public law, which emerges based on a “claim of necessity”; the government manages to legally justify its claims to unfettered sovereignty that operates in a “rights-free regime” (Neuman, 1996: 1229) by classifying the situation as an “emergency” and also via reference to the peculiar status of the Bay itself - it is an extraterritorial zone that has the functional equivalent of a US border, both legally and spatially – ie it has certain properties of both being within the US and outside it. This rights-free regime allows the US an “uninhibited exercise of power” (ibid. 1232), unhindered by any legal or constitutional consideration. It also accounts for what Neuman calls “symbolic mobility” which is “the spread of the anomalous character of the zone by analogy” (ibid. 1232). This is especially relevant for the use of Guantanamo as a detention camp: we can see this “symbolic mobility” exemplified in Abu Ghraib and also in all cases of extraordinary rendition.

The intention of the US regarding its dealing with Al Qaeda detainees became obvious with the release of the Presidential Military Order of November 14, 2001: “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” (Bush, 2001). This order was already briefly analyzed in the previous chapter but it warrants further attention. Among other things the order stipulated that detainees suspected of terrorism are to be tried by military tribunals for “violations of the laws of war and other applicable laws” (Bush, 2001: Section 1e) and, more importantly, “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” (ibid. Section 1f). Further, “military tribunals shall have exclusive jurisdiction with respect to offenses by the individual” and “the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf in any court of the US” (ibid. Section 7b). This military order was, first and foremost, a statement of intent and a blueprint of what was to come. It laid out the ambitions of the US executive to completely exclude the legal branch from their dealings with Al Qaeda and Taliban detainees through the establishment of military tribunals that would only be accountable to the President and the defense secretary. It also stipulated the intentions of the executive branch to suspend customary, constitutional and even international law and to prevent detainees from seeking recourse to legal court rulings. At this stage US admin still hadn’t come up with the concept of the “enemy

combatant” so the order dealt with the category of “terrorist suspect” that was present in the Patriot Act (see chapter 1). Finally, a large part of this military order attempted to justify these exceptional measures on the basis of the danger and potential threat that international terrorism represented, putting in use the pre-emptive discursive framework that was established by the Bush administration after 9/11 (for the pre-emptive significance of the order please refer to the previous chapter). This sort of justification for violations of customary law based on the perceived emergency that the US faces were a recurring line of argument of the administration ever since 9/11, and were one of its main tools for justifying not only pre-emptive but also more broadly exceptional measures.

It was clear at the time that the complete overhaul of both the domestic and the international legal frameworks that the Military Order called for was untenable if the detainees were to be held in the US, or in any country that was a party to the Geneva Conventions. As a result, Guantanamo Bay was the obvious choice to serve as a prison for terrorist suspects - neither on US territory, nor out of it; not in Cuba’s jurisdiction but within its sovereignty – Guantanamo Bay represents both a legal twilight and a border. The place of exception is and always has been the border, where things are fuzzy enough not to be confined to categories as they are constantly de-categorised and re-categorised. Add to this the uncertainty of the law in a place like Guantanamo and one gets an empty space of legal exceptionalism. “Where all is emptiness there is room to move,” as Ray Bradbury once observed in a short story; that is, the lack of firm legal framework and boundaries in Guantanamo enables one to challenge existing legal assumptions and to create and operate new rules.

It is difficult to establish the inception of Guantanamo Bay as a detention facility for terrorist suspects, both in legal and in factual terms. This is possibly due to the fact that the US administration did not expect Guantanamo to attract so much attention from the press and the public, and to subsequently become one of the centrepieces of the criticisms against US exceptionalism. Moreover, the administration perhaps considered that the abovementioned Presidential Military Order, alongside with the so called “Authorization to Use Military Force” (AUMF), which grants the President the authority to “use all necessary and appropriate force against those...[who] planned, authorised, committed, or aided the terrorist attacks”, would provide sufficient justification for the internment of the terrorist suspects (US Congress, 2001). The first groups of detainees started arriving at the facility

mid-January 2002 and it was around the end of that month that their fate emerged as a discourse in the public field. At the time, the US admin did not release any legal statutes to justify the existence of the detention centre but, instead, exclusively relied on press releases and public statements in order to carve out this new entity. Notable is one of the first public outings of the news, which was made by Dick Cheney on the 27th of January, 2002, in a televised statement to the nation. In his speech, he said that the detainees at GB were not to be recognised as Prisoners of War and would most likely not be protected by the Geneva Conventions. In order to justify these extreme measures he said:

“These are the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort” (Cheney, cited in Fox News, 2002)

This emotional line of argument, which appeals to people’s feelings of fear and empathy in order to justify administrative measures, while completely disregarding the dry and rigorous logic peculiar to the law, was very common for the Bush administration during the year following 9/11. In many ways it was one of the tools that the executive branch used in order to manufacture the framework of pre-emption, as well as the necessity for exceptional measures, because any governmental practice that suspended and/or transcended the law needed some sort of moral justification. In fact, there were a lot of legally informed memorandums being circulated within the administration at the time but most of them exclusively dealt with the attempts of the administration to circumvent domestic and international law in their dealings with Guantanamo Bay prisoners. Notable memorandums of that time include the Yoo/Delahunty Memo of January 9, which provided legal advice on the possibility of circumventing the Geneva Conventions at GBay, and the Alberto Gonzales Memo of January 25, which provided a follow up on the Geneva Conventions question, along with an assurance that the administration could get away with stripping the detainees of their “Prisoners of War” status. Among other things Judge Gonzales warned the administration that “a determination of inapplicability of the GPW [Third Geneva Convention] would insulate against prosecution by future ‘prosecutors and independent counsels’” (Gonzales, 2002). The latter statement refers to the US potentially breaching section 2441 of the War Crimes Act, which deals with torture and inhumane treatment of prisoners. In his memo Judge Gonzales argued that, should the detainees be determined to be outside of the reach of the Geneva Conventions, the US’ treatment of detainees would

not be subject to the War Crimes Act. There are two very important conclusions that I want to draw from these memorandums. First of all, the Yoo/Delahunty Memo is dated two days before the first terrorist suspects arrived at Guantanamo Bay. This means that the US executive knew exactly what they were doing and that all of the exceptional measures taken at GBay were part of a carefully constructed plan. This contradicts most of the accounts of US policies re GBay, which stipulate that the US administration was merely improvising and that they were just trying to react to exceptional and novel circumstances; in fact the US executive branch worked really hard in order to create these novel and exceptional circumstances.

Meanwhile, legally informed documents concerning Guantanamo Bay were lacking; the only official document issued by the US Government at the beginning of its operations at Guantanamo was a White House Press release, dated February 7, 2002. It was the conclusion of one month of internal deliberations and it came in lieu of a legal writ concerning the camp. It stipulated that the Geneva Conventions would apply to the Taliban detainees, as they are citizens of a country that is part to the Conventions, but the al Qaeda detainees would not be covered by any of the Conventions. Further, the press release stated that neither the Taliban detainees nor the Al Qaeda ones would qualify for a Prisoner of War status, which meant that they would not be protected by the laws of war. This was justified on the basis of a perceived violation of Article 4 of the Geneva Conventions, which deals with the requirements for a person to be considered to be a POW. Thus, this press release served as a rights-stripping writ that was meant to leave a large part of the Guantanamo detainees out of the reach of both domestic and international law. This also led to the invention of the category “unlawful combatant,” which later evolved into “enemy combatant” and which needed to come into being in order to denote the people who are stripped of their Geneva Conventions protections. However, it took a very long time for the US to come up with an appropriate definition of the term so in the beginning it was legally void and mostly used as a label.

The preceding discussion aims to show that the detention centre at Guantanamo Bay did not appear as a result of the legal exceptionalism, nor it was what caused it. Instead, it is an indelible part of it, as the exceptional legal space both emerged through it and helped define it. We can say that Guantanamo Bay is the spatial equivalent to the abstract legal anomaly

which the US government purposefully created and that the two entities complement each other and work through each other.

Finally, as it will be illustrated at a later stage of the chapter, the US' interpretation and attempted circumvention of the Geneva Conventions was both erroneous and incomplete and was meant to mirror and complement the complete negation of the domestic constitutional legislature that the US admin aimed to establish at Guantanamo Bay. All of this laid down the foundations for an unstable and contradictory quasi-legal space that would become the centre of a series of confrontations between the US executive and legal branches. This tug of war between the two branches of US power was fought almost exclusively on a case by case basis, with each new case bringing its own sets of precedents and novel legislation. The chapter will proceed by mapping the most important of these cases.

It has to be noted from the start that these cases were and are the battleground in which the future of US exceptionalism is being decided and the validity and reach of the law is being challenged and re-established. If it is true that “the state of exception presents itself as a measure which is ‘illegal,’ yet perfectly ‘juridical and constitutional’ [and it] concretises itself in the production of new norms”, then, throughout the Guantanamo cases the US courts attempted to strip the administrative branch of its power to produce new norms, and also tried to re-synchronise the union between the *legal* space, the *juridical* space and the *legislative* space (Agamben, 2005: 27). In sum, they attempted to re-establish the predominance of the legal branch over the executive and to, if you will, re-activate the law so that it could once again take precedence over the exception and put an end to the permanent coup d’etat.

In order to do that the legal courts and the Guantanamo plaintiffs did not centre their cases upon proper the recognition of the validity of the Geneva Conventions, nor were they primarily concerned with restoring the status of Prisoners of War to the detainees. At stake was something much more central to the functioning of the law – the writ of *habeas corpus*.

1.2 The significance of Habeas Corpus

Habeas Corpus is arguably one of the most ancient writs in the Western legal tradition, as its earliest recorded uses date back to the twelfth century; it is also one of the few *prerogative* and unassailable writs of the law, along with *mandamus*, *quo warranto* and *certiorari*, writs which provide the form and origin of the law as we know it. As a result their

validity cannot be questioned or challenged by any entity, be it juridical or legislative. *Habeas corpus* is deceptively simple in its meaning and function. Its literal translation from Latin is “to have the body/you shall have the body” and it was initially used as an interlocution that served the purpose of ensuring that the “defendant to an action” is physically brought before a court in order to be tried by a jury; that is, *habeas corpus* was meant to “ensure the physical presence of a person in court on a certain day” (Attrill et al, 2011: 2). Eventually, the mirror function of the writ - that of scrutinising the validity and legality of one’s detention – became the predominant reason for its usage. It became the writ used to carry into an effect one of the key provisions of Magna Carta: “No free man shall be seized or imprisoned, or stripped of his rights or possessions ... except by the lawful judgement of his equals or by the law of the land” (The House of Anjou, Magna Carta: 39). This remained its primary use in Medieval Europe, and it was considered to be one of the primary safeguards of liberty, as it ensured that “no person shall be deprived of his liberty ‘without due process of law’” (Bailey, 1913: p.6). It was also known as the Great Writ in England and it was eventually guaranteed by the Habeas Corpus Act of 1969.

The reverence that people had for habeas corpus in England was brought to America by the colonists “and claimed as among the immemorial rights descended to them from their ancestors” (Bailey, 1913: 2). As a result it found a prominent place in the US Constitution – Clause 2 of Section 9 of the Constitution states that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” (US Constitution). The inclusion of the writ of *habeas corpus* in the Constitution guaranteed its status as a prerogative writ and ensured that, just as with its European counterpart it will be “beyond the power of legislature to abrogate this writ or curtail its efficiency” (Bailey, 1913: 7). Suspension of the writ is only acceptable in cases of high treason and it still required the issuing of a Habeas Corpus Suspension Act; “in the absence of such an act, an action or even indictment, would lie against anyone who had abused the powers conferred...” (Attrill et al, 2011: 92).

The previous discussion illustrated the prevalence of the writ of *habeas corpus* in the western legal system and it also made clear its unassailable status as a *rights-enforcing* principle. It should be made clear, however, that the most important function of the writ is not the guarantee of liberty that is inscribed in its function but the fact that it *necessitates the inclusion of detained people within the domain of the law*. “What habeas corpus ratifies

in its procedures is jurisdiction. Whether it results in the release of people from internment or not, it is jurisdiction that is at issue, and the recognition of bodies therein.” (Mitropoulos, 2004) That is precisely the reason why a recourse to the writ is so well suited to counteract the exceptional measures that were instituted in Guantanamo Bay. It is a tool that can guarantee the inclusion of GBay detainees in the legal sphere, which would be a sufficient measure to “re-activate” the prevalence of the law and to curtail the extremity of the exceptional measures which were brought in effect after 9/11. It is the only writ that can ensure that the law will once again apply to the detainees and that they will enter into a zone of legal distinction. That is why the recourses of GBay detainees to *habeas corpus* assumed the central role in the attempts of the legal branch to regain its lost footing.

Before I continue on to the legal cases of interest, a clarification needs to be made regarding the functioning of the US legal system. At the basic level is the “law of the land” which is codified in the US constitution and has a superior standing to all other laws – it cannot be abolished or abrogated by other legal entities. At the next level is the Code of Laws of the US, which “is the codification by subject matter of the general and permanent laws of the United States” (US Government Printing Office, 2012). This code comprises of statutes; each statute is a law adopted by one of the US legislative bodies – either congress or the federal and state legislatures. The US constitution gives the federal and the state courts the power to enact statutes and also the power to codify novel legislature (Brinson et al, 1999). Thus, we have two complementary strands of law – the constitutional law that rules supreme and cannot be abrogated and the statutory law that complements and reinforces the constitutional one and is dependent on the latter for its validity. Finally, there is a third, shadier, sphere of the law called “common law” which in practice covers all areas that are not properly addressed by either the statutory or the constitutional law. Common law has its roots in the English legal system and is a precedent-based legislative framework that relies on a “system of deciding cases,” which it uses in order to establish legally binding principles (US Legal Dictionary, 2012). That is, whenever there is an issue at hand which cannot be addressed and resolved by the constitutional or the statutory law, both the legal courts and the congress refer to similar cases (precedents) and treat the resolution of these cases as the law of the land. In the US, in particular, common law is the “the traditional law of an area or region created by judges when deciding individual disputes or cases” – that is, a lot of the states have their own unique common law set-up (ibid.). As time passes, these law

establishing cases enter proper law, as their legally binding decisions and resolutions get enacted into statutes. Until that happens, however, their legal power is in constant flux and is subject to alteration by the decisions made in any follow up cases. As a result, common law is the most malleable of the three strands of law that make up the US legal system, and is the one that is the easiest to challenge.

Habeas corpus is to be found in the US legal system both in the constitutional and the statutory law. Its constitutional presence (Clause 2, Section 9) was already discussed; as a statute, it is located in section 2241 of the US Code: *28 U.S.C § 2241 - Section 2241: Power to Grant Writ*. Its most important provision is as follows:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions* (28 U.S.C, section 2241, emphasis added).

In effect, section 2241 grants the Supreme Court, or any district or federal court, the power to issue writs of habeas corpus to any person detained “*within their respective jurisdictions*” (ibid). I have repeated and added emphasis to this phrase on purpose: it is important for the reader to comprehend its meaning as it lays on the foundation of the most important legal dispute concerning Guantanamo Bay.

2. The ties that bind: *Rasul v Bush* as an expression of the legal prerogative

2.1 *Rasul vs Bush*: beginnings

My analysis of the legal cases involving Guantanamo Bay begins roughly half a century earlier, with a case which provided the initial blueprint for dealing with habeas petitions from GBay and ostensibly informed the decision of the US administration to use the Bay as a detention centre in the first place. The case in question is *Johnson v. Eisentrager*, 339 US 763 (1950).

In it, “twenty-one Germans captured in China, convicted of war crimes there by a military tribunal, and imprisoned in Germany under American authority, petitioned for habeas relief in the District Court for the District of Columbia” (Thai, 2006: 513-4). They were charged for the war crime of refusing to cease their hostile operations against the US after Germany’s surrender, with their offensive operations chiefly involving reconnaissance that was relayed to Japan, before its respective surrender. Since they were captured and tried in China, and were later transferred to a prison in Germany, they never set foot on US soil, and as a result the court decreed that it lacks jurisdiction to entertain their habeas corpus petitions. This

was based on the court's decision that "aliens detained outside of the US had no entitlement to constitutional rights and therefore no constitutional habeas corpus entitlements" (Londras, 2008: 40). To quote the court: "[the foreign nationals were] at no relevant time [] within any territory over which the US is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the US" (339 US, 1950: 768). The court also added, without any clarification: "[n]or does anything in our statutes' entitle petitioners to habeas review" (Thai, 2006: 514). As a result, the habeas writ was refused to the Eisentrager detainees both on constitutional and on statutory grounds. The justification for the inapplicability of constitutional habeas writ was legally solid and left no room for challenges, but there was very little in the Eisentrager decision to support the denial of the statutory habeas corpus writ, a point that will play a pivotal role at a later stage in this discussion.

The Eisentrager case provided a resolution to a problem that was not addressed by either constitutional or statutory law – namely, the capacity of aliens detained outside the sovereign control of the US to apply for the writ of habeas corpus. As a result, it became one of the precedent cases to inform US common law [see above discussion]. Consequently, the court decision that led to its resolution gained the legally binding power of statutory law. It can be argued that the decisive status of Eisentrager in US common law was one of the key factors which determined the decision of the US administration to detain the terrorist suspect at GBay – Eisentrager meant that the government had a precedent that it could refer to in order to deny any of the detainees the writ of habeas corpus: "as a result of *Johnson* [vs Eisentrager], at the start of the 'Global War on Terrorism' the US administration believed that aliens held outside of the US had no habeas corpus rights in domestic law." (Londras, 2008: 41). Regardless of whether it influenced the inception of the detainment centre or not, Eisentrager did end up playing a big role in the legal proceedings of Guantanamo Bay, although not quite the role that was intended for it.

I am now going to turn to the first publicised case to come out of Guantanamo Bay, which also happens to be the most significant one in rights-establishing terms, as it set the tone for the confrontation between the legal branch and the executive branch over the legal status of the detainees; the case in question is *Rasul vs Bush* 124 S.Ct. 2686 (2004). It involved two separate cases which the district court chose to consolidate. The petitioners in *Rasul* were two UK citizens and two Australian citizens, who filed a petition for a writ of habeas corpus,

“requesting the court to order their release from unlawful custody.” (Sloss, 2004: 789). The complementary case was *Al Odah vs United States*, in which twelve citizens of Kuwait sought “a declaratory judgement and an injunction ordering that they be informed of any charges against them and requiring that they be permitted to consult with counsel...” (*Al Odah vs US*, 321 F.3d, pp. 1134-6). Even though the Al Odah plaintiffs claimed that they do not seek the writ of habeas corpus, the district court concluded that a petition of habeas corpus is the “exclusive avenue” for them to seek relief and as a result it decided to merge the two cases together (Sloss, 2004: 789). Henceforth, it held that it lacks jurisdiction over any habeas corpus claims of the petitioners, and it backed up this decision with *Eisentrager*: “in *Rasul*, the district court construed *Eisentrager* to mean that ‘writs of habeas corpus are not available to aliens held outside the sovereign territory of the US’” (ibid.). The district court further rejected the claim of the petitioners that “the US has a *de facto* sovereignty over the military base,” as it stated that GBay “is not part of the sovereign territory of the US” (*Rasul*, supra note 5: 69). As a result, it was claimed that *Rasul* could not be meaningfully distinguished from *Eisentrager*.

The decision of the lower courts was unanimous and the proceedings seemed to be going according to the expectations of the US administration. It appeared that the case for the detainees being beyond the reach of the law had been successfully made and that the position of the US executive branch was unassailable. Should that have been the final decision of the court the consequences would have been lasting and, from a legal point of view, harrowing, as the US government would have had successfully created a self-contained exceptional space of lawlessness, the perfect camp.

2.2 *Rasul vs Bush*: a change of course

It certainly seemed that this would be the case when *Rasul vs Bush* was taken to the Supreme Court for a final consideration, with all of the lower courts having recommended suspension of the writ of habeas corpus. It took the ingenuity and the boldness of one man to come up with a way to challenge and reverse this decision in a manner that was both legally binding and authoritative. The name of the man was Justice Paul Stevens and he launched his attack against the case during the oral argument in *Rasul v. Bush* which took place in the Supreme Court proceedings and which was expected to conclude in the same way that *Eisentrager* did. However, Justice Stevens managed to “turn *Eisentrager* on its head as a precedent that spoke *in favour of* rather than against habeas review for detainees

abroad” (Thai, 2006: 518). He achieved that through the invocation of an obscure common law case which stood at the roots of *Eisentrager*, maintaining its validity. Just as the Chief Judge of the Court, Mr. Gibbons was about to reach the conclusion that the Court had reviewed and denied the merits of the habeas petition, Justice Stevens intervened with the following response:

“Well, there is another problem [with *Eisentrager*]... that case was decided when *Ahrens* against Clark was the statement of the law, so there is no statutory basis for jurisdiction there, and the issue is whether the Constitution by itself provided jurisdiction. And of course, all that’s changed now.”

(Stevens, quoted in Pohlman, 2008: 170)

At the time, this statement made about as much sense to the Judges as it makes to the reader of the present document and so, as in the best crime mysteries, it needs to be unpacked carefully. Justice Stevens was referring to *Ahrens v. Clark*, 335 US, a case that was decided in 1948, two months before *Eisentrager* was taken to the court. The petitioners in *Ahrens* were a hundred-and-twenty German citizens, who were detained in the beginning of World War II and held at Ellis Island, New York. They addressed the District Court for the District of Columbia with a request for the writ of habeas corpus, on the grounds that they were being held illegally, in violation of the Alien Enemy Act of 1798 (Thai, 2006). The judges in *Ahrens* were less concerned with the actual request than with the question of the scope of jurisdictional power that the Columbian District Court possessed in that particular case. They identified the main problem as being “whether petitioners may bring their action in any district other than the Southern District of New York where they are confined, and second, whether the Attorney General is a proper party” (*Ahrens*, 335: 188). As a result of this concern, the majority of the Court voted to dismiss the case for lack of jurisdiction because “the detainees were not confined in the judicial district in which they filed their petitions” (Thai 2006: 506). The court’s final statement read as follows: “the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of *habeas corpus*” (*Ahrens*, 335: 189). This was, in fact, an interpretation of the statutory law contained in the US Code which was already discussed (see above, p.138). As you will remember, section 2241 of code established the statutory law on the matter by granting all courts the power to issue writs of habeas corpus *within their respective jurisdictions*. What it did not do, however, was to clarify what “within their respective jurisdiction” meant. *Ahrens* interpreted it to mean that the power of the courts to

issue writs should be limited to petitioners restrained within the geographic territories of these courts. Since it was the first case to provide such an interpretation, on a matter that was not previously discussed, its decision set the precedent that established the common law rules on the matter.

When *Eisentrager* commenced, the resolution of the *Ahrens* case was still very current in the judicial sphere, and *Eisentrager* was implicitly reliant on it. We already discussed the decision of the courts in *Eisentrager* to deny statutory habeas review to the German detainees without any detailed explanation. It is easy to see how this decision was in fact based on the recently concluded *Ahrens* case, which interpreted the statutory phrase “within their respective jurisdictions” to “require the physical presence of the prisoner within the district [where the court is located]” (Thai, 2006:524). Since *Ahrens* de facto constituted the common law at the time, the courts in *Eisentrager* were bound by its decision and could not consider offering statutory habeas corpus to the German detainees, as they were completely out of the territorial jurisdiction of any US courts. Thus, *Ahrens* in a way had created a “statutory gap” in jurisdiction that *Eisentrager* couldn’t overcome or ignore.

So far so good: *Rasul* was based on *Eisentrager*, which was reliant on the decision of the court in *Ahrens*. This is where the influence of Justice Stevens comes into play. His involvement in this chain of cases dates back to the beginning – at the time when *Ahrens* was being decided Paul Stevens was a law clerk under the employment of Justice Rutledge, who was one of the dissenters in *Ahrens*. After the decision of the *Ahrens* majority became clear Justice Rutledge was assigned the task of writing the dissent to the case, and he did this in collaboration with Mr. Stevens¹⁸. They both agreed that *Ahrens*’ decision creates a dangerous jurisdictional gap, as it is “destructive of the writ’s availability and adaptability to all the varying conditions and devices by which liberty may be unlawfully restrained” (*Ahrens*, 335 US: 205-6[Rutledge, dissenting]). They further claimed that the interpretation of “within their respective jurisdiction” that the *Ahrens* majority provided was unnecessarily

¹⁸ In legal terms, the “dissent” of a case is a written document that voices the minority opinion; if it is persuasive enough it has the power to reverse the majority decision of the case by making some of the judges change their votes

limiting and that it could lead to obstruction of serving justice not only in cases of petitioners located outside the territory of a district court but also of petitioners detained abroad (which turned out to be the case with Eisentrager and Rasul). Finally, they suggested that “within their respective jurisdictions” “could just as well be construed to refer to a district court’s jurisdiction over the jailor by service of process within its territory, as it could be construed to refer to the presence of the prisoner within the district” (Thai 2006: 511). They backed up this suggestion by making the observation that “the weight of authority (in the lower courts and elsewhere) have generally taken the position that jurisdiction over the custodian is sufficient regardless of the location of the party restrained” (Draft Dissent of Paul Stevens, cited in Thai, 2006: 508). Linking these observations back to Ahrens, they argued that since the Attorney General, who was the custodian of the German prisoners, is within the territorial jurisdiction of the District Court for the District of Columbia, then the prisoners were entitled to the writ of habeas corpus. In other words, they proposed that it is enough for the jailor to be “lawfully served within the territory of the district court”, even if the prisoner is confined elsewhere (Thai:2006: 509). The dissent was very well argued and when it was presented to the court a lot of the judges who were previously supporting the majority, joined the dissenting side. The numbers weren’t enough in order to overrule Ahrens’ decision but the arguments made by Justice Rutledge and Justice Stevens were powerful enough in order to be of influence to future cases. This is precisely what happened in 1973, more than twenty years later, when the Supreme Court “revisited the question of how best to interpret the statutory phrase ‘within their respective jurisdictions’” (Sloss, 2004: 791). The case that prompted this was *Braden v. 30th Judicial Circuit Court of Kentucky* 410 US. The petitioner pursuant in that case was charged for a crime perpetrated in Kentucky and was held in a prison in Alabama; nevertheless, he filed a petition for a writ of habeas corpus in the District Court for the Western District of Kentucky, as the officials who issued the primary charges against him resided in that state. This time the Supreme Court decided that the writ of habeas corpus could be issued; it interpreted the phrase “within their respective jurisdictions” to “require [] nothing more than that the court issuing the writ have jurisdiction over the custodian’ through proper service of process” (Thai, 2006: 514). It further held that, regarding Ahrens, the Court could “no longer view that decision as establishing an inflexible jurisdictional rule” (Braden, 410 US: 499-500). As a result *Braden* “rendered *Ahrens* inapposite” and established as the law of the land the view which was

expressed in the dissent of *Ahrens*, namely that “the jailor must be within the territorial jurisdiction of the relevant court” (Londras, 2008: 42).

It is now time to return to our primary object of interest – *Rasul vs Bush* – and revisit the seemingly baffling statement that Justice Paul Stevens made before the court in the oral argument for that case:

“Well, there is another problem [with *Eisentrager*]... that case was decided when *Ahrens* against Clark was the statement of the law, so there is no statutory basis for jurisdiction there, and the issue is whether the Constitution by itself provided jurisdiction. And of course, all that’s changed now.”

(Stevens, quoted in Pohlman, 2008: 170)

With the background knowledge presented over the last few pages it is easy to see what he meant and how he made the connections between the cases – *Ahrens* was the common law case that precluded *Eisentrager* from granting statutory habeas corpus to the German petitioners; *Eisentrager*, in turn, established the common law which precluded the court in *Rasul* from granting any habeas corpus rights to the Guantanamo Bay petitioners. However, the decision made in *Braden* nullified the validity of the *Ahrens* resolution and “superceded its statutory position with that of the *Ahrens* dissent” (Thai, 2006: 522). As a result, *Ahrens* no longer provided legal backing for *Eisentrager*’s statement that “[nothing] in our statutes’ entitle[s] petitioners to habeas review” (Thai, 2006: 514). Finally, that meant that *Eisentrager*’s common law standing could only prevent the court in *Rasul* from issuing constitutional writs of habeas corpus, but had no effect on the petitioners’ right to request writs of habeas corpus on the statutory basis of Section 2241 of the US Code. The way in which Justice Stevens managed to relate these three cases was as ingenious as it was fortunate; had he not been a law clerk, who got to work on *Ahrens* in his youth, he would not be able to make the connection between it and *Eisentrager* and so would not be capable of seeing the significance of *Braden* with regards to *Rasul*. At the time *Braden* was decided nobody really considered the adverse effect the case would have on *Eisentrager*, as they were separated both in historical terms and in terms of their status in US law – *Braden* was a domestic case that dealt with a criminal offense, while *Eisentrager* was an international case that concerned itself with war crimes. The only thing that linked both of them was *Ahrens*, and you will remember that *Ahrens* was only implicitly referred to in *Eisentrager*.

2.3 *Rasul vs Bush*: resolution

It took Justice Stevens more than an hour of oral argument to make the other judges see the connections which he identified and to get them to appreciate the fact that the unexplained statement on statutory habeas corpus in *Eisentrager* “referred merely to the then governing *Ahrens* rule that no statutory jurisdiction existed for petitioners detained outside a court’s geographic territory” (Thai, 2006: 522). When he finished, however, it became clear that his speech was a resounding success, as he managed to secure the votes of four of his colleagues, which resulted in him commanding the majority of the court. Since he was the court’s most senior member he got to write the opinion of the court himself. In it he carefully made the connections between the cases illustrated above and presented the conclusion that *Eisentrager* no longer barred statutory review, even where overseas petitioners were concerned. Further, he said that “the government did not contest the district court’s jurisdiction over the detainees’ custodians by service of process, and pursuant to the habeas statute, those detainees claimed their custody violated federal law” (Thai, 2006: 525). In other words: a) the jailor of the *Rasul* petitioners, who was in fact the US government, could be reached by service of process by the District Court of Columbia, and b) said petitioners claimed that their detainment violated federal law. Since the statute “by its terms, requires nothing more”, Justice Stevens declared for the majority that the Guantanamo Bay detainees who petitioned for a writ of habeas corpus in *Rasul* were to be granted such, as the court could exercise jurisdiction over them. The opinion of the majority in *Rasul* also included a number of other relevant conclusions.

First of all, it was argued that “there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship” due to the fact that the statute does not draw any distinction between Americans and aliens “held in federal custody” (*Rasul*, 542 US: 481). This statement was very relevant as a response to the US claim that the detainees were not affected by any statutes due to their status of “unlawful combatants”. In order to further distinguish *Rasul* from *Eisentrager*, the court added that, in contrast to the German petitioners in *Eisentrager*, the *Rasul* petitioners were “not nationals of countries at war with the United States”, and thus should not be treated as “alien enemies” – a term reserved for the “subject[s] of a foreign state at war with the US” (*Rasul*, Supreme Court, quoted in Sloss, 2004: 789). This point was further supported by the fact that the *Rasul* petitioners “den[ie]d that they have engaged in or plotted acts of aggression against the United States”; what is more, they had actually “never been afforded

access to any tribunal, much less charged with and convicted of wrongdoing” (ibid. 790). In contrast, the petitioners in *Eisentrager* could be charged with hostile activities against the US, as “a duly appointed military commission, had already so held” (ibid.) The fact that none of the Guantanamo Bay detainees were charged with any crimes always gets intentionally omitted when the US is talking about them, and it was an important step forward for the Supreme Court to bring it forward and make it a recognised part of the Guantanamo Bay discourse. When being constantly subjected to the US assessment of the Guantanamo Bay prisoners as “terrorist suspects” who have perpetrated heinous crimes against the US, it is easy to forget that these people are first and foremost “suspects”, who have not necessarily committed any crimes whatsoever. This is precisely why the US government was so wary of allowing the detainees recourse to the writ of habeas corpus –once their detainment was subjected to legal review it would become clear that there are no respectable reasons for holding them as prisoners, especially since the petitioners had never been charged or convicted.

The final point made by the majority in *Rasul* addressed the argument that the detainees cannot be tried because they are all outside US territory; this claim also stemmed from the reliance of the US government on *Eisentrager* because the fact that the *Eisentrager* petitioners were outside US territorial jurisdiction served as a pivotal point in deciding the Court’s holding in the case. Justice Stevens, however, yet again had an apposite counter argument. First he proceeded to analyse US’ legal status as a lessee of Guantanamo Bay. He considered the primary agreement between the US and Cuba in which Cuba recognised that “the United States shall exercise complete jurisdiction and control over and within the area” (*Lease of Lands for Coaling and Naval Stations*, 1903: 418[cited in Londras 42]). In 1934 US and Cuba signed a further treaty guaranteeing that “the lease would remain in effect so long as the US shall not abandon the naval station of Guantanamo” (*Treaty Defining Relations with Cuba*, 1934: 866). Through the use of straightforward property law analysis Justice Stevens proved that the US, as a perpetual lessee, exercises “a high degree of operational sovereignty over the base, thereby bringing it within the Supreme court territorial Jurisdiction” (Londras, 2008:43). Finally, he brought the argument to conclusion by referring to *Foley Brothers Inc v Filardo*, a common law case which proved that territorial jurisdiction is enough for the habeas statute to be in effect (ibid.) He concluded, on behalf of the

majority, that the presumption against extraterritorial application of statutory law could not restrict its application in Guantanamo Bay.

2.4 *Rasul vs Bush*: conclusion

All of these intricate developments led to the powerful conclusion of *Rasul*, which made several very important advances on behalf of the US legal branch. First and foremost *Rasul* brought Guantanamo Bay back in the legal realm, and by doing so it put the post 9/11 exceptionalism under question and limited it. In a way, both the detention facility in Guantanamo Bay and the exceptional measures of the US administration were challenged and by being challenged they entered back into the discursive realm, where they could and can be assailed and put under scrutiny. As a result, what *Rasul* did was momentous and historical in its significance, a decision that both established *a field for confrontation* and identified two equal adversaries to inhabit it – the US Courts and the US legislative institutions. *Rasul*'s significance is also to be found in its rights-enforcing character as: by establishing that a district court acts “within its respective jurisdiction” so long as the custodian can be reached by service of process, *Rasul* has de facto “extend[ed] the scope of the habeas statute to the four corners of Earth” (Thai, 2006: 530). This is relevant not only to all GBay detainees, whose path to the recourse of a habeas corpus writ is now open, but also to all the people detained as a part of US' extraordinary renditions, and, practically, all people that are in US custody, regardless of their location around the world. This is an adequate and fitting response to the “rights-free regime” initially established in Guantanamo that was earlier. *Rasul* not only managed to interfere with and partially abolish this “rights-free regime” in Guantanamo by providing detainees with a path towards reclaiming their rights, but also provided the legal framework with a tool which can potentially preclude the US from establishing “rights-free regimes anywhere in the world and which thus negates what Neuman referred to as the “symbolic mobility” of Guantanamo (inid.). Finally, the territoriality analysis of the naval base in Guantanamo Bay that is presented in *Rasul* can be “read as the foundation for a future extension of constitutional rights to Guantanamo detainees” (Londras, 2008: 43). The majority in *Rasul* did not end up demanding constitutional habeas rights for the Gbay detainees but it is easy to see how it could have gone there – after all the prisoners in the naval base were denied constitutional rights based on *Eisentrager*'s decision that the petitioners were “at no relevant time within any territory over which the US is sovereign” and thus “their offense...capture...trial... and their

punishment were all beyond the territorial jurisdiction of any court of the US" (339 US, 1950: 768). By partially reversing this Eisentrager decision, Rasul opened the way for the Supreme Court to argue that the US has a de facto sovereignty over the Bay and that, consequently, all detainees have constitutional rights.

This was the first step of the confrontation between the US Administration and the US legislative wing and it is a perfect expression of the problematic that was discussed earlier in this chapter. On the one hand there is the tension inherent to the uneasy duality between the subject of right and the subject of interest and, on the other hand, we have the corresponding clash between the juridical logic of rights and individual inviolability and the neo-liberal/bio-political logic of utility. It was already explained how the banishment of select individuals (both citizen and non-citizen), even though not technically part of the security *dispositif*, actually serves its interests and its goals of preserving the market environment and the social system that is based on it. This also corresponds to the relationship between biopolitics and death that was already discussed: the state should have the power to let live and let die, but also, if it is in the interest of sovereignty, make die. In our case, denying Rasul of habeas corpus would have resulted in both a political and a legal death.

So, we have the Administration attempting to deny the legal structures any access to Rasul and the Guantanamo detainees and strip those detainees of their rights so that they can be indefinitely removed from society – the perfect solution in terms of the logic of the security apparatus of power. Opposed to this, is the resolution of the Supreme Court to follow the principles of individual inviolability and to attempt to bring those individuals back into the legal sphere and bring back their status of a *homo penalis* – the subject who can be punished by the law but also who can be protected by the law; in other words – re-subjectify them. This is precisely what is achieved by granting them habeas corpus.

3. Powers, separated

3.1 The separation of powers in the United States

The story of Guantanamo Bay is also very much a story of the uneasy separation of powers in the US, a separation that has often been a point of contention in the legal history of the US. It is also one of the recurring topics of debate in the political philosophy of Western democracies and before moving forward we can only benefit from some elaboration on the tripartite separation of powers in the US.

“Of the doctrine of the separation of powers...the Constitution says not a word”. So begins the chapter on separation of powers in one of the definitive analysis of the US Constitution, as produced and edited by Philip Kurland and Ralph Lerner (1987: 311). It is only natural that they start with this point because it is the most crucial one. The US is a country which can be characterized by its strict adherence to the constitution and the fact that such an important topic as the separation of powers has been left out of the primary legislative document has led to a lot of tension and uneasy deliberations. However, it has also led to a large body of written and unwritten agreements and statements, a lot of them found in political philosophy, that serve to guide US conduct. The most influential person to inform this debate was Montesqieu, and chapters 6 and 7 of book 11 of his Spirit of Laws, in particular. Not only does Montesqieu relate liberty to the safety and freedom of the individual, something which is at the heart of the legal discourse that we have identified, but he also writes strongly on the need for separation of the basic powers of the government, a separation that needs to be present if the liberty in question is to be achieved:

“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge then would be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor” (quoted in James Madison, Federalist, No. 47, 30 Jan 1788).

These views have been picked up and espoused by a large number of US administrators, lawmakers and political philosophers and have been most vehemently defended by James Madison in his Federalist papers, the most famous of all jurists - William Blackstone, and also by other significant figures such as Alexander Hamilton, James Madison and Tomas Jefferson. The basic theory of separation of powers is simple.

The key presumption is that the power of the government can be stripped down to three basic tasks: the making of laws, the execution of laws, and the application of laws to particular case through the rule of law. Thus, in order to make the government as accountable and as just as possible these three powers should never fall in the same hands. This is important for two reasons – first, because “different abilities are necessary for the making, judging, and execution of laws” and thus different people should be allocated to each, and secondly because “the concentration of these [powers] in the same hand is precisely the definition of a despotic government” for the very reasons that were outlined by

Montesquieu in the quote above (Chipman, quoted in Kurland: 332; Jefferson, quoted in Kurland: 319). So, the only logical solution was the separation of power in three branches that provide a very flexible and adaptable system of checks and balances, a system that ensures that power will never be concentrated in the hands of one individual or one body of individuals, since, to quote Jefferson: "It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one." (ibid.) That is, we have the congress, which creates into being new legislation, the executive, which has the power to execute this legislation and the judiciary, which in a way is the most important branch in terms of fairness as it provides an impartial and unbiased judicial oversight.

In Guantanamo, we have a very unique, very unprecedented situation that has many different facets. First of all, it is well established in American history that the balance of powers shifts radically in favour of the executive in times of war. However, the precise magnitude of this shift has never been clarified in any exact nature, which leads to awkwardness of accounting for the US foreign and defense policy in times of war – e.g. questions such as how much power the president should have, how much legislation the congress can pass through unchecked, etc. have to be answered on precedential basis each time the US enters a state of war, and the balance has to be redefined in each subsequent conflict. One thing that is very important to note is that usually, throughout the whole American history since the inception of the constitution, the three branches have been more or less united in times of war, or, when there have been disagreements they haven't been of big significance. In Guantanamo, however, we have the unprecedented situation in which there is a huge chasm established between the executive and the legislative branch, on the one hand, and the judiciary branch on the other. This is especially true for the situation during the first seven years of the "war on terror", when the goals of the republican president and republican congress were congruent to each other and were in complete opposition to the agenda of the judiciary branch. These are also the parameters of the rift between the discourse of the state (as upheld by the congress and the president) and the diametrically opposed legal discourse (as upheld by the Supreme Court). I will conclude this short excursion with stressing upon the fact that Guantanamo has provided for an unprecedented tension between the three branches of the US Government, and that it ultimately serves as a test to the integrity of the US Governmental system.

3.2 Executive advances: The Detainees Treatment Act of 2005 and The Combatant Status Review Tribunals

The discussion above is very informative in providing a background for the events that occurred after *Rasul* was decided. It represented a big victory for the judicial branch and successfully checked the initial urge of the Republican Party to deal with the Guantanamo detainees on its own terms. Further, the decision in *Rasul* was arrived at in a very factual, logical way that could not be really confronted in terms of logical consistency. So, in order to counteract this decision the only thing that the executive/legislative complex could do was to attempt to change the rules of the game, and that's precisely what it did.

To begin with, the US administration did not attempt to deny straight away the law-establishing character of *Rasul*'s resolution that all Guantanamo detainees can have recourse to the statutory writ of habeas corpus, nor it challenged the presumption of the Supreme Court that all Guantanamo detainees are by proxy entitled to a judicial review of their potentially unconstitutional detention. However, the administration found another niche in the law that it could exploit – this had to do with an attempt to use the multiple qualifiers of the detainees - “unlawful” “alien” “enemy” “combatants” – in order to strip them from their legal protections.

As I already mentioned, initially the administration chose to qualify the detainees as unlawful combatants; this was done for the purpose of making them potential subjects of military tribunals. This qualification originated from yet another legal precedent – *Ex Parte Quirin* (317 US, 1942). *Quirin* dealt with eight German saboteurs who infiltrated the US posing as civilians and who “were intent on using explosives against railroads, factories, bridges, and other strategic targets” (Fischer, 2003: 489). The court at the time recognised this case as an extraordinary one, since it dealt with an act of war, which was not perpetrated by uniform soldiers; as a result, it was warranted that the “enemies...who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the law of war”(7 Fed. Reg. 5101 cited in *ibid.*). The category “law of war” is of crucial importance as it refers to a diffuse collection of statutory holdings that are present in the field of international law and which have not been gathered in one place (*ibid.*). As a result, this is a flexible, blurry legal space, which is referred to only in times of war and the recourse to which seems to be reserved for informing precedential cases – in *Quirin* the court dealt with alien enemies, who could not be classified as Prisoners

of War (Note: they would be normally protected by the Geneva Conventions but the Conventions originated 7 years after *Quirin*) and who thus constituted a genuinely new category that was as open to interpretation and classification as the “law of war” itself. What the court in *Quirin* did with the referral to the “law of war” was to in effect leave the case in the hands of the executive and vest all jurisdictional power in the so called military tribunals, which were entirely under the control of the administration. This seems to be an unreasonable and dangerous decision, since it placed an inordinate amount of power in the hands of the executive but one could see how, at the time, it was justified - after all, the decision was taken during the time of a genuine war and the court and the executive were working together in order to ensure the security of the country. As a result, all of the prisoners were tried under a military tribunal that was convened with the help of a Proclamation issued by President Roosevelt. At the very beginning of the statement of intent of the tribunal it was announced that:

“such persons [as the detainees] shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States ... except under such regulations as the Attorney General, with the approval of the Secretary of War may... prescribe” (US Proclamation 2561, 1942, cited in Fisher, 2003: 489)

This, in effect, worded out the complete transfer of jurisdiction from the legal branch to the executive. It was a very controversial decision, but it held, and, in a way, worked out for that particular case. It has to be noted that throughout this case the Supreme Court worked very closely alongside the military tribunal and heavily assisted it to come to a conclusion – a further evidence that the transfer of power in that case was more of a *convenience* measure than anything else. Finally, *Quirin’s* importance lies in the establishment of the category of “unlawful combatant”: the court specifically created this category in order to describe “enemies who enter the country in a civilian dress”, who were to be juxtaposed to lawful combatants, who are normal uniformed soldiers (Fisher, 2003: 491). The major distinction between the two was that, when captured, the lawful combatants were to be treated as Prisoners of War, while the unlawful combatants were to be tried by military tribunals.

The US administration explicitly used *Quirin* as a blue-print for its treatment of Guantanamo Prisoners – if you refer back to our discussion of the presidential military order released right after 9/11 you will see that the language used there almost word for word mirrored *Quirin*: “military tribunals shall have exclusive jurisdiction with respect to offenses

by the individual” and “the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf in any court of the US” (Bush, 2001: Section 7b). However, since Rasul thwarted all that, as it allowed detainees to seek recourse to the courts, the US administration was forced to come up for a new justification to apply *Quirin’s* holding.

The administration, in its approach towards the detainees in Guantanamo Bay, decided to build upon the beneficial legal framework that had already been established by reference to the *Quirin* case. One week and two days after Rasul and Hamdi were decided, on July 7, 2004, the department of defense (ie the executive branch) issued a military order titled “Order for establishing Combatant Status Review Tribunal” which not only for the first time provided a definition of the term “enemy combatant” but also established the rules for the trial of enemy combatants by military tribunals called Combatant Status Review Tribunals (CSRTs). According to that order, an enemy combatant:

“... shall mean an individual who was part of supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the US or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense” (Wolfowitz, 2004)

Note that in order to be an enemy combatant an individual does not need to be explicitly part of the Taliban or al Qaeda; if it was found out that the individual has been supporting one of the two entities it would be enough to classify them as EnemyCombatants (EC), which already significantly increases the range of people likely to be labeled as EC. Furthermore, also note that the determination of whether one is an EC is exclusively made by the officers of the Department of Defense, ie members of the Executive. The military order, goes on to describe the terms of the CSRT. It stated that all people classified as ECs would be given the chance to contest their designation as an EC; also, each detainee would be assigned a personal representative, who would be “a military officer, with the appropriate security clearance, for the purpose of assisting the detainee in connection with the review prescribed herein” (Wolfowitz, 2004). Next, the order stipulated that detainees should be allowed to attend all proceedings, except for those in which information relevant to national security is discussed, thus potentially granting to the tribunals the power to remove the detainees from their own process (i.e. something reminiscent of Kafka’s Trial). Finally, and perhaps most

importantly, the tribunals were not to be “bound by the rules of evidence such as would apply in a court of law”(ibid.). Instead, “the tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it” (ibid). They also included a segment saying that “preponderance of evidence shall be the standard used in reading this determination, but there shall be a rebuttable presumption in favor of the Government’s evidence” (ibid). That is, the order seemingly complied with the Supreme Courts demands with regards to the evidence produced, as the evidence of proof would be cumulative of all evidence produced by both sides (“preponderance of evidence”) but in actuality, by including the presumption in favour of the Government hearsay evidence by military personnel, would be allowed to rule supreme. Needless to say, soon most of the GBay detainees acquired the EC classification, and all detainees that had applied for the writ of habeas corpus, without exception, were classified as Enemy Combatants and the Administration proceeded to state that a trial by military tribunal would satisfy the requirements of the writ of habeas corpus.

The second big blow to the Judiciary Branch came from Congress, which responded to the decisions in Rasul and Hamdi with the passing of new legislation. The Detainee Treatment Act of 2005 (DTA) was introduced, on Dec 30, 2005, by Senator Lindsey Graham, as a jurisdiction stripping measure – “ie a provision that removes federal courts’ capacity to hear habeas corpus petitions from particular detainees”; in the case of the DTA the detainees in question were explicitly named as those in Guantanamo Bay (Londras, 2008: 44). Fiona de Londras argues that “the concept of a legislative enactment that strips federal courts of statutory habeas corpus jurisdiction is well established and entirely acceptable within the US legal system” (ibid.). The capacity of the legislative branch to produce legislation that limits the power of the judicial branch regarding particular cases is one of the aspects of the separation of powers principle and the Congress took full avail of that. The DTA is a very short document that nevertheless exerted huge impact on the GBay proceedings and was also the first Act to actually amend the text of the habeas corpus statute, from what it read in the original Constitution. Subsection e) of § 1005, which is entitled “JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS” constitutes the essence of the Act. It amended Section 2241 of Title 28 of the United States Code – The Power to Grant Writ (of habeas corpus). The new version of the act stipulated that, except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or

consider” applications for a writ of habeas corpus or “any other action against the United States” relating in any way to the detainees in Guantanamo bay or to individuals who have “been properly detained as an enemy combatant” (Detainee Treatment Act, Section 1005 [e]).

That is, the Act stipulated that no court, not even the Supreme Court, was to have the capacity to review writs of habeas corpus filed by Guantanamo Bay detainees. Moreover, this was a direct amendment to the US Code, which meant that the Judiciary branch could not possibly challenge it. The Act also established that the only court which would be able to review the validity of the decisions made by the CSRT would be the Court of Appeals for the District of Columbia Circuit, which further severely limited the recourse of GBay detainees to judicial review. So basically, with the CSRT order and the DTA in place, the only way for a detainee to challenge his detainment would be to appeal for the District Court of Columbia to review the validity of the decision that he is classified as an enemy combatant. However, since the classification of Enemy Combatant had been made so broad by the order that established it, it was next to impossible to successfully challenge it. Thus, the Congress and the Executive seemed to have effectively normalized and legalized the indefinite detention of the Guantanamo Bay detainees. The Judicial Branch has no say in the validity of executive orders and as a result couldn't challenge the CSRT order and it also had no ability to provide for a meaningful review of the legislation produced by the Congress so it was seemingly neutralized.

The US admin used the newly established category of Enemy Combatants and with the added excuse that the US is officially in a state of war, was able to put forward a jurisdiction-stripping measure that directly influenced a long-established statute. I want to reiterate, however, that the way in which this was done was perfectly legal – “the concept of a legislative enactment that strips federal courts of statutory habeas corpus jurisdiction is well established and entirely acceptable within the US legal system [especially in time of war] but it must be distinguished from a suspension of constitutional habeas corpus” (Londras, 2008: 44). Since the detainees had already been denied constitutional rights as a result of Eisentrager, the administration was clear on that matter. Another thing that the Detainee Treatment Act did was to put the CSRT on a statutory footing and to “deem[] their decisions reviewable only in the federal courts of the District of Columbia in limited circumstances,

with the proceedings before the CSRT intended to take the place of habeas corpus review” (Londras, 2008:44).

3.3 Hamdan vs Rumsfeld

However, the Supreme Court managed to once again come up with a meaningful challenge to the abovementioned motions by the Congress and the Executive and through the use of very clever arguments and loopholes managed to regain its hold on the proceedings at Guantanamo and to restore the hope for judicial oversight to the detainees. The way it accomplished this was the only way it could: through the Supreme Court proceedings of a case – Hamdan vs. Rumsfeld (548 US ____ 2006, No.05-184).

Salim Ahmed Hamdan, is a Yemeni national, who was captured by militia forces and turned over to the US authorities in November 2001, during the initial invasion of Afghanistan (i.e. before the Taliban relinquished control of the country). In June 2002 he was transferred to Guantanamo Bay and held there without charges until July 2003, when the President declared that, based on the Nov 13, 2001 Presidential order¹⁹ he was eligible for a trial by military commission. He was charged with *conspiracy* “to commit...offenses triable by a military commission” based on the fact that he was the personal driver and bodyguard of Osama bin Laden. Notable is the fact that he didn’t actually commit any offenses triable by a military commissions, he just allegedly conspired to do so, based on the fact that he was in close contact with Osama.

Fortuitously for Hamdan, and for the Supreme Court, he had really good lawyers who, in 2002, filed very well argued petitions for mandamus and for habeas corpus. In these petitions Hamdan conceded that a court-martial constituted in accordance with the Uniform Code of Military Justice would have the authority necessary in order to try him. However, he claimed that the military commissions established by the Nov 13 Presidential order lacked such authority. Further, he made two very meaningful points: firstly, he argued that there is neither a Congressional Act nor a tenement in the common law of war to support a trial by a military commission for the crime of conspiracy, a crime, he continued, that was not a violation of the laws of war; secondly, he challenged the legality of the military commissions saying that they violated “the most basic tenements of military and international law,

¹⁹ Any citizen who is associated with al Qaeda or “has engaged or participated in terrorist activities aimed at or harmful to the US ... shall, when tried, be tried by military commission for any and all offenses triable by military commission”... (Nov 13, 2001 Presidential Order).

including the principle that a defendant must be permitted to see and hear the evidence against him” (548 US, 2006: 2). As a result of his petition, the district court granted Hamdan’s request for a writ of habeas corpus in 2004. Consequently, the CSRT order came into being and Hamdan was one of the first detainees to get classified as an Enemy Combatant and to be assigned a military commission in accordance with the CSRT. However, in Nov, 2004, the District Court granted Hamdan’s petition for habeas corpus and stayed the commission’s proceedings. Hamdan’s lawyers did very well to bring up to Uniform Code of Military Justice, as the District court picked upon this claim to say that the CSRT military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention, “because it had the power to convict based on evidence the accused would never see or hear” (ibid.: 6). This is a very interesting innovation in the Guantanamo Bay discussion as it was the first time in the proceedings at GBay that international law was brought into play – you will remember that in Rasul international law did not figure at all, partly because of the novelty of the GBay proceedings and partly because the US has always shied away from relying on international law when it comes to trials and cases that it considers to be entirely within its capacity to decide. However, at the time the claim that the Geneva Conventions should exert any effect whatsoever on Hamdan’s case couldn’t be explored further, as the Court of Appeals for the District Court of Columbia immediately reversed the District Court’s acknowledgement of the writ of habeas corpus for Hamdan. This is the time at which the case was picked up by the Supreme Court – on November 7, 2005 it granted certiorari²⁰ “to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings” (ibid: 7). On February 13, 2006, the Government filed a motion to dismiss the writ of certiorari altogether, based on the US Code adjustments made by the Detainee Treatment Act. The Supreme Court considered this motion and used it as a starting point in its decisive opinion on Hamdan, as ruled on June 29, 2006.

In its opinion, the Supreme Court, naturally first considered the statement that the DTA negates its power to have an opinion on the case whatsoever, as it makes the Enemy Combatants immune to any court proceedings. The Supreme Court, however, and here is the first clever play on its part, managed to prove that nothing in the language of the DTA

²⁰ A legal writ that seeks legal review.

stated that it should be applied retroactively – ie. the Supreme Court argued that nowhere in the DTA is stated that section 1005 (e) should apply retroactively and, since the question under consideration was of grave importance (ie the habeas rights of detainees who claim that they have been wrongfully imprisoned), in order for the relevant section of the DTA to apply retroactively there should be an “unmistakably clear statement” of that somewhere in said section (ibid: 10). Further, the SC rebuts the statement of the administration that DTA effectively “erects a presumption against jurisdiction” of the Supreme Court over all pending cases, by stating that in this case a presumption against retroactivity trumps the presumption against jurisdiction because the basic rights of the individual at question are concerned.

After having established that it has the jurisdiction to consider Hamdan’s case the Supreme Court proceeded with its actual judgment on the case. It began by exploiting yet another legal loophole inherent in the Presidential order establishing the CSRTs. The Supreme Court argued that the president was not, in fact, authorized to establish military tribunals without an *express act of congress to warrant these tribunals* and, since, such act was not in place, the CSRTs are for all purposes, illegal. It based its ruling on two sources. The first was a case known as *Ex Parte Milligan* which explicitly dwells on the role of the separation of powers with regards to the establishment of military commissions and rules that neither the President nor any commander under him “can, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels” (Milligan, 1866: 139-40). That is, congress should explicitly justify, through legislature, the establishment of any relevant military commission. The second source for the Supreme Court opinion was Article 21 of the Uniform Code of Military Justice, which states that military commissions can only try people if they are authorized either by statute or the law of war (UCMJ, Article 21). Thus, the Supreme Court argued that the CSRTs are authorized by neither: “there is nothing in the text or the legislative history of the AUMF [Authorisation for the Use of Military Force] even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ” (i.e. the AUMF cannot be construed to be an Act of Congress that expressly authorizes the establishment of military commissions) (548 US, 2006: 29). Finally, the Court concluded its argumentation on this issue by saying that, even though the DTA recognizes the existence of military commissions it did not specifically

authorize them. Now, this is an obvious loophole because it is apparent that Congress agreed with the establishment of the CSRTs and even constructed half of the text of the DTA so that it is in congruence with them. However, the Court was constitutionally entitled to request an express legislative authorization and to interpret the lack of it as a ruling in invalidating the CSRTs. Thus, the Court used impeccable, rigid logic in order to exploit the loopholes of the DTA and the CSRT establishing order and, as a result, to defy the other two branches of the US Governing body, that, ever since the establishment of GBay, had been unprecedentedly pitted against it.

However, the Supreme Court did not end there with the unraveling of the claim of the Executive that it had full possession of Hamdan's body. It continued its opinion by further considering the multiple implications of UCMJ Article 21, the chief among which was the inference that the laws of war should be the controlling authority in Hamdan's case. The Supreme Court carefully considered all the charges against Hamdan and ruled that none of them violate the laws of war (i.e. conspiracy is not a violation of the laws of war). As a result, Hamdan could not be tried by a law-of-war military commission, as these explicitly dealt with charges that violated said law. The Supreme Court dedicated some fifteen pages of hard evidence and references to prove this point and it grounded its decision both in international and US law. It also negated the Government's argument that "conspiracy to violate the law of war is itself a violation of the law of war", especially since Hamdan was allegedly conspiring before 9/11 and before the beginning of the war in Afghanistan (548 US, 2006: 48).²¹

At this point, the Supreme Court brought into consideration the broader precepts of international law: "the USCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,' Quirin, 317 US" (548 US, 2006:49). First of all, it invoked the uniformity principle of the UCMJ, stating that "military commissions [should] be governed by the same rules and procedures as courts-martial insofar as practicable" (Londras, 2007: 542). This was obviously not the case in Hamdan due to the use of hearsay, un-sworn testimony and, more

²¹ "Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an agreement the inception of which long predated the attacks of Sep 11, 2001 and the AUMF" (548 US, 2006: 48)

importantly, due to the fact that Hamdan had effectively been “excluded from his trial” (548 US, 2006: 53).

Next, the Court finally turned its attention to the application of the Geneva Conventions in Hamdan’s case. The main arguments that the Court of Appeals (under the instruction of the Government) used to disqualify the use of the Geneva Conventions in Hamdan, was the claim that they were not judicially enforceable and that Hamdan, as an individual, is not entitled to the protections of any of the Conventions. The Supreme Court invoked, yet again, UCMJ Article 21 which was controlling in applying the law of war to Hamdan’s case and it was ruled that the Geneva Conventions, as part of that law of war, are an “independent source of law binding the Government’s actions and furnishing [the] petitioner with any enforceable right” (548 US, 2006: 64). The second claim of the Court of Appeals is more interesting – it is the claim that none of the Geneva Conventions actually apply to any of the GBay detainees due to their peculiar predicament. In Hamdan’s case, the Government argued that he was captured in connection with the US’ war with al Qaeda which is distinct from the war of the US with the Taliban in Afghanistan. After this was established the Government, through the Court of Appeals, proceeded to state that common article 2 of the Geneva Conventions is only applicable to conflicts “which may arise between two or more of the High Contracting Parties”, i.e. nation states that have signed the Geneva Conventions (ibid: 65). Even though it admitted that the war with the Taliban in Afghanistan is technically a war between two high contracting parties, it alleged that the conflict with al Qaeda was not. The Supreme Court accepted the validity of this claim. However, the Supreme Court but it stipulated that “there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories” (ibid: 66). This provision, the SC stated, was common Article 3 of the Geneva Conventions. This Article appears in all of the Geneva Conventions and provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum [certain provisions protecting] persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by detention” (ICRC, 1949: Article 3). The Government had previously discarded this article on the claim that the conflict with al Qaeda is of an international scope and therefore does not qualify as a conflict not of international character. Thus, the Government was actually using a loophole to get out of the Geneva

conventions – it discarded the Conventions based on international conflicts (ie conflicts between nation) on the premise that al Qaeda is not a recognized international entity (as defined by the GC), and discarded Common Article 3 precisely because it was an international entity. The Supreme Court unraveled this loophole by stating that “not of international character” as stipulated by common article 3 of the GC, related to conflict that is not one between nations, and as a result it was perfectly suited to apply to US’ conflict with al Qaeda. The Supreme Court concluded this analysis by stating that Common Article 3 requires that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” (ibid.). Next, the Supreme Court related this statement to its previous claim that a “military commission can be regularly constituted by the standards of our military justice system only if some practical need explains deviations from court-martial practice” (548 US, 2006: 70). It did not find any practical need of that kind. Thus, the Supreme Court concluded that the CSRTs are illegal, that the Geneva Conventions apply to Hamdan and all GBay detainees, thus bringing international law into the field of contention, that the Courts have the power to consider habeas corpus petitions submitted before the enactment of the DTA, and that “the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction” (ibid: 71). On these grounds it reversed and remanded the case. Eventually, Hamdan was sentenced to six years imprisonment in 2008 and was credited for the time served in Guantanamo. He served his last month of imprisonment in his country of origin, Yemen, where he currently resides and where he is co-authoring a book with his translator about his travails.

In Hamdan, the cold, impeccable logic of the legal discourse once again prevailed over the statist security discourse of exigency and urgent necessity. The Supreme Court successfully manufactured two logical loopholes to arrest the progress of and disrupt the union between the Executive and the Legislature, and it also dismantled one loophole that was created by the Executive. However, there is much more to that case than logical conundrums – Hamdan is an immense compliment to the resilience and the effectiveness of the separation of powers principle and shows how, when it is put to the extreme test, it actually works very well. Hamdan is a perfect example of the judicial branch providing clearheaded and constitutionally informed judicial oversight of the emergency-driven exceptional decisions that the Executive and the Congress were trying to make. Thus, in Hamdan, the principles of justice and individual liberty that were upheld by the Founders of the constitution were

upheld by the Supreme Court as well. In a way, this shows the resilience of law as the founding principle of the state that managed to override the attempts of the government to use it tactically.

4. Law without democracy, democracy without law

4.1 Further executive advances: The Military Commissions Act of 2006

It is not hard to guess how the events unfolded after Hamdan was decided. As Londras observes in her account of Hamdan, the ruling made in it was “a significant statement of judicial intent to assert a full supervisory role in relation to suspected-terrorist detainees” (Londras, 2007: 545). Congress, on the other hand, had already shown that its bias is on the side of the Executive Branch, which held the position that the alleged state of emergency and the state of war that the US was facing at the time justified exceptional measures regarding the treatment of the GBay detainees. Both sentiments are in line with my proposed separation between a juridico-legal discourse, that observes the rigid logic inherent in the Western system of law, and a statist discourse of emergent power, which puts the integrity of the state/nation before all other considerations.

The majority of the Republican Congress responded relatively fast to the developments in Hamdan and its response came in the only way it could: through the establishment of new legislation: the so called Military Commissions Act of 2006. The naming of the Act was very apt, given that the Supreme Court achieved its big victory in Hamdan through an exploit of the fact that Congress never explicitly authorized the presidential military commissions – well, the very title of the new legislation suggested that now there can be no doubt about the unity between the legislative and executive branches with regards to the establishment of the Military Commissions, a unity that is a prerequisite for their legitimate existence. However, the Military Commissions Act went much farther than that – its goal was not only to undo the progress that the Supreme Court made with Hamdan but also to erase any of previous advancements that came through with the resolution of Rasul and Hamdi; in short the MCA was made with the explicit aim to wrench from the Courts any possible claim that they could have towards a judicial oversight of the GBay petitioners.

The MCA of 2006 directly amends the United States Code by adding an entirely new chapter under Subtitle A of title 10, titled “Chapter 47A – Military Commissions”. This chapter starts by specifically noting that it will exclusively deal with the establishment of

military commissions for the unlawful enemy combatants, thus for the first time providing a legally sanctioned, if not legally justified, definition of the term “Enemy Combatant”. The definition is as follows:

10 USC § 948a. “(1) UNLAWFUL ENEMY COMBATANT.—(A) The term ‘unlawful enemy combatant’ means— “(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents, who is not a lawful enemy combatant²² (including a person who is part of the Taliban, al Qaeda, or associated forces) or “(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal...

Thus, this section of the MCA reaffirms the basic premise of the presidential military order that established the CSRTs and also effectively makes the Combatant Status Review Tribunals dispositive for the purposes of military commissions – ie the decision of the Supreme Court in Hamdan that military commissions re GBay detainees should follow the same procedures as courts martials, is effectively reversed. Further, this section grants the CSRTs the exclusive ability to brand people as enemy combatants without any judicial review in the process of assigning the Enemy Combatant staple.

Next, the MCA made sure to disentangle all connections that were previously made between international law tenements and the legal status of the Guantanamo Bay detainees. First of all, it considered the finding of the Supreme Court in Hamdan that the Guantanamo Detainees fall under the protections of Common Article 3 of the Geneva Conventions and, in response, added a subsection to Section 948b stating that “a military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognised as indispensable by civilised peoples’ for purposes of common Article 3” (10 USC § 948b[f]). What this effectively amounts to is “our military commissions comply with the Geneva Conventions because we say that they do” and yet it was perfectly justified in legal terms as it was present in a Congress approved legislation. More interesting is the next subsection – 10 USC § 948b(g) – which is much more straightforward: “no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights”. This subsection is legally viable because it is backed up by the statement that the commissions

²² A lawful enemy combatant is “a member of the regular forces of a State party engaged in hostilities against the us”

are in line with the Geneva Conventions, and thus detainees are ostensibly already furnished with all necessary recourse to establishing their basic rights. What the subsection does, in fact, is to effectively strip all GBay detainees from any kind of recourse to International Law principles, thus in one sentence undoing hundreds of pages of legal arguments that supported the ruling of Hamdan's case.

The next sections of the MCA mostly do with procedural issues regarding the military commissions and they do not differ from what was already established by the DTA and the CSRT establishment offer – hearsay evidence was still considered adequate, deference to Government evidence was still present and the detainees were still not entitled to proper neutral representation, nor were they allowed to attend all proceedings of their trials. The pinnacle of the MCA, however, is section 7, which *effectively* and *retroactively* strips all US Courts from the ability to consider statutory habeas corpus petitions from the unlawful enemy combatants in Guantanamo. It repeats word for word the already discussed section 1005 (e) 1 of the DTA which strips all courts, justices and judges from their jurisdiction “to hear or consider an application for a writ of habeas corpus filed by or on behalf of an ... enemy combatant” (MCA, 2006, Section 7 [a]).

4.2 Boumediene vs Bush: On sovereignty and law

At this point in time it seemed that the Guantanamo Bay question was, yet again, settled once and for all in favour of the union between the legislative and the executive powers. However, the Supreme Court and, more particularly, the justices within the Supreme Court that espoused the principles of the juridical discourse of power, was able to bounce back and make their way out of a seemingly impossible limbo. This happened during the first major court case resolution after the MCA was voted into being – the resolution of Boumediene vs Bush, case No. 06-1195, Decided June 12, 2008. In fact, I can, without exaggeration, say that this was the most legally significant of all the Guantanamo Bay cases and that the lengthy legal analysis that precedes the opinion of the court is one of the most compelling legal documents in the history of the Supreme Court. Moreover, the court in Boumediene addressed and resolved previously unanswered questions about the nature of sovereignty and about its scope of influence, thus transcending the narrow issues present at Guantanamo Bay and etching a deep mark on the ancient plaque of Western law.

The way it did this was by addressing the proverbial elephant on the room and finally providing a definite answer to the question of whether GBay petitioners have constitutional

habeas rights. You will recall that this question was sidelined as early as *Rasul*, based on the findings of the *Eisentrager* case, which stipulated that prisoners held outside of the de facto jurisdiction of the US do not hold any constitutional rights whatsoever. Well, in *Boumediene* the Supreme Court was finally able to re-visit the question about the reach of the constitution and to provide an answer that was both unexpected and incontestable in terms of its legal integrity.

But first, the reader needs to know more about the man in question, his comrades, and their common predicament. Lakhdar Boumediene and five other men, all of them Algerian-born Bosnian citizens, were seized in 2001 by the Bosnian government, on charges that they were conspiring to blow up the American embassy in Bosnia. Their case was brought to the Supreme Court of Bosnia, which ruled that there was insufficient evidence for the detention of the six men, dropped all charges against them and released them in January 2002. However, American forces which were part of a 3000-strong peacekeeping contingent in Bosnia were waiting in ambush for the freshly released Bosnian nationals and, immediately after their release, captured them and transported them to Guantanamo Bay without charges. Boumediene naturally filed a petition for habeas corpus in which “he alleged, among other things, violations of the Fifth Amendment’s Due Process Clause, statutory clause and International Human Rights” (Englerth, 2008: 417). His petition was promptly rejected by the District Court and the US Court of Appeals for the DC Circuit, on the claim that he was detained outside of the US and thus not entitled to the writ. After the Supreme Court decided *Rasul* in favour of statutory habeas corpus Boumediene submitted his h.c. petition one more time. However, it took very long for the District Court to process this petition and, in the meantime the MCA was enacted and as a result the DC circuit Court yet again ruled against Boumediene and the other detainees. In retort, Boumediene argued that the MCA did not apply to their petitions and that the rejection of their habeas corpus petition violated the Suspension Clause of the Constitution. The reply of the DC Circuit was that it was well established that constitutional rights do not apply to petitioners held outside of the borders of the United States.

The case made it all the way to the Supreme Court, which, unexpectedly, granted a writ of certiorari and agreed to re-review the case despite the constrictions of the MCA. The decision was unexpected and yet justified for the following reasons. First, of all, Section 7 of the MCA was controlling with regards to the complete lack of jurisdiction of the Supreme

Court over habeas corpus petitions and the Supreme Court couldn't possibly overrule that. Thus, it was not expected for it to attempt to rule over the case. On the other hand, the decision was legally justified because the Supreme Court made it clear that it will not attempt to consider the statutory habeas corpus rights of the petitioners but would rather reopen the question about their constitutional rights. Finally, it is very important to note here that this was an exceptionally divisive issue within the Supreme Court and that *Boumediene* was decided with a very borderline majority, thus indicating that a good portion of the Justices sided with the Executive on the issue. This is a relevant observation because it has to become clear to the reader that there is no clear division by between the supporters of the statist and the juridical discourses – there are justices on each side in the Supreme Court, just in the same way that there are Congressmen that are opposed to each other in favouring the two discourses²³.

The *Boumediene* proceedings in the Supreme Court began much in the same way that they began in the *Rasul* case – with an excursion to the origins of the habeas corpus principle in English law. Only this time the Court was not interested in the development of the statutory habeas corpus tenements, but rather in the constitutional scope of the writ, in its potential application to prisoners held outside the sovereign jurisdiction of the United States, and, last but not least, in refuting the controlling significance of the *Eisentrager* case on the constitutional reach of the writ.

The historical analysis commenced with multiple reiterations of the centrality of the writ of habeas corpus in the US constitution and, in particular, its role in fulfilling the “promise of the Magna Carta” (553 US, 2008: 12) They exclusively focused on the connection of the writ to the principle of individual liberty and observed that the writ was also central to the principle of separation of powers. It was outlined how the Framers’ view was that “pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power” and that their “inherent distrust of governmental power” was the key consideration behind “the constitutional plan that allocated powers among three different branches” (*ibid.* 13)²⁴. Further, it was evident that the Framers considered the writ of habeas corpus to be “a vital

²³ The division in Congress can be often seen to be congruent with the Republican/Democratic split, with congressmen from the Republican Party often favouring the statist discourse and the congressmen from the Democratic Party supporting the juridical discourse of individual liberty and the rule of law. In re the Executive, again, it is entirely dependent on whether it is controlled by the Republicans or the Democrats.

²⁴ Here they quoted an observation made in *Youngstown v Sawyer*, 343, 1952: “The constitution diffuses power the better to secure liberty”(p. 579).

instrument for the protection of individual liberty” due to the fact that it takes a central place in the Constitution, ie in the Suspension Clause (ibid.) For the sake of clarity I will include its exact wording yet again: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless, when in Cases of Rebellion or Invasion the public Safety may require it” (US Constitution, Art. I, section 9, cl. 2). At first sight, this clause is meant to provide a list of the instances in which it is acceptable to suspend the writ of habeas corpus. However, the stress should be put on the fact that in all other cases, except for the two very narrow that are outlined – rebellion or invasion- the writ *is not to be suspended*. That is, this clause ensures that all people under the jurisdiction of the US will have a recourse to the Constitutional writ of habeas corpus, unless the writ gets *explicitly suspended* through the invocation of the Suspension Clause. Thus, “the clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention...‘and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ’” (ibid 15, includes quotation from the New York Ratifying Convention, July 26, 1788). That is how the Supreme Court in Boumediene established the constitutionally central, structural importance of the writ of habeas corpus, insofar as it helps to protect the intricate separations of powers system, concluding that “the separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause” (ibid. 16).

After this was established, the supreme court established the threshold question that was to govern its decision in Boumediene: “whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation’s security, may assert the privilege of the writ and seek its protection” (ibid.) A qualifying statement that was made with regards to this question, was the observation that the protections of the Suspension Clause *may* have expanded along with post-1789 developments that define the contemporary scope of the writ. Next, the Supreme Court outlined the two conflicting statements in attempting to answer this question – a) the position of the government that, historically, the writ “ran only to those territories over which the Crown was Sovereign”, and this did not change when the writ was accepted by the US Constitution, thus making the constitutional claims of GBay petitioners void; and b) the position of the petitioners that the constitution “followed the King’s officers” around the Globe and, as a result, it can be

extrapolated that in the US case the reach of the constitution should be equal to the reach of the Governmental agents (ibid.). The Supreme Court considered an example outlined by the Government in support of its claims – namely, the observation that at the time when the US Constitution was written, the English Courts lacked the power to issue the writ of habeas corpus to Scotland and Hanover, “territories that were not part of England but nonetheless controlled by the English Monarch” (ibid. 18). However, after a close analysis of these cases, the Supreme Court concluded that the English Courts did not issue the writ to these territories not because of “formal legal constructs” but due to “prudential concerns”, ie the technical difficulties of exporting the writ of habeas corpus to territories that *maintained their own laws and court system*²⁵. As a result, these “prudential concerns” were not relevant to Guantanamo, as there was no reason “to believe an order from a federal court would be disobeyed at Guantanamo [since] no Cuban court has jurisdiction to hear these petitioners’ claims, and no law other than the laws of the US applies at the naval station” (ibid. 19). Consequently, the governmental analogy was discounted. The Supreme Court proceeded by stressing the importance of the fact that Guantanamo was unique in all relevant legal aspects and that as a result there were no clear precedents that could be found to be controlling of the ruling of the court. That is, the question of whether the constitutional reach of the writ extended to Guantanamo was to be answered by analogy and not by grounding it in the decision of another case. It was argued that both the Government and the petitioners were trying to argue that “the very lack of a precedent on point” supported their respective positions (ibid). However, this was obviously not the case, and the Supreme Court refused to “infer too much, one way or the other, from the lack of historical evidence on point” (ibid. 20)²⁶.

The Supreme Court decided that the only way in which the Boumediene quandary could be resolved was by addressing directly the question of sovereignty and the particularities of the US sovereignty over GBay. It took for its starting point the claim of the Government that “the Suspension Clause affords petitioners no rights because the United States does not

²⁵ “Common law decisions withholding the writ from prisoners detained in these places easily could be explained as efforts to avoid either or both of two embarrassments: conflict with the judgements of another court of competent jurisdiction; or the practical inability, by reason of distance, of the English courts to enforce their judgements outside of their territorial jurisdiction” (ibid. 18-19).

²⁶ This decision was further corroborated by a case, *Reid v Covert*, 354, US in which it was argued that constitutional adjudication should not be reliant on evidence that is “too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution” (1957: 64)

claim sovereignty over the place of detention” (ibid.). The Supreme Court confirms that Cuba indeed maintains the “ultimate sovereignty” over the territory, but it stresses upon the fact that under the terms of the lease through which the US acquired Guantanamo the US Government exercises “complete jurisdiction and control” over the territory, while Cuba is stripped of all rights as a sovereign. Still, the Court admitted, the question of sovereignty has always been a political question that is for the political branch to decide and thus stated no intent of challenging the claim that the US does not maintain sovereignty over the Bay in the legal and technical sense of the term. However, it added that “our cases do not hold it improper for us to inquire into the objective degree of control the Nation asserts over foreign territory”, thus indicating its capacity to distinguish between different levels of sovereignty (ibid. 21).

Consequently, the Supreme Court provided a very interesting analysis of the meaning of sovereignty, an analysis that forms the backbone of its ruling in *Boumediene*. It began this analysis with a consideration of the definition of the term and the political significance of this definition. As a result, it distinguished between the broad, dictionary definition of sovereignty, meaning “the exercise of dominion or power” (Websters’ New International Dictionary, cited in 553 US, 2008:21) and a more narrow, legal definition of the term meaning “a claim of right”. It expanded the latter by reference to Section 206 of the US Restatement of Foreign Relations which notes that sovereignty “implies a state’s lawful control over its territory, generally to the exclusion of other states, authority to govern in that territory and authority to apply law there” (p. 94 of said document ,cited in 553 US, 2008: 21). Based on these observations, the Supreme Court thought it imperative to differentiate between two different aspects of sovereignty – *de jure* sovereignty, which referred to practical sovereignty in the sense of exclusive territorial jurisdiction and *de facto* sovereignty, in the sense of effective legal jurisdiction over a particular territory that is not part of one’s jurisdiction. After these key principles were established, the Supreme Court argued as follows:

“For the purposes of our analysis, we accept the Government’s position that Cuba, and not the US retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the US, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.” (ibid.)

Finally, it concluded its three-step logical knock-down by rejecting the “Governments premise that *de jure* Sovereignty is the touchstone of habeas corpus jurisdiction” in favour of the claim that the history of common-law habeas corpus supports the idea that *de facto* sovereignty is sufficient for it to be applicable. Further, it added that this position is also the one that is most consistent with the separation -of-power principles.

Obviously, such a bold interpretation required sufficient evidential proof and the Supreme Court went on to provide this by analysing every single case that posed, in one way or another, the question of the Constitution’s geographic scope. For example, it started with a consideration of the so called Insular Cases, which dealt with the legal status of territories acquired by the US in the Spanish-American War. After an extensive overview of these cases the Supreme Court concluded that practical considerations were controlling in the determination of the constitutional reach in these territories – ie in the Insular cases it was decided that the Constitution would apply in full in territories that were “destined for statehood”, while it would apply only in part in territories that would not be incorporated, territories that would be likely to preserve their own legal system. Further, the Supreme Court cited a case, *Balzac*, 258, US at 312, in which it was evident that even in unincorporated territories noncitizen inhabitants were provided with “guaranties of certain fundamental personal rights declared in the Constitution” (258 US, 1922; 553 US, 2008: 23). Another important case that the Supreme Court considered was *Reid*, 354, US 1, a case in which spouses of American Servicemen were charged with crimes committed on the territory of American military bases in England and Japan. In it, Justice Frankfurter argued that the “specific circumstances of each particular case” should be taken in account before determining the geographical reach of the constitution; he also explicitly rejected a “rigid an abstract rule” for determining said reach (ibid. 24). The Conclusion of the Supreme Court in *Reid* was that the Fifth and Sixth Amendments apply to American civilians tried outside the US. Even though this case dealt with American citizens and not with enemy combatants, the Supreme Court was more interested in the logic through which the principle of habeas corpus was applied to territories that were under the *de facto* jurisdiction of the US and argued that the *Reid* principle of constitutional reach of habeas corpus can be applied by analogy to the reach of Guantanamo. Also, it once again stressed that in *Reid*, as in the Insular cases, the most important considerations controlling the rulings were *practical/prudential considerations*. The final case that the Supreme Court addressed in this

discussion was the case with which this chapter began, the case which had been the bane of the judicial branch in Guantanamo Bay since the inception of the internment camp – the case, then, in which it was first decided that the constitution does not reach outside of the territorial sovereignty of the US – *Johnson vs Eisentrager* 339 US 763 (1950). After an in-depth reconsideration of this case the Supreme Court argued that in *Eisentrager*, as in *Reid* and the *Insular* cases, “practical considerations weighted heavily as well” (ibid 25). However, in *Eisentrager*, the balance of these considerations was shifted in deference to the interests of the military since providing a proper trial for the prisoners of war would “require allocation of shipping space, guarding personnel, billeting and rations” and would “damage the prestige of military commanders at a sensitive time” (ibid.). That is, the decision in *Eisentrager* was based on prudential principles and as a result the Government was wrong in “[seizing] upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension clause” (ibid 26). The Supreme Court further repeated that the US lacked both *de jure* sovereignty and plenary control over the Landsberg prison, where the *Eisentrager* petitioners were held. The Conclusion that the SC drew out of this comprehensive analysis of cases where the extraterritorial reach of the constitution was considered, was that there is no rigid principle for determining this reach and that each case should be treated separately. As a result, since Guantanamo Bay was under the exclusive *de jure* jurisdiction of the US there were no prudential barriers for the writ of habeas corpus to apply to the petitioners from the detention camp: “In every practical sense Guantanamo is not abroad...[it] is not a transient possession....it is within the constant jurisdiction of the US. While obligated to abide by the terms of the lease, the US is, for all practical purposes, answerable to no other sovereign for its acts on the base” (ibid. 29). In addition to that, the Supreme Court argued that the US Government did not have the power to “switch the Constitution on or off at its will” and that “the Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply” (ibid. 27). That, is the separation-of-power principles were strictly against any Executive interpretations of the law that were not in congruence with the interpretation of the judicial branch – after all, if you remember, the separation of powers principle stipulates that it is up to the legislative branch to make the law, up to the executive branch to put the law in practice, and up to the judicial branch to *interpret* the law.

Summing up this lengthy discussion the Court made its first significant ruling re Boumediene: “We hold that Art. I, Section 9, cl. 2, of the Constitution has full effect at Guantanamo Bay [and] if the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause” (ibid. 31). That is, the Supreme Court basically said that the only way in which constitutional habeas corpus could be denied to the detainees at Guantanamo Bay was through formal Suspension of the writ of habeas corpus, a Suspension that was not authorised by the MCA. Thus, all GBay detainees were found to be entitled to the privilege of the writ of habeas corpus.

Despite this ruling, the Supreme Court recognised that habeas corpus is one of the most flexible principles in the US Constitution and, as a result, in certain circumstances a trial by a military commission could provide an adequate and effective substitute for this principle. That is, if it could be proven that the CSRTs provided the detainees with sufficient due process and furnished them with a viable alternative that satisfied all of the demands of the writ of habeas corpus, without the formal application of the actual principle, the constitutional requirement would be satisfied. Consequently, the Supreme Court proceeded its argument with a lengthy analysis of whether the DTA/MCAs procedures for reviewing detainees’ status were an effective substitute for the habeas writ. This chapter has already considered the relevant points of this argument (as outlined in Hamdan) and the Supreme Court in Boumediene didn’t really add any new findings. However, based on the new ruling that constitutional habeas applies to GBay, it was able to carry to conclusion the argument that was initially outlined in Hamdan. It found that “Congress intended the DTA and the MCA to circumscribe habeas review, as is evident from the unequivocal nature of the MCA Section 7’s jurisdiction-stripping language, from the DTA’s text limiting the Court of Appeals’ jurisdiction to assessing whether the CSRT complied with the ‘standards and procedures specified by the Secretary of Defense’, and from the absence of a saving clause in either Act” (553 US, 2008: 5). Thus, the Supreme Court felt compelled to argue that Section 7 of the MCA constitutes an unconstitutional Suspension of the writ of habeas corpus, and is thus rendered inapposite by Boumediene, granting full constitutional habeas corpus rights to the detainees. The Supreme Court further argued that there are no prudential barriers

whatsoever to the application of the writ to Guantanamo due to the exclusive *de jure* jurisdiction that the US held over the Bay²⁷.

Boumediene and the five other detainees proceeded with submitting their applications for the writ of habeas corpus and were released from Guantanamo on May 15, 2009 after a US Federal Judge found that “the Bush administration relied on insufficient evidence to imprison them indefinitely as ‘enemy combatants.’” (Bravin, 2008). Boumediene currently resides in Provence, France, with his family.

5. Conclusion: shades of law

Boumediene effectively put an end to the seven-year-long habeas corpus debate in Guantanamo bay and did it in the most unprecedented and controversial of ways – by declaring an act of Congress to be unconstitutional. By doing this it preferred to uphold the sacred legal principle of individual liberty over the sacred principle of democracy, because it is indeed the principle of constitutional democracy that was violated in Boumediene’s ruling: “by invalidating an act of Congress that was approved by a majority of lawmakers and signed into law by the president, the court essentially substituted a minority view for the democratically enacted majority view” (Pallitto, 2010: 484). Add to that the fact that all opinion polls taken in 2009 indicated that the public support of the Governmental decision to keep Guantanamo open was notable²⁸ and you get a complete override of the basic principles of democracy. This serves to show two things: first of all, democracy, when left to its own devices can set in motion events that violate its basic principles of liberty and equality – that is, if the courts hadn’t interfered Guantanamo Bay would be allowed to function as a detainment centre where people could be held indefinitely without charges, and this detainment centre would be approved both by the public and by the lawmakers. So, surprisingly, or perhaps not surprising at all, democracy is not averse to the principle of biopolitics and in times of extraordinary circumstances, such as the US war against terrorism, it is apt to follow the principle of biopolitical necessity to its very end, thus giving the statist

²⁷ The final statement of the Court is quite strong: “In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.”

²⁸ Two Gallup polls of 2009 indicate that the percentage of supporters/opponents of the detention camp in Guantanamo Bay was 45%/35% and 65%/32% respectively. (Morales, 2009; Jones, 2009)

discourse of emergency free reign. On the other hand, we have the revelation that the judicial discourse, with its rigid logic and its unyielding dedication to the principle of individual liberty, is able to endure through the hardest of times and stand up to the most challenging circumstances in upholding these principles. It should be reminded that that the Western legal tradition in general, and the principle of habeas corpus in particular preceded the emergence of the concept of democracy by some eight hundred years, and is thus far more resilient, flexible, and reliable, especially insofar protection of the individual is at stake.

Further, it has been illustrated that there never was a legal black hole that haunted Guantanamo, or a perversion of the law, or a rupture within the American law, or a “zone of indistinction.” Instead, Guantanamo has represented a legal object from its inception, an object that caused an almost irreversible rift between the different governmental branches and yet an object the existence of which was contested on legal grounds. It is important to note that ever since the beginning of the Rasul case, Guantanamo Bay has not really left the sphere of the law and all of the decisions that were taken there were taken within the established frame of the law. Even the motions of the administrative branch that appear to be illegal were done through the legal framework and were thus not beyond the law per se. As a result, it is more accurate to represent Guantanamo Bay as a legal battleground in which the US legal and executive branches fight for supremacy, a fight which, I would like to reiterate, is done according to the rules: unlike Abu Ghraib, or the Extraordinary Detention Centres in other parts of the world, Guantanamo actually represents a unique case, a legally-justified exceptional space, which is painted in different shades of law, as either the executive or the legislative discourses take the upper hand. The main reason it is so hard for the Obama administration to close the camp lies precisely in the fact that Guantanamo Bay is actually already embedded in the legal sphere and completely disbanding it would be just as exceptional and as illegal as its inception is deemed to be. With the passage of time Guantanamo Bay has been successfully integrated into the current legal framework and its existence has become part of the almost normal politics of the US that have introduced some measures of permanent exceptionality within the topology of power, without altering the basic configuration of this topology.

A few additional notable characteristics of the law have been illustrated in the current chapter. First of all, law itself is a living, adaptive entity that goes through constant changes and reacts to the different transformations of the state. Next, law is made by the people - be

it Supreme Court Judges or Congressmen passing legislation or the President signing orders - and it often evolves on case by case basis as decisions are made to meet precedents and previous cases are revisited to inform judgements on current affairs. Law itself is adaptive and indelible from the topology of power that makes the state functions and it provides, in a way, both the origin of the sovereign exceptional decision and its ultimate limit, as it was illustrated in the case of Guantanamo Bay. It has been illustrated that even though law has been put to tactical use on many occasions since the inception of the biopolitical grid of intelligibility and it has often been treated as no more as a tool of the government it retains its founding nature and its resilience as a discursive formation that logically precedes, supersedes and encompasses the grids of intelligibility which functionally define the state. In other words law precedes the state and makes the state *possible* just like it makes the exception possible; as a result, all of the statist configurations of power are only possible insofar as they do not violate the basic rules of formation that are postulated by the law. This is especially true for the United States where the system of checks and balances and the tripartite division of state power guarantee that the legal *raison d'être* of state formation defines the limits and capacities of *raison d'état*.

Finally, it is important to note that the controversy, conflict and disputes surrounding Guantanamo had surprisingly little overlap with the pre-emptive grid of intelligibility/logic of power/discursive formation that was established by the Bush administration after 9/11. It is true that most of the detainees were brought into the camp on account of the pre-emptive doctrine of necessity but the events that transpired after that followed the logic of legal exceptionalism, as well as the logic of law-formation, as this exceptionalism was gradually broken down and integrated into the existing legal system – sometimes in favour of the executive wing, sometimes in favour of the judicial one.

Conclusion

This thesis is grounded on the assumption that the events of 9/11 led to a significant reconfiguration of power relations in the West, the US in particular, and proceeded to provide an exploration of two distinct problem spaces that are part of this reconfiguration. My approach is strictly Foucaultian in character and I use the analytical category of the *dispositif* in order to carry out of my investigation. The *dispositif* is a complex apparatus which assumes that power relations are inscribed across a heterogeneous space upon which a variety of different techniques of governance coexist in a complex ensemble of systems of relations. These apparatuses are matched by a particular *regime of truth* that is determinative of the logic that defines the matrix of relationships between the different techniques – each regime makes possible the enunciation of a particular set of statements and is capable of inscribing into reality certain distinction between truth and falsity. The regime is further made operable by a *principle (or principles) of veridiction* and a number of *grids of intelligibility* which are meant to “make reality intelligible” and, in the process, effect knowledge-power relationships in the social and political realm. Further, I made extensive use of the Foucaultian concept of biopolitics, which stands for a *dispositif* of governance that shifts the focus of governance from sovereignty to life and establishes the *population* as a “political problem”. In the thesis I explored the hypothesis that after 9/11 terrorism was established as a *principle of veridiction* that completely changed the topology of the existing biopolitical neo-liberal *dispositif* of power in the US.

Since my approach is both Foucaultian and biopolitical in character the first key intervention of my research was to reconceptualise, or rethink, the term *biopolitics* so as to make it capable of analysing contemporary power relations. The first step of this intervention was to make sense of the discontinuity between Foucault’s first tryptich of books on biopower – *Discipline and Punish*, *History of Sexuality* and *Society Must Be Defended (a lecture series)* – and his consequent lectures that were delivered at the *College de France* over the course of 1977 and 1979 and were later released in their entirety in *Security, Territory, Population* and *The Birth of Biopolitics*. There was only one year gap between *History of Sexuality* and *Security, Territory, Population* but the ideological change in direction was significant. The first tryptich of books was focused on exploring the

differences between two different *technologies* of power – sovereignty and biopower. In the process of analysis, it mobilised two key ideas: first, that the concept of war can be seen as one of the primary grids of intelligibility of social and political relations; and second, that with the advent of biopolitics, state racism became one of the primary mechanisms of governance, in its capacity to assay and categorise life and distinguish between life that must proliferate and life that is threatening to life and must be disallowed. The lectures of 1977 and 1979, on the other hand, completely abandoned the concepts of war and race and instead focused on providing a history of Western *governmentality* or *the conduct of conduct* after the 18th century, which took the form of liberalism and, later, neo-liberalism. Foucault focuses on a whole new series of objects of analysis – such as the pastorate, the market, the enterprise and the subject of interest - and postulates that the market has become as a main principle of veridiction of power relations and the main principle of governmental limitation. In addition the concept of *technology* was effectively replaced with the concept of the *dispositif* and Foucault further identifies not two but three key sequential *dispositifs* – the juridical, disciplinary and security *dispositifs* - that coexist in a heterogeneous space where only one can be dominant at any point in time.

After a careful reading of the two different series of books I make the conclusion that their discontinuity does not mean that they are contradictory on any level. Foucault's lecture series of 1977-9 features a different principle of interrogation, based on governmentality, and explores a different set of problems; thus, despite the fact that there is very little overlap between the first tryptich of books and the later lectures Foucault does not, in fact, discard or abandon his ideas on *race*, *war* and *sovereignty*. I proceed from this conclusion to argue that the reconfiguration of the US *dispositif* of governance after 9/11 requires the reinvigoration and reinscription in Foucaultian analysis of the conceptual array that he forged in his earlier books on biopower.

In order to do that, I explored a number of contemporary developments of Foucault's ideas that are helpful to my analysis. First of all, I accepted Collier's very useful proposition that the biopolitical space of power relations can be interpreted as a topology, upon which a number of different heterogeneous elements are engaged in constant recombinations and redeployments. Next, I proceeded to explore the way in which post-9/11 developments were deployed within this topology. I analysed Butler's assumption that after 9/11 US governmentality made tactical use of the sovereign exceptional prerogative in order to

effect legally exceptional changes; I built upon it to establish the postulation that the biopolitical and the sovereign prerogative are distinct in their logic and as a result make use of a different operationalisation and conceptualisation of the exceptional. Further, I looked at Neal's argument that the historico-political grid of intelligibility which makes the use of war as the main principle of social relations can be used to identify post-9/11 developments, thus re-inscribing war as a principle of intelligibility in the neo-liberal biopolitical *dispositif*. I proceeded to argue that war is made functional in the current *dispositif* of power through the technique of racism. I further developed this idea by invoking some of the key ideas of Dillon, especially those related to life and racism. I made particular use of his idea that life in biopolitics, is not just biological life but an adaptive construct that expresses the "biopolitical imaginary" of life. I used this understanding to construct the argument that this biopolitical imaginary is precisely what constitutes the biopolitical prerogative and further advanced my argument that the two key *dispositifs* – sovereignty and biopolitics – have different prerogatives – law and life – that allow them to engage differently with different problems of sociality and to make tactical use of each other's techniques and principles of governance.

Armed with this extended conceptual array I proceeded to engage with the second key intervention of my thesis – an extensive analysis of an empirical legal object – the PATRIOT Act, as well as a supporting analysis of a wide variety of *speech acts*, legislative and executive documents, and a number of governmental publications. Over the course of the chapter I made two key arguments. First, I claim that the *doctrine of pre-emption* represents a genuinely novel grid of intelligibility that used terrorism as its key principle of veridiction and successfully made present a reality that was not there before, thus establishing a new economy of truth. It must be noted however, that this grid of intelligibility still operates within the biopolitical *dispositif* of power and is used to operationalise biopolitical imperatives. Secondly, I made the point that the PATRIOT Act is a novel type of *bio-legal* document that successfully integrates key elements of the biopolitical prerogative within the legal framework, thus mobilising the productive capacity of the law in order to pursue pre-emptive biopolitical goals.

I explored the way in which pre-emption was inscribed within the public domain through a series of speeches delivered by key administrative figures in the year after the terrorist attacks of 9/11. I further analysed the way in which the particular logic Bush's doctrine of

pre-emption – to prevent the enemy from having the *capacity* for threat – was mobilised in order to frame the way in which the terrorist threat was perceived and to consequently justify and enforce controversial decisions of exceptional legal character. I further explored how the doctrine of pre-emption was used in order to manufacture a state of “almost normal” routine. Next, I suggested that the administrative discursive approaches also managed to bring into existence a state of temporary permanence where things are kept at an “almost normal” state of affairs, which provides the surface for the temporary permanent inscription of the logic pre-emption within the biopolitical *dispositif*.

I then turn my attention to the PATRIOT Act, analysed in conjunction with the Presidential Military Order of November 14 2001, in order to illustrate how these documents present an unprecedented fusion of sovereign, biopolitical and pre-emptive elements, which are successfully integrated into the legal framework and are justified by the functionally permanent state of exception that was manufactured by the US administration after 9/11. I proceed to identify three key spheres of influence of the act. First of all, I explore in detail the exceptional powers that were granted not only to key figures of sovereign authority such as the President and the Secretary of the State, but also to a wide variety of people who, within the act, are known as “governmental entities”; i.e. agents of the state. The PATRIOT act empowers these agents to create legally binding judgements based on their own perception, thus effectively enabling them to create law on the spot and enforce it. This is a variation of what Foucault identified as one of the main functions of the police state, as the exceptional sovereign power becomes de-centralised and is allowed to permeate the social structure. What is witnessed, in effect, is the return of the foundational sovereign power of the exceptional decision, although this time it is tactically used in the pursuit of bio-political goals and is also evenly distributed within society, as all “governmental entities” are allowed to enforce exceptional decisions. Further, thus also visibly changes the relationship between law and its enforcement, as the distinction between the two becomes indistinct.

The second sphere of influence of the PATRIOT Act, I argue, is to be found in the way in which it repurposes the disciplinary surveillance mechanism in order to enable it to serve a pre-emptive function. The surveillance procedures that the PATRIOT Act makes possible do not gather information in order to establish one’s guilt but one’s potential for guilt; it is the individual’s potential for threat that is to be prevented and punished, rather than an action

that represents the materialisation of this threat. What is more, information is also gathered and used in order to single out and eliminate bad circulations of money and people, without harming the beneficial ones – this kind of regulation is more in line with the classic biopolitical regulation.

Finally, I take interest in the way in which the PATRIOT Act contributes to the biopolitical assay of life. This is done, on the one hand, by juxtaposing the categories of the barbarian alien and the patriotic citizen, who are defined along the lines of the friend/enemy distinction. However, we also see the introduction of the pre-emptive category of the *terrorist suspect* – in the logic of the PATRIOT Act the terrorist suspect for all purposes and effects equals the terrorist; this, of course, has significant reverberations for a whole range of legal notions including the *innocence-guilt* and the *burden of proof* logic of operation. For example, after the release of the PATRIOT Act the evidentiary standard of “reasonable grounds of suspicion” which was previously insufficient to even justify a cursory detention of a suspect criminal, is now used in order to enable the indefinite detention of terrorist suspects. Next, some of the clauses in the PATRIOT Act, especially those that invest the governmental entities with law-producing power, enable the operationalization and the function of the classic logic of racism within society via what is commonly known as institutional racism – once the agents of the state are given the power to imprison anyone they have a “reasonable grounds to believe” is threatening to life and society, they fall back on classic racial distinction and perform what is known as racial profiling to help them make judgement calls. Thus, even though racial profiling is not explicitly codified in the PATRIOT Act, it enables and reinforces its function. I am confident that throughout the PATRIOT Act chapter I manage to defend the idea that it not only represents a novel bio-legal document that formalises the pre-emptive biopolitical logic, but also successfully manages to incorporate some classic disciplinary (surveillance) and juridical (exceptional decision; banishment) techniques within it, which are repurposed and used in the pursuit of biopolitical goals.

My third intervention explored a very interesting problem space - the Guantanamo Bay detention camp – that was located within the topology of the post-9/11 *dispositif* of power. The United States administrative apparatus intended Guantanamo to be a sovereign heterotopia, a place where people who were potentially threatening to the state – in the face of the terrorist suspects - could be pre-emptively banished and abandoned. This was to

be enabled by the spatial and legal status of the camp as being *de facto* within the US jurisdiction but *de jure* outside of its sovereignty, a legally unprecedented state of affairs that initially allowed the US to frame Guantanamo as a space of legal exceptionalism where the juridical technique of banishment could be repurposed to pursue biopolitical goals – i.e. the disallowing of threatening life. However, in the course of Chapter 5 I illustrated how, through a series of legal cases, the Supreme Court managed to reinscribe the camp at Guantanamo Bay back in the legal realm, and by doing so provided an effective limit to the sovereign prerogative.

In the first major case – *Rasul vs Bush* – the reinscription was accomplished by a recourse to the legal statute of *habeas corpus*. This statute was used productively by the judicial branch of the US government, in order to *re-subjectify* Rasul and, as a result, reproduce his status as a subject of right. In the process, the detention camp at Guantanamo Bay was established as a legal object and all further confrontations between the executive and the judicial branches of government were firmly positioned on the legal plane. Further, in *Rasul* the Supreme Court managed to completely overturn the classic legal understanding of territoriality by arguing that *de facto* and *de jure* should be considered as legally equivalent, which further disqualified the exceptional status of Guantanamo Bay and advanced its re-integration in the legal domain.

The second case that I discussed – *Hamdan vs Rumsfeld* – illustrated how the tripartite separation of powers specific to the United States government maintains the parity between the sovereign power in the face of the state, and the juridical power, in the face of the Supreme Court. It posits them as equal entities with the capacity to dissociate from each other, even in the context of the power configuration that is peculiar to the contemporary biopolitical neoliberal *dispositif* of governmentality. That is, the separation of powers principle allows the juridical branch to retain a measure of independence from both the executive and legislative branches (the president and the congress) and to provide a constitutionally informed judicial oversight that places a limit to the ability of the state to effect exceptional changes. Finally, in *Hamdan* the confrontation between the executive and the judicial was, for the first time, shifted to the domain of the law of war – the state invoked its capacity to extend its prerogative on the basis of the exigent status that the perceived war on terror engendered and attempted to establish executive military commissions that were to try the Guantanamo detainees. The Supreme Court accepted the

challenge and, through the exploitation of a number of legal loopholes, managed to prove not only that Hamdan was not a war criminal but that, in addition, he falls under the international protections of the Geneva Conventions.

The third case that I followed, *Boumediene vs Bush*, reified the status of the confrontation over the legal object of Guantanamo Bay as a two-sided opposition between the executive and legislative branches on the one side, and the judicial branch on the other. The case followed and addressed the Congressional implementation of the so called Military Commissions Act of 2006, which was meant to negate the advances that the Supreme Court made in Hamdan and to inscribe and justify within the legal domain the existence of executive, congress-approved, military commissions for the trial of the Guantanamo Bay detainees. Over the course of the *Boumediene* case the Supreme Court approached the concept of *sovereignty* in the way in which it approached *territoriality* in *Rasul* and came to the conclusion that there should not be legal distinction between *de facto* and *de jure* sovereignty, thus placing the Guantanamo Bay detainees under the protection of habeas corpus. This case culminated with another unprecedented development that saw the Supreme Court declare an Act of Congress unconstitutional – a development that escapes the logic of democracy and reifies the resilience of the law in the face of the sovereign prerogative.

Over the course of the Guantanamo Chapter I managed to show that law has a productive capacity, that it is adaptive and responsive to change and that it has the ability to equal and overpower the sovereign entity. Thus, I established the existence of an aspect of the law that exceeds sovereignty and is able to surpass the tactical reach of the latter. I further illustrated the productive function of the law by exemplifying its ability to re-subjectify individuals that have been desubjectified by the state, and its power to demand legitimacy from the state. Finally, I provided a reflective overview of the unprecedented tension between the three branches of the government that Guantanamo caused and, in the process, revealed an active, human element in law's development which, ultimately, makes it infinitely adaptive and makes it capable of maintaining an active role within the biopolitical topology of power.

Bibliography

107th Congress of the USA, First Session, 2001. *Authorization for Use of Military Force (Enrolled Bill)*. S.J.Res.23. Washington: Congress at the White House.

107th Congress of the USA. 2001. *House Report 107-127*. Washington: Congress at the White House.

Agamben, G., 1998. *Homo Sacer: Sovereign Power and Bare Life*. Stanford, California: Stanford University Press.

Agamben, G., 2005. *State of Exception*. University of Chicago Press: Chicago.

Anderson, B. 2010. Preemption, precaution, preparedness: Anticipatory action and future geographies. *Progress in Human Geography*. 34 (6). 777-798.

Atrill, S., Farbey J. and, Sharpe R. 2011. *The Law of Habeas Corpus*. 3rd ed. Oxford: Oxford University Press.

Bailey, W. F., 1913. *A Treatise on the Law of Habeas Corpus and Special Remedies Including Mandamus, Certiorari, Quo Warranto and Prohibition, and Also the Subject of Contempts*. Chicago: T.H. Flood.

Barr, B. 2006. Testimony on the Honorable Bob Barr Chairman, Patriots To Restore Checks And Balances. In: Lovelace, D. ed., 2006. *Terrorism: Documents of International and Local Control: Volume 63*. Oceana Publications: pp.505-511.

Baudrillard, J. 2001. *The Spirit of Terrorism*[online]. Available: <http://www.egs.edu/faculty/jean-baudrillard/articles/the-spirit-of-terrorism/> [Accessed 5 May, 2013]

Baudrillard, J. 2002. *The Spirit of Terrorism*. London: Verso.

Benjamin, W. 2003. On the Concept of History. In: Eiland, H and Jennings, M., eds. *Walter Benjamin: Selected Writings (Volume 4:1938-1940)*. Cambridge: Harvard University Press.

Bertani, M. and Fontana, A. 2004. Situating the Lectures. In: *Foucault, M. Society Must Be Defended*. Penguin Books: London, 273-293.

Bigo, D. 2011. Security: a field left fallow. In: Dillon, M. and Neal, A. 2011. *Foucault on Politics, Security and Law*. New York: Palgrave Macmillan. Ch. 4.

Bravin, J. 2008. "Judge Orders 5 Gitmo Inmates Released". *The Wall Street Journal*. Available:

<http://online.wsj.com/article/SB122719994241444547.html?mod=googlenews_wsj>. [Accessed: June 22, 2012].

Bush, G. W. 2001. *Public Address Speech - September 11 2001*. Available through: <http://news.bbc.co.uk/1/hi/world/americas/1539328.stm> . [Accessed 10 February 2013].

Bush, G. W. 2001a. Bush Remarks At Prayer's Service – September 14 2001. In: *BBC News Online*. 2013. "Our purpose as a nation is firm". Available through: <http://news.bbc.co.uk/1/hi/world/americas/1545043.stm> [Accessed 10 February 2013]

Bush, G.W. 2001b. Address to Joint Session of Congress Following 9/11 Attacks – September 20 2001. In: Peters, G. 2013. *The American Presidency Project* [online access]. Available through: <http://www.presidency.ucsb.edu/ws/?pid=64731> [Accessed 10 February 2013]

Bush, G.W. 2001c. Proclamation 7463--Declaration of National Emergency by Reason of Certain Terrorist Attacks. In: *Federal Register* 66 (181). Available: <http://www.fas.org/irp/news/2001/09/fr091801.html> [Accessed 10 February 2013]

Bush, G.W. 2001d. *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*. Executive Order dated November 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001).

Bush, G. W. 2001d. Report on Actions taken to Respond to the Threat of Terrorism. In: *107th Congress of the USA. 2001. House Report 107-127*. Washington: Congress at the White House.

Bush, G.W. 2001e. *President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*. Washington: Office of the Press Secretary, White House.

Bush, G. W. 2002. *Bush State of the Union Address – 29 January, 2002*. Available: <http://edition.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/> [Accessed 15 February 2013]

Bush, G.W. 2002a. *Bush West Point Speech – 1 June, 2002*. Available: <http://www.nytimes.com/2002/06/01/international/02PTEX-WEB.html?pagewanted=all> [Accessed 15 February 2013].

Bush, G.W. 2002b. Address to the United Nations. In: CNN. 2002. *President Bush's Address to the United Nations*. Available through: <http://edition.cnn.com/2002/US/09/12/bush.transcript/> [Accessed February 15, 2013]

Bush, G.W. 2002c. *Statement at the United Nations General Assembly – 12 September 2002*. Available through: <http://www.un.org/webcast/ga/57/statements/020912usaE.htm>. [Accessed February 17 2013]

Bush, G.W. 2002d. Address given by President Bush in Cincinnati – October 7,2002. In: The Guardian. 2002. *Transcript: George Bush’s speech on Iraq*. Available through: <http://www.guardian.co.uk/world/2002/oct/07/usa.iraq> [Accessed 10 March 2013].

Butler, J. 2004. *Precarious Life*. London: Verso.

CNN. 2001. “You are either with us or against us”. *CNN Online*. Available: <http://edition.cnn.com/2001/US/11/06/gen.attack.on.terror/> [Accessed 10 February 2013]

Calarco, M. and DeCaroli, S, ed. 2007. *On Agamben: Sovereignty and Life*. Stanford University Press: Stanford, California.

Chang, N. 2009. *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties*. New York: Seven Stories Press.

Cole, D. 2006. Testimony of Professor David Cole, Professor of Law, Georgetown University Law Center. In: Lovelace, D. ed., 2006. *Terrorism: Documents of International and Local Control: Volume 63*. Oceana Publications: pp.512-526).

Collier, S. 2009. Topologies of Power: Foucault’s Analysis of Political Government beyond ‘Governmentality’. *Theory, Culture and Society*: 26, 78-108.

Collins, D. 2006. Testimony of Daniel P. Collins, Partner, Munger, Tolles & Olsen LLP. In: Lovelace, D. ed., 2006. *Terrorism: Documents of International and Local Control: Volume 63*. Oceana Publications: pp. 527-539.

Cooke, J. 1961. *The Federalist*. Wesleyan University: Illinois.

Davidson, A. 2004. Introduction. In: Foucault, M. 2004. *Society Must Be Defended*. Penguin Books: London, pp. xiv-xxii.

Dempsey, J. 2006. Testimony of James X. Dempsey, Executive Director, Center for Democracy and Technology. In: Lovelace, D. ed., 2006. *Terrorism: Documents of International and Local Control: Volume 63*. Oceana Publications: pp. 540-554.

Department of Justice. 2001. *The USA PATRIOT Act: Preserving Life and Liberty*. Available: <http://www.justice.gov/archive/ll/highlights.htm> [Accessed 10 March, 2013].

Derrida, J., 2001.” 9/11 and Global Terrorism: A Dialogue with Jacques Derrida”. Interviewed by Giovanna Borradori. Available: <http://www.press.uchicago.edu/books/derrida/derrida911.html> [Accessed 10 April 2013].

Diken, B. 2006. From exception to rule: from 9/11 to the comedy of (t)errors. *Irish Journal of Sociology*: 15 (1), 2006, 81–98.

Diken, B. and Larsten, C. 2005. *The Culture of Exception: Sociology Facing the Camp*. Routledge: New York.

- Dillon, M. 2007. Governing Terror: The State of Emergency of Biopolitical Emergence. *International Political Sociology*: 1, 7-28.
- Dillon, M. 2011. Security, Race, and War. In: Dillon, M. and Neal, A. 2011. *Foucault on Politics, Security and Law*. New York: Palgrave Macmillan. Ch. 8.
- Dillon, M. and Neal, A. 2011. *Foucault on Politics, Security and Law*. New York: Palgrave Macmillan.
- Doyle, C. 2001. *Terrorism: Section by Section Analysis of the USA PATRIOT Act*. Washington: The library of Congress.
- Elesa, J. and Garcia, M. J., 2010. *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*. Washington: Congressional Research Service Report for Congress 7-5700. Available at: < <http://www.fas.org/sgp/crs/natsec/rl33180.pdf> > [Accessed 07 Mar 2011].
- Englerth, M. 2008. Quo Vadis Guantanamo? Reflections on the U.S. Supreme Court's Boumediene Decision. *European Journal of Crime, Criminal Law and Criminal Justice*: (16)4. pp. 397-432.
- Epic Online. 2013. "National Security Letters". Available through: <http://epic.org/privacy/nsl/>. [Accessed 10 April, 2013]
- Fisher, L., 2003. Military Tribunals: A Sorry History. *Presidential Study Quarterly*: 33 (3), pp. 484-508. Available Through: JSTOR [Accessed 01 Dec 2011]
- Foucault, M. 1967. *Of Other Spaces: Heterotopias*. Available through: <http://foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html>. Accessed [10 April 2013].
- Foucault, M. 1977. The Confession of the Flesh: Interview. In *Power/Knowledge Selected Interviews and Other Writings* (ed Colin Gordon). 194–228.
- Foucault, M. 1978 *History of Sexuality, Vol. 1: An Introduction*. New York: Vintage Books.
- Foucault, M. 1991. Nietzsche, Genealogy, History. In: Rabinow, P., ed. 1991. *The Foucault Reader: An Introduction to Foucault's Thought*. Penguin: London.
- Foucault, M. 1991a. *Discipline and Punish: The Birth of the Prison*. New York: Penguin.
- Foucault, M. 2004. *Society Must Be Defended*. New York: Picador.
- Foucault, M., 2008. *The Birth of Biopolitics: Lectures at the College de France 1978-1979*. Houndmills: Palgrave Macmillan.
- Foucault, M., 2009. *Security, Territory, Population: Lectures at the College de France 1977-1978*. Houndmills: Palgrave Macmillan.

- Fox News. 2002. "Transcript: Cheney on Guantanamo Detainees". Available: <<http://www.foxnews.com/story/2002/01/27/transcript-cheney-on-guantanamo-detainees>>. Last accessed 20th June 2012.
- Golder, B and Fitzpatrick, P. 2009. *Foucault's Law*. Routledge: New York.
- Gordon, C, ed. 1980. *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977: Michel Foucault*. Pantheon Books: New York.
- Haynes, W., 2002. "Memorandum re Enemy Combatants". Washington: Council of Foreign Relations.
- Hudson, R., 1999. *The Sociology and Psychology of Terrorism: Who Becomes a Terrorist and Why?* Library of Congress: Washington.
- Ingersoll, E., 1849. *The History and Law of the Writ of Habeas Corpus: An Essay on the Law of Grand Juries*. Philadelphia: T.K. and P.G. Collins Printers.
- Jones, J. 2009. "Americans Oppose Closing Gitmo and Moving Prisoners to U.S. Gallup Politics". Available at: <<http://www.gallup.com/poll/119393/americans-oppose-closing-gitmo-moving-prisoners.aspx>>. [Accessed June 22, 2012].
- Kain, E. 2011. 9/11 "Chart of the Day". Forbes Online. Available: <http://www.forbes.com/sites/erikkain/2011/09/12/911-chart-of-the-day/> [Accessed 8 March 2013].
- Khaki, A. 2011. *The PATRIOT Act, 10 Years Later*. American Civil Liberties Union. Available: <http://www.aclu.org/blog/national-security/patriot-act-10-years-later> [Accessed 8 March, 2013]
- Kritzman, L., ed. 1998. *Michel Foucault: Politics, Philosophy, Culture*. London: Routledge.
- Kurlan, P. and Lerner, R. eds., 1987. *The Founders Constitution Volume One: Major Themes*. Indianapolis: Liberty Fund.
- Londras, F., 2008. Guantanamo Bay: Towards Legality. *The Modern Law Review Limited*. 71 (1), pp. 36-58.
- Londras, F. 2007. US Supreme Court, 29 June 2006 , Hamdan v. Rumsfeld , 126 S Ct . 2749 (2006); 548 US — (2006). *Netherlands International Law Review*. 54(3), pp.539-550
- Lovelace, D. ed., 2006. *Terrorism: Documents of International and Local Control: Volume 63*. Oceana Publications.
- Madison, J. 1787. Federalist. No.47, ch30, 30 Jan, 1787. In: Cooke, J. 1961. *The Federalist*. Wesleyan University: Illinois. Pp.323-332.

Massumi, B., 2012. *The Remains of the Day*. [pdf] Available through:
<http://historiesofviolence.com/wp-content/uploads/Brian-Massumi-the-remains-of-the-day.doc.pdf> [Accessed 10 April 2013]

Massumi, B. 2007. Potential Politics and the Primacy of Preemption. *Theory and Event*. 10(2) [online journal]. Available:
http://muse.jhu.edu/journals/theory_and_event/v010/10.2massumi.html [Accessed 5 March 2013].

McCarthy, A., 2006. Testimony of Andrew C. McCarthy Attorney and Senior Fellow, The Foundation for the Defense of Democracies. In: Lovelace, D. ed., 2006. *Terrorism: Documents of International and Local Control: Volume 63*. Oceana Publications, pp.555-574.

Mills, C., 2007. Biopolitics, Liberal Eugenics, and Nihilism. In: M. Calarco and S. Decaroli. *Giorgio Agamben: Sovereignty & Life*. Stanford: Stanford University Press, pp. 180-203.

Mitropoulos, A. 2004. "Habeas corpus e pluribus unum". Available:
<<http://interactivist.autonomea.org/node/4006>> Last accessed 20 June 2012.

Morales, L. 2009. "Americans Send No Clear Mandate on Guantanamo Bay". Gallup Politics. Available at: <<http://www.gallup.com/poll/113893/americans-send-no-clear-mandate-guantanamo-bay.aspx>>. [Accessed June 22, 2012].

Murphy, J. 2009. "PATRIOT Act Abuses Seen". CBS News Online. Available:
http://www.cbsnews.com/2100-500164_162-564189.html [Accessed March 10 2013].

Neal, A. 2011. Goodbye war on terror? Foucault and Butler on discourses of law, war and exceptionalism. In: Dillon, M. and Neal, A. 2011. *Foucault on Politics, Security and Law*. New York: Palgrave Macmillan. Ch. 2.

Neuman, G. L., 1996. Anomalous Zones. *Stanford Law Review*. 48, pp. 1197-1234. Available Through: HeinOnline [Accessed 03 Feb 2011].

Olson, T., Clement, P., Garre, G., and Drennan, J., 2004. *Brief for Respondents No. 03-669 On Writ for Certiorari to the US Court of Appeals For the Fourth Circuit*. Available:
<<http://www.lawfareblog.com/wp-content/uploads/2010/09/Hamdi-SCOTUS.pdf>> [Accessed: 06 June 2012].

Online Dictionary Update. 2013. "Everything". Available through:
<http://www.dictionaryupdate.com/everything> [Accessed 10 April 2013]

Online Oxford Dictionary. 2012. "Logic". Available:
<<http://oxforddictionaries.com/definition/english/logic>> Last accessed 22 June 2012.

Oxford Online Dictionary, 2013b. "Topology". Available: <http://oxforddictionaries.com/definition/english/topology?q=topology> . [Accessed 10 April 2013]

Oxford Online Dictionary. 2013. "Everything". Available: <http://oxforddictionaries.com/definition/english/everything?q=everything> [Accessed 10 April 2013].

Oxford Online Dictionary, 2013a. "Exception". Available: <http://oxforddictionaries.com/definition/english/exception> [Accessed 10 April 2013]

O'Leary, T. 2002. *Foucault: The Art of Ethics*. Continuum: London.

O'Neill, P. Jr. 2008. *National Security and the Legal Process*. New York: Oxford University Press.

O'Neill, P. Jr., ed. 2008b. *National Security and the Legal Process: Supplement*. New York: Oxford University Press.

PATRIOT Act. 2001: See citation for PUBLIC LAW 107-56

Pallitto, R. 2010. The Legacy of the Magna Carta in Recent Supreme Court Decisions on Detainees' Rights. *Political Science & Politics*. (43)3. Pp.483-486.

Pitt, C. 2011. US PATRIOT Act and Racial Profiling: Are There Consequences of Discrimination. *Michigan Sociological Review*. 25 (4). 53-69.

Presidential Military Order of November 14, 2001: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism". Washington: The White House.

ProCon. 2013. "Does the PATRIOT Act unfairly target minority and immigrant communities?" Available: <http://aclu.procon.org/view.answers.php?questionID=000719> [Accessed 14 March 2013]

Rabinow, P., ed. 1991. *The Foucault Reader: An Introduction to Foucault's Thought*. Penguin: London.

Radcliffe, M. F. and Brinson. D. "US Legal System". FindLaw. Available: <http://corporate.findlaw.com/litigation-disputes/the-u-s-legal-system.html> . Last accessed 20 June 2012.

Reid, J. 2011. Life Struggles: war, discipline, and biopolitics in the thought of Michel Foucault. In: Dillon, M. and Neal, A. 2011. *Foucault on Politics, Security and Law*. New York: Palgrave Macmillan. Ch. 3.

Rozenzweig, P., Kochems, A., and Carafano, J. eds., 2004. *The PATRIOT Act Reader: Understanding the Law's Role In The Global War On Terrorism*. Washington: The Heritage Foundation.

Schmitt. 2005. *Political Theology. Four Chapters on the Concept of Sovereignty*. Chicago: University of Chicago Press.

Senellart, M. 2008. Course Context. In: Foucault, M. *The Birth of Biopolitics*. Palgrave Macmillan: Hounmills, Basingstoke, 475 – 507.

Sloss, D. L., 2004. Rasul v. Bush. 124 S.Ct. 2686. *The American Journal of International Law*. 98 (4), pp. 788-798. Available Through: JSTOR Archive [Accessed 02 Mar 2011].

Thai, J. T. 2006. The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens's Influence From World War II to the War on Terror. *Virginia Law Review*, 92, pp. 501-532. Available Through: HeinOnline [Accessed 16 Nov 2011].

The White House. 2002. *The National Security Strategy of the United States of America*. Available: <http://www.state.gov/documents/organization/63562.pdf> . Accessed [10 April 2013].

The White House. 2006. The National Security Strategy of the United States of America. In: O'Neill, P. Jr. 2008b. *National Security and the Legal Process: Supplement*. New York: Oxford University Press. 47-75.

U.S. Department of Justice. 2005. "Bureau of Justice Statistics, National Crime Victimization Survey. Available: <http://www.project.org/info.php?recordID=168> [Accessed 10 March, 2013].

US Congress. 2006. Military Commissions Act of 2006 HR-6166. Washington: The White House.

US Congress. 2009. Military Commissions Act of 2009 (H.R. 2647, Title XVIII). Washington: The White House.

US House and Senate. 2005. Detainee Treatment Act of 2005. Washington: The White House

US Legal Dictionary Online. 2012. 'Common Law'. Available: <http://definitions.uslegal.com/c/common-law/>. [Accessed 20 June 2012].

US Legal Dictionary Online. 2012. "Common Law". Available: <http://definitions.uslegal.com/c/common-law/>. [Accessed 20 June 2012].

US Legal Dictionary Online. 2012a. "Lex Specialis". < <http://definitions.uslegal.com/l/lex-specialis> > [Accessed 19 June 2012]

US Legal Dictionary Online. 2013. "Racial Profiling". Available:
<http://definitions.uslegal.com/r/racial-profiling/> [Accessed 20 February, 2013]

Waldron, J. 2010. *Torture, Terror, and Trade-Offs: Philosophy for the White House*. Oxford University Press: Oxford

Welsh, S. 2006. *Terrorism Detainees: Geneva Convention Common Article 3*. Available Through: <<http://www.stevencwelsh.com/cdi-archive/gc-art3.php>> Accessed: 07 June 2012

Wolfowitz, P., 2004. "Order Establishing Combatant Status Review Tribunal". Available at: < <http://www.defenselink.mil/news/Jul2004/d2004070review.pdf> >

Zizek, S. 1994. *The Metastases of Enjoyment: Six Essays On Women And Causality*. London: Verso.

Zizek, S. 2006. "On 9/11, New Yorkers faced the fire in the minds of men". The Guardian. 11 Sep. Available through:
<http://www.guardian.co.uk/commentisfree/2006/sep/11/comment.september11> [Accessed 10 April 2013].

Bibliography of Legal Documents:

8 USC § 1101 - Definitions

8 USC § 1182 - Inadmissible aliens

10 USC Chapter 47 - Uniform Code of Military Justice

10 USC § 948a – Definitions

18 USC § 2332d - Financial transactions

18 USC § 2339A - Providing material support to terrorists

18 USC § 2339B - Providing material support or resources to designated foreign terrorist organizations

18 USC § 2705 - Delayed notice

18 U.S.C. § 4001 - Limitation on Detention; Control of Prisons

28 U.S.C. § 2241 - Power to Grant Writ

28 U.S.C. § 2243 - Issuance of Writ; Return; Hearing; Decision

50 U.S.C. 1541-1548 – War Powers Resolution (1973)

50 USC § 1804 - Applications for court orders

Ahrens v. Clark, 333 U.S. 826 (1948)

Boumediene v. Bush. 553 U.S. (2008)

Boumediene v. Bush No. 06-1595 (U.S. 2008), together with No. 06-1196 Al Odah, Next Friend of Al Odah, et al. v. United States et al., 553 U.S. (2008).

Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 500 (1973)

Delahunty, RJ and Yoo, JC. 2002. *Application of Treaties and Laws to al Qaeda and Taliban Detainees*. Memorandum dated 9th January 2002. Available:

<<http://texscience.org/reform/torture/yoo-delahunty-9jan02.pdf>>. Last accessed 20 June 2012.

Detainee Treatment Act of 2005 (H.R. 2863, Title X). Washington: The White House.

Duncan v. Kahanamoku, 327 US 304

Dunham, F. *Petition for the Writ of Certiorari*. Hamdi v. Rumsfeld No. 03-_____ (2004).

Available at: <<http://cjc.delaware.gov/PDF/Hamdi%20Cert%20Petition.pdf>> Last accessed: June 22, 2012.

Ex Parte Milligan, 71 US, 2 (1866)

Ex Parte Quirin, 317 U.S. 1 (1942)

Federal Rules of Criminal Procedure. Rule 6. The Grand Jury. (1984)

Gonzales, AR. 2002. *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban*. Memorandum dated 25th January 2002.

Available: <<http://texscience.org/reform/torture/gonzales-bush-25jan02.pdf>>. Last accessed 20 June 2012.

Hamdan vs. Rumsfeld, 548 US_ (2006)

Hamdi v. Rumsfeld, 542 U.S 507 (2004)

Hamdi II, 296 F.3d 2002

International Committee of the Red Cross (ICRC). 1949. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31. Available at:

<<http://www.unhcr.org/refworld/docid/3ae6b3694.html>>

Johnson v. Eisentrager, 339 U.S. 763 (1950)

Matthews vs. Elridge, 425 US (1976)

Mobbs, M. 2002. *Mobbs Declaration*. App. 148. In: Hamdi v. Rumsfeld, 542 U.S 507 (2004)

Montes, J. G., Roosevelt, T. 1903. *Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, signed Feb 23, 1903*. Available:

http://avalon.law.yale.edu/20th_century/dip_cuba003.asp [Accessed 20 June 2013]

O'Connor, S.D. 2004. *Hamdi v. Rumsfeld: Opinion*. 542 U.S 507 (2004)

PUBLIC LAW 107–56—OCT. 26, 2001: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001.

US Congress, 2001. *Authorisation for the Use of Military Force*. Public Law 107–40 (Sept. 18, 2001).

Rasul v. Bush 542 U.S. 466 (2004)

Reid v Covert, 354_US (1957)

Terry v. Ohio, 392 US 1, 27 (1968)

The House of Anjou. 1225. Magna Carta. Available:

<http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html>. Last accessed 20 June 2012.

Uniform Code of Military Justice UCMJ, 64 Stat. 109, 10 U.S.C. Article 21

United States Constitution Amendment 5

United States Constitution Amendment 14

United States Constitution Art. I, §9, cl 2

United Nations Charter, Article 51 (1945)

US Government Printing Office, 2012. *United States Code*. Available:

<<http://www.gpoaccess.gov/uscode/>> Last accessed 20 June 2012.

Wolfowitz, P. 2004. *Order for establishing Combatant Status Review Tribunals*. Washington: Department of Defense, White House. Available:

<<http://www.defense.gov/news/jul2004/d20040707review.pdf>>. Last Accessed June 22, 2012.