2. War Crimes

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The military’s racist classification of indigenous and settler peoples in Guam was not a randomly selected event, nor was it entirely unique in scale and composition. The national and international discussions on war criminality that occurred in the 1940s similarly expressed the racial hierarchies used by the military’s intelligence agencies, as much as they reflected the ambivalent, contradictory, and vindictive positions of jurists, legal scholars, and military officials in the United States and elsewhere. As early as August 2, 1944, the U.S. War Department began to shape the scope and meaning of these debates with the publication of What Shall Be Done with War Criminals? Authored by the Harvard criminologist Sheldon Glueck, the text described the mid-twentieth-century nature of war crimes and war crimes tribunals. With the war still waging, Glueck used his association with the War Department to project a victory on the part of the United States and its allies. As he boldly asserted, the United States “will have a hand in the trial and punishment of Japanese war criminals whose offenses took place in Wake, Guam, the Philippine Islands, the Aleutians, and other Pacific areas.”1 Just how the United States would accomplish the task of incarcerating war criminals on a global scale remained unclear.

In this chapter, I reckon with this dilemma of imperial judgment as well. By examining what war criminality meant for the United States and its military agencies, I show how the U.S. Navy’s War Crimes Tribunals Program developed a language of white supremacist statecraft and punishment as legitimate law in Guam. As with the incarceration of Chamorros, Japanese, and Asians in various camps, the navy turned to its rules and proclamations—all steeped in the logics of the carceral state—to make lawful its then-burgeoning military commission. National and interna-
tional debates on war criminality, as much as issues of culpability, staffing, and translation, informed the making of the tribunal in Guam. With these factors in mind, I discuss how the tribunal brokered justice, expanded its jurisdiction, and fashioned its subjects.

War Criminality and the State of Exception

In Sheldon Glueck’s treatment of war criminality, questions of the carceral and the colonial likewise resonated with how, if at all, U.S. federal laws on the individual “offender” would inform the prosecution of Japanese and Nazi war criminals. As he ascertained, “We regard every offender as an individual. His assets and liabilities are studied and a program is planned to make the most of his abilities . . . curb his bad habits, and gradually restore him to a useful and law-abiding place in society.” But, he inquired, “Should this policy be followed for the war criminals?” Although he did not provide a definitive response, he treated individual offenders and war offenders as separate categories entitled to legally distinct forms of incarceration. As Glueck explained, ordinary offenders “can afford to experiment with the humane approach, and the public, even the victims and their families, can be made to agree to a policy of rehabilitation.”

On the other hand, for “war offenders of the Axis type, who have committed thousands of shocking atrocities, measures of cure and rehabilitation of the individual offender according to his needs would be interpreted (especially by the surviving victims of Axis brutality) as undeserved leniency.”

Invoking the Moscow Declaration of 1943 as the Allied model for punishing German war criminals, Glueck offered several forms of punishment that could arise from this agreement and that could be levied against war criminals in Europe and elsewhere. The options available to the Americans, English, and Soviets included execution, imprisonment, reeducation, and rehabilitation, with the prominent offenders left alive to be “studied by psychiatric clinics . . . so that we might learn what made these men defy the laws of civilization and lead millions of their fellow countrymen to an orgy of death and destruction.” Lest any of these options emasculate or humiliate offenders into “martyrs,” Glueck suggested that Japanese and Nazi offenders be sentenced to “prison terms at hard labor for life, perhaps on lonely islands in distant seas, whence escape would be impossible.” By casting islands as sites of exile, he featured a form of punishment once employed by European governments in their transportation of convicts, lepers, and revolutionaries to islands in the Atlantic, Indian, and Pacific Oceans. As the
literary critic Elizabeth M. DeLoughrey reminds us, colonial governments often perceived islands as remote locales scattered far from their metropoles and inhabited by “colonized and enslaved populations who, without access to maritime vessels, were less likely to escape.”

Although islands as proposed carceral sites never resurfaced in Glueck’s assessment of war criminality, what must be underscored was the lack of international consensus regarding the prosecution of war criminals. Central to these discussions was the traditional definition of war criminality, broadly construed as “crimes against humanity.” As Glueck opined, war criminals of this magnitude could be understood as persons who violate “(a) the laws and customs of legitimate warfare or (b) the principles of criminal law that are generally observed in civilized legal systems, or who have ordered, consented to, or conspired in the commission of such acts.” But as he rightly observed, the conditions of World War II spurred a series of “crimes” that were not recognized by the Geneva Convention of 1929 and its rules on “civilized” warfare between nations and their soldiers. Its laws concerning the protection of civilians, medical personnel, and prisoners proved insufficient for jurists, scholars, and tribunals that were coming to terms with the new laws on crimes against humanity. Murder, rape, and theft committed by military personnel at their own initiative and not at the behest of orders constituted these crimes, as did treaty violations and acts of treason on the part of government officials. However, national courts and war crimes tribunals had yet to draft various procedures on these and other crimes of the “Axis type,” an effort that other jurists realized as well.

In a speech to the American Society of International Law on April 13, 1945, Supreme Court justice Robert H. Jackson was one such jurist. In his talk, he offered a more tempered perspective on the American prosecution of war criminals than that presented by the criminologist Sheldon Glueck. As Justice Jackson proclaimed, “I have no purpose to enter into any controversy as to what shall be done with war criminals, either high or humble.” Yet, even with this caveat, he still offered his preference for executing war criminals on the condition that national trials refrain from participating in these acts. He said, “If it is considered good policy for the future peace of the world, if it is believed that the example will outweigh the tendency to create among their own countrymen a myth of martyrdom, then let [the war criminals] be executed. But in that case let the decision to execute them be made as a military or political decision.” Careful not to conflate constitutional legalism with military doctrine, Justice Jackson further cautioned, “We must not use the forms of judicial proceedings to carry out or ratio-
nalize previously settled political or military policy. Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people.” 10 By “farcical judicial trials,” he meant war crimes tribunals that could wield the power of politics and militarism and not of law. “Among us,” he remarked, “there are some who candidly would use courts as an instrument of power and many more who favor all of the premises of that philosophy without recognizing the conclusion. The ease with which men thoughtlessly fall into step with this philosophy is strikingly demonstrated by the attitude of many people toward the trial of war criminals.” 11

Cautious about the tendencies of courts to operate as “policy weapons,” Justice Jackson defended what he believed were the fair principles of judicial review granted to individuals who faced civil courts. Addressing the attorneys, he continued, “The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial.” 12 He forewarned, “The world yields no respect to courts that are merely organized to convict.” 13 As these comments indicate, Justice Jackson remained cognizant of the ways in which war crimes tribunals can leverage militarist, political, and nationalist sentiments over and beyond the rule of law. A surface reading of his remarks indicates that he viewed law, militarism, and politics as unrelated spheres of influence, a seemingly naive perspective for somebody who, on May 2, 1945, would be appointed as the U.S. chief of counsel in the prosecution of Axis war criminals. This partly explains why he guardedly welcomed the possibility of “bringing those accused of war crimes to trial.” 14 As Justice Jackson emphasized, “I repeat that I am not saying there should be no trials. I merely say that our profession should see that it is understood that any trials to which lawyers worthy of their calling lend themselves will be trials in fact, not merely trials in name, to ratify a predetermined result.” 15

Having previously dissented in Korematsu v. United States (1944), the Supreme Court’s ruling on the legality of interning Japanese Americans during World War II, Justice Jackson may have anticipated gross violations of the law wherein various court systems could “ratify a predetermined result” under the pretense of national or international law. 16 As evidenced in this case, the Supreme Court upheld the exclusion and relocation of 120,000 Japanese U.S. citizens and noncitizens from the West Coast of the United States. The majority decision endorsed the military’s fear that the Japanese, as a race, conspired to spy and commit acts of sabotage against the U.S. state,
especially in cities, harbors, and military bases along the coast. Recognizing the racist elements of this decision, Justice Jackson opposed the ruling on the grounds that it violated the Constitution. Therefore, the legal codification of racism—what the Lumbee scholar Robert A. Williams Jr. calls the “rights-denying jurispathic power” of the law—underscored discussions of war criminality that may have troubled Justice Jackson. In this respect, Jackson knew that one court’s decision could influence another’s and thereby normalize racism as just. In Korematsu v. United States, the Supreme Court sanctioned the military curfew and exclusion orders previously decided in Hirabayashi v. United States (1942), thereby making legal the denial of habeas corpus to and the racial incarceration of Japanese Americans.

In legal terms, this process has been described as the doctrine of stare decisis wherein, as in U.S. courts, like cases should be decided alike. For Williams, stare decisis remains a central tenet of the U.S. Supreme Court and its ongoing reliance on nineteenth-century rulings that were informed by racisms toward American Indians. By examining the landmark cases on American Indian rights by Chief Justice John Marshall, wherein American Indians became domestic “wards” of the United States in the early nineteenth century, he shows how these cases have become the precedents for denying numerous civil liberties, economic opportunities, political rights, and treaty protections to American Indians and, tellingly, to other racialized or minoritized peoples of “like cases.” As Williams explains, “Stare decisis, by its very nature, represents a persistent danger for the protection of minority rights in [the U.S.] legal system, threatening to expand the original principle of racial discrimination justified by a particular legal precedent to new purposes and applications.” Until the Supreme Court strikes down such precedents, moreover, the expansion of racial discrimination has no foreseeable limit. As he affirms, “Even without possessing a hostile intent toward any particular minority group, a judge who feels bound to enforce prior precedents because of the doctrine of stare decisis can perpetuate, in the most subtle of fashions, a system of racial inequality.”

Given these circumstances, Justice Jackson may have understood the emerging debates on war criminality and war crimes tribunals as crossing the lines between law, militarism, and nationalism. With the doctrine of stare decisis as a looming factor in these discussions, he alluded to the internment of Japanese Americans in his blunted criticism of the Supreme Court’s failure to protect their rights to due process. Although he never identified the Japanese Americans in his speech, the allusion was discernible. As Justice Jackson indicated, “The assurance of our fundamental law
that the citizen’s life may not be taken without due process of law is of little avail against a foreign aggressor or against the necessities of war.” Implicitly referring to Executive Order 9066 and to its logic of military necessity in which the civil rights of Japanese Americans were denied, he said, “It ought to be clear by this time that personal freedom, at least the kind and degree we have known in this country, is inconsistent with the necessities of total war and incompatible with a state of militarization in readiness for one.” In addition to admonishing national courts that were corrupted by the “necessities of war,” as in Korematsu v. United States, he also criticized the arrogance of “extreme nationalists” who believed that international law always worked on their side.

As these sentiments illustrate, Justice Jackson engaged the postwar dangers of nationalism, retribution, and stare decisis before the American Society of International Law. He even provided a generous reading of U.S. constitutional law as redeemable despite his direct and implied critiques of its violence. So long as the military did not seek the judiciary’s counsel in enforcing its decisions, Justice Jackson believed in the distinct but important roles of the judiciary and the military. For this reason, he was not opposed to the making of military war crimes tribunals. In his later capacity as chief of counsel in the prosecution of Axis war criminals, for example, he expressed optimism in the justice proffered by the war crimes trials in Europe. Invoking the supposed universalism of American responsibility, he wrote, “After we entered the war, and as we expended our men and our wealth to stamp out these wrongs, it was the universal feeling of our people that out of this war should come unmistakable rules and workable machinery from which any who might contemplate another era of brigandage would know that they would be held personally responsible and would be personally punished.”

Ultimately, Justice Jackson called for the separation of law from policy (or law from militarism) in the defining of war criminality and in the making of war crimes tribunals, a task that, contrary to his beliefs, proved materially and politically untenable. As in the case of Guam, constitutional law, international law, and naval law, among other legal codes and doctrines, mutually constituted what Giorgio Agamben has theorized as the state of exception. Contrary to Justice Jackson’s conviction that law operated as a fair and autonomous sphere, the law, when employed in the U.S. territory of Guam, functioned as a harbinger of militarized violence and white supremacist statecraft. When analyzed in terms of the law’s historical relation to American Indians, Japanese Americans, and other “rights-denying” subjects of the United States, the conflation of law, militarism, and policy
often became the norm rather than the exception. As such, Justice Jackson’s treatment on war criminality was fundamentally about internationally expanding the U.S. carceral state. The dialogue on war criminality advanced by naval attorneys and officials merely reiterated the militarist and punitive character of U.S. law in the Pacific.

Take, for instance, Lieutenant Commander James J. Robinson of the Office of the Judge Advocate General of the U.S. Navy. As an attorney and military officer, he shared his views on the legal charges regarding war crimes trials before the American Bar Association and the Federal Bar Association on April 20, 1945. At a conference held in Washington, DC, the lieutenant commander recounted a series of Japanese atrocities committed against American prisoners at a labor camp located in Palawan Island, Philippines. Robinson’s talk drew from media accounts and American survivor memories of the Japanese military’s attempt to execute the prisoners on December 14, 1944. He summarized the plot as follows: Upon noticing that American bombers were flying above their labor camp, the Japanese soldiers ordered the prisoners to enter the air-raid shelters, at which time the soldiers proceeded to throw lighted torches, paper, and gasoline into the shelters. The Americans who tried to escape the area were immediately clubbed, bayoneted, or shot. A few Americans even ran to a nearby cliff, climbed down its face, and jumped into the ocean, thereby hoping to swim away from the camp. Only 9 of the original 150 American prisoners survived the tragedy. Recalling witness testimony of a failed escape, Robinson shared the following image: “One American who was shot in the water was dragged out through the slime and was being stabbed with bayonets as he staggered along the shore surrounded by his captors. While he was begging them to shoot him rather than burn him to death, the Japanese poured gasoline on one of his feet and set it on fire, then on the other foot and set it on fire, and then, as he collapsed, they threw gasoline over him and he was enveloped in the flames.”

Moralizing the Americans as victims, the lieutenant commander then raised the question that dominated debates on war criminality. With the Japanese soldiers from the camp now imprisoned by the U.S. military, he asked, “What are we going to do with them?”

For the Americans who fought the Japanese or the Nazis, Lieutenant Commander Robinson surmised that these Americans would most likely respond with the phrase “shoot them.” Knowing that this act would constitute a “war crime,” he opposed any form of immediate violence toward individuals who were accused of war crimes. As he put it, “To shoot the perpetrator of a war crime immediately upon capture may [give] immunity
to the superior officers, the master-minds or any other fellow-gangsters of the dead criminal. . . . Moreover, the contents of the confessions of war criminals and the court records of war crime convictions will provide information and support needed, at the peace table and elsewhere, in making appropriate provision for the prevention of future war crimes or even of future wars.”

Lieutenant Commander Robinson thus reasoned that if the United States and its allies were to successfully prosecute soldiers and their superior officers, then the full force of the law should be applied. It is necessary, he declared, “to follow principles and rules of international law, criminal law and military law, well-established in precedent and practice among the nations.” As he argued, “The trials should be conducted, depending upon the circumstances of the case, in the regular national civil courts of the countries whose people have been outraged by the offenses, or in military commissions or tribunals, especially tribunals of mixed membership, that is, membership drawn from more than one nation or from more than one of the armed services or from both military and civilian personnel or from any combination of these sources.”

That Lieutenant Commander Robinson could casually list the ways in which hybrid, military, or national courts could extend their “outrage” toward individuals and groups accused of war crimes was indicative of at least two factors. First, several definitions of war crimes had become increasingly widespread and provisionally accepted among the United States, the United Nations, and the international community. Violations of the laws of war, an act reflecting the general elements of a “crime” (e.g., the time of the prohibited offense, the territory in which its commission is forbidden), and the crossing of an international boundary surfaced as central markers of war criminality. These definitions likewise resonated with the notions of criminality previously defined by Glueck and Jackson, as would the A, B, and C war crime classifications that later informed several tribunals. Second, the elasticity of international law enabled various court systems to selectively define war, crime, and war crimes to their own ends, if not allowed courts to violate the rules of war. Despite the Fourth Hague Convention of 1907, the Geneva Convention of 1929, and other covenants on “civilized” warfare, the international law on war crimes did not adhere to a universal set of rules, let alone possess the enforcement power to ensure that countries abided by them. Hence, international law became a convenient proxy for countries that sought to broaden the scope and meaning of war crimes.

As the legal scholar Gerry J. Simpson explains, “The attempt to develop a more general notion of criminality in international law has proved trouble-
some given the structure of the system itself.” As he notes, “International law is seen simply as the contractual relations between States. When States commit wrongs they become delictually liable to other States and not to some transcendent public administrative organ.”

As elusive as definitions of war criminality may appear in international law, however, states and courts nevertheless invoked the foundational concept of “piracy” in their respective trials and proceedings. Discussing its etymology, the anthropologists Shannon Lee Dawdy and Joe Bonni observe that the word “piracy” originates from “the classical Greek root ‘peirates’—meaning an attempt or an attack.” Associated with a kind of violation, then, piracy became “the first international crime, or the first offence to give rise to universal jurisdiction” in international law. With the pirate as its referent, the figure of the war criminal was “characterized as an enemy of mankind—‘hostis humani generis’—operating outside the bounds of law and outside the jurisdiction of national law.” For this reason, Arthur G. Robinson, rear admiral of the U.S. Navy and president of the Military Commission in Guam, could declare in 1948 that war crimes were “international crimes in the sense that they are crimes against all civilized nations, like the crimes of slave trading and of piracy—and in this respect the war criminal, like the pirate . . . is an enemy of mankind . . . and as such he is justiciable by any state anywhere.” With the war criminal likened to the pirate and made “justiciable” by any state, it often became commonsensical for jurists, legal scholars, and military officials to levy judgment against the Japanese and Nazis accused of committing atrocities against the United States and the Allied forces.

In this respect, states frequently utilized the signifier of piracy in defining war criminality as that which disrupts “a customary flow of goods and ideas.” This interruption, a process often likened to conflict, deception, or theft, “frequently involves a kind of real or symbolic violence, such as the taking of a ship or hacking of a system.” Along these lines, courts were not merely concerned about determining the “guilt” or “innocence” of war criminals. As with piracy, war criminals were targeted for interfering in the normal state of affairs, which, for Asia and the Pacific, meant the stability of European and U.S. colonialisms. As the critic Lisa Yoneyama asserts, Japanese political and military leaders were punished and executed not for the “atrocities they committed against the people of Asia and the Pacific—that is, for Japan’s ‘crimes against humanity’—but for disturbing the peace and order preserved under white European and U.S. domination and for violating their colonial entitlements, properties and privileges in that region.”

As in the case of Guam, the island became a site where the navy reasserted
its hegemony over Japan, which, the naval courts held, possessed no jurisdiction over Guam and its people. As the trials examined in this book demonstrate, the navy drew from a plethora of concepts, laws, and rules in its racialized claims to justice for the injured and the dead. But what, exactly, did the navy mean by justice and jurisdiction? Given the widespread debates on war criminality, what courts did the navy eventually employ, and why? And how did the navy, alongside other military agencies, further expand the U.S. carceral state in the Pacific?

Naval Justice and Jurisdiction

In 1945, the U.S. Bureau of Naval Personnel defined naval justice as the “maintenance of naval discipline, without which the Navy cannot function as an efficient fighting organization.” With the waging of war as its central premise, the Bureau projected naval discipline as the “true basis of democracy, for it means adherence by the individual to the set of rules which has been found best suited to govern relations between individual members of society in order to protect the interests of the whole.” Contrasting criminal courts and the navy’s brand of justice, Rear Admiral O. S. Colclough, judge advocate general of the navy, reiterated, almost verbatim, the definition of naval justice as disciplinary and martial in nature. He wrote, “This difference has been expressed succinctly as follows—the objective of criminal law is the protection of society; the objective of military law is the maintenance of that standard of discipline which is the sine qua non of an efficient fighting organization.” That kind of justice would be, as he put it, of global reach by the end of the war. As Rear Admiral Colclough expressed, “From a geographical standpoint, prior to the war, the administration of naval justice was roughly limited to the United States and its territories, Cuba, Iceland, and the Philippines. During the war it embraced not only Europe, the Atlantic, and the Pacific, but practically the entire world.” As an expanding apparatus of discipline, naval justice was achieved by exacting punishment against its disobedient ranks and its perceived enemies. For the navy, punishment was “potent but dangerous, useful but destructive; astonishingly effective when rightly used, alarmingly destructive when used wrongly.” The “value of punishment lies in the object lesson it furnishes the wrongdoer, and others, that the offense must not be repeated. This is referred to as the deterrent theory of punishment.”

In accordance with the navy’s deterrent theory of punishment, military tribunals became the instruments of inquiry par excellence by which naval
justice was sought and attained. Reflecting on the inquiry as a relation of knowledge-power, Michel Foucault asserts that the “inquiry is precisely a political form—a form of power management and exercise that, through the judicial institution, became, in Western culture, a way of authenticating truth, of acquiring and transmitting things that would be regarded as true.” As per the navy’s culture of discipline, military tribunals ascertained “truths” by way of punishing individuals and groups who violated the abilities of the navy to wage war. From the trial and execution of the British spy Major John André in 1780 to the arraignment and massacre of thirty-eight Dakota in Mankato, Minnesota, in 1862 during the American Civil War, military tribunals acquired, over time, the power of extreme authority, discipline, and violence. Whereas civil courts have often afforded individuals the constitutional right to trials by jury and the availability of habeas corpus, military tribunals grant those under their purview neither of these rights and protections. As the legal scholar Louis Fisher observes, military tribunals have been generally “hostile to civil liberties, procedural due process, and elementary standards of justice.” Operating without the judicial constraint granted by the civil courts and the Constitution, military tribunals have wielded “much wider discretion as to the punishment to be imposed than is ordinarily given to civil courts.”

The rationale for justifying the legal power of military tribunals is explicitly expressed under article 1, section 8, of the U.S. Constitution, wherein Congress shall provide for the “common Defense” and “general Welfare” of the United States. Take, for instance, clauses 13 and 14, which grant Congress and the president the license to “provide and maintain a Navy” and to “make Rules for the Government and Regulation of the land and naval Forces.” These are two of several passages that provide “abundant authority” for the appointment and use of military tribunals. Along these lines, the Constitution “invests the President as Commander in Chief with the power to wage war and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations including those which pertain to the conduct of war.” The president can also appoint, as he has in the past, military tribunals and prescribe the rules under which they have to operate. With its power drawn from the Constitution, Congress, and the president, military tribunals have not been, for the most part, “subject to review by the Federal Courts,” including the U.S. Supreme Court. At times, the Supreme Court may inquire whether a tribunal has jurisdiction over a person or an offense or whether
a sentence imposed was within the scope of a tribunal. But if the military tribunal “had lawful authority to hear, decide and condemn, its action is not subject to judicial review merely because it made a wrong decision on disputed facts.” Moreover, all errors of decision belong to the military tribunal and not to judicial courts.

With respect to World War II, the United States employed three types of military tribunals, all of which were recognized as legitimate courts by the United Nations. The tribunals included, first, the courts-martial; second, the military commission or exceptional military court; and, third, military government courts and military tribunals established by the military government. The courts-martial is the most frequently used system of inquiry for the navy, having been formed to “determine if a person subject to naval law has committed a violation of the Articles for the Government of the Navy and, if [the court] finds him guilty, to adjudge an adequate punishment.” As with the Articles of War and the Naval Courts and Boards (1937), the Articles for the Government of the Navy provide the rules and procedures for determining the scope of naval law, the appropriate conduct of persons, and the criteria for discipline and punishment. These and other articles of naval law pertain to the courts-martial and to the other military tribunals, and have likewise been periodically revised. But whereas courts-martial focus solely on the prosecution of individuals under the purview of naval law, the other military tribunals have wider latitude in terms of their command structure, procedural composition, and territorial jurisdiction. Indeed, military commissions and military government courts employ naval personnel as well, as in determining the convening authority of naval officers. But these “exceptional” military tribunals differ from the courts-martial in terms of their ability to prosecute civil crimes, military violations, and war crimes, among other disruptions to military law, occupation, or warfare. Such exceptional courts could likewise be administered by a convening authority, a naval governor, or a military commander, and the proceedings could occur wherever the United States asserts its claim to sovereignty as an occupier.

With the knowledge that military tribunals can assert naval justice (and political hegemony) in times of war, coupled with information gained from debates on war criminality of the “Axis type,” Secretary of the Navy James Forrestal established the War Crimes Office on January 13, 1945. Located in the War Department, the War Crimes Office coordinated the administrative efforts on war crimes matters between the Navy, War, and State Departments. As his official memo to the Navy Department indicated, the national War Crimes Office aimed to “collect evidence against enemy persons who
commit murders, atrocities and other violations of the laws of war against members of the armed forces of the United States or against other Americans, including the peoples of any dependency such as the Philippines, and to arrange for the immediate or eventual apprehension, trial and sentence of such war criminals.”

Secretary Forrestal’s legal directives were especially forceful in their granting of police-like authority to naval commanders in war zones across Asia and the Pacific. As he declared, naval commanders were “directed to take necessary action” in obtaining, investigating, and forwarding information on war crimes to the judge advocate general of the navy and to the Navy Department. Affirming the carceral dimension of the military, Rear Admiral Arthur G. Robinson likewise argued that it is “the duty of the victor to [punish those who violated the law and customs of war], just as it is the duty of the police and the court to apprehend, to confine, to try, and to punish those who violate domestic criminal law.” As he asserted, “The ‘police,’ the forces of law and order, must be stronger than the criminals. If not, the power of society to punish for wrongdoing would perish, for the criminal and his kin do not apply the standards of lawful society to punish the wrongdoer.”

Invoking what Rear Admiral Robinson eventually called the “natural and proper” authority of a victor, the War Crimes Office proceeded to sanction violent acts of intrusion, inquiry, and incarceration on an unprecedented scale across the world. In Asia and the Pacific Islands alone, these forms of policing led to the incarceration of more than three thousand individuals, with approximately another one thousand receiving death sentences. While hybrid, military, and national courts from Australia to Singapore played important roles in the postwar incarceration of their respective enemies, the United States “was consistently in the forefront in the development and effectuation of the entire war crimes program.” In January 1945, the War Crimes Office and its affiliated branches had thus advanced a U.S. penal regime suited for the war and its aftermath, a regime the critical ethnic studies scholar Dylan Rodriguez describes as “an indispensable element of American statecraft, simultaneously a cornerstone of its militarized (local and global) ascendancy and spectacle of its extracted (or coerced) authority over targeted publics.”

Yet, as I revealed in the previous chapter, the U.S. Marine Corps and U.S. Navy, along with their intelligence agencies, had already begun to classify and criminalize Asians and Pacific Islanders in Guam as early as July 1944. The military’s classification of such “targeted publics”—that is, the criminal, the disloyal, the enemy, and so forth—occurred at least five months
earlier and without the secretary’s declaration to investigate war crimes. That the American military unilaterally interned and investigated these and other deviant types had much to do with how the United States viewed Guam as its colony. For this reason, the American military conducted its interrogations of Asians and Pacific Islanders without any legal or political constraints, acts that would otherwise be construed as “exceptional.” As Rear Admiral John D. Murphy, director of the War Crimes Tribunals Program declared, “It goes without saying that the work of investigations was the foundation upon which all subsequent war crimes actions was [sic] based. It was the first step in the long detailed task of detection, apprehension, and preparation of evidence for cases before the military tribunals in the prosecution of the accused” (figure 2.1).66 The navy thus interrogated anybody at any time. In this respect, the navy’s legal advisers and officials argued that Japan never lawfully claimed the island and its peoples, a point emphasized in its trials of war criminals from Japan and the Mariana Islands.
Following this logic of conquest, the War Crimes Office established different war crimes tribunal branches in the European, Mediterranean, and Pacific regions. In the Pacific, the General Headquarters of the Supreme Commander for the Allied Powers (SCAP) drafted the “Regulations Governing the Trials of Accused Criminals” on December 5, 1945. This policy granted any Allied nation the authority to create military courts for the trial of war criminals. According to the regulations, these nations possessed jurisdiction over war crimes cases involving the waging of war and the taking of life since the “Mukden incident,” also known as the Japanese military invasion of Manchuria on September 18, 1931. With a temporal frame of the 1930s to the 1940s at their disposal, the United States and its allies apprehended representatives of Japan’s imperial government who were accused of war crimes. This network of inquiry relied, as well, on the integration of U.S. Army and U.S. Navy personnel into the Pacific branches. These efforts, the War Crimes Office projected, would “result in closer cooperation among all the military services, a more centralized control over activities pertaining to war crimes, and a more efficient exchange of information between war crimes officers in the field and the United States War Crimes Office in Washington, D.C.” While this interservice arrangement benefited the War Crimes Office, the navy eventually received sole control of the war crimes cases in the Pacific Islands, whereas the army predominated the war crimes cases covered by SCAP. For the navy, the areas that represented the Pacific Islands encompassed the Bonin Islands, the Caroline Islands, the Gilbert Islands, the Mariana Islands, the Marshall Islands, and the Palau Islands, with the army mainly focusing on Japan and the Philippines.

The army, navy, SCAP, and other agencies defined war crimes as such: Class A, “crimes against peace,” or the planning and initiating of a war of aggression; Class B, “conventional war crimes,” or the violating of the laws or customs of war; and Class C, “crimes against humanity,” or the murdering and committing of inhuman acts against civilian populations. Based in Tokyo, and led by General Douglas MacArthur of the U.S. Army, SCAP primarily dealt with Class A war criminals of the International Military Tribunal of the Far East. In addition, SCAP communicated with other U.S. war crimes agencies in China (Shanghai), India (New Delhi), the Pacific Islands (Guam), and the Philippines (Manila), among others. In his capacity as commander, MacArthur had the power to “(a) appoint special international military courts (Which term shall be held to mean tribunals of any kind) composed of military or naval officers or civilians of two or more of the United Nations, for the trial, under any applicable law, domestic or international, . . .
of Far Eastern war criminals . . . and (b) to prescribe or approve rules of procedure for such tribunals.”

Unlike the courts-martial, these military tribunals wielded a triangulation of power invested in the Constitution, the Congress, and the president, not to mention an array of regulations that emanated from the War Crimes Office and its affiliated branches. For these reasons, the tribunals could “legally assume jurisdiction over all criminal offenses committed in occupied territory and over civil cases affecting the military government.” As noted earlier, the tribunals also held jurisdiction to try war crimes and accused war criminals without having to possess jurisdiction over the person and place of the offense. As Rear Admiral Robinson opined, “Under the familiar territorial principle of jurisdiction familiar to our domestic courts and our ordinary crimes—the convening authority is required to have jurisdiction over the person who committed the offense, and of the place where the offense was committed.” “This traditional concept,” he argued, “is clearly inapplicable to crimes in violation of the laws and customs of war. War crimes is one of a number of exceptions to this concept. . . . The international nature of the crimes and the realistic necessity of their punishment by the injured or victor nations [are impelling reasons] for departure from the ordinary concept of territorial jurisdiction.”

As strikingly violent as these layers of hegemony appear, though, the carceral and colonial mechanisms of naval justice and jurisdiction still hinged on another important legal principle. The U.S. Navy’s War Crimes Tribunals Program would not have emerged in Guam, a military colony of the U.S. empire, without the plenary power doctrine. From this vantage point, we can analyze the navy’s development of a military commission in the island, including its demarcation of “criminal” and “noncriminal” subjects among the population.

The Commission and the Colony

As disclosed in the introduction, the plenary power doctrine is a cornerstone of the U.S. empire, where it has been historically employed to uphold and protect its white citizenry, expand or fortify its national borders, and wage its protracted wars of conquest and settlement. As the legal scholar Natsu Taylor Saito argues, the plenary power doctrine remains “core U.S. law relating to American Indian nations, immigrants, and external colonies such as Puerto Rico and Guam.” Wherever the United States exerts the plenary doctrine, she notes, “harsh consequences . . . are generally ignored or dismissed as aberrations, perhaps because—like the law of slavery—it
is exercised over relatively powerless Others.” Yet analyses of the doctrine “reveal a systematic denial of both domestic and international legal protections to those who most need them.”

With nonwhite peoples as its primary target, and with the acquisition of land, labor, and natural resources as its aim, the navy subsequently imposed the plenary power doctrine in Guam. Reflecting on the significance of the doctrine’s ties to military rule, where the law follows the flag but not necessarily the Constitution, the editors for the U.S. Navy Report on Guam, 1899–1950 ascertained, “When the United States acquired Guam, neither the constitution nor the laws of the country were extended to the new possession. The sole administrative authority vested in the Navy, as the agent of government, was that derived from the President as Commander in Chief.” Naval governors then assumed control over the island much as “they had commanded naval vessels or naval establishments on previous tours of duty.” As expressed by the former naval commander Roy E. James, himself stationed in Guam in the 1940s, “Law and order often became ‘discipline,’ legislation became ‘commands’ or ‘orders,’ education became ‘training,’ and so on.” Through the plenary power doctrine, Guam became a site where “the essential elements of National Security and Local Security are inter-woven and inseparable.” It was this context, an island without the full application of the U.S. rule of law but nevertheless bound by its legal exceptions, that greeted Admiral C. W. Nimitz, the commander in chief of the U.S. Pacific Fleet and Pacific Ocean Areas.

On July 21, 1944, Admiral Nimitz arrived in Guam on the pretense of re-claiming the island from the Japanese government. With the U.S. military invading the island on the same day, he declared, in the vein of colonial possession, Proclamation No. 4, titled “Exceptional Military Courts.” Article I of the proclamation specifically stated, “Exceptional Military Courts for Guam and adjacent waters are hereby established. There shall be Military Commissions, Superior Provost Courts and Summary Provost Courts, the constitution and competence of which are set forth in article III.” As stipulated in article III of the proclamation, one or more military officers, some of whom could be appointed by a military governor, convened each court. Similarly, military officers served the dual role of judge and jury on these courts. Many of the military officers were also drawn from the naval reserve, with a few individuals coming from the air force and army. Describing the general composition of these courts, Rear Admiral Robinson stated that the conveners “were experienced trial lawyers from civil practice who had remained in the Navy under their reserve commissions. . . . They were
of an unusually high caliber and were conspicuous for their marked ability as trial lawyers and their apparent devotion to the work in which they were involved.”

Many of the military officers received their academic training in naval law and international law. Upon their arrival in Guam, they adhered to the navy’s required tour of duty; this meant that officers and enlisted personnel were compelled to reside there for at least eighteen months, the average tour of duty on the island. But because of the labor shortage attributed to the war, the commission operated with fewer personnel than expected. Staff members utilized in war crimes work were even “begged, borrowed and stolen for this purpose.”

The “technical and clerical processes of recording and filing information was in itself beyond the capacity of available personnel. However, it can definitely be said that some evidence of specific crimes was obtained and that valuable leads which formed the basis of subsequent successful investigations were obtained.” Highlighting the uneasy demand to fill positions but also maintain the capacity of the commission, Rear Admiral Charles A. Pownall said, “The work of all regularly assigned investigators, prosecutors and defense counsel was of an usually high character. It is hard to believe that as much work could have been accomplished with so few officers.”

Despite the upbeat nature of some military officials, the navy knew that its staffing shortages would hamper its ability to address unforeseen legal and political dilemmas (figure 2.2). Even with the power accorded to its tribunal in Guam, the navy still approached its claims to formerly occupied Japanese islands with caution. As Judge Advocate and Admiral Thomas Leigh Gatch expressed on April 10, 1945, “The occupation of islands in the Pacific Ocean Area is giving rise to many novel and difficult legal problems, particularly in the fields of international law, trial of war criminals and prisoners of war, and international aspects of naval justice.”

“In many cases now arising,” he said, “good precedents do not exist and when decisions are made in these cases law is actually being made. It is important that such decisions be correct, otherwise they must inevitably result in later embarrassments and difficulties.” Cognizant of its limitations, the military court attempted to follow legal precedents and adhere to international laws on war crimes.

In this sense, the navy sought to curtail any media coverage of racism among its staff, a premise that belied the racist foundations of the court. In light of the allegations and rulings concerning the abusive treatment of prisoners at the War Criminals Stockade, for example, military officers in
the tribunal argued that “continuous instruction and indoctrination of all ratings and ranks was essential in order to assure compliance with requirements of international law.” 92 Their report continued, “This was more noticeably true as relatively new and inexperienced personnel began replacing the wartime personnel. Prejudices against the Japanese appeared to be more pronounced in the seventeen to twenty year old replacements.” 93 In practice, however, the navy rarely took stock of its racisms; instead, it directed its violence against anybody accused of crimes. The navy’s usage of American, Chamorro, and Japanese court interpreters is a case in point.

Specifically, the tribunal understood that interpreting “between oriental and occidental languages is not comparable to coding and decoding messages, but requires a distressing amount of circumlocution and rearrangement of thought.” 94 When working with interpreters, the military commission subsequently urged the prosecution and defense counsel to use “short, simple questions as free from artifice as if examining a small child.” 95 The tribunal thus infantilized “oriental” languages—that is, languages spoken by Asians and Pacific Islanders—because “complicated questions,” “conditional questions,” “long questions,” and “sarcastic questions” were purportedly beyond “comprehension” of those on trial. 96 As a result, no “criticism of an interpreter, direct or implied, was permitted to be made in
open court by counsel of either side”; with English elevated as the system of
signs from which all thought emanated, all translation discrepancies were
resolved in court recess and with the approval of the court-appointed chief
translator.97

With respect to the twenty-five trials concerning the Mariana Islands,
the military commission provided thirteen interpreters for the prosecution
and defense counsel. They included two Americans: Frederick A. Savory
and Eugene F. Clark; seven Guamanians: Jorge Cristobal, Tomas A. Iglesias,
Juan Manibusan, Isabel T. Perez, Joaquin C. Perez, Vicente C. Reyes, and
Isabel Perez Zafra; and four Japanese: Kan Akatani, Yoshio Akatani, George
Kumai, and Kimio Tsuji. Of these individuals, Jorge Cristobal, a chief stew-
ard in the navy, served as a translator in twelve cases, the most afforded
to anybody. His first opportunity to work as an interpreter emerged at the
behest of Admiral William Halsey, then appointed as an American naval
officer in Aotearoa New Zealand in July 1944. As Cristobal recalled, the ad-
miral said, “‘I’m going to have you transferred to the Third Marine Divi-
sion as an interpreter.’ He told me that the Marines were about to invade
Guam and take it back from the Japanese. He knew I spoke Japanese, and I
could translate for the Chamorros also.”98 At the invitation of the admiral,
Cristobal left his role as the officer’s mess attendant in New Zealand and
accompanied the Third Marine Division in its reinvasion of Guam. Later in
the month, Cristobal “went in on the third wave landing at Asan Beach, and
I was right there in the middle, looking like a Marine. I was wearing a hel-
met and everything was Marine for me! I went down that rope ladder from
the ship to get into the amtrac, and I had a carbine with me. It was light to
carry, and it could fire eleven shots without reloading.”99

Excited about his newfound Marine identity but fearful of the Japanese
gunfire directed at him, Jorge Cristobal landed on the shore of his home-
land, only to witness two other Marines die nearby. “I couldn’t explain my
feeling as I went ashore, but I went right in there with the rest of them. I
crawled right up there, and three or four guys followed me there in between
Asan and Piti. Of course, I was very familiar with that whole area.” Eventu-
ally, Cristobal reunited with his family, assisted the Marine Corps and navy
as a scout, and “became a war crimes commission interrogator.”100 Having
once lived in Japan as a porcelain maker in the 1930s and having worked as a
steward for the U.S. Navy thereafter, he was well suited for translation ser-
dices. As a result of its experiences in working with Cristobal, the tribunal
decided to select other interpreters like him. On his role as a naval inter-
preter, he said, “A lot of people don’t understand. The terminology is dif-

WAR CRIMES 79
different. . . . Because, you know, the primary interrogator has the locations, where are they, how many people, all those things like that.” Elaborating on the fear of being interrogated, Cristobal also stated, “It does make too much hard work to do that because when you talk to a person who is very scared, too, an enemy. Sometimes they don’t answer you back, right quick. Because they feel like they’re going to be killed. I would feel the same, too, myself.” As he explained, “The [accused war criminals] that were caught here in Guam; there were sixteen or seventeen of those guys that really know the locations of where the enemies are; but they very silent sometimes. . . . They won’t talk anything at all. But common sense will tell you, if you ask them, ‘Why did you kill them?’ He’s not going to tell why. At that time, they were pretty well stunned, too. Their mind is not clear.”

It is quite plausible, then, that the tribunal hired Cristobal as an interpreter for many cases because he had survived the Japanese military bombing of Pearl Harbor, his family had persevered under the Japanese military occupation of Guam, and he had “liberated” Guam as a Marine. That he assisted in many trials merely illustrated the degree to which the navy would hire biased translators to legitimize its rule of law and assert its political sovereignty. On the other hand, staff assigned to the military commission, the War Criminals Stockade, and related units did not entirely express enthusiasm in their tours of duty in Guam. Nor did everybody possess the legal and linguistic utility of men like Jorge Cristobal. In fact, numerous naval officers and attorneys resigned early or returned to the continental United States, demonstrating that the nationalist zeal often ascribed to military service was never ubiquitous. In December 1945, for example, Lieutenant Commander O’Brien desired “separation from the service”; First Lieutenant Small was not interested in “staying in the service,” as were Lieutenants John K. Murphy and William Mahoney; and Lieutenant Franklin Williams simply wanted to be “released as soon as possible.”

The dilemma of having a reliable and impartial staff of military officers was compounded further by the reality of the then reemerging apparatus of naval discipline in Guam. Because the island took several years to recover from the war, the U.S. naval court system sought to reestablish itself from the 1940s to the 1950s. To resolve this predicament, the naval government selected the military commission to handle civil crimes and Class B war crimes trials during the war and thereafter. As the chief of Naval Operations clarified, “When Military Courts are used in the administration of civil judicial matters in occupied territories and hear cases involving violations of local laws, regula-
As the navy understood it, the tribunal shall also “have jurisdiction over all persons in the custody of the convening authority at the time of the trial charged with war crimes committed against United States nationals and any white person whose nationality has not prior to ordering of the trial been established to the satisfaction of the convening authority.”

Unlike the seemingly race-neutral directives issued by the War Crimes Office, the commission in Guam was more candid in its privileging of whiteness as a phenotype of injury alongside the presumed loyalty of U.S. citizens and nationals. As with the caricatured white female victim of earlier investigations conducted by American intelligence personnel, so, too, did the tribunal privilege white masculinity, property, and sovereignty in its regulations and court proceedings.

In this regard, the navy often recognized and protected white Americans (usually men) over indigenous peoples, a common pattern shared by Anglo war crimes tribunals. White privilege and protection in these tribunals often adhered to this hierarchy: first, white American citizens and military personnel; second, white Allied military personnel; third, white Allied citizens; and, fourth, indigenous and other nonwhite peoples. By defining whiteness as the legal category of personhood, then, the navy’s commission in Guam primarily sought to identify and safeguard white citizens and military personnel; the trope of native loyalty also upheld this racial and racist hierarchy, one that conveniently coincided with the postwar settlement of white military personnel in the island. As the historian Hal M. Friedman observes, populating the islands with “white Americans was considered one way of eradicating Japanese influence, assimilating the [indigenous] population to American rule, and consolidating U.S. control.”

Consequently, the military tribunal afforded its subjects “the Anglo-Saxon right of presumption of innocence until proven guilty,” a rights framework that primarily benefited white heterosexual men. Under the legal and political purview of SCAP, the military commission also had the power to determine, at will, the scope of its regulations. That is to say, “the proceedings of the Military Commission will be governed by the Naval Courts and Boards, except that the commission is permitted to relax the rules for naval courts to meet the necessities of any particular trial, and may use such rules of evidence and procedure, issued and promulgated by the Supreme Commander for the Allied Powers . . . as are necessary to obtain
justice.” In other words, “the commission may adopt such other rules and forms . . . as it considers appropriate.”

Clearly, various debates on war criminality helped to shape the making of the War Crimes Office and the international drafting of A, B, and C war crimes classifications. U.S. legal discussions on these topics forewarned the implications of linking law with militarism and politics, a process that failed to cohere nation-to-nation agreements on the treatment of war criminals other than to ensure that they be tried like “pirates” in international law. Selectively heeding these debates and measures, the United States synthesized, revised, and projected a series of federal, international, and military laws on war criminality in an unprecedented manner across the world. To this effect, the carceral and colonial regimes of the United States merged with naval notions of justice and jurisdiction in the mid-1940s, enabling military tribunals to possess nearly unchecked rules and regulations. With a history of naval governance in Guam, one that is inherently tied to the plenary power doctrine, the island was chosen to become the main site for the navy’s military commission. Given its charge to try both civil and war crimes cases, the military commission drew from the authority of naval law and the four codes of law invented by the naval government in the early 1930s. These codes included the Civil Code of Guam, the Code of Civil Procedure, the Penal Code of Guam, and the Probate Code of Guam, another set of laws that coconstituted the extrajuridical threshold of the military commission. What was at stake for the navy, then, was not merely the apprehension of criminal types. Rather, the question of political sovereignty ultimately informed the making of the military commission and its efforts to reestablish order on an island and for people outside of the law.

By establishing the navy’s War Crimes Tribunals Program in Guam on March 24, 1945, the United States represented itself as the claimant to the island’s sovereignty. As a military colony, the island—and, most vitally, Japan’s possession of it—compelled the United States to reassert its sovereignty at a time when the future of U.S. colonialism in the Pacific was placed under duress and, via Japan’s propaganda, anticolonial scrutiny. As evidenced in its review of the international law on sovereignty, the navy asserted that “the rights of sovereignty over Guam were not lost to the United States by the Japanese occupation of the island. . . . That sovereignty had been previously exercised through the American Naval Governor of Guam. The laws promulgated by him, set forth in the Penal Code, Civil Code and Code of Civil Procedures of Guam, remained in effect during the Japanese occupation unless suspended by the Japanese under military necessity.”
According to the navy’s War Crimes Tribunals Program, the Japanese military never suspended the codes and, as a result, Japan never eroded the sovereignty of the United States. On this matter, the judge advocate general clarified that even if the Japanese military attempted to suspend the codes, as “belligerent occupants,” it lacked the authority under international law to do so. As the navy’s legal advisers observed, “Belligerent occupation is ‘essentially provisional’ and does not transfer sovereignty over the occupied area, although the legal sovereign is not in a position, during the period of occupation, to exercise its sovereign rights. . . . The principle underlying these rules is that although the occupant in no way acquires sovereignty over occupied territory through the mere fact of having occupied it, he in fact exercises for the time being military authority over it.”\textsuperscript{112} “In the case of Guam,” proclaimed the judge advocate general, “all that existed was a state of belligerent occupancy, temporary in nature, which never ripened into more.”\textsuperscript{113} By asserting the continuity of its political sovereignty, the navy, as the “protector” of its subjects, stipulated that its laws had to be obeyed in spite of Japan’s imperial presence. As the navy declared, “The protection which a state owes to its inhabitants does not cease when its forces are temporarily withdrawn so that the enemy exercises the rights of any army in occupation. . . . The occupying belligerent does not become an agent of the legitimate sovereign charged with the same obligation of protection. The belligerent exercises only a temporary authority for his belligerent purposes. The laws of the legitimate sovereign continue in force. . . . [And] the inhabitants are bound to obey them.”\textsuperscript{114} Extending the procedural and jurisdictional scope of these claims, the navy’s legal advisers also noted that the statute of limitations on crimes committed during the Japanese occupation had no bearing on the operation of the military commission. All violations, the navy maintained, were subjected to its “prosecution following American reoccupation.”\textsuperscript{115}

As these passages attest, the navy employed its War Crimes Tribunals Program to make certain U.S. sovereignty over Guam. Equally significant was the navy’s treatment of the island’s people, who, despite their respective classifications by the navy as ally, criminal, or otherwise, all fell under its “pastoral” care. In this respect, the navy’s “protection” of its subjects resonated with Michel Foucault’s theorization of the pastoral-shepherd-sheep as a relation of modern power and as a technology of surveillance. As Foucault argues, “The essential objective of pastoral power is the salvation (salut) of the flock.”\textsuperscript{116} In the navy’s view, salvation partly meant the purging of “belligerent” types—what Foucault variously calls “wolfs” and
“corrupted” sheep—in order to reassemble the subjects under its care. Like modern power, the power of the pastor was forceful, persuasive, and weak, as much as it was undetermined and malleable.

Regarding the issue of force, for example, the judge advocate general frequently demanded the loyalty and, hence, pastoral duty of the Chamorros of Guam. As early as March 31, 1923, the navy asserted this claim of provisional inclusion: “While a Native of the Island of Guam owes perpetual allegiance to the United States, he is not a citizen thereof nor is he an alien and there are no provisions under law under which he may become a citizen of the United States by naturalization.”

On April 24, 1945, the navy maintained that the subject status of Guamanians as “loyal natives” persevered even during Japan’s military occupation of Guam. As the navy argued, “The native Chamorros remained nationals of the United States and continued to owe allegiance to the Naval Government of Guam and to the United States. They owed to the Japanese military government only obedience and neutrality. They did not owe allegiance to Japan nor could they be legally compelled to take an oath of allegiance to Japan or to the Japanese Military government.”

Other naval officials were more persuasive, but no less commanding and condescending in their presumptions of the island’s pastorate. As Lieutenant Commander Francis Whitehair exclaimed on July 25, 1945, the “proper disposition of war criminals now . . . is essential to gain the respect, loyalty, and confidence of the civilians in the Navy’s charge, as well as to establish the desired prestige.”

But what proves especially instructive for analyzing the navy’s classes of racial inclusion and exclusion was what Foucault described as the pastor’s “paradoxically distributive” power. As he states, the power is “paradoxically distributive since, of course, the necessity of saving the whole entails, if necessary, accepting the sacrifice of a sheep that could compromise the whole. The sheep that is the cause of scandal, or whose corruption is in danger of corrupting the whole flock, must be abandoned, possibly excluded, chased away, and so forth.”

As illustrated in the protective compounds, the prisoner of war camp, and the War Criminals Stockade, Foucault’s notions of the sacrificial sheep, the corrupted sheep, and wolves applied to these carceral spaces. As a result, the American military gave the interned individuals the impression that a shift had occurred not only in the pastoral care of the nation but also in the constitution of its pastorate. Rear Admiral Charles A. Pownall, a naval governor of Guam, expressed these sensibilities in a speech delivered to the island’s military, political, and religious elite on May 30, 1946. Rallying them as a “team,” he said, “We must re-energize
Guam as a team. In this team there is no place or position for: (a) The ex-collaborationist with the enemy, if there be any. (b) The pessimist or defeatist. (c) The crank. (d) The troublemaker. (e) The loafer” and other criminal types. The attention given here to the nonpastorate is precisely the paradox to which Foucault refers. That is to say, the “salvation of a single sheep calls for as much care from the pastor as does the whole flock; there is no sheep for which he must not suspend all his other responsibilities and occupations, abandon the flock, and try to bring it back.”

The Final Report

In the navy’s calculation of its subjects, the efforts to police individuals as markedly criminal or noncriminal were equally exhaustive endeavors. As such, each person was subjected to naval justice and jurisdiction, even though many individuals creatively and actively challenged, often under profoundly violent circumstances, the jurisprudence of the U.S. empire. As demonstrated in Foucault’s theorization of the pastor, we can analyze this naval projection of power in terms of its paradoxically distributive forms of racial classification, segregation, and incarceration. As a military commission, the U.S. Navy’s War Crimes Tribunals Program exemplified this form of biopower in its interrogation of 135,000 “enemy” civilians and military personnel from 1945 to 1949. Including its racialized surveillance and incarceration of individuals in Guam, this number could have risen to as high as 150,000. Belauans, Chamorros, Chuukese, Japanese, Koreans, Marshallese, Okinawans, and Taiwanese were subjected to these carceral regimes. Of these groups, the navy investigated approximately 500 individuals for their supposed involvement in war crimes cases, with about one-fourth of them receiving consideration for trial. These cases included allegations of cannibalism, espionage, murder, rape, sadism, and treason, among other traditional and emergent categories of war criminality.

The historian Tim Maga observed that “of the 148 Japanese nationals and Pacific islanders tried, 123 had been Japanese military personnel. Thirty of the 148 received death sentences, and several were commuted to life in prison.” The military commission specifically tried twenty-six war crimes cases, with the remaining cases being multiply (and sometimes contradictorily) classified as civil crimes cases or “war crime type” cases. With respect to the Mariana Islands, the navy’s War Crimes Tribunals Program charged two Guamanian U.S. nationals for civil crimes. Only one Guamanian U.S. national faced a war crime trial on the matter of “sexual
perversion” or homosexuality. On the other hand, the military commission accused two Rotanese, eight Japanese, and eleven Saipanese men (one of whom faced two separate trials) of committing war crimes in either Guam or Rota. Other Chamorros became implicated in these cases as well, from Chamorros of Japanese ancestry to Chamorro women conscripted for the Japanese military’s sex houses in wartime Guam. At the completion of the tribunal on May 21, 1949, the Japanese government owed approximately $10 million in court fees to the U.S. Navy and its affiliated agencies. With this transaction at its behest, the War Crimes Tribunals Program claimed to have purged Guam of its “war criminals,” eradicated Japanese legal and political ties to the island, and reasserted a military brand of American sovereignty here and elsewhere. At least this was the impression provided by its director, Rear Admiral John D. Murphy, in his summary of the commission called The Final Report.

Comprising five volumes, The Final Report represented the culmination of what began as a series of conflicting debates on war criminality in the United States and internationally. It symbolized, as well, the navy’s utilization of carceral and colonial logics in Guam. The U.S. Navy thereby employed justice as a violent project—that is, unconstitutional in its legal exceptionalisms, militarist in its seizures of nonwhite bodies and lands, and racist in its avowal of the Chamorro loyal type. For Rear Admiral Murphy, however, The Final Report celebrated the military commission and its pedagogical significance for training military personnel in the use of military warfare and international law. “It is essential,” he wrote, “that the accumulated experience covering five years of U.S. Navy activity be summarized and recorded in brief workable form (a) for use in future planning and operations, (b) for the training and educational instruction of U.S. naval personnel, and (c) for historical reference and professional study in the field of international law.”127 Lest his critics question the commission’s ability to try both civil and war crimes cases, Rear Admiral Murphy also emphasized that the tribunal “was not aimed or directed toward the objects of vengeance or retaliation. Its purpose was primarily one of deterrence.”128 His conclusion illustrated the character of imperial judgment. As he put it, “I believe the Navy military commissions convened in the Pacific have demonstrably acted in harmony with the highest traditions of judicial dignity and impartiality.”129