Extraordinary Rendition, Law and the Spatial Architecture of Rights

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Abstract

This paper examines the Bush Administration's use of extraordinary rendition as a spatial tactic to secure largely extra-legal interrogation of terrorist suspects by moving them across various territorial jurisdictions. I present this argument in three major sections. I first present a conceptual discussion of the connections among legal rights, sovereignty, and space. I argue that liberal rights are in part defined through law, which can be conceived as a space and set of spatial practices structured along two axes. While traditional legal protections around privacy, in particular, define an uneven vertical terrain that protects individual rights through limiting where certain forms of statecraft may be applied within domestic space, distinctions of jurisdiction provide the horizontal limits to rights; simultaneously containing particular rights regimes, and excluding others. I then examine the development of extraordinary rendition in larger historical-geographical context, as a deeply spatial tactic of political violence. Finally, I examine how Bush Administration lawyers framed these developments using a very particular argument about legal-territorial logic. It is my argument that the Bush Administration used extraordinary rendition to achieve through extra-territorial means what they could not, or would not, attempt in domestic territory: the suspension of law for certain classes of people.

Holiday in Afghanistan

On December 31, 2003, a Kuwaiti-born German citizen named Khaled El-Masri stepped on a bus in his hometown of Ülm, Germany on his way to a holiday in Skopje, Macedonia. In order to get from Southern Germany to Macedonia, El-Masri needed to cross a number of international borders. According to later testimony (El-Masri, 2005), he did so without incident, until the very last border; that which divided Serbia from Macedonia. There, Macedonian border guards pulled him off the bus for questioning about his alleged connections to Islamic militants. For his family and friends in Ülm, El-Masri then simply disappeared.

Apparently unconvinced by El-Masri's protestations of innocence, the guards confiscated his passport and sent him on to a hotel in Skopje, where he was held in detention for the next few weeks. As he recounted the story:

> I was guarded at all times, the curtains were always drawn, I was never permitted to leave the room, I was threatened with guns, and I was not allowed to contact anyone. At the hotel, I was repeatedly questioned about my activities in Ulm, my associates, my mosque, meetings with people that had never occurred, or associations with people I had never met. I answered all of their questions truthfully, emphatically denying their accusations. After 13 days I went on a hunger strike to protest my confinement (El-Masri, 2005).

What happened next, according to El-Masri, conjures up images of a Kafkan nightmare. Macedonian guards handcuffed and blindfolded him and placed him in a car, explaining he was on his way back to Germany. In fact, however, his final destination was half-way around the world, and the journey there a harrowing one. As El-Masri describes:

> The car eventually stopped and I heard airplanes. I was taken from the car, and led to a building where I was severely beaten by people's fists and what felt like a thick stick.... I was dragged across the floor and my blindfold was removed. I saw seven or eight men dressed in black and wearing black ski masks. One of the men placed me in a diaper and a track suit. I was put in a belt with chains that attached to my wrists and ankles, earmuffs were placed over my ears, eye pads over my eyes, and then I was blindfolded and hooded. After being marched to a plane, I was thrown to the floor face down and my legs and arms were spread-eagled and secured to the sides of the plane. I felt two injections, and I was rendered nearly unconscious. At some point, I felt the plane land and take off again. When it landed again, I was unchained and taken off the plane. It felt very warm outside, and so I knew I had not been returned to Germany. I learned later that I was in Afghanistan (El-Masri, 2005).

Khalid El-Masri's is but one of many similar stories of the human consequences of one of the novel tactics the Bush Administration used to conduct its *War on Terror*. In the first lawsuit of its kind (El-Masri v. Tennet, 2006), El-Masri claimed he was an innocent victim of a practice known as “extraordinary rendition". Extraordinary rendition is a tactic the CIA used to circumvent both domestic and international human rights laws by transporting suspects to those jurisdictional purgatories on the edges of the global human rights regime. The practice ties together a variety of jurisdictional nodes and material locations into an uneven terrain of legal-political space that exists both outside the purview of

United States sovereign jurisdiction, and within ambiguous gaps between international and domestic law. In El-Masri's case, his destination was Afghanistan during a time of ambiguous sovereignty; according to his complaint, one interrogator told him that he "was in a country with no laws" (El-Masri, 2005).

Beyond legal-geographic transformations, extraordinary rendition has also been contingent on a variety of other spatial transformations. First, in the name of justice, the creation of new practical and imaginative political-geographies of a *War on Terror* simultaneously fetishized a domestic homeland territory and opened up expansive spaces of impunity around the globe. Second, the very geography of El-Masri's rendition was materialized in the reconfiguration and repurposing of everyday spaces such as civilian airports and hotels into state-controlled spaces of violence. Finally, these spaces, while ultimately exploited to hide practices of rendition and detention, ironically left their own unique traces, which activists, investigative reporters, and lawyers ultimately used to make them visible.

Extraordinary rendition is a profoundly geographical innovation in the practice and the political-economy of statecraft after 9/11. In this paper, I explore the implications of such new geopolitical strategies to the intersections of rights, space, and sovereignty, and with it the challenges of democracy in a post-9/11 imperial order. If Don Mitchell (1997) argued in a different context that anti-homeless legislation served to "annihilate space by law", my argument is quite the opposite: that the Bush Administration used tactics such as extraordinary rendition to annihilate law by space. I present this argument in three major sections. I first present a conceptual discussion of the connections among legal rights, sovereignty, and space. I then move on to examine the development of extraordinary rendition in larger historical-geographical context. Finally, I examine how Bush Administration lawyers framed these developments using a very particular argument about legal-territorial logic.

Sovereignty, Law, and Democracy

Law and Exception

The Bush Administration's detention and rendition programs foregrounded the ways law mediates relations among sovereignty, citizenship and space. Both extra-territorial detention and rendition are spatial fixes to the entanglements of rights and responsibility that attach to legal territory. These entanglements define the very relations between citizens and state, subjectivity and authority.

In conventional liberal understandings, the modern state is a container of sovereignty. The boundaries of the state define largely undifferentiated conditions for citizenship and sovereign authority within (Agnew, 1994, 2005). This notion of ideal containerized sovereignty brings with it a universalist and essentially aspatial perspective on citizenship and statecraft. Both sovereignty and citizenship, then, become ideal states, rather than differentiated and dynamic social-historical conditions.

Notwithstanding the universalist ideals of liberalism, the historical-geography of actually-existing liberalism has always been a profoundly uneven one (Marston and Mitchell, 2004). To the degree that liberalism has always defined certain privileged subjects as model citizens, it has done so in relation to a range of less-than-citizens (D'Arcus, 2006; Isin, 2002). This uneven terrain of citizenship is a product of both representational and material work, played out in both geographical imaginations and concrete practices. If the abstract disembodied individual of liberal citizenship floats free of geography and geographic attachments, the Others within are often characterized by their grounded relations to place: the welfare mother of the inner-city ghetto, migrant youth in the banlieues of urban France, etc.

Post-9/11, scholars have increasingly refocused on the notion that sovereignty is not some modernist container of rights, but that it is a practice worked out through an uneven and dynamic space constituted by highly-differentiated social identities, relationships to the state and so forth (Agamben, 2005; Brown, 2006; Butler, 2006). This more critical position focuses on sovereignty less as a binary condition rooted in universal law than on a social practice that involves ongoing decisions on contextual exceptions. The German jurist Carl Schmitt famously declared "Sovereign is he who decides on the exception" (Schmitt, 1985), by which he meant to critique the liberal view and promote one that emphasized a conflictual and dynamic perspective on both law and sovereignty.

The Territory and Topography of Law

The liberal state, then, is a spatial medium whose architecture involves an uneven field of rights, duties, and identities. Yet there is a long history of spatially-fixing citizenship rights, and with that sovereignty itself. Law provides just such a more-or-less crystallized form to citizenship by way of a rational set of conventions that regularize rights and duties within the container of the state (Taylor, 1994). Like liberalism more broadly, law is a simultaneously universalizing discourse and a particularized practice that gives shape and structure to citizenship and democracy.

The most elemental of liberal rights can be understood as spatial rules that govern the proper relation between citizen and state. The *Magna Carta*, for example, includes recognition of *habeas corpus*, which remains among the most basic principles of modern democracy: the notion that an Executive may not detain people without review. Detention itself is a spatial practice where a representative of the state apprehends a person at some (often public) place, and then physically moves them to a bounded space, from which they cannot leave. In this sense, the legal principle of *habeas corpus* constitutes a kind of spatial rule that structures relations between citizen and state.

The differentiation of public and private spaces is also central to the spatial dimensions to law. In an ideal sense, privacy carves out a sphere of individual shelter from state intrusion (Mitchell, 1995; Kohn, 2004). It assigns a personal

sovereignty to an expanse of space, and limits the sovereignty of the state within that space. Likewise, public space is often understood to mean the absence of the capacity to exclude, either by the state or by private owners (Blomley, 2004). In this sense, fundamental democratic legal principles such as free speech or freedom of assembly come with crucial historical ties to concrete spaces. The legal rules that structure those relations can be conceptualized as constituting a qualitatively uneven space.

To give this notion of legal-spatial differentiation some conceptual definition, then, I suggest a basic distinction within law and legal rights: the *territorial* and what I will call the *topographical*. By topography of law, I refer to the internal differentiation of legal space, based largely on ownership, access, visibility, and so forth (Kohn, 2004). The legal-spatial distinctions I note above, for example, create an uneven topography that shapes the conduct of both state power and citizenship. They constrain what kinds of practices of statecraft can be applied to which kinds of spaces. More basically, they condition who may do what, where, in whose name. The topography of law thus can be conceived as an uneven three-dimensional space that gives form to particular conditions and possibilities of citizenship.

By territory of law, by contrast, I refer to the horizontal differentiation of particular rights regimes; to their scalar containment. In a phrase, I am referring to *territorial jurisdiction*.[2] As Richard Ford (1999) has argued, territorial jurisdiction is a legal crystallization of socio-spatial practices, and serves to carve up territory through clearly-defined bounded spaces of authority and obligation. At the same time, through the differentiation and the practice of jurisdiction, states intervene in the politics of identity and citizenship more broadly. Boundaries of jurisdiction serve to classify what class of laws apply to what class of legal subjects, and so formalize distinctions of citizenship. In so doing, practices of statecraft as worked out through territorial jurisdiction serve to define relations among territory, state, and populations.

State of Emergency

To understand what I mean by the "spatial architecture of law," it might be best to illustrate with an example. When states encounter crises, they often invoke a legal condition referred to as a state of emergency (Agamben, 2005). The state of emergency applies a general condition to an expanse of jurisdictional space: a neighborhood, a city, or the entirety of the state. Under this condition, the sovereign may suspend otherwise fundamental legal rights: the ability to assemble in space, or to be free from unreasonable search and seizure and detention. They may impose these restrictions with different time frames and rhythms; a curfew, for example, often applies to nighttime hours. States of emergency, in short, have

[2]As I will explain later, territorial jurisdiction is one of three kinds of legal jursidiction. The debates around the legality of different forms of rendition typically center on different ways of framing relations among these different types of jurisdiction.

always involved inheritantly spatial interventions in geographies of everyday life, as evidenced by El-Masri's harrowing journey from vacation bus to hotel room, to distant, and hidden detention in Afghanistan.

From the perspective of law, a state of emergency does two things. First, it generalizes the objects of state administration within sovereign territory. The sovereign bars *everyone* from public assembly, and grants *noone* the right to privacy; either to deny the entry of a police officer into their home without a warrant, or to stop them on the street and arrest them, or to challenge their subsequent detention. In principle, then, *everyone* becomes something like *homo sacer* (Agamben, 2005); placed outside the normal certainties of law and subject to the strict security imperatives of the state.

Second, in so doing, in invoking a state of emergency, states seek to change the ontology of legal space. In particular, they aim to flatten the distinctions between public and private. While people may occupy public space, they may do so only as purely atomic individuals (Mitchell, 2005). In this sense, the restriction on assembly obliterates the most fundamental quality of public space: what Kohn (2004) refers to as its "inter-subjectivity." In short, public space ceases to be really public. Likewise, a state of emergency also radically changes the meaning of privacy. If by privacy we mean in part the capacity to withhold access to space not just from other private legal subjects, but also from the state, then the suspension of *habeas corpus* and the ability for police (and in some cases military troops) to freely enter homes effectively eliminates a crucial dimension of private space. Private space is no longer private.

Under a state of emergency, then, the state transforms a differentiated legal space inhabited by different kinds of subjects with different relations and orientations toward the state into an undifferentiated container of state access and visibility. Conceptually, then, a state of emergency flattens the topography of rights. The state transforms public space into a space of state control, and opens private space to state access. It is not quite that public space becomes private, or vice versa, but rather the qualitative boundaries that distinguish them dissolve into a uniform field of ideal state visibility and access.

These distinctions between citizen and non-citizen, public and private, and so forth are in turn central to modern notions of democracy. If we conceive of a dynamic and socio-spatially-differentiated "citizenship formation" (Marston and Mitchell, 2004), then, we might understand law and rights in similar ways. Through law, states normalize rights; as unevenly distributed to differentiated legal subjects. The boundaries of territorial jurisdiction serve both to contain particular rights regimes, and to exclude others. Explicitly conceptualizing the relationship between statecraft and law in this way is, I argue, important for a deeper appreciation of both the political stakes and the empirical transformations in the practice of American statecraft after 9/11. As I will argue, it is particularly significant that the Bush Administration did not invoke a formal state of emergency

in the months and years following 9/11, but instead chose other—more obviously extra-territorial—means to achieve similar practical political outcomes.

Rendition and the Geopolitics of the "War on Terror"

The Bush Administration consistently argued that 9/11 inaugurated a new geopolitical era and a fundamentally new kind of threat to the integrity of the state and to its sovereign borders. Groups like al Qaeda, they argued, are dangerous precisely because they are different in form than the threats that had previously animated the geopolitics of modernity. As one report from the Office of Homeland Security (National Strategy for Homeland Security, 2002: 10) put it:

> Al-Qaeda is part of a dangerous trend toward sophisticated terrorist networks spread across many countries, linked together by information technology, enabled by far-flung networks of financial and ideological supporters, and operating in a highly decentralized manner.

In turn, the report continued, transnational terrorist groups exploit vulnerabilities in domestic territory:

> Our population is large, diverse, and highly mobile, allowing terrorists to hide within our midst. Americans congregate at schools, sporting arenas, malls, concert halls, office buildings, high-rise residences, and places of worship, presenting targets with the potential for many casualties (National Strategy for Homeland Security, 2002: 10-11).

Geographically-diffuse, organizationally-fragmented, profoundly-mobile, and stateless, officials concluded, the new global terrorist was also a challenge to traditional notions of containerized sovereignty: easily able to slip across international borders, to then blend virtually seamlessly into local places, and from there turn the most innocuous instruments of everyday life—box cutters, airplanes, and cell phones—into deadly weapons.

In the face of this new threat, the Administration argued that the historical-geopolitical conditions of the past that influenced the development of existing laws are no longer relevant. In the context of a globalized world of easy border-crossing, unprecedented information-access, and multi-cultural societies, it was time to undo the restrictive boundaries of existing law. As Vice President Cheney put it in a speech in early-2006:

> We are not dealing with a conventional enemy, but with a group of killers whose objective is to slip into our country, to work in sleeper cells, to communicate in secret, using every means of technology from the Internet to cell phone networks. This enemy is weakened and fractured, yet still lethal, still determined to hurt Americans. We have a duty to act against them as swiftly and as effectively as we possibly can. Either we are serious about fighting this war or we are not (Cheney, 2006).

For Cheney, then, to be "serious" was to be willing to rethink common sense norms and practices.

To that end, the Bush Administration aggressively mapped out a dramatic expansion of its counter-terrorism strategies. Among the issues they focused on

early were avoiding the restrictions that bound the options they might consider. Both domestic and international law provided overlapping legal jurisdictions of frameworks of rights that constrained what United States military, intelligence and law enforcement personnel could do in the emerging "War on Terror" and *where* they could do it. The Administration strategy thus sought to reduce these restrictions so as to free up room for innovative and aggressive measures. The most controversial of these strategies centered on the intersections of intelligence gathering and detention, with rendition being but one example.

Intelligence, Spatial Transformations, and the "War on Terror"

The detention center at Guantánamo Bay has offered visible focus to concerns about the extraterritorial dimension of the Bush Administration's "War on Terror." Here debate centered on both the status of detainees as legal subjects, and their jurisdictional location within the fractured intersections of national and international law (Gregory, 2006; see also Sidaway, 2010 for related issues around Diego Garcia). The Bush Administration invented new legal subjects such as "unlawful enemy combatants" so as to reposition detainees' relationship to international law, and they created new spaces of detention to reposition United States obligations to both domestic and international law. They justified such moves by creative interpretation of the relationship between law and sovereignty, arguing that, for example, Cuba has "ultimate sovereignty" over the Guantánamo Bay base and thus the Cuban state alone has the obligations to abide by international law.

In his sweeping analysis of the legal issues surrounding Guantánamo, Joseph Margulies (2006) argues that many of the most controversial aspects of the Bush Administration's "War on Terror" reflected its uncompromising vision of the relationship between anti-terrorism, intelligence and detention. That vision saw intelligence as among the central tools to combat future terrorist attacks. In turn, its architects saw effective intelligence as inseparable from effective detention. Indeed, analysts frequently characterized the attacks of 9/11 as an intelligence failure. So while they described the general threat as geographically and organizationally agile transnational terrorist networks that exploited the vulnerabilities of democratic states, their more specific diagnosis was one that saw states as relatively information poor. In this view, the strategic advantage of groups like al Qaeda was their ability to exploit new information technologies such as the internet, and so to communicate instantaneously, across great distances, largely under the eyes of states. This diagnosis, then, understood the terrorist attacks as simultaneously reflecting two sides to the information-state nexus. On one hand, the state itself was information-poor; unable to see into the inner workings of contemporary netwar. On the other hand, it saw an information-rich adversary; one which had access to an unprecedented volume of information about the state and the potential targets within its midst. Metaphorically, then, the state was much like a blind elephant; profoundly visible, and yet unable to see.

The Bush Administration interpreted this new information threat through the lens of a relatively new theory of intelligence: called the "mosaic theory" (Pozen, 2005). Traditionally, state intelligence has been source-oriented. Meaningful information, in this view, is intrinsic to a document, or interview, or other source. During the Cold War, the intelligence agencies applied this approach to cultivating high-level contacts in foreign governments, focused on decoding communications among government officials discussing commonly understood efforts and initiatives, and in general assumed a kind of integrated modernist object of intelligence. Under the mosaic theory of intelligence, however, meaning is relational and fragmented. Intelligence is not intrinsic to isolated pieces of information, but rather to complex relationships among a myriad of otherwise innocent facts. The object of intelligence is thus fragmented. Moreover, it is one that reflects the largely phantom quality of the distinction between society and state (T. Mitchell, 1991), and what Painter has described as the "prosaic" quality of state-society relations (Painter, 2006). The mosaic theory, then, suggests two new threats and related policy approaches. First, it suggests that successfully averting tragedies like 9/11 will involve the collection and intensive analysis of unprecedented volumes of information. The state's intelligence lens must much more fully illuminate the looming threats both within and without its borders, and it must do this by taking a broad view on what might constitute meaningful intelligence.

Much of the focus of the War on Terror has thus been on the acquisition of intelligence. Intelligence, in turn, was embedded not just in electronic transfers of money or communication, but also embodied in the minds of individual bodies. This "human intelligence" was central to Bush Administration detention policies, which, as Margulies (2006) emphasizes, were designed not per se to punish or to avert future acts by the individuals in question, but rather to extract information about the network itself so as to avoid future terrorist attacks. Extracting that embodied intelligence required that suspects be captured and detained. Moreover, they must be detained in spaces that have suitably flexible relations to law, where they can be interrogated free from any of the inconveniences of law (or indeed liberal society more broadly).

A second consequence of the mosaic theory is the conclusion that the state itself may well be too visible. If on one hand, then, transnational terrorists are successful because they are largely invisible, they are on the other hand because they collect strategic intelligence about their targets. It is for this reason that the Bush Administration quietly reclassified millions of previously unclassified documents, removing them from Internet access, and so forth.

In this way, the mosaic theory as interpreted by Bush Administration policy understood the state as both the subject and the object of intense visibility. In Margulies' interpretation, the intelligence imperative of the Bush Administration's "War on Terror" resulted in a policy of preventive, and largely extra-legal, detention. All the focus on detention at Guantánamo misses a more crucial fact for

Margulies: the military designed facilities like Camp Delta as ideal spaces of interrogation. Their purpose was to extract intelligence (see also Mayer, 2007). In turn, and related, the other policy outcome of this perspective was that the practices of statecraft involved in anti-terrorism must be wherever possible hidden from view.[3]

Territorial Constraints

Extraordinary rendition was a product of both of these imperatives: the need to both acquire embodied intelligence, and to do so secretly. It was also a product of the previously mentioned desire to avoid the territorial constraints of law. In crafting an aggressive counter-terrorism strategy post-9/11—one that focused on the centrality of intelligence gathering—the Bush Administration came up against a variety of simultaneously legal and spatial constraints that severely limited what they could do, and *where*.

The most obvious constraints the Administration faced were those of domestic law. These included Constitutional protections outlined in the Bill of Rights: in particular those that circled around the spatial relations between citizens and the state: the right to privacy, to be free from detention without charge and the entitlement to a speedy trial. Most fundamentally, it included the right to petition for *habeas corpus* review: the most elemental judicial check on executive power. All of these restrictions, Bush Administration officials concluded, were too onerous to effectively conduct an aggressive "War on Terror." Absent a formal declaration of emergency—a legal exception that might, for example, remove the right to *habeas corpus* review—constitutional rights limited the capacity of the Executive to detain suspects and to interrogate them. As a result, the Bush Administration sought creative ways to achieve the same effect elsewhere: beyond the legal boundaries of United States jurisdictional commitments.

Yet while domestic law hampered Administration efforts within sovereign territory, international treaty obligations introduced other constraints extra-territorially (Satterthwaite, 2007). Most notably, the *Geneva Conventions* set strict rules on both detention and interrogation of prisoners. Similarly, the *International Convention Against Torture* included not only provisions against aggressive interrogation measures, but also against the rendition of people to other jurisdictions that did practice torture. International law, then, placed serious constraints on the conduct of the "War on Terror" extra-territorially as well.

Extraordinary rendition thus became one stategy to seek to avoid these legal-geographic constraints by positioning people and things in spaces with less-than-clear legal sovereignty or oversight. Notably, however, use of extraordinary rendition required rather creative interpretation of law, and legal territory.

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[3]Dana Priest and William Arkin (2010) have recently documented the extensive network of security infrastructure built up across the United States in the wake of the events of 2001, often in mundane, everyday places like suburban office parks.

Gaps

While the term "rendition" has taken on a particular meaning in the context of the "War on Terror," its legal meaning is much broader. Rendition involves the transfer of a person or thing from one jurisdiction to another. Extradition, for example, is a kind of rendition; in this case a formal legal process structured by legal agreements such as international treaties. But rendition can also involve more informal transfers of people and things.

In both legal and practical precedent, extraordinary rendition has its origins before 9/11. Beginning in the late-1980s, United States law enforcement faced new challenges (Herbert, 1997).[4] These challenges all centered on the increasingly extra-territorial and transnational character of crime. The "War on Drugs" was perhaps the first of these struggles, involving producers, distributors and consumers tied together across a variety of domestic and foreign territories; some within United States jurisdiction, and many not. In order to fight this war, agencies like the FBI and the DEA increasingly dealt with suspects and informants who circulated in spaces beyond United States territorial jurisdiction.

This is an old story of a spatial or scalar struggle over the territoriality of criminality and statecraft. The United States government established the FBI as an anti-crime organization with federal jurisdiction in order to explicitly target then-new kinds of crimes that crossed existing jurisdictional boundaries. The new jurisdictional authority of the FBI—as well as later additions such as the DEA, ATF, and so forth—allowed them the same spatial reach as the criminals they were charged with apprehending. Yet the state could only rescale such authority within its sovereign boundaries. Such was not the case with extra-territorial character of globalized illicit trade in sex workers, drugs or weapons. As a result, fighting these new criminal threats involved coordination and cooperation with other jurisdictional authorities. Sometimes this meant joint policing operations, and sometimes requests for extradition. In any case, it introduced the potential for conflicts over which jurisdiction had the ultimate authority over the "personal jurisdiction" of particular criminal suspects.

Such conflicts came to a head in the 1985 case of the kidnap and subsequent torture and murder of DEA agent Enrique Camarena in Guadalajara, Mexico, allegedly at the hands of a drug cartel. In 1990, DEA agents arranged for a doctor indicted in the crime to be captured and forcibly rendered to United States jurisdiction. He was thus kidnapped outside his office in Guadalajara, flown by private jet to El Paso, Texas, and put on trial in Los Angeles. The rendition

[4]Note, however, that extraordinary rendition is not a particular innovation of United States statecraft. As Human Rights Watch (2005) has documented, for example, regimes in the Arab world have been shuttling prisoners informally around since at least the 1990s. Similarly, there were earlier international human rights cases around extraordinary rendition in South America involving Uruguayan security officials apprehending suspects in Brazil and Argentina and subsequently allegedly torturing them in Uruguay (Satterthwaite, 2007: 1364).

happened without the cooperation or help of Mexican officials, despite an existing extradition treaty between the United States and Mexico.

The central legal question the case presented was whether the fact of the defendants' extra-legal rendition was grounds for granting jurisdiction to United States courts to hear the cases. In the original case (United States v. Alvarez Machain, 1992; see also Caron, 2004), the Judge ruled that it was not, and released the defendant. The appeal went to the Supreme Court, which relied on precedent that stretched back to the 19th century to conclude that the manner by which a defendant was brought within the territorial jurisdiction of a court was irrelevant, and that the court did in fact have legal jurisdiction to hear the case.

The Department of Justice has more recently referred to this ruling to conclude that the courts placed no legal restrictions on such extra-territorial abductions. As one Justice Department document interpreted the ruling:

> [T]he Supreme Court ruled that a court has jurisdiction to try a criminal defendant even if the defendant was abducted from a foreign country against his or her will by United States agents. Though this decision reaffirmed the long-standing proposition that personal jurisdiction is not affected by claims of abuse in the process by which the defendant is brought before the court, it sparked concerns about potential abuse of foreign sovereignty and territorial integrity (International Extradition and Related Matters, 1997).

So while noting the potential political fallout of such informal renditions, the Department of Justice nevertheless noted the Judiciary presented no legal roadblocks to its use. Faced, then, with a range of characters—rogue dictators like Manuel Noriega, drug lords, transnational terrorists—that escaped capture by hiding behind the protective walls of foreign jurisdictional boundaries, the United State government increasingly relied on these "informal renditions" throughout the 1990s. These involved United States law enforcement agents apprehending criminal suspects in foreign jurisdictions and transporting them to the jurisdictional orbit of United States courts (Bush, 1993). While expressly designed to avoid the sometimes complicated legal formalities of extradition—and in fact doing so in ways which often directly challenged the territorial sovereignty of other states—these "renditions to justice" nevertheless ultimately brought suspects within the space of law; to be prosecuted to be sure, but under conditions which also guaranteed them basic legal rights in the process.

If these informal renditions that brought people like Manuel Noriega to face trial in the United States still more-or-less corresponded to international legal norms in the sense that their goal was to try criminal suspects before courts of law, another kind of informal rendition had a quite different relationship to law. During the Clinton Administration, the CIA began using a tactic that has since become known as "extraordinary rendition." This involved the apprehension of international criminal suspects—often by United States agents—in a foreign jurisdiction, and their transfer to a third sovereign state. The suspects were

typically Islamic extremists, and their destinations Middle East regimes with dubious human rights records: Egypt, Syria, and so forth.

Unlike either extradition or "informal rendition," then, "extraordinary rendition" is not focused on criminal prosecution. The justifications that advocates have offered for the practice are not really legal justifications. Former CIA officer Michael Scheuer (2005), for example, defended the practice as a necessary practical innovation, and explained the focus in the following way:

> [T]here's kind of three tiers of importance. The most important thing in '95 and as we talk in July of 2005 is to get these people off the street. That's the single most important thing, the idea, of course, being to protect America and Americans.
>
> The second most important is to grab, when they're arrested, whatever paper, hardcopy documents or electronic media they have with them, because in that media is going to be information they never expected the Central Intelligence Agency to be reading.
>
> The third thing is to talk to them. But anything we get in the third level is gravy …

Legal concerns about prosecution, then, do not enter into Scheuer's explanation of the purpose of the program. In addition, the territorial focus of the practice is outward; on moving suspects not within the territory of United States sovereignty and law, but rather without.

After 9/11, the Bush Administration dramatically expanded the use of extraordinary rendition, as well as shifted greater relative attention to interrogation. They have also allegedly introduced a new kind of extraordinary rendition. Rather than send detainees to third-party states, they instead sent them to spaces of *de facto* United States control, but otherwise ambivalent sovereignty. The CIA-run prison in Afghanistan where Khalid El-Masri found himself was but one example of the in-between legal status of these rendition destinations. Guantánamo Bay is another. These spaces provided the benefits of sovereign authority and control, without the obligations of sovereignty either to domestic or to international law.[5]

Extraordinary rendition is a very specific kind of rendition, then, which relies on spatial transformations in the geographies of enforced disappearance. Extraordinary rendition involves the extra-legal transfer of a person by a state to the jurisdiction of another state or quasi-stateless jurisdiction for the purpose of detention and interrogation. It is a way to suspend law for certain classes of subjects by moving their bodies across territorial boundaries. By using such tactics, the Bush Administration territorially barred these suspects from access to domestic legal rights. By effecting such movement covertly, the Bush Administration also denied them access to the protections of international law. The active subject moving these bodies across this global jurisdictional chessboard is a shadow state; ideally completely invisible. The transfer, then, typically happens by--or least in

[5]As I explain further below, this perspective relies on a controversial reading of international human rights law that focuses on one, obviously territorial, aspect of jurisdictional rights obligations, while ignoring others.

collaboration with--the labor of civilian subcontractors. While often front-companies for state agencies such as the CIA, they nevertheless work though the networks of the formal economy and civil society. These are legally civilian employees, flying on legally civilian aircraft, through the nodal points of civilian airports, within a network of civilian airspace (Grey, 2006).

The Legal-Geographic Imagination of the Bush Administration

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society…. But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act (Johnson v. Eisentrager, 1950).

It is hard to know the Bush Administration's legal justifications for extraordinary rendition since they formally denied the practice, and there are no publicly released documents among senior Bush Administration officials and lawyers that openly discuss it. One can, however, read the logic of the program through broader discussion about the legal basis for the extra-territorial conduct of the War on Terror more generally.

Ultimately the questions Bush Administration lawyers grappled with were quite simple: who may we detain, under what conditions, and where? If both domestic and international law presumed sovereign states and some agreement among them that limited their capacity to detain people without charge, Bush Administration lawyers concluded, then the solution was to seek out, first, those spaces of ambivalent sovereignty; where the weight of both kinds of law might be minimized.

In doing so, they hung virtually their entire legal argument on a single Supreme Court ruling: Johnson v. Eisentrager (1950). The case involved a German intelligence officer captured in China in the wake of World War II (Lane, 2004a; Lane, 2004b). The United States Army tried and convicted him in a military commission on a base under United States control, but within Chinese territory. The Army subsequently flew Eisentrager to Germany, where they detained him. While detained by the United States military on bases under its control, Eisentrager never set foot in United States territory. Nevertheless, he petitioned for habeas corpus review on the basis that he was detained under *de facto* United States sovereignty, and thus Constitutional obligations.

The Court ruled that because Eisentrager was neither a United States citizen nor was he present within United States territory, he could not appeal his detention. The ruling stripped the right of *habeas corpus* review from enemy detainees held outside U.S. territorial jurisdiction and sovereignty more generally. The ruling thus instituted an exception that the Court explicitly linked to territory. The ability to petition for judicial review of detention of foreign citizens only applied within United States territory. As one Pentagon working group report more recently interpreted the matter in general, "the courts have rejected the concept of 'de facto

sovereignty,' [and] constitutional rights apply to aliens only on sovereign U.S. territory" Department of Defense (2005 [2003]:268).

The Bush Administration continued to use Johnson v. Eisentrager as justification for efforts to justify extra-territorial detention. Indeed, Bush Administration lawyers turned to this case in the weeks and month after 9/11 as they were crafting their detention policy. Their decision to detain suspects at Guantánamo Bay was clearly based on the logic of the case. Given the United States enjoyed mere *de facto* sovereignty over the base, they believed, it was shielded from the jurisdiction of United States courts. And yet, they argued, that de facto sovereignty also shielded the territory from the obligations of both Cuban and international law. It was in effect a legal grey zone.

Appearing before the Senate Judiciary Committee more recently, former White House Counsel Bradford Berenson (2006) argued for suspending *habeas corpus* review for "enemy combatant" detainees based on just such an interpretation of Johnson v. Eisentrager. The argument gives larger insight into how the Bush Administration tended to view the relationship between law, territory and rights, and how it is likely to have shaped their view of extraordinary rendition. Berenson centered the bulk of his testimony on the "suspension clause" of the Constitution, which defines the conditions under which the Executive might suspend habeas: "in cases of rebellion or invasion the public safety may require it." With respect to Eisentrager, Berenson argued on one hand that the decision made clear that "[o]nly when an alien comes within our territory or establishes some sort of meaningful connection to the United States do the protections of our constitution begin to attach." On the other, he continued, "planning to kill our civilians in mass terror attacks generally does not qualify as a meaningful connection for constitutional purposes."

For this line of argument, then, the Constitution creates both a qualitatively and jurisdictionally uneven field of rights. The space of domestic territory represents a geographic container of the highest bar of protections. Yet in Berenson's view, simple geographic presence is not enough to secure those rights. For Berenson, the Suspension Clause, and subsequent rulings that relied on it, simultaneously tightly bracketed off the right to habeas at the territorial boundary of the state, and opened the door to a more confined right within that boundary. As he put it:

> The two instances in which suspension is permitted under the clause – rebellion and invasion – both contemplate a physical threat to public safety inside the United States. The focus of the clause is domestic. If the writ is to be suspended, the Framers appear to contemplate that it would be suspended as to individuals found inside the United States. The notion that the writ spans the globe does not sit comfortably with the words of the Suspension Clause itself.

This argument—and in fact the argument that ultimately held sway in the Bill that the Congress subsequently passed—is based on three primary claims about the relation between law, territory and identity. First, it claims that contemporary

transnational terrorism has made the old territorial containers of rights and sovereignty—on which the writ of habeas corpus and other foundational rights are based—obsolete. As Berenson put it:

> The attacks on September 11 constituted a literal invasion of this country by a ruthless enemy. Our financial center was attacked; the headquarters of our military was attacked; and an attempt was made to attack the seat of our government. All of this was accomplished by enemy combatants who entered our territory surreptitiously and planned and executed their attacks from our soil. The horrific loss of innocent life resulting from those attacks amply demonstrates the danger to public safety presented by al Qaeda's invasion. It would seem reasonable that, at least if Congress made the necessary findings, its power under the Suspension Clause to limit application of the writ would be triggered.

In his most bold claim, then, Berenson argued that Congress would be within its rights to suspend the writ entirely. In other words, the territorial sanctity of the state had been violated in ways consistent with the Suspension Clause.

Second, Berenson claimed that the boundary-erasing character of global terrorism made the old territorial distinctions of Eisentrager itself obsolete. From this perspective, since the 9/11 hijackers had all planned and orchestrated the operation within the territorial borders of the United States, to only deny habeas to their colleagues apprehended beyond territorial borders would constitute an arbitrary and dangerous restriction.

Finally, of course, Berenson's argument rested on a clear and transparent notion of identity. The object of these new exceptions, he made clear, were "terrorists" and "enemy fighters." He completely elided the historical fact that *habeas corpus* came into being to guard against an Executive's arbitrary assignment of an individual to an identity that consigns them to a world without rights: the micro-space of a four-walled prison cell or, in the case of Guantánamo, a cage.

The particular territorial fetish behind Bush Administration legal arguments was, and remains, controversial. Human rights activists, for example, suggest that such arguments focus on narrow readings of the rights obligations that attach to territorial jurisdiction,[6] but willfully ignore other, non-territorial, aspects of jurisdictional obligation. Satterthwaite (2007), for example, argues that international human rights law also grants significant weight to *personal jurisdiction*, which can be understood as the *de facto* control and authority exercised by states over persons irrespective of territorial location. From this perspective, (international) human rights trump (national) state law and borders, and *where* a representative of a state apprehends someone for rendition to a state where they may be subject to torture is irrelevant. The debate about extraordinary

[6]See, for example, Pines' (2011) law review article that justifies extraordinary rendition based on just this very formalistic and territorial reading of international human rights law. In essence, he argues, the reach of human rights law stops at the United States border, and so activities that take place beyond that border cannot be subject to its jurisdiction.

rendition, then, goes to the very heart of how we understand relations among law, rights and space.

Conclusion: Beyond Law, Through Space

Berenson's argument, one might say, was the preferred endgame of post-9/11 Bush Administration domestic security strategy. From this view, because the battlefield of the "War on Terror" knows no bounds, the Executive's right to detain and interrogate should also be spatially limitless. Extraordinary rendition was thus an expedient compromise of sorts: unable or unwilling to successfully navigate the domestic politics of invoking the Suspension Clause within domestic territory, they instead achieved something similar through the territorial trick of rendition.[7]

Bush Administration lawyers like Berenson imagined an almost geometric set of interlocking legal-geographic spaces. Within that geometry, on one hand, they sought to identify those interstitial spaces where the jurisdiction of both national and international law was minimal. Those spaces were by definition characterized by less-than-clear sovereignty. On the other hand, they sought to transform the existing spaces of sovereign jurisdiction to limit rights claims to a narrower range of people. With both brands of extraordinary rendition, the Executive carefully avoids any formal claims to sovereignty, and the international rights obligations they imply. In essence, they transfer suspects beyond the spaces of law. In so doing, the state strategically exploits the uneven territoriality of sovereignty so as to strip legal subjects of their rights, and to avoid the state's own obligations. In short, they largely achieved through territorial means what would otherwise happen by topographic intervention (for example, suspending law within domestic territory).

Abstract legal-geographic arguments have concrete geographic outcomes, and practices of disappearance such as extraordinary rendition have consequences both social and individual. To return to the story I opened with, for the next five months after his arrival in Afghanistan, like many others, Khalid El-Masri simply disappeared to everyone that had ever known him. And just as quickly as the border guards pulled him off that bus in Skopje, he found himself on a plane out of Afghanistan. Again in this own words (El Masri, 2005):

> On May 28, I was led out of my cell, blindfolded and handcuffed. I was put on a plane and chained to the seat.... When the plane landed, I was placed in a car, still blindfolded, and driven up and down mountains for hours. Eventually, I was removed from the car and my blindfold removed. My captors gave me my passport and belongings, sliced off my handcuffs, and told me to walk down a dark, deserted road and not to look back. I believed I would be shot in the back and left to die, but when I

[7]In a globalized world in which states can be both the subject and the object of violence wrought across great distances, many to argue for quite subtle legal-territorial distinctions in ways that can easily slip into a much more traditional formalities of war. Justice Scalia (2004), for example, has seemed to suggest taking Berenson's argument a step further still and suspending *habeas* more generally within United States territory, without distinctions of citizenship or territory. More particularly, Scalia was simply saying that the state either must invoke the Constitutional Suspension Clause, or it must be subject to *habeas* review, or a broadly similar review process.

> turned the bend, there were armed men who asked me why I was in Albania and took my passport. The Albanians took me to the airport, and only when the plane took off did I believe I was actually returning to Germany. When I returned I had long hair and beard, and had lost 40 pounds. My wife and children had left our house in Ulm, believing I had left them and was not coming back.

Since then, El Masri tried for years, without success, to have his case heard in courts of law in various jurisdictions around the world. In late 2012, the European Court of Human Rights finally rendered judgment on the case; unanimously finding that Macedonia had violated El Masri's rights under the torture-related provisions of the European Convention on Human Rights (Kulish, 2012).

Extraordinary rendition reflects a new—globalized—version of old state practices of disappearance; the scale of estrangement is merely larger.[8]

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[8]Extraordinary rendition is also perhaps the ultimate expression of neoliberalized statecraft. The practice involves the apparent privatization of the practice of statecraft (see De Londras, 2011), and the simultaneous off-shore subcontracting of the work of interrogation and intelligence. The irony, however, is that the fact that the practice has operated through a kind of privatized infrastructure of everyday life has also left it vulnerable to disclosure. For example, CIA use of civilian aircraft operating through civilian airspace and airports meant a paper trail that activists and investigative reporters could ultimately trace (Grey, 2006).

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