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Cyber-Territoriality

Timothy Zick
William & Mary Law School, tzick@wm.edu

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Although it is mentioned briefly, Kal's book does not address cyber-territoriality in detail. I take Kal at his word that there will be no sequel. But I think the history and framework Kal provides may be useful in assesssing efforts to manage cyber-territoriality. I should note that I generally agree with Kal that exceptionalist claims that cyberspace has "flattened" the world and undermined territorial sovereignty are overstated (pp. 8-9). In their book, *Who Controls the Internet?*, Jack Goldsmith and Tim Wu present a compelling argument that geography and territory remain potent organizational and regulatory markers, even in the digital era.

It was recently **reported** that the U.S. is creating a new cybercommand within the Pentagon to protect against cyberattacks and perhaps to plan offensive operations abroad. Officials have encountered some early complications relating to privacy and defense. As Duncan Hollis has **observed**, the initiative raises a host of legal and regulatory issues. But the territorial concerns are more germane to the subject of Kal's book. As reported in the *New York Times*:

> *The Pentagon is increasingly worried about the diplomatic ramifications of being forced to use the computer networks of many other nations while carrying out digital missions — the computer equivalent of the Vietnam War's spilling over the Cambodian border in the 1960s. To battle Russian hackers, for example, it might be necessary to act through the virtual cyberterritory of Britain or Germany or any country where the attack was routed.*

Officials are concerned that they may need to request and receive permission to access foreign computer networks in "cyberterritories" abroad. General James E. Cartwright, the vice chairman of the Joint Chiefs of Staff, is quoted as saying: "How do you understand sovereignty in the cyberdomain? It doesn't tend to pay a lot of attention to geographic boundaries."

Putting aside what may be the fundamental territorial misunderstanding in the quote, I wonder what the evolution of territoriality suggests with regard to this national security initiative. Kal's book details the various extraterritorial options. Conquering and controlling "cyberterritories" is obviously out of the question. But assuming soverign borders are still operative in this context, Kal's book suggests several other options. Will or should the U.S. (a) simply assert extra-territorial authority, on the trans-boundary effects rationale; (b) negotiate in advance to establish new international rules regarding cyber-entry and search; or (c) pursue more informal channels of resolving these territorial difficulties? Does the study of territoriality suggest a likely or perhaps a preferable solution?

Officials involved in this activity would remain on U.S.soil, and would thus not need the sort of protective bubble SOFAs provide. But in the event agents might travel to any of the territories searched, I wonder if some comparable protections might be needed.

In terms of Fourth Amendment and other constitutional rights that might be implicated by the cybercommand's actions abroad, I assume *Verdugo* precludes granting any constitutional relief to foreign nationals (at least those with no connection to the U.S.). Contrary, perhaps, to my prior post, which was critical of the Court's halting development of the doctrine of constitutional scope, perhaps this example suggests that Justice Kennedy's functionalism is forward-looking and appropriate. It seems highly impracticable to provide warrant or other Fourth Amendment protections in this context.

Perhaps, though, the old territorial models and frameworks will need to be revised or supplanted to account for the unique problems associated with "cyber-territories."

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