SOIL AND CITIZENSHIP

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The issue of targeted government killing of U.S. citizens within the national territory garnered an intense burst of attention earlier this year when Senator Rand Paul staged a memorable thirteen-hour filibuster during the John Brennan confirmation hearings.[1] After the al-Awlaki assassinations in Yemen, Rand Paul demanded to know if the government claimed authority to kill citizens here at home as well, and initially received an evasive answer.[2] In response, Paul promised to

> speak as long as it takes until the alarm is sounded from coast to coast that our Constitution is important, that your rights to trial by jury are precious, [and] that no American should be killed by a drone on American soil without first being charged with a crime, [and] found . . . guilty by a court.[3]

Attorney General Eric Holder eventually conceded that targeting any U.S. citizen for assassination within national territory (in the absence of imminent threat) is out of bounds.[4] Meanwhile, Rand Paul himself retreated from the blazing purity of his position a few weeks later when he said in an interview that, actually, "If there's a killer on the loose in a neighborhood, I'm not against drones being used."[5]

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1. 159 CONG. REC. S1150 (daily ed. Mar. 6, 2013) (statement of Sen. Rand Paul).

2. Conor Friedersdorf, *Killing Americans on U.S. Soil: Eric Holder's Evasive, Manipulative Letter*, ATLANTIC (Mar. 6, 2013, 6:00 AM), http://www.theatlantic.com/politics/archive/2013/03/killing-americans-on-us-soil-eric-holders-evasive-manipulative-letter/273749/.

3. 159 CONG. REC. S1150.

4. *See* Rachel Weiner, Aaron Blake & Philip Rucker, *Eric Holder Responds to Rand Paul With 'No,' Paul Satisfied*, WASH. POST (Mar. 7, 2103, 2:02 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/07/white-house-obama-would-not-use-drones-against-u-s-citizens-on-american-soil/; *see also* Attorney General Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

5. *Cavuto* (Fox Business Network television broadcast Apr. 22, 2013) (interview with Sen. Rand Paul), *available at* http://www.paul.senate.gov/?p=video&id=777. Senator Lindsey Graham had taken this position all along: "'Wouldn't that be kind of crazy to exempt the homeland, the biggest prize for the terrorists, to say for some reason the military can't defend America here in an appropriate circumstance?' Graham asked at the hearing." Sara Sorcher, *What Was Behind Rand Paul's Filibuster of John Brennan*, NAT'L J. (Mar. 6,

Still, Senator Paul's filibuster was a reverberant moment in contemporary cultural politics. The prospect that the government might "*kill Americans on American soil*"[6] resonated; in fact, it became a raging meme and a source of political panic that galvanized both right and left. That the government might assassinate its citizens here at home was portrayed as an utterly egregious and terrifying possibility. In response to his protest, people from across the political spectrum announced their intent to "Stand With Rand."[7]

The question of the legitimacy of any domestic assassination practice is obviously urgent. But for me here, the filibuster episode provides a useful context for thinking about some of the ways that a person's location and a person's legal status intersect to determine both rights and perceived ethical standing. Gerald Neuman and Kal Raustiala, among others, have powerfully examined the complex location-status nexus in the constitutional setting.[8] I am interested in the Constitution as well, but my focus extends to political and ethical thought more broadly. Here, I want to talk about the structure of conventional normative thinking on the subject of status, location, and perceptions of deservingness—using Rand Paul's filibuster as a launching point.

First, to set the scene, a few words about the law. Many of you know that the U.S. Supreme Court made clear, more than five decades ago in a case called *Reid v. Covert*,[9] that it is indefensibly arbitrary to make a citizen's constitutional rights turn on where she or he is physically located at a given moment.[10] As Justice Black wrote in *Reid*, when "the Government reaches out to punish a citizen who is abroad," that citizen's constitutional rights cannot "be stripped away just because he *happens to be* in another land."[11]

The precept articulated in *Reid*—that there are, in Raustiala's terms, "no longer geographical limits to the Constitution's reach" for citizens[12]—has applied in standard law enforcement settings ever since. It appears, however, that some in government do not regard this rule to extend to times

2013), http://www.nationaljournal.com/daily/what-was-behind-rand-paul-s-filibuster-of-john-brennan-20130306.

6. 159 CONG. REC. S1150 (emphasis added).

7. *See* STAND WITH RAND PAC, http://www.standwithrandpac.org/ (last visited Mar. 25, 2014).

8. *See generally* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 111–15 (2009); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2076–77 (2005); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 282 (2009); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005).

9. 354 U.S. 1 (1957).

10. *Id.* at 7–8.

11. *Id.* at 6 (emphasis added).

12. RAUSTIALA, *supra* note 8, at 146.

of national emergency (whatever "emergency's" scope is deemed to be).[13] In this current moment, the constitutional distinction between being here and being abroad may have been reinstated.[14] But beyond the law itself, this reinstatement of normative territorial thinking is conspicuously detectable in political discourse. Indeed, the impulse to defend the special normative significance of territorial presence is what fueled Rand Paul's filibuster effort in the first place. Although Senator Paul criticized the government's al-Awlaki assassination in Yemen,[15] his full-throated protest against the prospect of government "killing of American citizens on American soil" expressed the conviction that killing citizens at home would be more objectionable.

Now, purely as a matter of legal logic, the idea that emergency should reimpose a territorialized conception of citizens' rights makes little sense in law,[16] and has mostly not represented government practice.[17] If anything, emergencies have served to justify degradation of the due process rights of some citizens located within the national territory.[18] Still, the visceral horror aroused by the prospect of *domestic* assassinations of citizens shows that many Americans specifically view domestic killing of U.S. citizens on U.S. territory as utterly beyond the pale.

It is interesting to think about why this would be true. Clearly, the filibuster episode became an irresistible opportunity for political posturing by various parties—but that is not enough of an explanation. The filibuster spoke—and it was heard—in ways that both reflected and reinforced what I

13. *See* MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 57–58, 106, 122 (2012) (discussing moments when wartime was used to justify limitations on constitutional protections).

14. See, for example, Attorney General Holder's ultimate position on drone assassinations of citizens—that it is sometimes acceptable abroad but never acceptable at home. *See also* Andrew Johnson, *Obama Stands by Drone Strikes on U.S. Citizens, but Not on U.S. Soil, Looking into More Oversight*, NAT'L REV. (May 23, 2013, 4:20 PM), http://www.nationalreview.com/corner/349186/obama-stands-drone-strikes-us-citizens-looking-more-oversight-andrew-johnson; *see also* President Barack Obama, Address at the National Defense University (May 23, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("[W]hen a U.S. citizen goes abroad to wage war against America and . . . when neither the United States, nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team."). President Obama went on to state that he would have been "derelict" in his duty if the United States did not take action against al-Awlaki. *Id.*

15. 159 CONG. REC. S1150, S1164 (daily ed. Mar. 6, 2013) (statement of Sen. Rand Paul) (discussing how al-Awlaki should have instead been tried for treason in federal court).

16. Kal Raustiala, *White Paper Suggests U.S. Could Launch Drones into U.S. Cities*, DAILY BEAST (Feb. 17, 2013), http://www.thedailybeast.com/articles/2013/02/16/white-paper-suggests-u-s-could-launch-drones-into-u-s-cities.html ("[W]hether a drone strike that kills a citizen comports with due process or not has essentially the same answer if the target is in Toronto or Detroit. . . . [T]here is no *legal* reason the operative could not be killed during a difficult capture attempt, wherever he might be.").

17. *See generally* RAUSTIALA, *supra* note 8.

18. *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426 (2004); *see also* Glenn Greenwald, *Three Democratic Myths Used To Demean the Paul Filibuster*, GUARDIAN (Mar. 10, 2013, 10:24 AM), http://www.theguardian.com/commentisfree/2013/mar/10/paul-filibuster-drones-progressives.

suggest remains an entrenched, ethical territoriality[19] in political consciousness. Even if it seems absurd in liberal terms to make a citizen's rights turn on where he or she *happens to be*,[20] that is not the dominant common sense.

Rather, the prevailing common sense can be discerned in discursive framings and linguistic choices. Notice that one of the ways Rand Paul's filibuster did its resonating work was through repeated use of the word *soil*. Once again, his stated goal was to ensure that the government would not "kill Americans on American soil." Of course, the word "soil" is a common metonym for the nation-state. Yet, it has very specific overtones: it conveys an organicized, even primordialized conception of national territory. Literally, soil implies rootedness: deep and natural belonging.[21] And its essentialism does a lot of galvanizing work: there is something about the idea of being *on American soil* (a bit like being in the "homeland") that seems to emotively trump the critique of locational arbitrariness.[22]

Admittedly, determining whether someone is, in fact, "on American soil" is itself subject to dispute and manipulation. The line between domestic and foreign territory is often contested (as well as gerrymandered) in law and in theory.[23] Still, there are plenty of situations that are not disputed; sometimes it is clear whether a citizen is or is not on national soil. For example, both al-Awlaki father and son—both citizens—were *not* on U.S. soil when they were assassinated without due process by U.S. drones.[24] And the fact that they were not in the United States has been treated by many as normatively consequential.[25]

Now, in thinking about the effects of territoriality on citizens' rights, keep in mind—and this is parenthetical, but crucial—that for *non*citizens, or aliens, constitutional rights *have* been held to depend on territorial presence.[26] As constitutional persons, noncitizens are protected rights holders, but only so long as they are territorially here. There is much room

19. Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126427.

20. Reid v. Covert, 354 U.S. 1 (1957).

21. Lisa Malkki, *National Geographic: The Rooting of Peoples and the Territorialization of National Identity Among Scholars and Refugees*, 7 CULTURAL ANTHROPOLOGY 24 (1992) (describing botanical metaphors in political discourse).

22. Indeed, sacral quality of *the soil* was also evidenced in discourse regarding the burial of the body of Tamerlan Tsarnaev (one of the alleged "Boston bombers"). *See* Leti Volpp, *The Boston Bombers*, 82 FORDHAM L. REV. 2205 (2014).

23. *See* Bosniak, *supra* note 19, at 405–06.

24. *See* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1; Letter from Eric Holder, U.S. Attorney Gen., to Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (May 22, 2013), *available at* http://www.justice.gov/ag/AG-letter-5-22-13.pdf.

25. *See* J. David Goodman, *Awlaki Killing Incites Criticism on Left and Libertarian Right*, N.Y. TIMES (Sept. 30, 2011, 1:35 PM), http://thelede.blogs.nytimes.com/2011/09/30/awlaki-killing-sparks-criticism-on-left-and-libertarian-right/.

26. *See* Bosniak, *supra* note 19, at 390, 408.

for argument about the legitimacy of this territorialist rule, which has served to permit unconstrained exercises of national power on noncitizens abroad.[27] At the same time, though, this territorialism has been highly protective for many noncitizens already present. True, aliens are subject to extraordinary national power governing whether they can be, or remain within national territory at all.[28] But as Justice William Brennan stated in *Plyler v. Doe*,[29] so long as an alien is present in the country—so long as he "'may happen to be'" here (this, notice, is an echo of the "happens to be" language of *Reid*)—then "the simple fact of his presence . . . [makes him] entitled to . . . equal protection [and due process]."[30] In other words, for noncitizens, access to protection and concern *has* turned on where they are, as distinct from citizens, for whom access to protection and concern has purportedly turned on who they are, irrespective of where. And yet this drone assassination episode illustrates that location continues to be understood to matter for citizens too.

So, what follows? Here are a few brief thoughts about this citizenship-soil-deservingness nexus.

First, if Anwar al-Awlaki had been *on* rather than *off* American soil, his assassination without due process by the U.S. government would have been deemed by many to be normatively worse than it was understood to be. The fact that he "happened to be in another land" (in *Reid*'s phrase) affected the overall normative assessment. Yes, the assassination was criticized by some commentators,[31] but as noted above, the discourse quickly shifted to the apparently more pressing question of whether the government claimed authority to assassinate citizens here at home.

Second, however, notice that precisely by virtue of his citizenship (he was born in New Mexico), al-Awlaki could have been inside rather than outside U.S. territory in 2011. Unlike an alien, he theoretically had unqualified access to U.S. territorial presence. If he *had* been on U.S. soil, he might well have been detained and prosecuted on various grounds but (according, now, to the government) he would not have been fair game for summary execution. The fact that he chose absence from the soil, therefore, resulted in a detriment to him—both in fact and in the moral economy of concern and outrage. We see here the inscription of a normative divide among citizens based on location. Arguably such a divide serves as a kind of functional penalty on the citizen's right to travel. Whether a citizen "happens to be abroad" indeed matters vitally.

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27. *See, e.g.*, *id.* at 393–94; *see also* sources cited *supra* note 8.

28. I bracket the case of the younger Al-Awlaki (also a citizen), whose killing appears to have been accidental. *See* Sabrina Siddiqui, *Obama 'Surprised,' 'Upset' When Anwar Al-Awlaki's Teenage Son Was Killed by U.S. Drone Strike*, HUFFINGTON POST (Apr. 24, 2011, 11:40 AM), http://www.huffingtonpost.com/2013/04/23/obama-anwar-al-awlaki-son_n_3141688.html.

29. 457 U.S. 202 (1982).

30. *Id.* at 215 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1033 (1866)).

31. *See supra* notes 15, 25 and accompanying text; *see also supra* notes 4–6 and accompanying text.

Third, however, al-Awlaki's very citizenship implicates its own bitter disputes. While some critics lambasted his killing in Yemen on grounds that a government should never kill its own anywhere, others, like Representative Tom Tancredo, responded that al-Awlaki was not truly a U.S. citizen at all.[32] The fact that Anwar's parents, then foreign students, "happened to be" on American soil at the time of his birth cannot, on this view, properly ground his national membership. While this argument has no merit constitutionally,[33] it articulates what has been a persistent objection to birthright citizenship more generally[34]—one captured well in Peter Spiro's phrase "happenstance" citizenship.[35]

What critics of happenstance citizenship seem to demand is a more rigorous relationship between citizen and soil.[36] In this respect, the critique shares elements with the ideology of "autochthony," which has recently roiled a number of African and European countries. The word autochthony literally means "to be born from the soil."[37] Politically, claims of autochthony are claims for the priority of soil-rootedness as the basis of belonging, and for exclusion of those who are deemed strangers to the soil.[38] Discussion of autochthony may seem inapplicable to us here given the United States' self-identity as a nation of immigrants. It might also seem paradoxical in light of the American-settler nation's disregard and destruction of natives' ties to the land.[39] Nevertheless, I think the concept is germane to our *jus soli* debates to the extent that it counterposes authentic to inauthentic relations between citizens and soil.

And even where invocations of national soil are read in less literal and primordial terms, the critique of happenstance citizenship still demands a more meaningful anchoring of citizenship to national place. "Being here," in this view, cannot be merely a matter of physical location on a spatial grid but must entail embeddedness in a national project. In this discourse, territoriality—along with citizenship—must be normatively thick.

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32. Tom Tancredo, *Anwar al-Awlaki and the Perils of Birthright Citizenship*, DAILY CALLER (Oct. 11, 2011, 3:24 PM), *available at* http://dailycaller.com/2011/10/11/anwar-al-awlaki-and-the-perils-of-birthright-citizenship/#ixzz2r0PzG8g8.

33. United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898) (holding that an individual born in the United States becomes a citizen at the time of his birth for purposes of the Fourteenth Amendment).

34. Actually, Rand Paul himself is one of those critics: In 2011, he sponsored a constitutional amendment that would deny citizenship to people like al-Alwaki—whose parents were not citizens, lawful permanent residents, or members of the military.

35. PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 19–22 (2008). Note that citizenship attributed via descent (*jus sanguinis*) is as much happenstance as territorial birthright citizenship (*jus soli*).

36. As a matter of fact, al-Awlaki's connection to "American soil" was not momentary but extended for several years into his childhood.

37. 1 OXFORD ENGLISH DICTIONARY 801–02 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

38. *See generally* PETER GESCHIERE, THE PERILS OF BELONGING: AUTOCHTHONY, CITIZENSHIP, AND EXCLUSION IN AFRICA AND EUROPE (2009).

39. For a brief timeline of Indian removal, see *Indian Removal Timeline*, DIGITAL HIST., http://www.digitalhistory.uh.edu/active_learning/explorations/indian_removal/removal_timeline.cfm (last visited Mar. 25, 2014).

To conclude: the *Reid* court criticizes making citizens' rights contingent on the happenstance of territorial presence and absence. Tancredo and others criticize making the grant of citizenship contingent on the happenstance of parents' territorial presence at the time of a child's birth. Both are protests against giving legal effect to the contingency of location. But in the Rand Paul filibuster moment, such contingencies were not challenged. Instead, where, as well as who, we happen to be is regarded as essential. National citizens on national soil are our core political subjects in our core political space, and these subjects' protection requires heroic measures against existential government threat.