THE RULE OF LAW AT THE CROSSROADS: CONSEQUENCES OF TARGETED KILLING OF CITIZENS

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> *Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization? . . . . These and other legal and policy questions posed by this case are controversial and of great public interest.*[1]
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> *– Judge Bates (2010)*

> *No free man shall be arrested or imprisoned . . . neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers.*[2]
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> *– The Magna Carta (1297)*

I. INTRODUCTION

During the spring of 2010, President Obama authorized the targeted killing of Anwar Al-Awlaki;[3] on September 30, 2011, he was killed.[4] Al-Awlaki is the first United States citizen known to have been the subject of any such executive order in the nation's history.[5] While Al-Awlaki is commonly described as a traitor who

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[1] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010).

[2] Magna Carta, 1297, 25 Edw. 1, c. 29 (Eng.) (author's translation from Latin).

[3] Nasser Al-Aulaqi uses a different transliteration from Arabic, which was used in the caption of the case he brought (as his son's next friend) in the District Court; accordingly, these differing transliterations will refer, respectively, to Anwar Al-Awlaki and Nasser Al-Aulaqi. The District Court, however, has failed to make this distinction.

[4] Mark Mazetti et al., *Two Year Manhunt Led to Killing of Al-Awlaki in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

[5] There is no evidence that in the seven years following the events of September 11, 2001 that the administration of George W. Bush ever considered ordering the targeting killing of an American citizen.

waged war against the United States,[6] he was never indicted for treason or for any terrorism-related crime in the United States.[7] Furthermore, the government never made these allegations via any official channel. The official position is that Al-Awlaki's designation as a traitor is a state secret; this ambiguous status is reinforced by the fact that the document that authorized his killing is itself secret.[8]

To fully understand the unprecedented nature of carrying out this extrajudicial death warrant, and the importance of the District Court opinion that made it possible—holding that the executive order was unreviewable by any court under the political question doctrine[9]—we should begin by considering the influence of the thirteenth century case of David ap Gruffydd. Gruffydd was a Welsh prince—the last ruler of an independent Wales—who owed personal fealty to the realm of England, as he had paid homage to King Henry III in 1253.[10] In 1282, he waged war against Henry's son Edward I, who subsequently issued a royal order that Gruffydd be killed.[11] We must return to the Middle Ages for a relevant comparator because the thirteenth century was the last time that the executive branch of any common law country, without the involvement of its judicial or the legislative branches, asserted that it was legal to kill a citizen on the basis of an executive order.[12] That is, until the case of Anwar Al-Awlaki.

Notably, the treason case against Gruffydd was defective: "David had not apparently defied his liege lord in formal manner. . . ."[13] This was perhaps the reason that he was not tried by the king's nobles in the manner that the nascent English constitutional tradition required, as described in the Magna Carta's famous Clause 29: "neither will we attack him or send anyone to attack him, except by the

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[6] *See, e.g.*, Steve Huntley, *Obama Right to Target al-Awlaki*, CHI. SUN TIMES (Oct. 3, 2011), http://www.suntimes.com/news/huntley/8010361-452/obama-right-to-target-al-awlaki.html.

[7] Al-Awlaki had been convicted in absentia of inciting the murder of Jacques Spagnolo, a French energy contractor, on January 17, 2011. It should be noted, however, that Mohamed Assem, the self-confessed murderer, had asserted in various court hearings that his motivation for killing Spagnolo was that "the latter had slapped and insulted him," and through his lawyer Assem asserted that he had no "connection or contact" with Al-Awlaki. *Yemen sentences Awlaki in absentia*, AL-JAZEERA (Jan. 17, 2011), http://english.aljazeera.net/news/middleeast/2011/01/201111713355833996 9.html.

[8] Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

[9] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 44–52 (D.D.C. 2010).

[10] J. G. BELLAMY, THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES 24–26 (1970). While this case occurred hundreds of years ago, it is still pertinent to this discussion.

[11] *Id.* at 26 ("Sir Thomas Grey of Heton and the author of the *Brut* who aver quite bluntly that David was sentenced at the king's command.").

[12] *See id.* at 177–205 (describing how acts of attainder had been appropriated by Parliament during the fourteenth century).

[13] *Id.* at 27.

lawful judgment of his peers."[14] This provision had been acknowledged as binding law for the first time by Edward's father. Accordingly, instead of being arraigned, Gruffydd was declared an outlaw by King Edward without receiving the benefit of a trial supervised by judges with his fellow peers sitting in judgment.[15] Pursuant to that royal order, Gruffydd was hung, drawn, and quartered.[16]

During his campaigns to subdue Wales and Scotland, Edward repeatedly failed to observe nascent legal norms when trying alleged traitors (where Sir William "Braveheart" Wallace had been made the subject of another dubious execution).[17] Owing in part to unease among his Barons about his legal ability to pronounce judgments of outlawry and to sentence alleged traitors to death, Edward was later pressed into reissuing the Magna Carta,[18]—which remains the law of the United Kingdom today. The manifold abuses of the law of treason by Edward and his heirs included having his nobles attainted based on facts read into evidence upon royal command. After this and other abuses, Edward III was forced to respond to these complaints by acquiescing to six statues that were "glosses on clause 29 . . . which cumulatively constitute the first major advance towards the seventeenth-century formulation of the doctrine of *habeas corpus*."[19]

These statutes extended to all the right to not be deprived of life without due process. Thus, the king implicitly acknowledged that the royal practice of personally sentencing those he accused of crimes had damaged the realm.[20] Later in his reign, another statute was adopted that defined the crime of treason with specificity (and, by the standards of its day, narrowly) for the first time in the history of the common law.[21] After the Treason Statute was put into place in 1351, the legal community retroactively condemned the cases in which Edward II had issued death warrants without trial: "The method condemned was the summary

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[14] Magna Carta, 1297, 25 Edw. 1, c. 29 (Eng.). This was numbered Clause 39 in the original document signed by King John at Runnymede, but since the later ratifications of the Charter—including the version that is still legally operative—number this Clause 29, that will be how this Article refers to this provision.

[15] BELLAMY, *supra* note 10, at 26.

[16] *Id.* The course of proceedings makes it clear that the king understood this action was of dubious legality. Edward attempted to insulate himself from the charge that he had denied Gruffydd due process of law by convening a Parliament before passing sentence, which had been given the opportunity to affirm that the allegedly treasonous actions met the legal definition of that crime. However, since the peers had not adjudicated Gruffydd's guilt, the order Edward issued for his execution was extralegal, even by the standards of the early Middle Ages.

[17] *Id.* at 33–37. This was problematic because Wallace was declared an outlaw despite the fact that he had allegedly never sworn fealty to Edward.

[18] D. A. L. Morgan, *The Political After-Life of Edward III: The Apotheosis of a Warmonger*, 112 ENG. HIST. REV. 856, 877 (1997).

[19] *Id.*

[20] As a result, it was established that suggestions of treason should be brought not to the king, but to his entire council, and that those accused would enjoy process of law consistent with the Magna Carta. *See* 37 Edw. 3, c. 18 (Eng.).

[21] The Treason Act, 1351, 25 Edw. 3, c. 2, § 5 (Eng.).

conviction of the accused on the king's own word that he was in fact guilty";[22] the "act was of the greatest significance legally, politically and constitutionally . . . its importance was second only to that of the Magna Carta."[23] As a consequence, there have been no executive death warrants issued in England—or any of its former colonies—since Edward III's time. Thus, the targeted killing of Al-Awlaki brings to an end seven consecutive centuries of faithful observance to the Magna Carta's decree that no one be killed by the executive without a trial.

Edward I's order that Gruffydd be put to death without benefit of the law (and other related abuses of justice) led to a significant backlash from the legal community. The backlash catalyzed the first safeguards against extrajudicial execution orders based on an executive's allegation that the accused had committed treason. Owing to their position as the bedrock of fundamental legal rights, these protections survived numerous constitutional crises. Over the centuries that followed, however, their enforcement depended on the vigilance of the legal profession. It is now incumbent upon this generation of jurists to decide whether we should return to the early medieval paradigm of executive death warrants. If we agree, as this Article proposes, that this would constitute a decisive and perilous rejection of the rule of law, the concept of law itself, and the destruction of our constitutional tradition—then we can set that inquiry aside permanently and turn instead to the question of how these death warrants can be stopped.

II. THE CROSSROADS, AND THE TRADITION THAT LEADS US THERE

A. Al-Aulaqi v. Obama and the Issues that it Raises (and Fails to Raise)

> *The argument . . . that however adequate the "open court" rule may have been in 1628 or 1864 . . . is distinctly unsuited to modern warfare conditions . . . is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. . . . It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.*[24]
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> *– Justice Murphy (1946)*

The *Al-Aulaqi* lawsuit makes it clear that the same arguments that the Plantagenet and Stuart kings used in attempts to weaken the Magna Carta and subsequent constitutional protections have been revived in a modern form. The complaint correctly asserts that "[t]he right to life is the most fundamental of all

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[22] BELLAMY, *supra* note 10, at 89.

[23] *Id.* at 100 (relying on Edward Coke for the proposition that the Treason Statute (1351) was of the utmost constitutional significance).

[24] Duncan v. Kahanamoku, 327 U.S. 304, 329 (1946) (Murphy, J., concurring).

rights."[25] However, the response to the Defendants' motion to dismiss notes that "the upshot of its arguments is that the executive, [who] must obtain judicial approval to monitor a U.S. citizen's communications or search his briefcase, may execute that citizen without any obligation to justify its actions to a court or to the public."[26] These arguments were of no avail in the District Court, which held that these allegations were indeed unreviewable in any court, because the executive had asserted, purportedly correctly, that addressing a violation of the right of life involves a nonjusticiable political question. Al-Awlaki was thus told that he was to have no day in court before being killed.[27]

Accordingly, seven hundred years after the executive death warrants issued by King Edward I (and four hundred years after a decisive rejection of King James I's tentative attempts to revive the practice), we appear to be at a similar crossroads of history. However, it remains to be seen whether carrying out an executive order to kill an American citizen will lead to a backlash that reaffirms the importance of the bulwarks against this exercise of arbitrary power over life and death, or whether it leads to an implicit decision to abandon the rule of law and the constraints on executive power that have defined our constitutional tradition for centuries.

The early history of the resistance to arbitrary executive authority is important to the worldview and legal theory of the Framers of the Constitution. This Article argues that this history provides the best lens through which we might scrutinize the constitutionality of the targeted killing of American citizens. In doing so, this Article attempts to bring back to the forefront what is at stake in the *Al-Aulaqi* lawsuit: not merely the potential harm to the targeted individual, but the damage this might inflict on our constitutional tradition. Specifically, this Article will argue that if the courts uphold a decision declaring that the president's powers are so broad as to preclude any judicial determination of whether the targeted killing program is prohibited by the Due Process Clause, we stand to lose the benefits of a seven-hundred year old tradition of resistance to arbitrary power.

B. The Constitutionalist Tradition and Its Limits on Executive Power

There are a number of pertinent lessons to be learned from the Anglo-American historical development of checks on the powers of the executive to order the execution of alleged traitors.[28] This Article's historical survey will demonstrate that the Framers' approach to due process and extraordinary executive power drew

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[25] Complaint for Declaratory and Injunctive Relief at ¶ 2, Al-Aulaqi v.Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469).

[26] Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss at 1, *Al-Aulaqi*, 727 F. Supp. 2d 1.

[27] *Al-Aulaqi*, 727 F. Supp. 2d at 52.

[28] Note the equivalence of the act of treason with the status of a traitor (which is important to the argument below. *See Traitor*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/204453 (last visited Nov. 16, 2011) (defining traitor in sense two as: "[o]ne who is false to his allegiance to his sovereign or to the government of his country; one adjudged guilty of treason . . . or of any crime so regarded").

upon the lessons of several struggles against theories of extraordinary executive power. These struggles include the colonial resistance to the arbitrary power of a sovereign, unrepresentative legislature; the crisis of the English Civil War (when the rule of law was threatened by theories of executive power propounded by the Stuart monarchs); and similar episodes in the late Middle Ages, when it was still uncertain whether the Magna Carta's conception of due process would survive. Responses to these arguments were cumulative. The common lawyers who championed the ideals of the rule of law across time developed a constitutionalist tradition, each generation building on the work of the last, in a process that shaped the specific formulations of the protections that would later be embodied in the Constitution and the Bill of Rights.

This Article argues that an advocate of the rule of law who is confronted by *Al-Aulaqi v. Obama* must ask whether a decision that effectively affirms the president's power to issue executive sentences is consistent with the rule of law—which is itself the central pillar of the constitutionalist tradition. The theory of executive power represented by this executive order is antithetical to the tradition in which every leading common lawyer since Henry of Bracton (the first, and most influential, truly English commentator in the medieval era) has helped to construct. Given this question, it is not alarmist to ask whether this decision might catalyze a post-constitutional paradigm, since it denotes a radical departure from the common law tradition.

This historical background is necessary to understand whether the Framers would have considered the executive death sentence at issue in *Al-Aulaqi* to be inconsistent with the vision of the rule of law that undergirds the Constitution. This question is premised on the position that "the Founding Fathers' faith in the existence of fixed constitutional principles helped them to establish the institutions that have effectively, if not absolutely protected individual autonomy."[29] In order to understand the meaning of these constitutional principles, we must appreciate that the Founding Fathers saw themselves as participants in a constitutionalist project that extended across time; that they were connected via participation in a living tradition with those common lawyers in the Anglo-American tradition who had espoused constitutionalism. They saw the term "constitutionalism" as:

> [D]escriptive of a complicated concept, deeply imbedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials.[30]

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[29] WILLIAM E. NELSON & JOHN PHILLIP REID, THE LITERATURE OF AMERICAN LEGAL HISTORY 288 (1985).

[30] David Fellman, *Constitutionalism*, *in* 1 DICTIONARY OF THE HISTORY OF IDEAS: STUDIES OF SELECTED PIVOTAL IDEAS 485, 485 (Philip P. Wiener ed., 1973).

This Article will demonstrate that the Framers believed that they could learn from the struggles of earlier generations of lawyers who had toiled in support of the rule of law and against the arbitrary judgment of kings. To understand the Framers' ideas, we must examine their appreciation and appropriation of the concepts outlined by the constitutionalists they saw as their own antecedents.

Before addressing the question of whether the targeted killing of Al-Awlaki is inconsistent with the rule of law, one should first consider whether such a killing is explicitly prohibited by the text of the Constitution itself. This Article will show that it is. However, conclusive proof will not be available until an analysis of the historical context of the constitutional tradition clarifies the scope of constitutional due process guarantees. Still, the Constitution itself provides a strong indication that the Framers were particularly concerned with the possibility of this sort of executive punishment of alleged traitors.[31]

The two constitutional provisions most relevant to this analysis—the Bill of Attainder Clause and the Treason Clause—predate even the Bill of Rights and were thought so fundamental as to be included in the document that created the framework for the government and its relationship with the nation's citizens.[32] Accordingly, it is shocking to note the failure to raise the question of the applicability of these clauses in the memorandum of the Office of Legal Counsel—specifically in the argument that Al-Awlaki's killing would be constitutional.[33] It will be argued below that these clauses are directly on point, and thus the killing of Al-Awlaki was grossly unconstitutional, having ignored due process protections that the Framers held to be of the utmost significance.[34] Furthermore, these clauses demonstrate that the administration has chosen not only to violate the constitution, but to break with eight hundred years of constitutionalist precedent.

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[31] *See infra* notes 62–76 and accompanying text.

[32] *See infra* notes 35–90 and accompanying text.

[33] Savage, *supra* note 8, at A1 ("The secret document provided the justification for acting despite an executive order banning assassinations, a federal law against murder, protections in the Bill of Rights and various strictures of the international laws of war, according to people familiar with the analysis.").

[34] *See infra* notes 35–90 and accompanying text.

III. THE BILLS OF ATTAINDER AND TREASON CLAUSES— AND WHAT THEIR CONTEXT REVEALS

A. Does the Bill of Attainder Clause Address Executive Death Warrants?

> *Again, there is no liberty if the judiciary power be not separated from the legislative* and executive. *Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*[35]
>
> *– Montesquieu (1752)*

This inquiry must begin with the simple question: if the Founding Fathers had believed that an order by the president to have an American citizen executed on his own authority was abhorrent to their constitutionalist ideals, why is such an order not explicitly forbidden by the Constitution—in the same manner as the prohibition on bills of attainder by Congress? The text of the Constitution suggests that the Framers may have believed that such an explicit command was unnecessary. This conclusion supported by the historical context detailed in the Sections that follow.

The second half of Article I, § 9, clause 3 of the Constitution is commonly known as the Bill of Attainder Clause. It simply states: "No Bill of Attainder . . . shall be passed."[36] This clause illustrates the Framers' decision to break with existing British legal practice: a bill of attainder was a device by which the British Parliament continued to assert that it might sentence to death those accused of treason.[37] This was deemed such a danger to liberty by the Framers that it is the only specific constitutional guarantee pertaining to due process that is absolute in its formulation ("no bill . . . shall be passed"), whereas the other provisions are merely qualified guarantees, e.g., the rights to be free from "unreasonable searches" and "excessive bail."[38] However, the intended scope of this unqualified protection against extrajudicial death sentences is not immediately clear.

Because it refers specifically to bills, it has become customary to construe the meaning of the Bill of Attainder Clause as forbidding any "legislative act which inflicts punishment without judicial trial," following the definition of that term

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[35] BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 182 (Thomas Nugent trans., D Appleton & Co. 1900) (1752).

[36] U.S. CONST. art I, § 9 cl. 3.

[37] *See, e.g.*, The Attainder of the Duke of Monmouth, 1685, 1 Jac. 2, c. 2 (Eng.).

[38] U.S. CONST. amend. IV, VIII; *see also* Jane Welsh, Note, *The Bill of Attainder Clause: An Unqualified Guarantee of Process*, 50 BROOK. L. REV. 77, 80–81 & n.12 (1983) (exploring the relationship between the Bill of Attainder Clause and due process protections on the one hand, and other, more specific Bill of Rights protections on the other).

found in the opinion of the watershed case of *Cummings v. Missouri*.[39] However, since *Cummings* involved the applicability of the clause to a state constitution,[40] it is unclear whether the Court intended this to be a restrictive definition.

Despite over a century of intervening jurisprudence, a court recently concluded that, "[n]either the Supreme Court nor the Second Circuit directly has addressed the issue of whether the Bill of Attainder Clause applies to non-legislative bodies."[41] Yet in at least two opinions, justices of the Court have expressed the intent to expand the protection of the Clause to actions of the executive, albeit in circumstances far less troubling that those detailed in *Al-Aulaqi*.

In his concurrence to an opinion disposing of a case that challenged actions of the Attorney General, Justice Hugo Black reasoned that, "I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution."[42] In a later case, Justice Douglas joined Black in a dissent that articulated a similar argument.[43]

Justice Black and Justice Douglas's theory of the applicability of the Bill of Attainder clause to executive punishment was not entirely original. In a case before the United States District Court for the Southern District of New York in 1874, the court applied the standards of *Cummings* to decide whether an Italian-American extradition convention ("independent[] of statute or treaty") that gave "the executive of the United States . . . the right to surrender fugitives from justice" constituted a Bill of Attainder.[44] However, as is the case in many constitutional challenges to executive acts involving the Bill of Attainder Clause, the court's holding did not address this issue directly, since the executive act was not held to constitute punishment.

That said, there were also subsequent cases in which lower courts held by implication that an executive act, if it constituted punishment, might offend the Bill

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[39] 71 U.S. (4 Wall.) 277, 323 (1867) (concluding that a bill of attainder that ordered execution was similar to a bill of pains and penalties and that the Bill of Attainder Clause forbade both).

[40] *Id.* at 316.

[41] Jamaica Ash & Rubbish Removal Co. v. Ferguson, 85 F. Supp. 2d 174, 184 (E.D.N.Y. 2000). *But cf.* Cooperativa v. Newcomb, No. 98-0949-LFO, 1999 U.S. Dist. LEXIS 23168, at *18 (D.D.C. Mar. 29, 1999) (reasoning that "there is no apparently authoritative case law holding that the prohibition against bills of attainder applies to actions of the executive branch").

[42] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 144 (1951) (Black, J., concurring) (discussing the applicability of the Bill of Attainder Clause to the actions of the attorney-general).

[43] Uphaus v. Wyman, 360 U.S. 72, 108 (1959) (Black, J., dissenting) (involving contempt order issued against a recalcitrant witness subpoenaed to testify before an investigative committee chaired by the New Hampshire Attorney General).

[44] *In re* De Giacomo, 7 F. Cas. 366, 369 (S.D.N.Y. 1874).

of Attainder Clause. Namely, in *Hoffa v. Saxby*,[45] the United States District Court for the District of Columbia reasoned that an executive act could constitute a bill of attainder in precisely the same manner as a legislative act.[46] Considering the claim that the condition attached to James Hoffa's presidential pardon (which banned him from union leadership until 1980) was a bill of attainder, the court opined:

> The condition attached to plaintiff Hoffa's commutation disqualifying him from union management is virtually identical to the type of regulation sustained in *De Veau*. . . . [I]t was the state legislature which imposed the restriction [in *De Veau*] while here the restriction came about by way of executive action. We find, however, that this difference does not legally distinguish *De Veau* from the case at bar . . . . [despite the fact that] we have found that the condition attached to Hoffa's commutation emanated from the President's explicit grant of power under Article II, Section 2 Clause One of the Constitution.[47]

According to Michael P. Lehmann: "The court in *Hoffa*, then, seems to accept and apply the theory . . . devised by Justice Black."[48] Additionally, Lehmann noted that other federal courts have expressed a greater willingness to reason that an executive act might constitute a bill of attainder where "Congress had delegated rulemaking authority to the executive branch."[49]As a result of these cases, it would be possible to bring a robust constitutional challenge to the targeted killing program as a violation of the Bill of Attainder Clause *stricto sensu*.

Alternatively, one could bring such a challenge by arguing that the executive action is really legislative action, insofar as it was merely delegated to that branch by Congress. Namely, one could argue that when the president and the National Security Council exercise the power to add names to the targeted killing list, they do so pursuant to the congressional authorization granted by Congress when it passed the Authorization for Use of Military Force against terrorists.[50] However, such a holding would seem to run against the grain of the majority of lower courts' cases, which seized on the language of *Cummings*, despite the fact that the

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[45] 378 F. Supp. 1221 (D.D.C. 1974).

[46] *Id.* at 1238–40.

[47] *Id.* at 1239.

[48] Michael P. Lehmann, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 HAST. CONST. L.Q. 767, 803 (1978).

[49] *Id.* at 801.

[50] Pub. L. No. 107-40, 115 Stat. 224 (2001). Note that congressional authorization of the targeted killing program is necessary for it to be legal under domestic law. *See* Jack Goldsmith, *Is the Obama Administration Relying on Article II for Targeted Killing?*, LAWFARE (Sept. 17, 2010, 1:12 PM), http://www.lawfareblog.com/2010/09/is-the-obama-administration-relying-on-article-ii-for-targeted-killing/.

language was dicta—and this specific question, whether a bill of attainder must be a legislative act, was not at issue in that case.[51]

One might argue in response that this second counterargument is wholly inconsistent with the spirit of the Clause. In his seminal hornbook on constitutional law, Laurence H. Tribe wrote in favor of Justice Black's view of the purpose of the Bill of Attainder Clause:

> Insofar as the ban on bills of attainder is understood "not to prohibit trial by a particular body but rather to prohibit trial by legislative method, that is, to assure a defendant adequate judicial safeguards regardless of what body tries him," it would make nonsense to view the ban as less applicable to executive officers . . . . [W]hat it will mean is that the case for procedurally fair participation by such persons [targeted for executive action] should be understood to rest not only on the general norms of fairness derived from the due process clauses . . . but also on the more precise concerns of the . . . bill of attainder clause[].[52]

As will be demonstrated in Sections below, Tribe's view is entirely consistent with the Framers' understanding of the evils of bills of attainder and their constitutionalist context.[53] However, there is another way—one that is perhaps more accessible to jurists without the historical knowledge necessary to understand Tribe's reasoning—to argue that Justice Black was correct when he reasoned that executive acts should be as constitutionally suspect as legislative acts when they single out an individual for extrajudicial punishment (or execution). Namely, one can argue that:

> [H]e meant that the restrictions on legislative power embodied in the proscriptions against bills of attainder should be applied, *mutatis mutandis*, to executive acts. Such an application would not be an attempt to extend article one, sections nine and ten of the Constitution, but would rather serve as a specific technique for assuring the constitutional guarantees of procedural due process.[54]

This seems to be the correct reading of Black's statements in *McGrath* regarding the constitutional limitations on the powers of the executive branch. His basic argument was that the Founding Fathers believed that punishment of alleged traitors was necessary, but citing James Madison in Federalist Number 42, Black

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[51] *See, e.g.*, Korte v. Office of Pers. Mgmt., 797 F.2d 967 (Fed. Cir. 1986) (holding that "the Bill of Attainder Clause . . . is a limitation on the authority of the legislative branch. . . . Korte has cited no authority, and we are aware of none, holding that the clause applies to the executive branch").

[52] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 500–01 (1978) (citations omitted).

[53] *See infra* notes 56–74 and accompanying text.

[54] Lehman, *supra* note 48, at 804–05.

argued that constitutional safeguards like the Bill of Attainder Clause and the Treason Clause had been necessary to prevent allegations of "new-fangled and artificial treasons."[55] These clauses exclusively vested the power to punish these crimes in the courts, to avoid an end-run around the guarantees of due process. However, Justice Black's theory—that the Bill of Attainder Clause informs the Constitution's guarantees of due process, which limit both Congress and the president—should be tested by way of comparison to the writings of the Framers themselves. If his theory passes this test, then it should be clear that the fundamental unconstitutionality of the targeted killing program must be addressed. This Article will return to this issue shortly before its conclusion.

B. The Framers' Rationale for the Clause, and What It Presupposes

Both the context surrounding the framing of the Constitution and the words of the Framers in that setting establish that the motivation behind guarantees of due process (in particular the Bill of Attainder Clause) was not due to a special suspicion of the legislative branch. Instead, the motivating concern was to see that that punishment for treason could not be inflicted "without a judicial declaration of guilt."[56] To illustrate this point, we must begin by considering the discussions pertaining to the rationale of the proposed prohibition on bills of attainder in 1787.

In Federalist Number 78, Alexander Hamilton made it clear that this Clause was merely the particular application of a more general principle. He stated what was by then a truism—and entirely uncontroversial to the American constitutionalists—that "there is no liberty if the power of judging be not separated from the legislative and executive powers."[57] It is only in the light of this statement that we can understand the true meaning of what follows in the next paragraph:

> By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[58]

If Hamilton believed that the power of punishment should be vested solely in the judiciary, his explanation of why the Constitution contains specified exceptions to the legislative authority but not to the executive authority become clearer. He

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[55] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 144 n.2 (1951) (Black, J., concurring) (quoting THE FEDERALIST NO. 42 (James Madison)).

[56] Welsh, *supra* note 38, at 80.

[57] THE FEDERALIST NO. 78, at 292 (Alexander Hamilton).

[58] *Id.* at 292–93.

appears to suggest that when the Constitution was framed and ratified, Anglo-American constitutional theory was divided on the question of whether the legislature had the power to try and punish citizens for high treason.

In contrast, there was no contemporary dispute over the purported power of the executive to punish—this issue had been decided in the negative a century earlier. The Star Chamber had been abolished in 1641;[59] conversely, at the time of the American Revolution, the British Parliament continued to assert its power to attaint purported traitors.[60] The fact that the Constitution prohibits bills of attainder and not royal proclamations of attainder (by then long obsolete), should not be taken as evidence that the Framers endorsed the idea *ex silentio* that the president should have the power of judging—especially since Hamilton felt that this would mean that there would be "no liberty." This absence merely indicated that in 1787 this idea had already been expressly rejected. By then it was the consensus position that the common law could not countenance such an anti-constitutionalist idea,[61] and the idea was hardly worth mentioning.

Detailed proof of this conclusion will follow in Part III, which demonstrates why the Framers thought it unnecessary to state that the executive had no power to enact attainders for treason without the cooperation of the legislature. However, before proceeding to that analysis, there is some additional textual evidence in the Constitution for this conclusion. It is not found in the Bill of Attainder Clause, but in its more famous (but by now almost forgotten) cousin, the Treason Clause.

C. What the Treason Clause Tells About the Framers' Views of Attainder

The historical record of the discussions among the Framers relating to the Treason Clause is not vast—indeed, in comparison to other provisions the record is rather sparse. However, when considered collectively, it becomes clear that "[t]he basic policy of the treason clause written into the Constitution emerges from all the evidence available as a restrictive one."[62] That is, "[t]he matter which dominated all references to the subject, however, was . . . its careful limitation . . . . [T]he limitations of the treason clause must reflect deeply held notions of individual security against official oppression."[63]

Echoing Hamilton's concerns with respect to the Bill of Attainder Clause, James Wilson (whom "[c]ircumstantial evidence suggests . . . played a significant role in shaping the final contours of the Treason Clause"[64]) stated that "if the crime of treason be indeterminate, this alone is sufficient to make any government

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[59] CONRAD RUSSELL, THE FALL OF THE BRITISH MONARCHIES 1637–1642 353–354 (1991).

[60] *See, e.g.*, LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 70 (2001).

[61] *See id.* at 68–78.

[62] Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 395 (1945).

[63] *Id.* at 395–96.

[64] Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 872 (2006).

degenerate into arbitrary power."[65] Consequently, to understand the Framers' views on the limits of the governmental power in this particularly sensitive area, we should also pay close attention to another of the "great forgotten clauses of the Constitution: the Treason Clause."[66]

The Treason Clause of the Constitution[67] is found in Article III, which pertains to the judicial branch. This is the first indication that the Framers considered the sentencing of that crime to be squarely and exclusively within the province of the judiciary. Of course, Article III, Section 1 states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In *Marbury v. Madison*[68] Chief Justice Marshall opined that this Clause made it clear that "[t]he constitution vests the whole judicial power of the United States in one supreme court, and [the] inferior courts . . . . This power is expressly extended to all cases arising under the laws of the United States."[69]

That said, by placing the definition of the crime of treason in Article III,[70] the Framers unreservedly stipulated that the power to adjudicate and sentence the crime of treason rested with the judiciary alone. Furthermore, the section of the Treason Clause describing the heightened evidentiary requirements also provides substantiation that the Framers intended that the crime only be punished in the courts established pursuant to Article III: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[71]

Carlton F.W. Larson has persuasively argued that the Treason Clause establishes that "persons who levy war against the United States are entitled to specific procedural protections and they must be prosecuted in an Article III court."[72] What naturally follows from this argument is the proposition that "persons who owe allegiance to the United States are not subject to military authority for acts that amount to treason but must be tried in the civilian courts under the full protections of Article III."[73] To do otherwise would contradict the constitutional requirement that those accused of treason be tried in "open Court"[74]

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[65] 3 WORKS OF JAMES WILSON, *in* LECTURES ON LAW 96 (John Fine & James Kent eds., 1852).

[66] Larson, *supra* note 64, at 865.

[67] U.S. CONST. art. III, § 3.

[68] 5 U.S. (1 Cranch) 137 (1803).

[69] *Id.* at 173.

[70] U.S. CONST. art. III, § 3, cl. 2. It is worth noting that treason is the *only* crime defined within the Constitution.

[71] U.S. CONST. art. III, §3, cl. 1.

[72] Larson, *supra* note 64, at 865.

[73] *Id.* at 893–94. Note that the Supreme Court held in *Schneider v. Rusk* that a citizen continues to owe allegiance to the United States despite moving overseas, even permanently. 377 U.S. 163, 169 (1964) ("Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance.").

[74] U.S. CONST. art. III, §3, cl. 1.

and would deny them the special procedural and evidentiary protections specified in the Treason Clause, which exceed even the protections of the Bill of Rights.

A person whose crimes appear to meet all of the elements of treason can, of course, still be convicted of a lesser charge that does not implicate these specific constitutional protections. John Lindh, the so-called American Taliban, pled guilty to providing material support to a terrorist organization (i.e., to a group that engages in terrorism generally, and not necessarily against the United States), rather than to the crime of adhering to and providing aid and comfort to the enemy.[75] However, accusing someone of a crime that meets the constitutional definition of treason and then imposing the penalty of treason—death—after denying them the specific protections of the Treason Clause would clearly be an illicit means of denying the accused the constitutional protections that the Framers thought were of the highest importance.

The Treason Clause establishes that no one shall be convicted of treason except in an Article III court. The Bill of Attainder Clause demonstrates that the Framers explicitly prohibited the only extant alternative for punishing an alleged traitor (other than after trial)—the bill of attainder. Reading these clauses together, we can conclude from the text of the Constitution alone that the Framers intended the Constitution to exclude the possibility of any means of sentencing and punishing treason other than after trial in open court. It is likely—given the British practice of having trials for treason in the "High Court of Parliament," or in the case of peers, in the House of Lords—that the Framers were more concerned with preventing trials for treason within Congress than they were with the possibility that the executive branch would hold secret trials resulting in executive death sentences. This is only because by 1787, such trials were seen as extraconstitutional abuses that had been long ago been eliminated.

As the next Section details, clear evidence exists to show that some of the Framers took further action to curtail attempts to avoid the guarantees of due process for traitors which they had provided in the Constitution.[76] In doing so, they provided additional evidence that the Framers would have viewed the executive death warrant currently at issue as abhorrent, even when placed into the context of the use of the president's powers as commander-in-chief.

D. The Framers' Attitudes Towards Military Jurisdiction over Treason

Since the foregoing analysis rests upon the assumption that there is no general exception to the requirements of the Bill of Attainder Clause in wartime, this Article must address a possible counterargument before it returns to the question of the source of the Framers' views on the dangers of unbridled executive power. Namely, one might argue even if Al-Awlaki had been targeted by the military pursuant to President Obama's executive orders, that he was merely being subjected to military justice. Ignoring the fact that Al-Awlaki was likely killed by a

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[75] *See* United States v. Lindh, 227 F. Supp. 2d 565, 567–69 (E.D. Va. 2002).

[76] *See infra* 78–89 and accompanying text.

drone operated by the Central Intelligence Agency,[77] there are responses to this based on both the text of the Constitution itself and the way that the Framers subsequently interpreted it.

As a preliminary matter, the Framers intended that the Constitution carefully circumscribe the president's war powers.[78] The president is not only denied the power to declare war, but he is also denied the ability to authorize military acts that are "less than full-scale warfare" via the Marque and Reprisal Clause of the Constitution,[79] which is found within the list of the enumerated powers reserved to Congress in Section 8 of Article I. By placing this Clause into Article I of the Constitution, the Framers made it clear that Congress, and not the president, possessed the power to authorize military acts that would fall short of the sort of actions that would lead to war, such as the seizure of persons and property. "[T]he Marque and Reprisal Clause was inserted in Article I to ensure that lesser forms of hostilities came within congressional power."[80]

It remains clear even today that in the absence of a declaration of war, the president's authorization of military acts that fall short of war[81] are governed and limited by the authorization granted by Congress.[82]

Subsequent events also made it clear that the Founding Fathers held that the Constitution prevented the president from ordering military action that Congress had failed to authorize, or even from slightly exceeding the narrow bounds of what had been authorized. When President Washington discussed a potential military expedition against the Cree tribe, he stated, "no offensive expedition of importance can be undertaken until after [Congress] shall have deliberated upon the subject, and authorized such a measure."[83] Likewise, President Jefferson requested

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[77] Mazzetti, *supra* note 4, at A1.

[78] The history of the interpretation of these powers during the twentieth century is outside of the scope of this Article.

[79] U.S. CONST. art. I, § 8, cl. 11; Jules Lobel, *"Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 68 (1995). Reprisal was the practice whereby Congress would authorize acts of a warlike nature that were short of "perfect" war.

[80] Lobel, *supra* note 79, at 70.

[81] Such acts include the approval of "Predator drone" strikes within nations against whom we have not declared war and that vigorously assert that the United States has no right to conduct these strikes within their borders, such as Pakistan—or in Awlaki's case, Yemen. *See, e.g.*, *Halt drone strikes, U.S. told Pakistan threatens to cut off supply line to Afghan allies*, TOLEDO BLADE (May 15, 2011), http://www.toledoblade.com/news/2011/05/15/Halt-drone-strikes-U-S-told-2.html.

[82] Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001). It should also be noted that if the military's power to carry out these acts can only be derived from congressional authorization, then the targeted killing by the military of a United States citizen runs directly against the Bill of Attainder Clause, since Congress could clearly not authorize the president—even by implication—to carry out an act that the Congress was forbidden to perform by the Constitution.

[83] Jeffrey D. Jackson, *The Dog of War as a Puppy: The Constitutional Power to Initiate Hostilities as Answered by the Framing*, 1 GEO. J.L. & PUB. POL'Y 361, 368–69 (2003) (quoting 33 THE WRITINGS OF GEORGE WASHINGTON 73 (J. Fitzpatrick ed., 1940)).

congressional authorization to take offensive measures against Tripolitan pirates even after the schooner *Enterprise* had repelled an attack.[84] The courts of this era endorsed this interpretation repeatedly in the various cases brought as a result of the hostilities occasioned by the Quasi-War with France. In *Little v. Barreme*,[85] Chief Justice Marshall held that Captain Little was personally liable for the damages arising from his seizure of a Danish ship pursuant to a presidential order authorizing him to do so, because the ship had been leaving port, and Congress had only authorized the president to order the seizure of ships entering French ports.[86]

More importantly, the Framers understood that the Constitution prevented the president from using the military to evade the protections of the Treason Clause. "The first Congress passed legislation placing military troops under Congressional authority,"[87] and the 1806 amendments to this statute "carefully limited military jurisdiction, even in time of war, to those who were not citizens or did not otherwise owe allegiance to the United States."[88] President James Madison—often called the "Father of the Constitution" because he was its principal author—intervened personally in 1812 to stop a court-martial of an American civilian, "directing that he be released unless 'arraigned by the civil courts for treason.'"[89]

It seems clear that the Framers would not have countenanced arguments that the president could evade the bar on Bills of Attainder by authorizing an executive death warrant to be executed by the military, since the president cannot order the military to do anything outside the bounds of what Congress has authorized (or can authorize). This is evidenced by the text of the Constitution as well as James Madison's continued belief that the president's powers as the commander-in-chief could not trump the fundamental requirements of liberty.

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[84] *See* Jackson, *supra* note 83, at 378–79.

[85] 6 U.S. (2 Cranch) 170 (1804).

[86] *Id.* at 178–79. *See generally* Katherine A. Wagner, Little v. Barreme: *The* Little *Case Caught in the Middle of a Big War Powers Debate*, 10 J.L. SOC'Y 77, 125–27 (2008) (noting that the decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), followed from the holding in *Little*, insofar as the Court held the president does not have the power to create military commissions to try Guantanamo Bay detainees because it would conflict with the Geneva Conventions and the congressional intention expressed in the Uniform Code of Military Justice, which exclusively gave the United States military jurisdiction).

[87] Brief for Law Professors with a Particular Interest in Habeas Corpus Law, as Amici Curiae Supporting Respondent, Rumsfeld v. Padilla, 542. U.S. 426 (2004) (No. 03–1027), 2004 WL 792208 at *22–23 [hereinafter Padilla Law Professors Amicus Brief]; *see also* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96.

[88] Padilla Law Professors Amicus Brief, *supra* note 87, at *23–24 (discussing limitations to those persons who were not subject to the Treason Clause).

[89] *Id.* at *24 (quoting *Case of Clark the Spy*, 1 MILITARY MONITOR & AM. REG. 121–22 (Feb. 1, 1813)).

E. The Need to See Al-Aulaqi Through the Tradition the Framers Inherited

The facts alleged (and essentially admitted by the government, as the plaintiff's subsequent briefs make clear) in Al-Aulaqi's pleadings reveal that the current administration's approach to executive death warrants is in direct opposition to the intentions of the Framers. Here, Al-Awlaki was explicitly accused of levying war against the United States—effectively labeled a traitor on this basis in a resolution presented to the House of Representatives.[90] Instead of being tried—in absentia or otherwise—in an Article III court and given the additional procedural protections the Framers thought necessary, he was deemed by the president (on the advice of the National Security Council) to be subject to quasi-military jurisdiction. An executive death sentence was issued—via an act of attainder of which the Framers could scarcely have conceived—which the president now claims is not reviewable in any court. In summary, Al-Awlaki was given the punishment appropriate for treason without any sort of trial at all, much less the one that the Framers mandated, on the basis of the sort of act of attainder (as we shall see below) that had already been considered extraconstitutional.

In this situation, perhaps it is time to devote attention to the legal context in which the Framers drafted those sections of the Constitution that limit the punishment of treason. Ignoring the constitutional tradition that underlies the constitutionalist vision of the rule of law risks stepping outside of the perspective engendered by the common law—an act that would make the Constitution unrecognizable to its Framers. In response to this danger, this Article will make the argument that executing a citizen for treason pursuant to a presidential death warrant is not merely against our constitutional order and the rule of law that it establishes, but it also destroys the Constitution's very preconditions. Embracing this new regime may constitute an irreversible and radical break from the constitutionalist tradition and the most fundamental premises of the common law itself. To understand the danger of these changes requires understanding the idea of the rule of law embraced by the Framers and embedded in the Constitution. To do this, we must turn to history.

IV. THE FRAMERS' KEY SOURCES: BLACKSTONE, HALE, COKE, THE MAGNA CARTA

> *[Treason] is a technical term. It is used in a very old statute of that country, whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it . . . . It is said that this meaning is to be collected only from adjudged cases . . . . But those*

[90] *See Congressman Wants Radical Cleric's Citizenship Revoked*, FOX NEWS (Apr. 21, 2010), http://www.foxnews.com/politics/2010/04/21/congressman-wants-radical-clerics-citizenship-revoked/.

> *celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale . . . and Blackstone, are not lightly to be rejected.*[91]
>
> *– Chief Justice Marshall (1807)*

The Framers drafted the Constitution in a particular intellectual context that was significantly influenced by the Magna Carta and the works of Coke, Hale, and Blackstone. To understand the Constitution adequately for the purposes of this Article, we must examine precisely how the Founding Fathers drew on these sources. We must also examine why they considered themselves perpetuators of the tradition of liberty that made the Constitution's meaning possible. When this is made clear, we will understand how they positioned their own work as part of a continuing tradition that looked on these writings as the antecedents of the Constitution. After clarifying the Framers' position in the constitutionalist tradition, we can address whether the targeted killing program is consistent with the Framers' Constitution—and, more importantly, the constitutionalist tradition that defines the Anglo-American notions of liberty and fundamental law.

A. William Blackstone's Idea of the Rule of Law and its Colonial Reception

The first source this Article will consider is William Blackstone's *Commentaries on the Laws of England*, a writing that had an unparalleled influence on the American lawyers who drafted the Constitution.[92] It served as a conduit through which English jurisprudential developments influenced the Framers and thus affected the development of the Constitution.[93] Consequently Blackstone's *Commentaries* had such a profound influence on the Framers' generation that it "was often used by practitioners 'as a shortcut to the law.'"[94] The *Commentaries* were an "immediate success," particularly in America.[95] "When Blackstone's *Commentaries* were published . . . Americans were among his most avid customers."[96] "American subscribers ordered 1,557 sets—an astounding response [in addition to over a thousand copies ordered individually in addition to those subscriptions placed through printers] . . . . Blackstone's text became ubiquitous on the American legal scene."[97] Thus, "[t]he influence of Blackstone's

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[91] *In re* Burr, 8 U.S. (4 Cranch) 470, 471–72 (1807).

[92] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (13th ed. 2010).

[93] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 59–60 (3d ed. 2005).

[94] Michael D. Pepson & John N. Sharifi, *Two Wrongs Don't Make a Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 AKRON L. REV. 1, 29 (2010) (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 112 (1985)).

[95] 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 12 (Steve Sheppard ed. 2007).

[96] FRIEDMAN, *supra* note 93, at 59.

[97] *Id.* at 59–60.

ideas on the Framers of the Federal Constitution is well known."[98] It is scarcely an exaggeration to say that "[t]he Framers discovered their inspiration for the founding documents of the United States in Blackstone."[99] We turn first to Blackstone's views on the subject to determine whether the Framers' intention when proscribing bills of attainder and the extralegal punishment of treason was to bar only legislative action and leave the president free to issue executive death warrants of suspected traitors. From even the most cursory reading of the *Commentaries*, it becomes evident that this was not the case.

Two sections of Blackstone's writings make it particularly clear that he transmitted the constitutionalist tradition on the rule of law to his American audience—his chapters on the rights of persons and the king's prerogative. In his first book, the chapter on the rights of persons cites chapter 29 of the Magna Carta repeatedly and asserts that the meanings of its guarantee are manifold.[100] However, with respect to the right not to be deprived of one's life without due process of law, Blackstone argues:

> This natural life . . . cannot legally be disposed of or destroyed by any individual . . . merely upon their own authority. . . . [If] the constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical . . . . [T]he constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law.[101]

Later in the chapter, Blackstone outlines in detail the bounds on the king in particular with respect to these practices and the means of circumventing these protections, such as declaring a purported traitor an outlaw:

> It is ordained by *magna carta*, that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8. and 11 Ric. II. c. 10. it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal [that is, on the King's own authority], in disturbance of the law . . . . [a]nd by 1 W. & M. ft. 2 : c. 2. it is declared, that . . . the execution of laws, by regal authority without consent of parliament, is illegal.[102]

Nor might the king create special tribunals that would legitimate these actions:

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[98] DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (1941).

[99] Carolyn A. D'Amore, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 598 n.33 (2006).

[100] BLACKSTONE, *supra* note 92, at 133–45.

[101] *Id.* at 129.

[102] *Id.* at 137–38.

> The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared in the statute 16 Car. I. c. 10. upon the dissolution of the court of starchamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel (which were the course of proceeding in the starchamber, borrowed from the civil law) or by any other arbitrary way whatsoever, to examine, or draw into question, determine or dispose of the lands or goods [and, by implication, much less the life] of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law.[103]

Here, we clearly see that Blackstone was not proposing a new constitutional framework for executive authority, but merely describing what had by then become established as the definitive theory of the balance of powers in Britain. First, the king has no authority to execute the laws (as he might understand them) without the consent of the legislature. Second, the king has no power to create special courts that would circumvent the procedural protections of the Magna Carta. Here, the reference to the Star Chamber is important. For the lawyers of Blackstone's generation (on both sides of the Atlantic), the Star Chamber was considered the zenith of arbitrary power.[104] That said, Blackstone's most explicit statements about the proper boundaries of the executive's powers are found in his section on the king's prerogative:

> After what has been premised in this chapter, I shall not (I trust) be considered as an advocate for arbitrary power . . . . He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases: unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary.[105]

Among the Founding Fathers, the key source of resistance to Blackstone was towards his view of executive power—not that it was too weak, but rather that it

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[103] *Id.* at 138.

[104] *See generally* Ryan P. Alford, *The Star Chamber and the Regulation of the Legal Profession 1570–1640*, 51 AM. J. LEGAL HIST. 553 (2011) (noting that the threat of selective prosecution and arbitrary punishment in the Court of Star Chamber loomed large over the legal profession). Consequently, the ideas of those lawyers (such as Edward Coke) who had prevailed against it were held in high esteem (and conversely, those who defended it, such as Francis Bacon, were held in low regard). The implications of this fact will be explained in the next Subsections.

[105] BLACKSTONE, *supra* note 92, at 243.

was too strong. Accordingly, it is absurd to consider that the Framers would have given powers to the president greater than those of a king.[106]

Blackstone's *Commentaries* was also clear on the constitutional relationship between the executive and the courts, a theme that would echo in the works of the Framers:

> In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the king personally sat in judgment . . . . liberty . . . cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power . . . . For which reason, by the statute of 16 Car. I. c. 10. which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council [i.e., the executive branch] . . . . Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and minister of state.[107]

Again, Blackstone was making the case for the constitutional limitations on the executive's role in the administration of justice within a monarchy. Consequently, it scarcely seems possible to argue that the Framers would have vested implied powers in the executive branch that it would have denied to the legislative branch. The Framers had to explicitly deny the legislative branch the power to pass bills of attainder, since this was deemed acceptable in England at the time, despite Blackstone's reservations about this junction of legislative and judicial power that also clearly influenced the Framers. However, they did not have to deny this power to the executive, since this point had already been established within the British constitutional framework.

Blackstone's ideas on the subject of habeas corpus derived from his understanding of the struggles with King James I on such matters as his power to imprison his enemies without charge, whether acting through the Star Chamber, the Privy Council (in the form of the Council Board) or directly.[108] These ideas were also clearly taken to heart by the Founding Fathers: "The Framers, steeped in the writings of preeminent common law jurists like Coke and Blackstone, understood the writ's central role in safeguarding individual liberty."[109] This importance is recognized not only by scholars but also by leading contemporary jurists. In what is perhaps the most important case heard in this country on the subject of executive power to detain an individual—and to resist judicial review of this imprisonment

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[106] While the Constitution explicitly does give the president the power to sign treaties and to veto bills, though these powers are limited because treaties are subject to ratification and vetoes to override by the requisite supermajority. Even the president's pardon power is not stated in absolute terms, as it does not apply "in cases of Impeachment." U.S. CONST. art. II, § 2, cl. 1.

[107] BLACKSTONE, *supra* note 92, at 258–60.

[108] *See* Alford, *supra* note 104, at 590–605.

[109] Padilla Law Professors Amicus Brief, *supra* note 87, at *3.

through the Great Writ—Justices Scalia and Stevens illustrated how our understanding of our most fundamental constitutional liberties owes much to Blackstone:

> The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. Blackstone stated this principle clearly: "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest magistrate [i.e. the king] to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities . . . To bereave a man of life . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking and therefore a more dangerous engine of arbitrary government." . . . These words were well known to the Founders. Hamilton quoted from this very passage in The Federalist No. 84.[110]

Writing only a decade before the American Revolution, Blackstone makes the argument that habeas corpus as a response to executive detention is vital precisely because the executive can no longer resort to executive death warrants. Such warrants would be "so gross and notorious an act of despotism" as to be considered tyranny, of the sort that virtually mandated a general uprising.[111] Again, this is evidence that while legislative acts of attainder were still considered licit in Blackstone's day, executive acts that "bereave a man of life" certainly were not, but were so abhorrent to the constitutional order that they required no written law to forbid them.[112]

The Revolution, and the constitutional framework that it created, gave further prominence to Blackstone's ideas. Indeed, the Framers' contemporaries viewed the Constitution's vision of the separation of powers as Blackstonian. It is entirely clear from *Marbury v. Madison*[113] that Blackstone's conception of fundamental law had been accepted as the key to understanding the Framers' vision of the role of the judiciary in adjudicating constitutional disputes by the time of Chief Justice Marshall's decision. Thus, his decision to rest his momentous argument upon this authority was not seen as particularly controversial. However, the disagreements

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[110] Hamdi v. Rumsfeld, 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting) (citing BLACKSTONE, *supra* note 92, at 131–33).

[111] BLACKSTONE, *supra* note 92, at 131–32. Note also that King Charles I had been tried for treason before the High Court of Justice and executed only a century earlier for crimes of this magnitude. *See* CLIVE HOLMES, WHY WAS CHARLES I EXECUTED? 93–94 (2007).

[112] BLACKSTONE, *supra* note 92, at 131.

[113] 5 U.S. (1 Cranch) 137 (1803).

between the Framers and Blackstone on the question of parliamentary supremacy have obscured the degree to which Blackstone shaped the Framers' own thoughts and expressions on the topic.

Starting with Federalist Number 78,[114] we can see that Alexander Hamilton uses the concept of fundamental law when describing the binding power of a constitution. He notes that any constitution is a "fundamental law," and as such, where "there should happen to be an irreconcilable variance between [the Constitution and a statute] . . . the Constitution ought to be preferred to the statute . . . . They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."[115]

This label of fundamental law is taken directly from Blackstone. He asserts in the *Commentaries* that all persons have absolute rights, and it is society's principle duty to protect these rights.[116] Society does so by assigning constitutional significance to certain acts that recognize these rights—the acts do not create the rights, because they are at core natural rights. Blackstone lists these acts that set out the "fundamental laws of England": the Great Charter of Liberties (i.e., the Magna Carta as altered and reconfirmed, mentioning by name the Confirmation of Charters), the Petition of Right, the Habeas Corpus Act, the English Bill of Rights, and the Act of Settlement.[117]

Accordingly, the very idea of American constitutional rights, as we understand them, is derived from the constitutionalist tradition manifested through Blackstone. Without the notion of fundamental law, there could be no principle of judicial review of statutes, or indeed of rights that could never be abridged by statute. However, in one important respect, the Framers broke with Blackstone on the question of the power and durability of the fundamental laws.[118] Blackstone himself was forced to recognize that owing to the current constitutional structure, the fundamental laws were not inviolable: "they can only be lost or destroyed by the folly or demerits of its owner: the legislature . . . ."[119] "True it is, that what [the Parliament] do[es], no authority upon earth can undo . . . ."[120] "[T]he power of Parliament is absolute . . . ."[121]

This was true in England at the time due to the triumph of Parliament over the king in the Civil War,[122] and because the Glorious Revolution and the Act of Settlement had established the conditions under which the House of Hanover

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[114] THE FEDERALIST NO. 78 (Alexander Hamilton).

[115] *Id.*

[116] BLACKSTONE, *supra* note 92, at 116–41.

[117] *Id.* at 123–24.

[118] *See, e.g.*, Philip Hamburger, *Foreword: Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 19–21 (2003).

[119] BLACKSTONE, *supra* note 92, at 122–23.

[120] *Id.* at 156.

[121] *Id.* at 157.

[122] *See generally* J. W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 80–97 (3d ed. 1971) (discussing the parliamentary sovereignty that resulted from parliament's expropriation of the king's legal authority).

would take and hold the throne: under Parliamentary authority.[123] "[T]he Glorious Revolution was 'the triumph of liberty, but of a liberty that had been institutionalized in Parliament's supremacy over the crown.'"[124] The result was that:

> During the century following England's Glorious Revolution in 1688, parliamentary supremacy replaced Coke's understanding that due process and higher law checked royal and parliamentary encroachments on substantive liberties. Higher-law constitutionalism, however, was received and adapted by the American colonies in their revolutionary struggle with Britain. Parliamentary supremacy slowly displaced higher-law constitutionalism during the eighteenth century in Britain, but not in America, thereby framing the constitutional conflict that led to the American Revolution and, ultimately, to the American Constitution and Bill of Rights.[125]

In essence, "[b]y the mid-1700s, a competing understanding of the English constitution had taken its place alongside higher-law constitutionalism."[126] Blackstone was forced to acknowledge that, while a court might treat a statute that led to an absurd result as void, it was "without power to enforce this rule, even against parliamentary violations of fundamental English rights."[127] Of course, given that the American Whigs were aggrieved by acts of Parliament (in particular by the Declaratory Act of 1766, in which Parliament claimed that it had the right to legislate for the colonies in all cases whatsoever) parliamentary supremacy was never an attractive constitutional theory in the colonies.[128]

Moreover, the American Whigs had Coke's constitutional theory to compete with parliamentary supremacy. While Blackstone had ignored *Bonham's Case*,[129] the Americans remembered that Coke had asserted that acts, both royal and parliamentary, could be declared void if they offended the Magna Carta.[130] If fundamental law had been extended to include more sources than the Great Charter alone, then by the same reasoning, acts of Parliament that offended these could also be ignored. However, before turning to how the Framers' adapted

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[123] *See* J.R. BROOME, REFORMATION AND COUNTER-REFORMATION: 1588–1688–1988, at 26–27 (1988); *see also* GOUGH, *supra* note 122, at 160–73.

[124] Frederick M. Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law, Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 613 (2009) (quoting 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 67 (1987)).

[125] Gedicks, *supra* note 124, at 611–12.

[126] *Id.* at 613.

[127] *Id.* at 613 n.149.

[128] *See* REID, *supra* note 124 at 68–69.

[129] Bonham's Case, (1610) 77 Eng. Rep. 638; 8 Co. Rep. 114; *see* Gedicks, *supra* note 124, at 613.

[130] *See* Gedicks, *supra* note 124, at 598–600.

Coke's views for their own purposes, we should first address the question of the Founding Fathers' views on the scope of the fundamental laws that were applicable in England.

1. Reception Statutes and the Fundamental Laws of England

> *States did not adopt through the reception statutes those aspects of English law relating to the monarchy . . . . Thus what remains of our English heritage on this point are the basic documents of English liberties—the Magna Carta, the Petition of Right, Habeas Corpus, and the English Bill of Rights.*[131]
>
> *– Judge Wright (1994)*

There remains the question whether the Founding Fathers intended the Constitution to serve as the sole, fundamental law of the United States in 1787. The Framers believed that the states had already adopted the most important elements of the fundamental laws that Blackstone had enumerated.[132] A majority of the colonies had already passed virtually identical reception statutes.[133] Some of these were passed long before the revolution,[134] while others were passed shortly beforehand, or just after the outbreak of hostilities.[135]

The Judiciary Act of 1789 imported the fundamental law, as adopted by the states, into the federal courts by referencing the common law in defining its jurisdiction. Section 34 of the Act states "[t]hat the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[136] And the laws of all the states included reception statutes, or constitutional provisions or judicial decisions that had the same effect.[137] For this reason, "English statutes

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[131] Jones v. Clinton, 869 F. Supp 690, 693 n.1 (E.D. Ark. 1994).

[132] Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 971–73.

[133] *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the States*, 4 VAND. L. REV. 791, 799 (1951).

[134] *See, e.g.*, *id.* at 798 n.32; *see also* 2 STATUTES AT LARGE OF SOUTH CAROLINA 414–15 (Thomas Cooper ed., 1837) (containing the South Carolina reception statute as originally written in 1712).

[135] *See, e.g.*, N.Y. CONST. of 1777, art. XXXV, *available at* www.courts.state.ny.us/history/pdf/library/1777_constitution.pdf ("[S]uch parts of the common law of England, and of the statute law of England and Great Britain . . . shall be and continue the law of this state . . . .").

[136] 1 Stat. 92 (1789).

[137] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 161 n.55 (1996) (Souter, J., dissenting) (listing reception constitutional provisions and statutes of various states). For an example of judicial decisions adopting English common law, see *Fitch v. Brainerd*, 2 Day 163, 189 (Conn. 1805).

enacted before the emigration of the American colonists constituted a part of the common law on its adoption in this country . . . . [T]hey are . . . part of our judicial heritage."[138]

If the colonies had passed reception statutes before 1787, and if the prevailing constitutional theory among the drafters of these provisions was Coke's, then it follows that the Framers believed that the fundamental laws of England—the Petition of Right, the English Bill of Rights, and the Magna Carta—would continue to be the law of the land, and binding fundamental law, after the passage of the Constitution. This is a point of vital importance to the issue at hand, as it provides another possible reason why the Framers felt no need to specify particular restrictions on the executive power as it did with the legislative. The powers of the executive were already bound by earlier fundamental laws, which would continue to be enforced after the Constitution was ratified because of the reception statutes and the Judiciary Act. In short, if Coke's view of the fundamental law was accepted, there was no need for constitutional provisions to constrain the president from passing executive acts of attainder, since these had already been clearly prohibited by the fourteenth century at the latest. All that was required were restraints on similar legislative acts, given parliamentary supremacy.

To understand why this constitutional framework—which triumphed in the wake of the demise of the Stuarts[139]—was considered both immutable and an essential bulwark against the arbitrary executive power that both Blackstone and the Framers despised, we must understand how this order emerged. We turn to the ideas of Matthew Hale, who, along with Coke, was the most important influence over both Blackstone's (who "consciously built on the writings of Hale")[140] and the Framers' conception of the rule of law.

B. Matthew Hale's Treatises and Its Influence on the Framers

> *Intellectual historian Bernard Bailyn writes that "the great figures of England's legal history, especially the seventeenth-century common lawyers, were referred to repeatedly" in revolutionary America, and adds that of these "Hale was a particularly well-known and attractive figure."*[141]
>
> *– Michael D. Ramsey (2002)*

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[138] 15A AM. JUR. 2D *Common Law* § 5 (2011); *see also* United States v. Reid, 53 U.S. (12 How.) 361, 363–64 (1851) ("The colonists who established the English colonies in this country, undoubtedly brought with them the common and statute laws of England . . . .").

[139] *See* GOUGH, *supra* note 122, at 174 (explaining the "ubiquitous appeals" to the fundamental law after the reign of the Stuarts).

[140] Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1733 (1994).

[141] Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1690–91 (2002) (quoting BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30 & n.11 (1967)).

Sir Matthew Hale was one of the most influential jurists of the late seventeenth century. In addition to serving many years as Chief Justice of the King's Bench, Hale authored several influential treatises. Of these, *The History of the Pleas of the Crown*[142] is often thought to be the most significant. It was accepted as one of the "books of authority" by the courts of England and Wales.[143] However, his *History and Analysis of the Common Law of England*[144] arguably had even more of an influence on the development of the constitutionalist tradition. This treatise "was the first attempt to give a comprehensive portrayal of the historical origins and growth of English law, and it remained the standard book on English legal history until the late nineteenth century."[145] It provided the inspiration for Blackstone's *Commentaries*, not only the subject matter, but because it was the first modern example of a comprehensive treatise of English law.[146] By comprehensively reorganizing Coke's seminal abridgment of Littleton's *Tenures*, Sir Matthew Hale created a vital link between Coke (and through him, the earlier medieval juridical tradition) and the modern jurists who followed.[147]

For the purposes of this Article, however, another writing of Hale's is particularly pertinent: his *Reflections on Hobbes's Dialogue of the Laws*.[148] This work best illustrates the decisive difference between the constitutionalist tradition that influenced the founders and the theory of sovereignty that they rejected. This was a decisive conflict in the debates of this age—a crucible out of which emerged the refined ideals of the rule of law that were enshrined in the Constitution. As Sir Frederick Pollock aptly put it, "Hobbes's speculations attracted the criticisms of one of that band of lawyers and historians whose works, as [F.W.] Maitland has said, made the first half of the seventeenth century 'the heroic age of English legal scholarship,'" and of these, Hale's was the most influential.[149]

Hobbes's dialogue was a strenuous criticism of Coke's theories of sovereignty and why laws are binding. Prefiguring positivism, Hobbes argues that "Law . . . is the command of a sovereign which, though it may be iniquitous, cannot be unjust.

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[142] SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (photo. reprint 1971) (1736).

[143] O. HOOD PHILLIPS, A FIRST BOOK OF ENGLISH LAW 200 (4th ed. 1960).

[144] SIR MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND (photo. reprint 1987) (1713).

[145] Berman, *supra* note 140, at 1707.

[146] *Id.* at 1702–03 ("It was Hale who first articulated a general theory of historical jurisprudence which was implicit in Coke's portrayal of the English common law . . . .").

[147] Berman, *supra* note 140, at 1707.

[148] SIR MATTHEW HALE, REFLECTIONS ON HOBBES'S DIALOGUE OF THE LAW, *reprinted in* SIR WILLIAM HOLDSWORTH, 5 HISTORY OF ENGLISH LAW 500 (2d ed. 1937). This was not printed in Hale's lifetime, although it circulated in manuscript form and was frequently copied, as was Hobbes's work before it was itself posthumously printed. Sir Frederick Pollock, *Sir Matthew Hale on Hobbes*, 37 L.Q. REV. 274, 274–75 (1921).

[149] Pollock, *supra* note 148, at 276 (citation omitted) (quoting 3 FREDERIC WILLIAM MAITLAND, *The Laws of the Anglo-Saxons*, *in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 447, 453 (H. A. L. Fisher ed., 1911)).

Neither case law nor custom is truly law."[150] Furthermore, he believed that the sovereign's lawmaking (and unmaking) power knew no bounds: "these laws cannot bind him, since otherwise he would lose his supreme power to keep order."[151] Hobbes, in making this argument against Coke, was setting himself not only against the constitutionalist tradition, but also against the longstanding understanding of the common lawyers as a profession, which had been consistent from the Middle Ages onwards. As Norman Doe made it clear in his exhaustive analysis of the basis of legal authority in the Middle Ages, "Abhorrent human laws are void. This is an entirely orthodox late medieval outlook."[152] Hale, following other early modern treatise writers,[153] agreed with the traditional view—the ancient constitution may "in many cases hinder the kings acts and make them void if they are against law."[154]

Coke, as the pre-eminent expositor of this tradition in the seventeenth century, had prevailed over the royalist theorists of that era (as espoused by Francis Bacon, Thomas Egerton, and others) who had attempted to grant the early Stuart monarchs unparalleled power over the law.[155] However, Hobbes—who had been familiar with Bacon, and who had sufficient royalist bona fines to serve as the tutor of the future King Charles II while in exile—revived these arguments in new and more acceptable form.[156]

Hobbes, like his royalist antecedents, claimed that the subjects of the sovereign cede to it all of their natural rights, as a condition of the protection that the sovereign provides from the potential "war of all against all . . . ."[157] In order to provide this protection, the sovereign had a right to demand all ultimate authority.[158] Hobbes disdains the desirability of the separation of powers, and consequently a Hobbesian sovereign would possess ultimate military, judicial, spiritual, and civil authority. Under this theory, the people cede all power to the

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[150] *Id.* at 277 (citations omitted) (citing 6 THOMAS HOBBES, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, *in* THE ENGLISH WORKS OF HOBBES 1, 25–26 (Molesworth ed., 1840)).

[151] Berman, *supra* note 140, at 1718.

[152] NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 83 (1990).

[153] *See, e.g.*, HENRY FINCH, LAW OR A DISCOURSE THEREOF IN FOUR BOOKS 75 (D. Pickering ed., 1759) (arguing that laws contrary to the natural law "lose their force, and are no laws at all").

[154] Pollock, *supra* note 148, at 283 (citing Hale's *Reflections By the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe*) (translated by author from Early Modern English to Modern English).

[155] Berman, *supra* note 140, at 1673–94.

[156] *See* Andrew Huxley, *The* Aphorismi *and* A Discourse of Laws*: Bacon, Cavendish, and Hobbes 1615–1620*, 47 Hist. J. 399, 408 (2004) (arguing that Hobbes may have written portions of Francis Bacon's *A Discourse of Laws*).

[157] *See* Quentin Skinner, *The Ideological Context of Hobbes's Political Thought*, 9 HIST. J. 286, 306 (1966) (quoting THOMAS HOBBES, DE CIVE; OR THE CITIZEN 13 (Sterling P. Lamprecht ed., 1949)).

[158] *See id.* at 307–08.

sovereign when they acquiesce to the social contract that establishes both the society and the sovereign's authority over that society.[159] As Hale summarized Hobbes's views:

> [T]here can be no qualifications or modification of the power of a sovereign prince but that he may make, repeal and alter what laws he please, impose what taxes he please, derogate from his subjects property how and when he please.
>
> . . . .
>
> That he alone is judge of all public dangers and may appoint such remedies as he please and impose what charges he thinks fit in order thereunto.[160]

It is true that Hobbes did not believe that the sovereign had necessarily to be a monarch, but in *Leviathan*[161] he states that of the three forms of Commonwealths—following Aristotle's taxonomy—monarchy is superior to the others, having the greatest "aptitude to produce the peace and security of the people . . . ."[162] It is unsurprising that Hale would be unsympathetic to Hobbes's views, since as a participant in the constitutionalist tradition, Hale's theory of law is that it "imposes limitations . . . on the sovereignty of the lawmaking power . . . ."[163] This is a natural consequence of constitutionalist lawyers (whose views had prevailed during the English Civil War) "emphasiz[ing] the ancient tradition of limitations upon the royal prerogative."[164]

Accordingly, in the second part of Hale's response to Hobbes (entitled *Of Sovereign Power*) he "countered Hobbes's ideal type [of an absolute monarchy as a model for the English polity] not only with moral and political arguments but also with the reality of English constitutional history, to which he attached normative significance,"[165] pointing to the limited balance of powers within the English constitutional tradition, and in particular to the boundaries on the powers of the executive, which he argued were desirable.[166] Writing at a time before the king was clearly subject to Parliamentary control, he noted that the king was bound by his coronation oath to observe the nation's fundamental laws, and that those laws, as named in as acts like the Magna Carta, specifically mentioned the liberties of the subject.[167] He further noted that the law itself has a power to render acts void

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[159] *Id.*

[160] Pollock, *supra* note 148, at 297 (citing Hale, *supra* note 154) (translated by author from Early Modern English to Modern English).

[161] THOMAS HOBBES, LEVIATHAN; OR THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL (A. R. Waller ed., 1904) (1651).

[162] *Id.* at 130 (translated by author from Early Modern English to Modern English).

[163] Berman, *supra* note 140, at 1708.

[164] *Id.*

[165] *Id.* at 1719.

[166] *See* Pollock, *supra* note 148, at 294–303 (citing Hale, *supra* note 154).

[167] *Id.* at 296 (citing Hale, *supra* note 154).

that are in opposition to these constitutional principles.[168] In doing so, he argued, "the sovereignty of the king exists within a legal framework."[169] Contrary to Hobbes, and following the tradition that extends as far back as Bracton, he asserted that the king is not above the law, but is constrained by those very laws that give him legitimacy.[170]

Bracton had argued in the thirteenth century: "[T]he king [should be] subject . . . to the law, for the law makes the king . . . for there is no king where the will and not the law has dominion."[171] In refuting Hobbes's absurd notion that any sovereign can be bound by the laws, Hale elaborated upon the medieval tradition of constitutionalism that Bracton represents, attesting to the continuity of constitutionalist thought over four centuries. He pointed again to the coronation oath: because of "the great solemnity of the oath which he takes at his coronation to observe and keep those laws and liberties . . . no man can make a question whether [the king] be not in the sight of God and by the bond of natural justice be obliged to keep it."[172]

Furthermore, in response to Hobbes's argument that binding the sovereign would prevent him from being able to respond to emergencies that might endanger the nation, Hale answered that

> it is a madness to think that the model of laws or government is to be framed according to such circumstances as very rarely occur. Tis as if a man should make agaric and rhubarb [powerful and dangerous medicinal herbs] his ordinary diet, because it is of use when he is sick, which may be once in 7 years.[173]

This is evidence that the constitutionalist tradition (as it existed shortly before the founding) was still not enamored with arguments about the necessity for broad executive powers, justified by the need to safeguard the security of the realm.

Because Hale strongly influenced the Framers, his opinions likely influenced the Framers' probable views on the question of whether they intended to grant to the president certain powers of judgment ordinarily reserved to courts—whether due to the allegedly inherent powers of an executive, or to protect the nation during emergencies and crises. Hale, in opposition to Hobbes, believed that the laws bound the sovereign and that the ancient constitution restricted the sovereign's authority, both expressly and impliedly.[174] He rejected the idea that the executive

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[168] *Id.* (citing Hale, *supra* note 154).

[169] Berman, *supra* note 140, at 1719.

[170] Pollock, *supra* note 148, at 296 (citing Hale, *supra* note 154).

[171] 1 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 39 (1878).

[172] Pollock, *supra* note 148, at 301 (citing Hale, *supra* note 154) (translated by author from Early Modern English to Modern English).

[173] *Id.* at 302 (citing Hale, *supra* note 154) (translated by author from Early Modern English to Modern English).

[174] *Id.* at 295–301 (citing Hale, *supra* note 154) (translated by author from Early Modern English to Modern English).

could possess certain implied powers owing to his duty to preserve order in a crisis.

Due to contemporary ideas regarding who was the sovereign, Hale refers only to the limitations on the powers of the king, and not to the powers of Parliament, as Blackstone had. Shortly after Hale died, the concept of sovereignty passed from the king to the "King in Parliament," a legal fiction that covered over the reality of parliamentary supremacy.[175] However, what we see across the works of all the constitutionalists is a concern with the problem of arbitrary power (whether in the hands of a king or a parliament) and the idea of the supremacy of the law as a response. Hale, like Blackstone after him and Coke before him, fought for the rule of law against absolute power in all of its guises.

Hale's idea of the rule of law was of particular importance to the Framers because it had been implicitly rejected by the British legal system at a critical moment before the American Revolution—the Declaratory Act of 1766.[176] When Parliament repealed the Stamp Act, a concession which might have defused tensions between England the American Whigs, it also passed the Declaratory Act. This act stated that Parliament "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of *America* . . . in all cases whatsoever."[177] The American Whigs understood this statement to include an assertion that Parliament could repeal any statute that had previously guaranteed the due process rights of the American colonists.[178] This beckoned the question, "[i]f Parliament was supreme in 1766 to such an extent that it could sweep away all rights of person and property by merely enacting a declaratory statute . . . which abolished [the] Magna Carta" did this not also abolish all of the other liberties of the subject?[179]

The American Whigs thought so. They believed that

> Parliament adopted wholeheartedly the doctrine of sovereignty as stated by Hobbes, that in every state there must be a sovereign, uncontrolled by law. Thus a theory of law that had cost Charles I his head [in the English revolution against the Stuarts that led to *The Agreement of the People*,[180]

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[175] *See* GOUGH, *supra* note 122, at 160–73.

[176] The Declaratory Act, 6 Geo. 3, c. 12 (1766) (Gr. Brit.).

[177] *Id.* (emphasis in original) (translated by author from Early Modern English to Modern English).

[178] *See* REID, *supra* note 124, at 47–62.

[179] Marshall Van Winkle, *That Great Litigation*, 15 A.B.A. J. 599, 603 (1929).

[180] A document elaborating a vision of the rule of law that clearly influenced the Framers, which stated:

> That in all laws made or to be made every person may be bound alike, and that no tenure, estate, charter, degree, birth, or place do confer any exemption from the ordinary course of legal proceedings whereunto others are subjected . . . . These things we declare to be our native rights . . . .

> and to the *Instrument of Government*, the first written constitution of the English-speaking world] and James II his throne [in the Glorious Revolution].[181]

They also believed that Parliament had adopted the theory of sovereignty that "emerged with the writings of Thomas Hobbes . . . departing from the common-law tradition and from the constitutionalism that would dominate American legal thought both before the Revolution and into the age of the early republic."[182]

Why was the adoption of Hobbes's theory of sovereignty so incendiary? It was because the American theory of sovereignty was diametrically opposed to Hobbes', as it was largely Hale's. Hobbes's view that

> the preservation of life itself depended essentially upon power and not upon law . . . [was] a significant inversion . . . [of] [t]he earliest tradition, . . . that of Hooker and Coke, Eliot and Hale, who would have repudiated all arbitrary government whatsoever, whether by king or parliament.[183]

It is impossible to understand the outcry against the Declaratory Act, namely fury sparked by the idea that it purported to allow Parliament to repeal the Magna Carta, without appreciating the influence on the American Patriots of Hale's view of sovereignty (and by implication, his explicit rejection of Hobbes's views). They had already adopted Hale's constitutionalist views, in particular that the sovereign itself was subject to the laws, and that judges retained the power to enforce the law against the sovereign. "[T]he law-declaring nature of the judicial power was also familiar to the Framers through the works of Sir Edward Coke and Sir Matthew Hale."[184]

Again, the Framers did not focus on the dangers of executive judgment because the idea of fusing the judicial power with executive power had already been decisively rejected. Further, in the eighteenth century, the body attempting to usurp the power to declare the law was Parliament, not the executive. However, the American reaction to the Declaratory Act demonstrated that a constitutional theory embracing a robust version of the rule of law (in line with Hale's) had already taken root in America. There was "a consensus in the colonies where theorists hearkened back in time to the seventeenth-century constitutional jurisprudence of

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The Agreement of the People, As Presented to the Council of the Army (1647), *reprinted in* CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625–1660, at 333, 335 (Samuel Rawson Gardiner ed., 3d ed. 1906).

[181] ARTHUR L. GOODHEART, LAW OF THE LAND 60 (1966) (emphasis in original).

[182] REID, *supra* note 124, at 63.

[183] BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 200–01 (1992) (internal quotation marks omitted).

[184] *The Resource Page: Focus on Unpublished Opinions*, 37 CT. REV. 37, Summer 2000, at 38.

Sir Edward Coke and Sir John Hampden—to the 'fixed constitution' limiting the king, and therefore the legislature."[185]

Accordingly, for further illustration of the Framers' views on the constitutional powers of the executive, we need to turn to the works of Coke, who the Founders revered more than either Blackstone or Hale (and the admiration for these latter figures was not insubstantial). Coke, however, appeared to speak directly to the Founding Fathers, and accordingly figured prominently in their ideas of what a constitution did, and more particularly, in their ideas on the rule of law and its role in curbing the dangers of arbitrary power.

C. Coke's Idea of the Rule of Law and Its Adoption by Founding Fathers

> *[D]uring the eighteenth century, Coke's* Institutes *were among the most widely held law books in American colonial libraries, and the Framers' generation still learned law by reading Coke's* Institutes. . . . *Coke's writings appear to have been the most frequently cited authorities in colonial cases. Indeed, the Cokean conception of the immemorial common-law rights of Englishmen became especially prominent during the decade leading up to the American Revolution when American Whigs sought authority to support their claims to English rights and liberty.*[186]
>
> *– Thomas Y. Davies (2007)*

Edward Coke, owing to his highly public (and largely successful) struggle with the absolutist ideas of King James I, has been a hero to constitutionalist lawyers in the centuries following his death, and this stature may well have been at its zenith during the colonial era in the United States.[187] Coke's "influence, as the embodiment of the common law, was so strong that it is useless to contend that he 'was either misled by his sources or consciously misinterpreted them' for Coke's mistakes, it is said, *are* the common law."[188] As such, anyone considering the context of the Founders' views on the proper executive and judicial powers must understand that Coke's chief accomplishment during his own lifetime had been his willingness to oppose the King's (and not merely Parliament's) encroachment upon the law.

King James I, much like Hobbes, believed that the sovereign's powers were boundless.[189] While he was the King of Scotland, James wrote a book that so

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[185] REID, *supra* note 124, at 127.

[186] Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law"*, 77 MISS. L.J. 1, 83–85 (2007) (citations omitted).

[187] *See* Gedicks, *supra* note 124, at 657.

[188] W. J. Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561, 562 (1954) (emphasis in original) (quoting Bryce D. Lyon, *The Lawyer and Magna Carta*, 23 ROCKY MOUNTAIN L. REV. 416, 431 (1951)).

[189] *See* JAMES I, THE TRUE LAW OF FREE MONARCHIES 24 (Daniel Fischlin et al. eds., 1996).

frankly stated his views on the powers of the monarch, that he was met with great resentment in his new kingdom when he ascended to the English throne. This book, "*The True Law of Free Monarchies*"[190] went to inordinate lengths to defend the divine right of kings.[191] He argued that kings had been directly appointed by God and enjoyed apostolic succession from Saint Peter that gave them the power to serve as God's vice-regent,[192] a claim that had previously been made only by Popes.[193] Regarding these powers over his subjects James wrote:

> [I]t [is] manifest that the king is overlord of the whole land, so is he master over every person that inhabits the same, having power over the life and death of every one of them . . . the power flows always from himself . . . . As likewise, although I have said a good king will frame all his actions to be according to the law, yet is he not bound thereto but of his good will and for good example-giving to his subjects . . . . So as I have already said, a good king, though he be above the law, will subject and frame his actions thereto . . . but not as subject or bound thereto.[194]

Furthermore, in order to make it clear to his new subjects that he did not consider this to be a theoretical matter, he asserted in a speech before Parliament:

> The state of monarchy is the supremest thing upon earth; for kings are not only God's lieutenants upon earth, and sit upon God's throne, but even by God himself they are called gods. . . . God has power to create or destroy, make or unmake at his pleasure, to give life or send death, to judge all and to be judged [by] nor accountable to none . . . . [Kings] have power of raising and casting down, of life and of death, judges over all their subjects and in all causes and yet accountable to none but God only.[195]

Owing to the resistance that he faced from Coke and other constitutionalist lawyers, King James I was never able to assert his powers to the extent that he thought was legitimate.[196] The battles that were fought over James's assertion that he could imprison his enemies indefinitely in the Tower of London and that they

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[190] *Id.* Here, "free monarchy" means monarchy that is without restraint, as it is the king who allegedly deserves freedom, not his subjects.

[191] *See id.*

[192] *See id.*

[193] *See id.* at 71–76.

[194] *Id.* at 71–72.

[195] James I, *Speech Before Parliament (1609)*, *in* 2 READINGS IN EUROPEAN HISTORY 219, 219–20 (James Harvey Robinson ed., 1906).

[196] *See generally* J.P. SOMMERVILLE, POLITICS AND IDEOLOGY IN ENGLAND 1603–1640 (1986) (describing how James was systematically blocked by Parliament when attempting to govern England in the fashion outlined in his two tracts on monarchy written in Scotland).

could not petition the Court of King's Bench for writs of habeas corpus—allow us to identify the assertion of this right as the high water mark of executive power during James I's reign.[197]

Coke was consistent across decades of struggle, asserting and reasserting through his holdings that "'the King has no prerogative, but that which the law of the land allows,' and that of this the judges and not the king were the authorized interpreters."[198] He ruled that the King had no right to serve as a judge,[199] contradicting James's statements on this subject directly and openly.[200] Coke also argued that this principle extended so far as to prevent the King from intervening in litigation that concerned the prerogative[201] or from interfering in the functioning of the administration of justice in any way.[202] However, despite the importance of these decisions, they pale in comparison to the influence of his ruling in *Bonham's Case*.[203]

This case's facts were not particularly portentous[204] but the holding outlined two principles that would echo through the ages, finding particular resonance in colonial America. First, Coke announced that a court could pronounce a statute void where it is "repugnant" to the nation's constitutional principles as the court understood them:

> And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void.[205]

Second, Coke eloquently asserted his reasons for concluding that the statute at issue—which purportedly gave the College the power to operate a tribunal to adjudicate charges of the unlawful practice of medicine and to serve as the prosecuting authority within that tribunal—was repugnant:

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[197] *See* Mark Kishlansky, *Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights' Case*, 42 HIST. J. 53, 55 (1999).

[198] Edward S. Corwin, *The Higher Law Background of American Constitutional Law*, 42 HARV. L. REV. 365, 367 (1929) (quoting Case of the Proclamations, (1611) 77 Eng. Rep. 1352, 1354 (K.B.); 12 Co. Rep. 41).

[199] Prohibitions del Roy, (1607) 77 Eng. Rep. 1342 (K.B.); 12 Co. Rep. 63.

[200] Commendam Case, (1616) 80 Eng. Rep. 290 (K.B.); Hobart 140.

[201] *See id.* at 293.

[202] *See* Brownlowe & Mitchell, 81 Eng. Rep. 421 (K.B.); 1 Rolle Rep. 188; Brownlowe v. Mitchell & Cox, 81 Eng. Rep. 434 (K.B.); 1 Rolle Rep. 206; Brownloe v. Michell, 81 Eng. Rep. 490–94 (K.B.); 1 Rolle Rep. 288.

[203] Bonham's Case, (1610) 77 Eng. Rep. 646 (K.B.); 8 Co. 113b.

[204] They involved the right of a doctor who was not licensed by the College of Physicians to practice medicine in London. *Id.*

[205] *Id.* at 652.

> The censors [the College's disciplinary officers] cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have half of the forfeiture, because no man can be a judge in his own case. It is a travesty of justice for one to be a judge in his own affair, and one cannot be Judge and attorney for any of the parties.[206]

This decision was so significant that the King himself demanded that Coke censor it in his law reports.[207] In his subsequent decisions that cited this case, Coke rested his holding on the authority of medieval case law, some of which he appears to wrench out of context, although one anonymous opinion, *Cessavit 42*, appears to be on point.[208] Further, in his *Institutes*, Coke relies largely on the same sources, although greater in number.[209] This attested to the fact that Coke was merely building upon the longstanding constitutionalist tradition in English legal thought. The *Institutes*, as noted above, were very influential in colonial America. However, Coke's most enduring influence comes from how his theories of sovereignty and law were put into practice in such situations as *Bonham's Case* and the Petition of Right, which Coke helped get Parliament to pass.[210]

In order to prevent the encroachments of the early Stuart kings on the liberties of the subjects—in particular, taxation without parliamentary approval and the denial of the right to habeas corpus—the Petition of Right was passed by Parliament.[211] It was the first major constitutional restriction on the powers of the king over his subjects since the enlargement of the Magna Carta.[212] However, the petition itself states that it merely confirms ancient liberties, many of which date to the time of Edward I and Edward III,[213] as discussed in the next Subsection.[214]

The Petition of Right was given royal assent by Charles I after both Houses of Parliament struggled to pass it without modification.[215] Charles then proceeded

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[206] *Id.* (includes author's idiomatic translation from Latin).

[207] *See* CYNDIA SUSAN CLEGG, PRESS CENSORSHIP IN JACOBEAN ENGLAND 145–147 (2001).

[208] *See* George P. Smith II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 306–10 (1966) ("*Cessavit 42* . . . is clearly a strong precedent for Coke's basic argument.").

[209] EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45–46 (1797); *see also* F.T. Plunkett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 35–36 (1926) (discussing how *Bohnam's Case*, *Tregor's Case*, *Cessavit 42*, and *Annuitie 41* affected the doctrine of Judicial Reivew).

[210] Berman, *supra* note 140, at 1674–78, 1686 n.92, 1701.

[211] SOMMERVILLE, *supra* note 196, at 163–65.

[212] *See* CONRAD RUSSELL, PARLIAMENTS AND ENGLISH POLITICS 1621–29, 352–54 (1979).

[213] Petition of Right, 1627, 3 Car., c. 1 (Eng.).

[214] *See infra* notes 247–301 and accompanying text.

[215] SOMMERVILLE, *supra* note 196, at 166–69.

to ignore it in practice, leading to *The Case of Ship-money*,[216] where the King, through intimidation, obtained the Justices' approval of his argument that he had the power to raise taxes without parliamentary approval, based on his declaration of a national emergency—of which the Crown was allegedly the sole judge.[217] Discontent about how this offended the Petition of Right considerably escalated tension with the King, leading to the English Civil War.[218] The ideas contained in the Petition of Right—Coke's ideas—had enduring influence because of their power and clarity.

The Petition was a necessary response to an ongoing crisis over executive authority, which came to a head in *Darnel's Case*, also known as the *Five Knights' Case*.[219] The reasoning of the lawyers in the *Five Knights' Case* (one of whom was John Selden, a close associate of Coke)[220] had tracked the underlying principles of *Bonham's Case* closely—the King could not order something which was repugnant to the ancient constitution. In the *Five Knights' Case*, Selden asserted that ordering imprisonment by special command would offend clause 29 of the Magna Carta. The King argued that to do so was within his prerogative because the laws did not bind the state, but the court rejected this argument and rendered an equivocal and narrow decision, which nevertheless curtailed certain abuses of executive power.[221]

The Petition of Right—which Coke drafted—stated the king or his commissions had no prerogative to violate the boundaries of the ancient liberties of English subjects, most particularly, freedom from arbitrary arrest, imprisonment, forced billeting of troops, martial law, from the suspension of habeas corpus, and taxation without consent from parliament.[222] These rights are explicitly connected with the Magna Carta and other charters—which, as Coke interpreted Bracton—form the law of the land, under which the king is bound to follow.[223] For example, as clause seven of the Petition of Right states:

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[216] R v. Hampden, (1637) 3 St. Tr. 825; GOUGH, *supra* note 122, at 69; *see* D. L. Keir, *The Case of Ship-money*, 52 LAW Q. REV. 546 (1936) (reviewing arguments about whether or not Charles I violated the Petition of Right); *see also* SOMMERVILLE, *supra* note 196, at 172 ("[Charles I] never renounced his claim to extra-legal powers. His action in the 1630s violated what many regarded as law.").

[217] *See* GOUGH, *supra* note 122, at 69; *c.f.* Keir, *supra* note 216, at 573–74 ("[The Judge's] sails may have been bent to catch the breeze of royal favour. Yet that motive is not everywhere apparent in their judgments. No doubt they were moved partly by political considerations. But there was still much to be said for a conception of public policy, inherited from the preceding age . . . .").

[218] SOMMERVILLE, *supra* note 196, at 173–82; *see* Keir, *supra* note 216, at 573–74.

[219] Five Knights' Case, (1627) 3 St. Tr. 1, 94–156 (Eng.).

[220] Berman, *supra* note 140, at 1695.

[221] Five Knights' Case, 3 St. Tr. at 114–139.

[222] Russell, *supra* note 212, at 344; *see* Petition of Right, 1627, 3 Car., c. 1 (Eng.).

[223] Berman, *supra* note 140, at 1675 n.67; Russell, *supra* note 212, at 344.

> [I]n the five-and-twentieth year of the reign of King Edward III, it is declared and enacted, that no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by acts of parliament: and whereas no offender of what kind [what]soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm; nevertheless . . . commissioners [were appointed] with power and authority to proceed within the land, according to the justice of martial law . . . to cause [alleged traitors] to be executed and put to death according to the law martial.[224]

Reassertion of the idea that the king was subject to the law did not immediately prevail in Stuart England, but after the Civil War and the Glorious Revolution, these ideas were incorporated into the English Bill of Rights of 1689 (and the United States' Bill of Rights, authored a century later).[225] However, the Petition of Right continued to have its own independent legal significance after the demise of the old regime, as it was accepted by the consensus of the legal profession (as reflected by Blackstone's *Commentaries*) as being part of the fundamental laws of England, which contained the "indubitable rights of the people of this kingdom."[226]

As described above, Coke had an unparalleled popularity among jurists at the time of the American Revolution,[227] but the particular reasons for his pre-eminent importance to the Framers must be outlined in detail here.

Coke was of unparalleled importance in Colonial America because he had been the dominant commentator when the colonies were initially charted and settled. At the time the colonies needed constitutional guidance, and Coke's *Reports* and *Institutes* were close at hand, so they exercised decisive influence at a formative moment. While the dominant view in England a century later was that there was "nothing constitutionally problematic in Parliament's imposition of revenue-raising and internal regulatory measures on the colonies. The colonists and the Whig minority . . . continued to understand the colonies' relationship to

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[224] Petition of Right, 1627, 3 Car. 1, c. 1 (translated by author from Early Modern English to Modern English).

[225] Berman, *supra* note 140, at 1689; William Pitt, *Pitt on the American Colonists' Opposition to the Taxation*, *in* 2 READINGS IN EUROPEAN HISTORY 353, 353–56 (James Harvey Robinson ed., 1906); *see also* U.S. Const. amend I–X; Bill of Rights, 1689, 1 W. & M., c. 2.

[226] BLACKSTONE, *supra* note 92, at 123.

[227] Gedicks, *supra* note 124, at 614 ("[Even after Blackstone's *Commentaries*,] Coke's higher-law constitutionalism remained the more influential school of thought before and during the Revolution . . . in the colonies.").

the king and Parliament in terms of [Coke's] seventeenth-century higher-law constitutionalism."[228]

As Coke's views were still dominant in America when Parliament began to enact increasingly repressive measures, it is not surprising that *Bonham's Case* would resurface. This occurred in one of the first public challenges to abuses of justice by British forces, long before the Declaratory Act,[229] the Stamp Act,[230] or those other Intolerable Acts that followed.[231] This occurred in 1761, when a committee of Boston merchants challenged the issuance of writs of assistance to customs agents, who used them to search merchants' houses.[232] Their lawyer, James Otis, argued that these writs were equivalent to general warrants for search and seizure, and because "the freedom of one's house" was among "the most essential branches of English liberty,"[233] and because violating the right to enjoy one's property was against, *inter alia,* the Magna Carta, the judges had a right to declare the statutes authorizing these writs void:

> Otis appealed directly to higher-law constitutionalism, citing *Bonham's Case*: "As to Acts of Parliament, an Act against the Constitution is void; an Act against natural Equity is void; and if an Act of Parliament should be made, in the very Words of this Petition, it would be void." Citing Magna Carta and Coke's *Second Institute*, Otis concluded that Parliament was not "the final arbiter of the justice and constitutionality of its own acts"; rather, "the validity of statutes must be judged by the Courts of Justice."[234]

While Otis lost his clients' case, his argument electrified his audience, comprised of Boston's legal community and others who later became important revolutionary leaders: "John Adams and other important statesmen attended Otis's argument in Boston. . . . Adams also wrote that Otis's attack on the writs of assistance was 'the first scene of the first act of opposition to the arbitrary claims of

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[228] *Id.* at 615.

[229] Declaratory Act, 1766, 6 Geo. 3, c. 11 (Eng.).

[230] Stamp Act, 1765, 5 Geo. 3, c. 12 (Eng.).

[231] In response to the Boston Tea Party, Parliament passed a series of acts, which became known as the "Intolerable Acts." *See* Quebec Act, 1774, 14 Geo. 3, c. 83 (Eng.); Quartering Act, 1774, 14 Geo. 3, c. 54 (Eng.); Massachusetts Government Act, 1774, 14 Geo. 3, c. 45 (Eng.); Boston Port Act, 1774, 14 Geo. 3, c. 19; Administration of Justice Act, 1774, 14 Geo. 3, c. 39 (Eng.).

[232] M. H. SMITH, THE WRITS OF ASSISTANCE CASE 144–48 (1978).

[233] *Id.* at 344.

[234] Gedicks, *supra* note 124, at 616 (quoting *Paxton's Case of the Writ of Assistance* (Mass. Bay. Super. Prov. Ct. 1761), *reported in* JOSIAH QUINCY, JR., 1 REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772 app. I, at 471, 520–21; *see* QUINCY, *supra*, at app. I, 521 n.23 (citing *Bonham's Case*)).

Great Britain.'"[235] It had a powerful effect on these listeners: as Adams noted, "Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. . . . Then and there the child Independence was born."[236] Furthermore, its significance carried far further than earshot: "[a]fter Otis published his argument in pamphlet form, a number of prominent colonial revolutionaries relied on it as the basis for their own constitutional arguments against parliamentary actions."[237]

Frederick Gedicks charted the degree to which these Cokeian arguments permeated the American Whig's discourse of liberty during the 1760s and 1770s.[238] In addition to influencing people like John Adams directly, similar arguments based on *Bonham's Case* were heard and reported by figures like Thomas Jefferson and George Mason.[239] Accordingly:

> [B]y the time the colonies declared their independence in 1776, due process and Magna Carta had become an integral part of the colonial arguments against parliamentary taxes and regulation of the colonial police power. . . . [P]re-revolutionary colonial courts "were constantly hearing arguments and deciding cases on the natural rights theory projected by Coke as a basic principle of the common law." The colonists' central constitutional claim was that they . . . were entitled to all the . . . natural and customary rights that had been recognized at English common law and granted to English subjects.[240]

Coke's view of the natural rights of the English subject was ubiquitous during the period before and during the American Revolution. While in the early colonial era Americans had adopted Cokeian views such that "they regularly invoked Coke and the Magna Carta in challenging the constitutionality of many of the infamous Parliamentary enactments that spawned the Revolution, such as the Navigation Act of 1761, the Stamp Act of 1765, the Intolerable Acts of 1774, and the Restraining Act of 1775."[241] Additionally, "Benjamin Franklin, who represented the colonial cause in England, also founded his case upon the 'common rights of Englishmen,

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[235] David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, U. PA. J. CONST. L. 581, 603 n.127 (2008) (quoting 10 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 248 (Charles Francis Adams ed., 1856)).

[236] ADAMS, *supra* note 235, at 247–48.

[237] Gedicks, *supra* note 124, at 617.

[238] *Id.* at 614–57.

[239] *Id.* at 618–19.

[240] *Id.* at 621 (quoting Clarence E. Manion, *The Natural Law Philosophy of Founding Fathers*, 1 U. NOTRE DAME NAT. L. INST. PROC. 3, 25 (1949)).

[241] Brief of the Indiana Trial Lawyers Association as Amicus Curia in Support of Appellant at 3–4, Martin v. Richey, 674 N.E.2d 1015 (Ind. Ct. App. 1997) (No. 53A04-9603-CV-104), 1997 WL 34584398, *reprinted in* 31 IND. L. REV. 1089, 1091.

as declared by the Magna Carta, and the Petition of Right.'"[242] It is scarcely hyperbole to describe Coke's influence in this manner:

> [T]he American Revolution was a lawyers' revolution to enforce Lord Coke's theory of the invalidity of Acts of Parliament in derogation of the common and right and of the rights of Englishmen.
> . . . .
> The views of Coke . . . were adopted not merely by patriotic leaders like John Adams, Samuel Adams and James Otis, but by Colonial legislatures, colonial and town conventions, and innumerable town meetings during a long series of years prior to 1776.[243]

Unfortunately for the American Whigs, the rights granted expressly by the Petition of Right and the English Bill of Rights appeared only to limit the powers of the king, who had clearly been the sovereign until the Glorious Revolution.[244] In the wake of the new constitutional settlement that followed, it was Parliament that exercised the powers of sovereignty.[245] However, Coke's ideas were still fundamentally pertinent and could be applied just as easily to an overreaching Parliament as to an overreaching king (as will be demonstrated below).[246] Coke argued that the medieval Charters that limited the sovereign's powers against his subjects were relevant to the early modern age. The triumph of these Charters was reflected by their recognition as binding—even after centuries of desuetude—and their becoming part of the fundamental laws of England. This is essential to demonstrate here because of the importance of these Charters, especially the Magna Carta, to the Framers and because detailing their views on the legal force and importance of the Great Charter helps us to understand their view of the rule of law and the separation of powers established by the Constitution. It is the Framers' orientation to these views on Magna Carta that we must now explore.

D. The Magna Carta's Role in the Constitutionalist Tradition

> *In many ways, England's law still controls America's law. Specifically, the Supreme Court still looks to England's Magna Carta for guidance in its decisions. The values embodied within the English tradition therefore continue to be the values adopted by this country. America's Founding Fathers not only embraced and valued the rights contained within the Magna Carta, but they came to America with a*

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[242] Riggs, *supra* note 132, at 970–71 (quoting THE WRITINGS OF BENJAMIN FRANKLIN 445 (Albert Henry Smyth ed., 1970)).

[243] N.Y. STATE BAR ASS'N, PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING 238, 249 (1915), *quoted in* Smith, *supra* note 208, at 313–14.

[244] *See* GOUGH, *supra* note 122, at 170–73.

[245] *See* REID, *supra* note 124, at 68–74.

[246] *See infra* notes 248–254 and accompanying text.

> *particular tradition which informed their subsequent interpretation of the Magna Carta and the newly developing American law.*[247]
>
> *– Sally Ackerman (1999)*

Because of the increased importance of the Magna Carta in the discourse of the constitutionalist lawyers of the seventeenth century and the attention paid to these figures (especially Coke) in colonial America, discussions of the Magna Carta assumed a significant position in the Framers' arguments about the arbitrariness of British rule. Not only did the "text of Magna Carta [circulate in America but so did] commentaries derived from Coke's, several of which printed an 'abstract' of Coke's chapter on Magna Carta 29 . . . ."[248] Coke had "considered Magna Carta sacred and unalterable; he insisted that 'Magna Carta is such a Fellow, that he will have no Sovereign,' and that an act of Parliament in violation of the Charter will be 'holden for none.'"[249] It is important to note that while the Framers' understanding of the Magna Carta was derived largely from Coke's, this does not mean that they inherited a novel and ahistorical appreciation of the Great Charter. Rather "[t]he tradition which Coke revived was . . . by no means his own invention; it referred back to and was to a great extent substantiated by an earlier period in the history of this famous document . . . ."[250]

While it is true that the Magna Carta was initially a limited grant of privileges from the king to a select group of his subjects (namely the barons), the meaning and importance of the document changed—indeed, grew—rapidly during the late Middle Ages.[251] Although it was originally a limited grant of liberties, its form was entirely novel. It was a compact between the barons and the king, not an act signed by the king alone, suggesting for the first time that a sovereign could be bound to contractual obligations (an idea that monarchs from King John to King James attempted to resist). The Charter also contained an enforcement mechanism in the event that the king defaulted on his obligations, consisting of distraint of his

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[247] Sally Ackerman, *The White Supremacist Status Quo: How the American Legal System Perpetuates Racism as Seen Through the Lens of Property Law*, 21 HAMLINE J. PUB. L. & POL'Y 137, 166–67 (1999).

[248] Davies, *supra* note 186, at 86.

[249] Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 852 (1978).

[250] Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 175–76 (1928).

[251] *See generally* GOUGH, *supra* note 122 (describing the growth of medieval constitutionalism).

possessions.[252] Most fundamentally, it appears to "place[] the law higher than the King" by imposing for the first time a "limitation on the power of the sovereign."[253]

Additionally, for the first time the clauses of a grant of rights "were drawn in terms that did not confine their application to the immediate issues at hand or to the interests therein involved . . . ."[254] which meant that it could be invoked at any later date, something that King John doubtless found troubling. John did not simply ignore the Charter; he appealed to Pope Innocent III to declare it invalid so that he might "be freed from its obligations."[255] This suggests that without the decision of a higher authority, the Charter of Liberties would otherwise be valid law.

This purported invalidation, however, did not settle the issue. First, the "reasons the pontiff gave for annulling the Charter were not the model of lawyerly clarity . . . ."[256] Second, the idea behind the Magna Carta managed to endure and grow, as Richard Helmholz asserted:

> Despite its imperfections, Magna Carta survived. More than survive, it flourished. It outlasted the death of King John, annulment by Pope Innocent III, and revisions pruning the extent of the powers granted to the barons. It assumed first place in the book of English statutes, served as a touchstone of the liberties of the English nation during constitutional conflicts of later centuries, and came in time to stand as a symbol of the rule of law against tyranny by the state.[257]

Edward Corwin suggested that the Charter grew in significance because it had been "cast into a milieu favoring growth," meaning that there has been great desire amongst all classes in England for laws limiting royal authority, and because its "successful maintenance . . . demanded the cooperation of all classes and so the participation by all classes in its benefits."[258]

That the Charter was reissued as a concession to the Barons after King John's death suggests how important the idea that the king was subject to the law had grown in a short time.[259] Corwin's assertion of the appeal of the Charter of

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[252] RALPH V. TURNER, MAGNA CARTA 70, 76–77 (2003); *see also* Magna Carta, 1297, 25 Edw. 1, cl. 37 (Eng.) ("[N]either we, nor our Heirs, shall procure or do anything whereby the Liberties in this Charter contained shall be infringed or broken . . . and if anything be procured by any person contrary to the premises, it shall be had of no force nor effect.").

[253] Charles McC. Mathias Jr., *Ordered Liberty: The Original Intent of the Constitution*, 47 MD. L. REV. 174, 179–80 (1987).

[254] Corwin, *supra* note 252, at 176.

[255] R. H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 361 (1999).

[256] *Id.* at 362.

[257] *Id.* at 299.

[258] Corwin, *supra* note 250, at 176.

[259] The Charter was reissued by the supporters of his son Henry III—who himself would later be forced to call the first Parliament—shortly a year after John had set his seal

Liberties to all classes seems to be confirmed, because upon reissue (and reconfirmed as legally effective) by Henry III in 1225 Article 29's application to all free men was taken to mean that it granted liberties alike to people and populace.[260] The desirability of these liberties is attested to by the fact that it was deemed to be worth the price that Henry charged for its reconfirmation—one fifteenth of every subject's moveable goods.[261]

The Charter's power was greatly expanded though its reconfirmation (yet again, in exchange for the approval of taxes) by Edward I, when he ordered in the Confirmation of Charters that

> all "justices, sheriffs, mayors, and other ministers which under us and by us have the laws of our land to guide," to treat the Great Charter as "common law," in all pleas before them. Furthermore, any judgment contrary to the Great Charter . . . was to be "holden for naught"; and all archbishops and bishops were to pronounce "the sentence of the Great Excommunication against all those that by deed, aid or counsel" proceeded "contrary to the aforesaid [Charter] . . . ."[262]

Once again, a king later regretted binding himself legally (and in fact, made it clear that under the law of the land, there could no longer be any dispute about whether this was the case); Edward asked Pope Clement V to absolve him of observance of the Charter.[263] While granted it was too late, the ideas contained within the Magna Carta had permeated the common law and had become widely known and accepted as a source of law.[264] However, it was during the reign of his grandson, Edward III, that the charter achieved its medieval zenith.

In exchange for the taxes necessary to wage the Hundred Years' War, Edward III confirmed the Charter no less than fifteen times, a process that was motivated by "a desire to get the king's acknowledgement in general that he was bound by the law."[265] This principle was no longer disputable during the late Middle Ages after Edward III's reign, thanks in part to his repeated reaffirmation of the Magna Carta. The most important of these reaffirmations were the "six statutes" interpreting

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to the Charter. *See* David V. Stivison, *Magna Carta and American Law*, 34 N.C. ST. B.Q. 30, 30 (1987).

[260] *See* Corwin, *supra* note 252, at 177.

[261] WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 154 (2d ed. 1914).

[262] Corwin, *supra* note 252, at 177–78 (quoting SELECT DOCUMENTS OF ENGLISH HISTORY 86–87 (George Burton Adams & H. Morse Stephens eds., 1911)).

[263] WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 497 (9th ed. 1921).

[264] *See id.*

[265] Corwin, *supra* note 252, at 178 n.92 (quoting GEORGE BURTON ADAMS, THE ORIGIN OF THE ENGLISH CONSTITUTION 290 n.15 (1912)).

Clause 29.[266] The most important of these is the Statute of 28 Edward III.[267] Chapter three of this statute states that "no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."[268] It was now abundantly clear that the Magna Carta's protections applied to everyone.

Parliament also acted repeatedly to ensure the protections of the Great Charter (as clarified and extended by the six statutes) making it more durable. The statute of 42 Edward III (1368) established (as Coke noted in his *Institutes*) that any future statutes that purported to narrow the protections of the Magna Carta would be null and void.[269] In this statute, we can see that already by 1368, the Charter had become a critical element of the legal tradition of England, which had set up rights that were now inviolable. Chapter three states that "no Man [shall] be put to answer . . . [except] according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error."[270]

Additionally, Parliament attempted to make sure that the people were aware of the protections of the Charter and ready to enforce their rights. Repeatedly, it demanded that the king have the Magna Carta read out by his officials point by point, that officials take oaths to uphold it, and that they be held accountable when it was broken.[271] The clergy were also called upon and actually did excommunicate those who offended it.[272] It appears to be beyond dispute that Coke was correct in asserting that the Magna Carta, by the conclusion of the reign of Edward III, had attained the status of fundamental law; in modern terms, it was now part of England's unwritten constitution.[273]

That said, as William Koch correctly noted,

> [T]he evolution and growth of its significance has continued through the centuries into the present time. Magna Carta was the first manifestation of the fundamental principle that both the governor and the governed are subject to the rule of law. Its history has been one of reinterpretation, and thus its importance lies not in the literal intent of the men at Runnymede

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[266] J. C. HOLT, MAGNA CARTA 10–11 (2d ed. 1992).

[267] *See generally* I STATUTES OF THE REALM 345 (1354) ("None shall be condemned without due Process of Law.").

[268] *Id.*

[269] I STATUTES OF THE REALM, *supra* note 267, at 388.

[270] *Id.*

[271] Faith Thompson, *Parliamentary Confirmations of the Great Charter*, 38 AM. HIST. REV. 659, 664–68 (1933).

[272] *Id.* at 668–69.

[273] BLACKSTONE, *supra* note 92, at 124.

> but rather in the meaning that future generations have read into its words.[274]

One more phase of interpretation of this clause bears mentioning: it occurred during the battle between Coke and Thomas Egerton (Lord Ellesmere, James I's Lord Chancellor) over the meaning of a critical phrase in Chapter 29 of the Charter. The key words here come towards the end of the chapter: "*nisi per legale judicium parium suorum vel per legem terre*," meaning "except by the lawful judgment of his peers [vel] the law of the land," where the Latin word "vel" is ambiguous.[275] It can be translated as an "or" or rather as an "and." This seemingly minor grammatical point was in fact of great significance. If it meant "and," then the Magna Carta guaranteed the right to jury trial in criminal actions, as against all other forms of justice, including trial in the Star Chamber and before commissions convened under martial law.

Coke, in his *Institutes*, insisted that the "or" was incorrect,[276] while Egerton insisted on the contrary view, refuting lawyers who elaborated upon Coke's argument in the Star Chamber, and defending his position to the Privy Council in briefs that outlined the importance to the royalist cause of defending this doctrine.[277] At the conclusion of the struggle between the constitutionalists (and Parliament, on the fields of ideological and political battle, respectively) and the early Stuart kings, Coke's view prevailed without reservation over Egerton's.[278] The Star Chamber was abolished and the English Bill of Rights made it clear that trials by military commissions and other forms of trial outside of the common law courts were not consistent with the guarantees of due process under the Magna Carta, and were thus constitutionally unacceptable.[279]

From that moment on, in the common law world, due process was considered a paramount guarantee of the law; the law of the land did not allow for the same alternative methods of administering justice that did not provide due process rights. This is the only conception of the law of the land that we would now recognize,

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[274] William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 356–57 (1996).

[275] *See* CHARLTON T. LEWIS, AN ELEMENTARY LATIN DICTIONARY (1890), *available at* http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0060. The English translation from Latin is the author's own.

[276] 2 EDWARD COKE, INSTITUTES 50 (Garland ed., 1979) (1797).

[277] *See, e.g.*, Anno Jacobi Regis, *A Breviate or Direccion for the Kinges Learned Councell Collected by the Lord Chauncellor Ellesmere* (1615), *reprinted in* LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE 322–23 (1977).

[278] *See generally* Allen Dillard Boyer, *"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43 (1997) (describing how Coke's views were integral to the Parliamentary side in the period prior to the English Civil War).

[279] Alford, *supra* note 104, at 723–26.

since "[i]n 1789, 'due' process meant process due according to the law of the land [i.e., the common law, and not some other law of the land, such as martial law], and the Supreme Court has agreed to that proposition on the authority of Sir Edward Coke . . . ."[280] This was also the interpretation that was most faithful to the context of the Great Charter and its reaffirmations, particularly the six statutes. This Article now turns to the question of how this interpretation of the Magna Carta helped to shape the Constitution.

1. The Magna Carta's Influence on the Framers—and the Bill of Rights

From the very beginning of the colonial period, the Magna Carta had been seen as a vital constitutional document by the colonists. As Chief Judge Mann so poetically put it: the Magna Carta "was so imbedded in English jurisprudence that it sailed with the English Colonist to the New World . . . ."[281] Accordingly, "most of the English colonies had attempted, in one form or another, to include the Great Charter's due process guarantees in their fundamental laws."[282] "Chapter [29], which figured so prominently in Parliament's resistance to the Stuarts, soon found its way to America . . . ."[283] At first this had largely been the result of the timing of these foundings—they occurred when Coke's influence over English legal thought was at its zenith. Nevertheless, enthusiasm over Coke's work soon translated into respect for the Magna Carta itself.

As Dick Howard noted, the problem in determining the Framers' views of Magna Carta is that it did not seem to feature heavily in their debates, or at least those debates that were recorded.[284] But by this point in history, the delegates were more concerned with their differences with the British constitutional tradition than with their commonalities. Thus, its influences can be seen by implication, or at one step's remove. When one sees the many references to Montesquieu or his *Spirit of the Laws*,[285] one must remember that he believed that "the British Constitution was the 'mirror of political liberty'; its secret lay in the fact that the legislative and executive powers were not united in the same hands."[286] Of course, by the time of the American Revolution, the British no longer believed that this was the correct

[280] Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 13 (2005).

[281] Julian Mann, III, *Due Process; A Detached Judge; And Enemy Combatants*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 27–28 (2008).

[282] Riggs, *supra* note 132, at 963.

[283] *Id.*

[284] A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 219–20 (1968).

[285] *See generally* MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (including elements such as the law and the spirit of the law; the division of governments into republics, monarchies, and despotisms; the notion of a free government of divided and balanced powers; and the examination of the conditions in this type of government).

[286] HOWARD, *supra* note 284, at 219 (quoting THE FEDERALIST NO. 47 (James Madison)).

interpretation of their Constitution, as they had developed a theory of parliamentary supremacy.[287]

Additionally, the Framers of the Constitution were primarily concerned at the time with establishing the machinery of government. For this reason, the terms of the Magna Carta were not precisely on-point. However, the same could not be said during the drafting of the Bill of Rights. During these debates, the Great Charter featured prominently.[288]

The failure to consider the need to insert Magna Carta-based provisions into the Constitution was already a source of friction, even before it was ratified.[289] This oversight had been a miscalculation by the Federalists, especially since the Great Charter was featured in the arguments of their opponents. In particular, George Mason, the drafter of the Virginia Bill of Rights (which had been so influential to other state constitutions), based his arguments against ratification on the "historical example of the English documents, such as Magna Carta and the [English] Bill of Rights,"[290] which in comparison made the Constitution appear deficient as a document guaranteeing ancient liberties. However, even the opponents of a bill of rights had great respect for the Magna Carta. James Wilson argued at the Pennsylvania ratifying convention that a bill of rights would be dangerous because by enumerating specific liberties, it would by implication authorize acts of the federal government, which should instead be considered reserved to the people.[291] He conceded that "[t]he Magna Charta of England is an instrument of high value . . . ."[292] In South Carolina's convention, Patrick Dollard argued that he could not vote in favor of the Constitution because it appeared to vest powers in the federal government that the people considered "their birthright, comprised in Magna Carta."[293]

Again, in Virginia's convention, the "Magna Carta figured in the discussion of whether or not the Constitution should have a bill of rights . . . ."[294] This was because the delegates were primarily concerned with the right to trial by jury,[295] which was not guaranteed by the Constitution. Thus, Virginia's proposal for a

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[287] REID, *supra* note 124, at 63–78.

[288] *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 173 n.18 (1992) (discussing the ideological and other impacts on the American Revolution, including the Magna Carta). Additionally, the state constitutions drafted during the period that contained provisions similar to what would later be included in the Bill of Rights and made reference, either explicitly or implicitly, to the Magna Carta. In particular, "language derived from Chapter [29] was incorporated into most of the initial state constitutions." James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 324 (1999).

[289] BAILYN, *supra* note 288, at 345–74.

[290] HOWARD, *supra* note 286, at 222–23.

[291] *Id.* at 225.

[292] *Id.*

[293] *Id.* at 226.

[294] *Id.* at 227.

[295] *See id.* at 228–29.

declaration of rights "added several provisions drawn directly from Magna Carta" like chapter 29 which was "restated almost verbatim."[296] Likewise, "English liberties as set out in the Bill of Rights of 1689 were also well represented in the Virginia proposals . . . [as was a] provision of the Petition of Right of 1628."[297] Based on this textual borrowing, and other evidence, we can conclude that the Bill of Rights was fashioned using the raw materials provided by the British constitutionalist tradition, from the Magna Carta onwards.

The tenor of the debates in Congress on what would become the Bill of Rights indicated that the only perceived issue with the Magna Carta is that it did not go far enough.[298] However:

> While the Americans did indeed go beyond anything which Magna Carta, whether in its original dimensions or as shaped by such later figures as Coke, had done or which was thought possible of it, the American debt to Magna Carta in the creation of their own constitutions remains considerable. . . . As the Supreme Court said over a hundred years after the Bill of Rights went into effect, "The law is perfectly well settled that the . . . Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors."[299]

The Magna Carta's enduring appeal in late eighteenth and early nineteenth century America is also revealed by the reception statutes previously discussed.[300] Even after the Bill of Rights were passed, the English Statutes were adopted by state legislatures as state law, in no small part to ensure that the protections of these Statutes (not only the Great Charter, but the Petition of Right and the English Bill of Rights) were available to their citizens.[301] As will be demonstrated in the following Section, it is critical when addressing the constitutionality of the targeted killing of citizens to understand how these documents shaped the Framers' view of the limitations on the powers of government and the liberties of citizens. The constitutional text on its face does not always reveal the Framers' concern with limiting the powers of the executive, because the issue of the day was legislative overreaching and because the constitutionalist tradition had already erected barriers against similar abuses by the executive.

To overlook the Framers' mistrust of excessive executive power—especially in connection with the power of judgment and punishment—would be an inexcusable mistake. As previously discussed, the Framers had great respect for all of the fundamental laws—all of which limit the executive, and not the legislative

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[296] *Id.* at 232.

[297] *Id.* at 233.

[298] BAILYN, *supra* note 288, at 374.

[299] HOWARD, *supra* note 286, at 239–40 (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).

[300] *See supra* notes 131–138 and accompanying text.

[301] Hall, *supra* note 136, at 797–801.

branch—and the debate they owed to the thinkers.[302] Unfortunately, gross ignorance of all of these facts (or willful blindness) is precisely what the *Al-Aulaqi* opinion reveals. Accordingly, it is time to turn our attention to that lawsuit to consider two ultimate questions. First, whether or not the particular executive death warrants that it describes might ever be considered consistent with the Constitution or the constitutionalist tradition. And second, if not, what damage might ensue from this divergence.

V. THE *AL-AULAQI* CASE AND THE RULE OF LAW

A. The Lawsuit, the Motion to Dismiss, and the District Court's Dismissal

The facts that gave rise to this lawsuit are stark and compelling. As the District Court's memorandum opinion of December 7, 2010 reveals, the targeted killing program appears to pose a serious question about whether or not the United States is being governed in a manner consistent with the Constitution and the rule of law.[303]

> Anwar Al-[Awlaki was] a Muslim cleric with dual U.S.-Yemeni citizenship, who is currently believed to be in hiding in Yemen. . . . Al-[Awlaki] was born in New Mexico in 1971, and spent much of his early life in the United States, attending college at Colorado State University and receiving his master's degree from San Diego State University before moving to Yemen in 2004.[304]

On April 7, 2010, the *New York Times* reported that after a discussion within the National Security Council, President Obama had authorized the targeted killing of Al-Awlaki.[305] Apparently, and perhaps as a means to sidestep the issue of the constitutional protections possessed by a citizen of the United States accused of treason, the National Security Council believed that the appropriate lens through which to view the legality of this killing was international law (more particularly, the laws of war) rather than domestic law.[306] Later that month, Congressman Charles Dent introduced a resolution calling for the State Department to issue a

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[302] *See supra* notes 91–135 and accompanying text.

[303] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

[304] *Id.* at 10 (citations omitted) (transliteration of Al-Awlaki's name modified).

[305] *See* Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES (Apr. 7, 2010), http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html. *See also* Adam Serwer, *Panetta: Decision to Kill Americans Suspected of Terrorism Is Obama's Mother Jones*, Jan. 30, 2012, *available online at:* http://motherjones.com/mojo/2012/01/panetta-obama-signs-killings-americans-suspected-terrorism.

[306] *See id.*

certificate of loss of nationality that would have stripped Al-Awlaki of his citizenship.[307]

In early July of 2010, Al-Awlaki's father, Nasser Al-Aulaqi, retained attorneys from the American Civil Liberties Union and the Center for Constitutional Rights ("CCR") to file a lawsuit to enjoin the targeted killing of his son.[308] On July 16, 2010, the Treasury Department added Al-Awlaki to the list of Specially Dedicated Global Terrorists pursuant to Executive Order 13,224,[309] an action that made it a criminal offense for the ACLU and CCR to file the *Al-Aulaqi* lawsuit without first receiving a license from the Treasury Department.[310] The Obama Administration viewed Al-Awlaki as a leader of Al-Qaeda in the Arabian Peninsula ("AQAP"), an organization that has allegedly organized terrorists attacks against the United States, actions that this Article has argued fall within the definition of waging war against the United States for the purposes of defining treason.[311]

At the time this designation was made, the Department's Undersecretary for Terrorism and Foreign Intelligence alleged publicly that

> Anwar [Al-Awlaki] has proven that he is extraordinarily dangerous, committed to carrying out deadly attacks on Americans and others worldwide . . . . He has involved himself in every aspect of the supply chain of terrorism—fundraising for terrorist groups, recruiting and training operatives, and planning and ordering attacks on innocents.[312]

After the ACLU and the CCR filed suit against the Treasury Department, alleging that the Department had no statutory authority under the International Emergency Economic Powers Act to bar American lawyers from representing an American

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[307] Mike Levine, *Rep. Introduces Resolution to Strip Radical Cleric of US Citizenship*, FOXNEWS.COM (Apr. 22, 2010), http://politics.blogs.foxnews.com/2010/04/22/rep-introduces-resolution-strip-radical-cleric-us-citizenship/.

[308] Glenn Greenwald, *ACLU, CCR Seek to Have Obama Enjoined from Killing Awlaki Without Due Process*, SALON (Aug. 3, 2010, 7:04 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/08/03/awlaki.

[309] Designation of ANWAR AL-AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Pt. 594 (2010). This is the first time Al-Awlaki was added to the list.

[310] Greenwald, *supra* note 308.

[311] *See supra* notes 62–76 and accompanying text.

[312] *Treasury Designates Anwar Al-Awlaki Key Leader of AQAP*, CNN THIS JUST IN BLOG (July 16, 2010, 2:24 PM), http://news.blogs.cnn.com/2010/07/16/treasury-designates-anwar-al-awlaki-key-leader-of-aqap/ (transliteration of Al-Awlaki's name modified).

citizen *pro bono*, the Department granted the necessary license.[313] The *Al-Aulaqi* lawsuit was subsequently filed on August 30, 2010.[314]

The Complaint details that the Plaintiff sought to enjoin the president, the secretary of defense, and the director of the Central Intelligence Agency ("CIA") from intentionally killing Anwar Al-Awlaki.[315] It argued that Al-Awlaki had standing to bring the suit as his son's next friend because Awlaki is "hiding under threat of death and cannot access counsel or the courts to assert his constitutional rights without disclosing his whereabouts and exposing himself to possible attack by Defendants."[316] It also asserted that the targeted killing policy infringed on Al-Awlaki's Fourth and Fifth Amendment rights.[317] Al-Awlaki sought a declaratory judgment stating that the targeted killing program—insofar as it targeted U.S. citizens who did not present concrete, specific, and imminent threats to life or physical safety—was unconstitutional.[318] He also sought an order requiring Defendants to disclose the criteria used when determining whether the executive will carry out the targeted killing of a citizen of the United States.[319]

On August 25, 2010, Defendants filed a motion to dismiss, arguing that Plaintiff lacked standing to file the claim and that adjudicating the claims would require the court to decide non-justiciable political questions.[320] On December 7, 2010, the District Court granted Defendants' motion to dismiss because the plaintiff lacked standing and the suit purportedly presented nonjusticiable political questions.[321]

B. The Court's Reasoning that Al-Awlaki Lacked Standing and Its Flaws

The court's decision that Plaintiff had no standing as Al-Awlaki's next friend appears highly problematic. The court concluded that "Al-Awlaki can access the U.S. judicial system by presenting himself in a peaceful manner," since "*[a]ll* U.S. citizens may avail themselves of the U.S. judicial system if they present

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[313] Glenn Greenwald, *Lawsuit Challenges Obama's Power to Kill Citizens Without Due Process*, SALON (Aug. 30, 2010, 8:32 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/08/30/assassinations.

[314] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

[315] Complaint for Declaratory and Injunctive Relief at ¶ 11, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469), 2010 WL 3478666.

[316] *Id.* ¶ 9.

[317] *Id.* ¶¶ 27–28.

[318] *Id.* ¶ 11.

[319] *Id.*

[320] Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 19–35, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469), 2010 WL 3863135. The motion also presented additional reasons for the suit's dismissal—including the state secrets privilege—but since these were not discussed by the District Court when ruling on the motion, they will not be discussed here.

[321] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 54 (D.D.C. 2010).

themselves peacefully . . . ."[322] First, this presumes that those administering the targeted killing program will act in accordance with the Constitution, after they have already concluded that its guarantees do not apply to the targeted person. Second, the court believed that Al-Awlaki could do so because "there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen . . . ."[323]

Since Nasser Al-Aulaqi had asserted the exact opposite in an affidavit,[324] these conclusions appear to contradict the principle that on a motion to dismiss, the court must presume the factual allegations in the Complaint to be true, and to draw all inferences from those allegations in favor of the plaintiff. However, citing precedent from the United States Court of Appeals for the District of Columbia Circuit, the court noted that it "may consider material other than the allegations of the complaint in determining whether it has jurisdiction,"[325] and accordingly that it "need not accept plaintiff's bald assertion that his son lacks access to the courts if 'the record makes clear the contrary.'"[326]

However, the record does not clearly support the court's conclusions that Al-Awlaki could turn himself over at the American Embassy or that he had the capacity to retain legal representation while in hiding. Indeed, such conclusions appear to require that many inferences be drawn in favor of the Defendants, something that turns the standard of review of a motion to dismiss on its head. First, the notion that Al-Awlaki could have simply turned himself over at the United States Embassy ignores the fact that he was in hiding hundreds of miles from the capital, and there was nothing in the record that suggested that he would be safe from targeted killing while he made that journey. Defendants had only argued that he would be safe should he "surrender[] or otherwise present[] himself to the proper authorities,"[327] something that could only have been done in Sana'a.

Second, on the question of access to counsel, the court engaged in strange speculation, asserting that:

> [I]t is possible that Anwar Al-[Awlaki] would not even need to emerge from "hiding" in order to seek judicial relief. The use of videoconferencing and other technology has made civil judicial proceedings possible even where the plaintiff himself cannot physically access the courtroom. . . . There is no reason why—if Al-[Awlaki] wanted to seek judicial relief but feared the consequences of emerging

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[322] *Id.* at 18 (emphasis in original) (transliteration of Al-Awlaki's name modified).

[323] *Id.* at 17.

[324] Affidavit of Nasser Al-Aulaqi at ¶¶ 7–10, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469).

[325] *Al-Aulaqi*, 727 F. Supp. 2d at 14.

[326] *Id.* at 17 n.3 (quoting Coal. of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1160 n.2 (9th Cir. 2002)).

[327] Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss at 3, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469), 2010 WL 4974324.

> from hiding—he could not communicate with attorneys via the Internet from his current place of hiding.[328]

There is, however, no evidence in the record that Al-Awlaki had any direct access to videoconferencing equipment or the Internet where he was thought to be located, in the "remote mountains of Yemen."[329] While video footage purportedly featuring Al-Awlaki had been disseminated, that might only establish that someone with a video camera has had contact with Al-Awlaki. Similarly, while he could have allegedly been contacted via e-mail, this might at most establish that someone who claimed to have access to Al-Awlaki might have the ability to relay e-mail messages to, and respond through, him. Neither of these allegations, without a chain of adverse inferences, tend to support the conclusion that Al-Awlaki had the means to initiate a privileged electronic communication with American lawyers for the purpose of retaining or interacting with them.

C. Al-Aulaqi's *Alarming Extension of the Political Question Doctrine*

The court also dismissed the suit for presenting a nonjusticiable political question. The court rested its reasoning chiefly on the precedent provided by the case of *El-Shifa Pharmaceutical Industries Co. v. United States*.[330] In that case, the "D.C. Circuit examined whether the political question doctrine barred judicial resolution of claims . . . seeking to recover damages after their plant was destroyed by an American cruise missile. President Clinton had ordered the missile strike . . . ."[331] The court reasoned:

> [The] plaintiff asks this Court to do exactly what the D.C. Circuit forbid in *El-Shifa*—assess the merits of the President's (alleged) decision to launch an attack on a foreign target. Although the 'foreign target' happens to be a U.S. citizen, the same reasons that counseled against judicial resolution of the plaintiffs' claims in *El-Shifa* apply with equal force here.[332]

The court determined that it would not address Al-Aulaqi's claim that Al-Awlaki should not be killed without due process. However, perhaps because it seems problematic to deny a citizen of the United States judicial review of an executive death warrant merely because he is alleged to be a "foreign target," the court further opined:

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[328] *Al-Aulaqi*, 727 F. Supp. 2d at 18 n.4 (transliteration of Al-Awlaki's name modified).

[329] Lee Keath and Ahmed al-Haj, *Tribe in Yemen Protecting U.S. Cleric Anwar al-Awlaki*, ASSOCIATED PRESS, Jan. 19, 2010, *available at* www.seattletimes.nwsource.com/html/nationworld/2010834237_apmlyemenalqaida.html.

[330] 378 F.3d 1346 (D.C. Cir. 2004).

[331] *Al-Aulaqi*, 727 F. Supp. 2d at 46.

[332] *Id.* at 47.

> The significance of Anwar Al-[Awlaki]'s U.S. citizenship is not lost on this Court. Indeed, it does not appear that any court has ever—on political question doctrine grounds—refused to hear a U.S. citizen's claim that his personal constitutional rights have been violated as a result of U.S. government action taken abroad. Nevertheless, there is inadequate reason to conclude that Anwar [Al-Awlaki]'s U.S. citizenship—standing alone—renders the political question doctrine inapplicable to plaintiff's claims.[333]

The court reached this conclusion because earlier cases have brought "habeas petitions . . . [that are] much more amenable to judicial resolution than the claims raised by [the] plaintiff in this case," which is purportedly significant because "'the Constitution specifically contemplates a judicial role' for claims by individuals challenging their detention by the Executive."[334] The court pointed to the Suspension Clause as evidence of the Framers' clear concern with imprisonment by the executive.[335] It appears that the court's argument rests on the implicit proposition that only those rights that were enumerated within the Constitution are enforceable when the executive asserts that upholding these rights would interfere with its powers. As demonstrated above, this argument appears to depend on a total lack of knowledge of the constitutionalist context of the Constitution's framing.[336]

Owing to this skewed perspective, the court's concern that the relief sought "would be vastly more intrusive upon the powers of the Executive" than those typically sought be a habeas petitioner, and because the questions posed in this case require "expertise beyond the capacity of the judiciary" and since there is a purported need for "unquestioning adherence to a political decision by the Executive,"[337] the court held that the claims were nonjusticiable. This was purportedly a felicitous result that avoided demonstrating a "lack of respect due coordinate branches of government," and creating "the potentiality of embarrassment of multifarious pronunciations by various departments on one question."[338]

In summary, the court decided on two grounds not to examine the merits of suit brought on behalf of a United States citizen who claimed he was the subject of an executive death warrant issued without due process. First, because of speculation and adverse inferences, the court concluded that his next friend had no standing to bring the suit, despite the fact that this prudential consideration has

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[333] *Id.* at 49 (transliteration of Anwar Al-Awlaki's name modified).

[334] *Id.* (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 848–49 (D.C. Cir. 2010)).

[335] *Id.* at 49–50.

[336] *See supra* notes 89–91 and accompanying text.

[337] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, at 50–51 (D.D.C. 2010).

[338] *Id.* at 48.

been waived in other cases when "[h]uman lives are at stake."[339] Justices have also expressed concern for decisions turning on "fine points of procedure or a party's technical standing to claim relief,"[340] though here, a prudential limitation is taken to trump constitutional claims of the highest order. Second, and more importantly, the case was dismissed because the court did not believe that the judiciary had the power to determine the constitutionality of a decision by the president to issue an executive death warrant. It held that such a decision is best left to the executive branch. Accordingly, in the wake of this decision we are forced to consider whether to embrace either the rule of law or the rule of men, or rather of a man: the president. We cannot avoid the choice of one of these routes now that we are at this crossroad, a place that we could have only reached due to great ignorance of our constitutionalist heritage and its importance. Perhaps it is time to for the legal profession to reassert that a president's assertion that his decision as a Commander-in-Chief should be considered justiciable whenever that decision would deprive a citizen of their constitutional rights—not least the right to life, which seems of even greater value than the right to bring an action challenging executive detention affirmed in *Boumediene v. Bush*.[341] Otherwise, we must accept that our civil rights exist only when the president says they do.

D. Al-Aulaqi *and the Dangers of Ignoring of the Constitutionalist Context*

The *Al-Aulaqi* decision held that the question of whether the executive death warrant at issue violated an American citizen's constitutional rights was best left to the Executive branch—the same branch that issued the death warrant. Here, using the threshold matter of whether the issue was justiciable due to the political question doctrine, the court effectively decided the merits of the case: the executive's actions fall into the realm of the conduct of warfare, which the judiciary does not second-guess. However, this conclusion required the use of circular logic: the court would not adjudicate the question of whether or not the action taken by the executive was constitutional because it had determined that the executive was exercising its constitutional powers.

What is worse, the opinion's constitutional interpretation requires a vision of the Constitution that is stripped entirely of context, and of essential content. As a result, the opinion's view of the Constitution is revealed at various stages to be two-dimensional, a distorted vision that led to distorted results. The first and most obvious of these moments is the discussion regarding why the judiciary purportedly has more authority to challenge executive detention than extraconstitutional killing. The court noted that the Suspension Clause

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[339] Rosenberg v. United States, 346 U.S. 273, 294 (1953) (Clark, J., concurring for six Justices).

[340] *Id.*

[341] 553 U.S. 723 (2008).

> protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account" and therefore reflects a "textually demonstrable commitment of habeas corpus claims to the Judiciary."[342] Conversely, "there is no constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target [i.e., for review of a decision to send someone to attack and kill him].[343]

Again, the implicit assumption is that the only constitutional rights that can be asserted against the executive are those which are explicitly stated in the text of the Constitution. However, as stated above, this runs directly against the intentions of the Framers, who argued against enumerating rights precisely because it might be misconstrued that these rights were exclusive rather than illustrative, and it was this fear that directly led to the drafting of the Bill of Rights after the discussions of the Virginia ratifying convention.[344] Furthermore, the argument is incoherent on its face.

Consider the text of the Suspension Clause: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[345] The clause is found in Article One of the Constitution, which limits the powers of the legislature. As noted, these provisions were largely motivated by the concerns about the dangers of legislative power made manifest by the contemporary English doctrine of parliamentary supremacy.[346] However, the common law writ of habeas corpus, so named in the Suspension Clause,[347] has always been a safeguard against executive detention. While the Framers thought it was important that this right not be suspended by the legislature except in certain instances, the right already existed (and had long limited the powers of the executive, and due to Coke's scholarship, this right was considered inviolable). The documents that established the right to the writ had the force of binding law even before the ratification of the Constitution, which itself creates no right to habeas corpus, although it specifies that this right can only be suspended in certain enumerated instances.[348]

Accordingly, there is clear evidence from the Suspension Clause that the Framers believed that there are fundamental rights, some of which are recognized by the Constitution, although they are not themselves established by the Constitution.[349] One of these is habeas corpus. This raises a question that the *Al-Aulaqi* opinion ignores: what is the source of these rights? In the case of habeas

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[342] *Al-Aulaqi*, 727 F. Supp. 2d at 49–50 (citation and quotation omitted).

[343] *Id.* at 49–50 (citation omitted) (internal quotation marks omitted).

[344] *See supra* notes 290–297 and accompanying text.

[345] U.S. CONST. art. I, § 9, cl. 2.

[346] *See supra* notes 125–139 and accompanying text.

[347] Michael A. Rosenhouse, Annotation, *Construction and Application of Suspension Clause of United States Constitution, U.S. CONST. art. I, § 9, cl. 2*, 31 A.L.R.6th 1 (2008).

[348] U.S. CONST. art. I, § 9, cl. 2.

[349] *See supra* notes 131–140 and accompanying text.

corpus, the answer is obvious. The right to habeas corpus had been explicitly recognized by the Habeas Corpus Acts of 1679[350] and 1640,[351] but Blackstone (and all those influenced by Blackstone, including the Framers) believed that the right had been established by the Magna Carta's Chapter 29.[352]

If the existence of habeas corpus, and the concomitant power of the Judiciary to hear claims brought pursuant to this writ, is not derived from the Constitution, but rather from the Magna Carta and other fundamental laws of England, then the argument that the Constitution contains no textually demonstrable commitment to the judiciary for claims about extralegal killing is meaningless. Chapter 29 of the Great Charter, in addition to addressing executive detention, addresses assassination: that "[n]o free man shall be taken or imprisoned . . . neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers."[353] The description of the conditions under which habeas corpus can be suspended is merely evidence that this particular question was still open in the jurisprudence of the Anglo-American tradition. The limitation of this one right does not prejudice the existence of others that were not specifically mentioned because they were well settled by 1787, especially since this mention establishes that the Framers believed that these rights were so fundamental that they need not be recognized in the Constitution.[354]

As soon as one recognized the obvious fact that the relevant constitutional rights (which were affirmed to have continuing legal force by the Bill of Rights and the reception statutes that affirmed the rights of the subject at common law) predate and undergird the Constitution (which destroys the specious argument that the Framers sought to enumerate all the ancient liberties, an argument upon which the *Al-Aulaqi* decision depends), then we can begin to understand how to properly evaluate the claim that an executive death warrant is unconstitutional. To do so, we must return to the constitutionalist context for the Constitution that has been described above. It will reveal how the Framers provided for this situation. Although they could not have contemplated the return of the argument that executive death warrants were constitutional (since this had been banned by the Magna Carta and had again been decisively rejected over the preceding centuries), the Constitution, by way of implicit reference to many other documents of the constitutionalist tradition, makes it clear that the definition of the rights that it did detail (especially the Fifth Amendment's guarantee of due process) can only be understood by reference to these other laws. In particular, it can only be understood with reference to Blackstone's fundamental laws of England—and the constitutionalist tradition that produced them. When we see the claim through this

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[350] Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (Eng.).

[351] Habeas Corpus Act of 1640, 16 Car. 1, c. 10 (Eng.).

[352] TURNER, *supra* note 252, at 173, 211. Blackstone had traced the issuance of the writ back to the fourteenth century, and in particular to the backlash against the purportedly unlawful acts of Edward I described above in the introduction, some twenty years after the execution of David ap Gruffydd. *Id.* at 3–4.

[353] Magna Carta, 1215, 25 Edw. 1, c. 29 (Eng.) (author's translation from Latin).

[354] *See supra* notes 131–140 and accompanying text.

lens, the danger of executive death warrants—not only to our fellow citizens, but also to the living fabric of our legal tradition—becomes clear.

E. Executive Death Warrants and the Constitutionalist Idea of Due Process

The issue presented by *Al-Aulaqi* is whether the Constitution vests with the executive the power to issue a death warrant for an alleged traitor, or whether this power is vested solely in the judiciary—to be imposed only after a trial in open court that provides specific procedural safeguards. This Section will briefly reiterate why, when we understand the constitutionalist context of the American Revolution, there can be absolutely no doubt that the targeted killing of an American citizen on the president's order would have been anathema to the Framers. The preceding Sections demonstrated the constitutionalist influences on the founding fathers: in order to see how these were manifested in the Constitution and the Bill of Rights. It was necessary to lay these out in reverse chronological order, since the Framers' understanding of Hale was shaped by their encounter with Blackstone, their understanding of Coke was mediated by Hale's influence, and their view of the significance of Magna Carta had been shaped decisively by Coke. At this point, however, it is possible to briefly summarize these influences in a more comprehensible chronological manner, by laying out the tradition of liberty that led to the vision of the rule of law embraced by the Framers.

After one lays out the concerns with the rule of law embedded within the Constitution and the Bill of Rights—against the backdrop of the constitutionalist context—we can easily see that the these documents demonstrate the speciousness of the argument that the Framers would not have wanted alleged traitors like Al-Awlaki to enjoy the benefits of due process in wartime. As demonstrated above, the Founding Fathers were particularly concerned with making sure that alleged traitors were afforded constitutional protections.[355] This Section will also demonstrate that when seen in the light of this tradition, it is evident that the Due Process Clause (even without reference to the Treason Clause and the Bill of Attainder Clause) itself clearly proscribes the targeted killing of a United States citizen on the orders of the executive.

F. The Magna Carta's Influence on the Due Process Clause Is Decisive

Great respect for the Magna Carta is the first reason the Framers would have concluded that the constitutionalist tradition, which they took for granted when they considered questions of natural rights, had long precluded a return to executive assassination. Chapter 29 clearly states that "[n]o free man shall be arrested or imprisoned . . . neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers."[356] Echoing this, the Fifth Amendment of the United States Constitution states that "nor shall any person . . . be deprived

[355] *See supra* notes 17–28 and accompanying text.

[356] Magna Carta, 1215, 25 Edw. 1, c. 29 (Eng.) (author's translation from Latin).

of life . . . without due process of law."[357] That the Due Process Clause was modeled on the Great Charter is beyond peradventure, as the discussion of George Mason's role in the drafting of the Virginia Declaration of Rights makes clear.[358] Constitutionalists fought for the Magna Carta over centuries, precisely so that nothing like the execution of David ap Gruffydd might ever be seen again.[359]

For hundreds of years, the Great Charter had prevented powerful English monarchs—including the Stuarts—from issuing death warrants. Even the regicides who had committed high treason by executing King Charles I were not subjected to executive death warrants. Those who fled to the Netherlands were not pursued by assassins bearing royal orders to kill; rather, they were arrested by English agents and returned to England, where they were put on trial.[360] Even in the periods of greatest peril, this was the rule: during the most tenuous years of Elizabeth I's reign, when traitors plotted her death from exile, they were made the subject of arrest warrants (and upon successful arrest, trials in open court), not death warrants.[361]

This had been such a longstanding and basic principle of justice that Blackstone, writing shortly before the drafting of the Constitution and the Bill of Rights, noted that "the constitution is an utter stranger to any arbitrary power of killing or maiming the subject."[362] By arbitrary he meant power which did not recognize the limits of the Magna Carta and the other fundamental laws, as "neither his majesty, nor his privy council, [the Executive] have any jurisdiction, power, or authority . . . [except] that the [subject] ought to be tried and determined in ordinary courts of justice, and by course of law."[363]

At the time the Constitution and Bill of Rights were drafted, a breach of this norm would have been inconceivable: "To bereave a man or life . . . without accusation of trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom."[364] This was the effect brought by the enduring respect for the Great Charter, which flourished in this country, as Justice Harlan wrote, some seven hundred years after the Magna Carta was first enacted: "[T]he guaranties of due process, though having their roots in Magna Carta's *'per legem terrae'* [are] considered as procedural safeguards 'against executive usurpation and tyranny.'"[365] Accordingly, it is difficult to

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[357] U.S. Const. amend. V.

[358] *See supra* notes 290–297 and accompanying text.

[359] *See supra* notes 10–16 and accompanying text.

[360] *See* CHARLES I, THE TRIALS OF CHARLES THE FIRST, AND OF SOME OF THE REGICIDES: WITH BIOGRAPHIES OF BRADSHAW, IRETON, HARRISON, AND OTHERS, AND WITH NOTES 279–82 (2010).

[361] *See, e.g.*, ROBERT HUTCHINSON, ELIZABETH'S SPYMASTER 117–18 (2007).

[362] BLACKSTONE, *supra* note 92, at 129.

[363] *Id.* at 138.

[364] *Id.* at 131–32.

[365] Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)).

imagine that the Framers would not have found a breach of the Magna Carta through an executive death warrant, as in *Al-Aulaqi*, particularly deplorable.

G. Coke's Influence on the Framers Illuminates the Due Process Clause

The Founding Fathers' reverence for Coke is also plain from the historical record.[366] This clarifies their position on the powers of the judicial and the executive branches, and sheds light on the type of executive judging at issue in *Al-Aulaqi*. Coke, in *Bonham's Case*—which had a legendary status among the patriots following James Otis's arguments—affirmed the power of a judge to strike down laws that were inconsistent with the Magna Carta, such as when one arm of the state operates as both the prosecutor and the judge, which is held to be "a travesty of justice."[367] Coke then wrote the Petition of Right, which was recognized by Blackstone as one of the fundamental laws.[368] The Petition of Right stated, "no man ought to be adjudged to death but by the laws established in this your realm either by the customs of this realm [the common law] or by acts of parliament."[369] It further stated that "no offender of what kind [what]sover is exempted"[370] from the requirement of the trial at common law (or bill of attainder, which the Framers subsequently abolished) before punishment, and held James I responsible in particular for "caus[ing] [traitors] to be executed and put to death according to the law martial."[371]

It is plain that the Framers would have considered the Obama Administration's executive death warrants to be entirely incompatible with Coke's ideas. Rather, those actions would likely have reminded the Framers of the ideas of James I, who had argued that the executive possessed the power of judgment, and that his decisions were not reviewable by any court, since it has power of life and death over everyone and is not subject or bound by the law.[372] Another document within the fundamental laws of England that clearly influenced the Framers (George Mason and James Madison in particular) was the English Bill of Rights, which decisively rejected James's argument and again gave Coke's the force of law.[373]

Coke's view of the rule of law as a bulwark against arbitrary power was supreme when the Constitution and the Bill of Rights were written, but there is

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[366] *See supra* notes 186–246 and accompanying text.

[367] Bonham's Case, (1610) 77 Eng. Rep. 646 (K.B.).

[368] BLACKSTONE, *supra* note 92, at 124.

[369] Petition of Right, 1627, 3 Car., c. 1 (Eng.).

[370] *Id.* § VII.

[371] *Id.*

[372] James I, *Speech to the Lords and Commons 1609*, *in* THE POLITICAL WORKS OF JAMES I 306–08 (Charles H. McIlwain ed., 2002).

[373] Bill of Rights, 1689, 1 W. & M. Sess 2, c. 2 (Eng.) ("[F]or the vindicating and asserting their ancient rights and liberties [we] declare . . . that the pretended power of dispensing with laws or the execution of laws by regal authority, as it has been assumed and exercised of late, is illegal.").

another reason to believe that the Framers decisively rejected the view that the executive had the power to judge. Alexander Hamilton was stating what had become a truism when he said "[t]here is no liberty if the power of judging be not separated from . . . the executive powers[]."[374] Accordingly, the influence of Coke on the Framers, evident from both their explicit and implicit references to his position on the rule of law, is good evidence that they would not have anticipated that the documents they wrote would support a theory of executive power constituting a step back from Coke's views, and which would effect a revival of the Court of Star Chamber. Specifically, a step to a paradigm of justice that had already been obsolete for three hundred years when Coke struggled with James I.

H. Hale's Refutation of the Hobbesian Sovereign and Its Influence

The Stuart perspective on executive power had been decisively rejected in Coke's time, but there was a moment when it might have been resurrected in a different guise, namely Hobbes's, after James's grandson, King Charles II was restored.[375] Hobbes's justification for vast executive power was the possibility of danger to the state; all the natural rights of the citizen must be ceded to the sovereign in order to receive protection by virtue of the social contract that this surrender creates.[376] The reaction to this theory on behalf of the representatives of the constitutionalist tradition had a decisive influence on the American patriots. It also provides a solid basis to predict how the Framers would have responded to the theory of sovereignty that undergirds the arguments that the president has the power to issue an executive death warrant.

Hobbes, like modern-day defenders of broad emergency powers, claimed that these powers would only be used sparingly by the sovereign; even though he will not be bound by the laws, he can be trusted to act in the best interests of the citizenry.[377] Sir Matthew Hale saw through this assertion, and relying on Coke's analysis of arbitrary power, argued that a sovereign who exercised absolute power in an emergency but who also had the power to declare an emergency would be a tyrant.[378] The Framers addressed this problem by including the Suspension Clause, which gives the executive immunity from the writ of habeas corpus only if Congress takes the action the Constitution requires.[379] Conversely, Hale noted that Hobbes's sovereign is alone "judge of all public dangers and may appoint such remedies as he please,"[380] something which he thought was incompatible with the constitutionalist tradition—the Framers agreed.

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[374] THE FEDERALIST NO. 78 (Alexander Hamilton).

[375] *See supra* notes 150–173 and accompanying text.

[376] *See generally* Skinner, *supra* note 157 (Hobbes of course was writing in the wake of the English Civil War, which had rent the country asunder).

[377] THOMAS HOBBES, LEVIATHAN 133–41 (1947 ed.) (1651) (discussing the rights of the sovereign).

[378] *See supra* notes 173–185 and accompanying text.

[379] U.S. CONST. art. I, § 9, cl. 2.

[380] Hale, *supra* note 148, at 509.

Hale understood that if the sovereign was the sole judge of public dangers, and could respond with extralegal measures in that situation, the king would no longer be under the law, a change that would do away with at least four hundred years of English constitutional precedent.[381] Hale, like Coke, believed that the actions of the king could be judged by legal standards even when he purportedly acted for reasons of state, or during an emergency.[382] The potential for problems during emergencies created by a balance of powers did not deter Hale, who argued, "it is a madness to think that the model of laws of government is to frame according to such circumstances as very rarely occur."[383]

As previously described, Hale was "particularly well known" within the colonies; this was evident during the period of turmoil when James Otis was making his arguments about the general warrants being issued by the colonial governments.[384] Hale's reaffirmation that the executive could only rule under the laws was undoubtedly attractive at that moment. In 1766, when Hale's influence in the colonies was apparently at its zenith,[385] Parliament had adopted powers over the colonies that were widely considered arbitrary. In doing so, Reid argued, "Parliament adopted wholeheartedly the doctrine of sovereignty as stated by Hobbes."[386] The Declaratory Act—which American Patriots believed asserted Parliament's right to repeal Magna Carta (contrary to Hale's views) of its powers—lit the fuse of the American Revolution.[387]

Accordingly, given the antipathy towards Hobbes's theory of sovereignty manifested by the American patriots, there is very little reason to believe that the Framers intended to create unremunerated reserve or emergency powers for the president. They had learned much from Hale's refutation of Hobbes, and to read these implied powers into the draft of the Constitution appears to ignore one simple fact: because these powers would have been against contemporary norms, we would certainly expect them to have been explicitly outlined and in the clearest possible manner. This serves as further evidence that the targeted killing of an American citizen falls outside of the broadest possible conception of our constitutionalist tradition.

I. The Patriots Orientation towards Blackstone and What It Reveals

As previously detailed, there is ample evidence that Blackstone was the jurist who had exercised the most influence on colonial American thought.[388] He had produced an eloquent defense of the balance of powers as a bulwark of liberty, and

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[381] *See supra* notes 171–172 and accompanying text.

[382] Hale, *supra* note 148, at 509–13 (translated by author from Early Modern English to Modern English).

[383] *Id.* at 512.

[384] BAILYN, *supra* note 183, at 30 n.11.

[385] *Id.*

[386] REID, *supra* note 124, at 60 (quoting Arthur L. Goodhart).

[387] *Id.* at 47–48.

[388] *See supra* notes 92–128 and accompanying text.

his writings reinforced the prohibitions against executive tyranny. Blackstone reasserted that "nothing . . . is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state," and that the executive's violation of the longstanding prohibitions against extraconstitutional killing "would be so gross and notorious an act of despotism; as must at once convey the alarm of tyranny throughout the whole kingdom."[389]

The Framers' key dispute with Blackstone's ideas was his apparent acceptance of the prevailing view of the wide-ranging powers of the legislative branch—Parliament. As John Phillip Reid explained:

> [T]he emerging British constitution, the constitution of the parliamentary executive . . . [is what] Americans were rebelling against not because "the people" were obtaining power, but because they perceived the command of government was becoming an arbitrary command unchecked by the balance of constitutional counterweights . . . . American constitutional theory was such a close copy of British constitutional theory it shared its weaknesses as well as its strengths . . . a few [British] commentators, such as John Locke and *Cato*, did warn that a legislature could endanger liberty, most discussion of the menace of power concentrated on royal abuse.[390]

American constitutional theory, as developed by the American Whigs and enshrined into its fundamental law by the Framers, rejected arbitrary power in all its forms, whether executive or legislative. However, it is particularly important to note that executive tyranny had already been decisively diminished within the British constitutional tradition.[391] This explains why the Bill of Attainder Clause[392] only mentions bills and not executive orders of attainder. The omission makes no sense otherwise, as the Framers believed that, "[t]he antithesis of arbitrary power was limited power";[393] every branch of the new government's power was limited by means that surpassed the existing constitutionalist approaches to the problem of arbitrary power. Accordingly, when Alexander Hamilton argued in Federalist Number 78 that the judiciary should be given the power to "declare all acts contrary to the manifest tenor of the Constitution void," in particular those relating to "bills of attainder," he could not have meant that the judiciary only had this power when these were acts of the legislature, since the judicial power to strike down executive extraconstitutional acts was as old as the Statute of 42 Edward III.[394]

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[389] BLACKSTONE, *supra* note 92, at 131–32.
[390] REID, *supra* note 124, at 134–36.
[391] *See supra* note 109 and accompanying text.
[392] U.S. CONST. art. I, § 9, cl. 3.
[393] REID, *supra* note 124, at 135.
[394] THE FEDERALIST NO. 78 (Alexander Hamilton).

Following and expanding upon the British constitutionalist tradition, the Constitution did not grant the president powers of judging in wartime by virtue of his powers as commander-in-chief. James Madison's actions during the War of 1812 established this understanding when he directed that a citizen accused of what amounted to treason be arraigned by the civil courts and released from military custody.[395] As secretary of state, Madison had witnessed the passage of the 1806 amendments to the acts establishing military jurisdiction, which "carefully limited military jurisdiction, even in time of war, to those who were not citizens."[396]

The Supreme Court affirmed the constitutional limits of the president's powers in the cases decided during the Quasi-War with France, in particular *Little v. Barreme*.[397] The Treason Clause,[398] the Marque and Reprisal Clause,[399] and the Bill of Attainder Clause[400] are all of a piece—they demonstrate a commitment to the rule of law and the balance of powers that it requires. They also demonstrate that no one is deprived of the protection of the laws, nor is anyone above the laws, whether traitor or president, even during periods of emergency. For these reasons, they are the most comprehensive and elegant constitutionalist documents yet produced. That said, modern analysis of constitutional protections have focused on the Bill of Rights' guarantee of Due Process. For this reason, and so that this Article's discussion might not be seen as antiquarian and obsolete, it must be reiterated that the issue at present is largely whether, in the light of the constitutionalist context for the Due Process Clause described above,[401] one might successfully make Justice Black's argument about the limitations of executive power. Namely, that the restrictions on legislative power embodied in the proscriptions against bills of attainder should be applied, *mutatis mutandis*, to executive acts—as a specific technique for assuring the procedural guarantees of due process. As Justice Day argued on the subject of the broad scope of the Constitution's due process protections, and the version of the rule of law that they embody:

> In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive.[402]

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[395] *Case of Clark the Spy*, *supra* note 89, at 121.
[396] Padilla Law Professors Amicus Brief, *supra* note 87, at *23.
[397] 6 U.S. (2 Cranch) 170 (1804).
[398] U.S. CONST. art. III, § 3, cl. 1.
[399] *Id.* at art. I, § 8, cl. 11.
[400] *Id.* § 9, cl. 3.
[401] *See supra* notes 356–358 and accompanying text.
[402] Wilson v. New, 243 U.S. 332, 366–67 (1917) (Day, J., dissenting).

J. If We Leave the Constitutionalist Path, Where Might We Arrive?

The key question that any appeal of (or challenge to) the District Court's decision in *Al-Aulaqi* presents is this: should the political question doctrine serve to bar any court from considering whether an executive death warrant against a citizen would deprive him or her of life without due process of law? It is hardly possible to read what was detailed above and come to the conclusion that it should. This is only possible if the political question doctrine is taken to warrant a radical departure from the constitutionalist tradition and its concern for the rule of law—without a remedy there can hardly be said to be a right. That said, there is another question that follows from the first, and which is ultimately more important: What consequences would result from an appellate ruling that affirms this holding, especially one that holds that *El-Shifa's* principles apply equally when the foreign target is an American citizen? Would this be a nation of laws, and not of men, in accordance with the rule of law, if the president can decide who lives and who dies, and this decision is entirely unreviewable? It is difficult to understand how the rule of law can survive if courts decide not to enforce constitutional guarantees when the president has made a decision to the contrary, since—as Hamilton had correctly argued—rights of this kind

> can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[403]

One might well ask: Where are we heading if constitutional rights against the executive are unenforceable whenever the executive makes such a determination? Giorgio Agamben, who drew upon the works of Carl Schmitt, provides the best explanation. In *State of Exception*, Agamben noted how the executive power to operate above the laws after it has declared an emergency situation creates incentives that lead inexorably towards totalitarianism.[404]

The theory of the state of exception originates within the continental legal traditions that begin with the French Revolution, which quickly led to Jacobin terror.[405] The doctrine has no explicit analogue in the common law tradition, since it is anathema to the rule of law. However, the political question doctrine can allow the state to put this existing theory into practice without any explicit recognition of divergence from the constitutional order. It should be obvious that this requires willful blindness, or perhaps embracing a theory of the "noble lie," so that one sees the value of the Constitution purely as a pious fiction that secures the consent of

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[403] THE FEDERALIST NO. 78 (Alexander Hamilton).

[404] GIORGIO AGAMBEN, STATE OF EXCEPTION 2 (Kevin Attell trans., 2005).

[405] *See* Charles Walton, Essay Review, 4 H–FRANCE REV. NO. 77. (2004), *available at* http://www.h-france.net/vol4reviews/walton3.html (reviewing Sophie Wahnich, *La Liberté ou la Mort: Essai sur la Terreur et le Terrosime*, LA FABRIQUE (2003)).

the masses, but which is rejected by the elect who deserve to govern in secret.[406] To allow the president to operate above the Constitution (by placing his actions above constitutional review, even when they are precisely those behaviors that the Constitution was created to constrain) is to secretly overthrow the rule of law, and to walk a path which in the past has led directly to repression, totalitarianism, and ultimately, destruction.

VI. CONCLUSION

> *[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.*[407]
>
> *– Justice O'Connor (2004)*

From 2001 to 2004, the constitutional order of the United States was severely tested. In *Hamdi v. Rumsfeld*,[408] the Supreme Court held that the writ of habeas corpus extended to a United States citizen held at Guantanamo Bay.[409] Eight of the nine Justices agreed that the executive branch did not have the power to hold a citizen indefinitely, without access to basic due process protections enforceable in open court.[410] This case was properly seen as a watershed, a rejection of theories of executive detention that were incompatible with the basic tenets of our common law tradition.[411] However, the clear right to habeas corpus is only slightly over three hundred years old—the right not to be killed without due process of law is twice as old and considerably more fundamental. As Blackstone made clear, habeas corpus was originally necessary because it was a prophylactic protection for Magna Carta's right not to be killed.[412]

To turn a blind eye to executive death warrants would be to trample upon numerous principles the Framers believed so important as to put into a document that outlines the parameters of the state itself. It would also trample upon principles that predate the Bill of Rights: the balance of powers, the constraints on arbitrary executive action, and the specific requirements of additional due process for those accused of crimes amounting to treason. It would also make a mockery of their

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[406] *See generally* SHADIA B. DRURY, THE POLITICAL IDEAS OF LEO STRAUSS (1988) (describing the widespread implications of the interpretation of Plato's allegory of the cave that Leo Strauss passed on to his academic and political disciples).

[407] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[408] *Id.* at 507.

[409] *Id.* at 535.

[410] *Id.* at 535–37.

[411] Jenny S. Martinez, Hamdi v. Rumfeld, *124 S. Ct. 2633, United States Supreme Court, June 28, 2004*, 98 AM. J. INT'L L. 782, 785–88 (2004).

[412] *See supra* note 112 and accompanying text.

comprehensive view of due process, which precluded the use of military justice against civilians. It would allow a return to the very features of royalist justice that they and their forbearers detested, such as allowing the executive the power of judgment and denying the courts the power to intervene—this was the hallmark of the detested Star Chamber, which was abolished on these grounds in 1641.[413]

What is perhaps most perplexing about this current crossroads is that there seems to be very little discussion of the importance of this case within the legal profession in general, and in particular among the scholars and lawyers who had opposed the legal framework for the indefinite detention of the detainees at Guantanamo Bay. It is difficult to understand why so much determined opposition should emerge to the withholding of the rights of habeas corpus from American citizens (which led to the decision in *Hamdi*),[414] while the administration's decision to issue executive death warrants has led to so little. Apart from the decision of the ACLU and the CCR to litigate the case on behalf of Nasser Al-Aulaqi, there has been very little action taken within the legal community to publicize the Obama Administration's decision to use the targeted killing program to assassinate an American citizen.[415]

As the discussion of the targeted killing program after Al-Awlaki's extrajudicial execution reveals,

> American militants like Anwar al-Awlaki are placed on a kill or capture list by a secretive panel of senior government officials, which then informs the president of its decisions . . . . There is no public record of the operations or decisions of the panel, which is a subset of the White House's National Security Council . . . . Neither is there any law establishing its existence or setting out the rules by which it is supposed to operate.[416]

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[413] *See generally* Alford, *supra* note 104 (explaining that the abolition of the Star Chamber related to repressive activities taking place during both the Jacobean and Caroline eras).

[414] Dante Gatmaytan, *Crafting Policies for the Guantánamo Bay Detainees: An Interbranch Perspective*, 2010 DEPAUL RULE L.J. 14 ("Lawyers displayed an almost singular resolve to undo the Guantánamo policy. When President Bush created military tribunals in 2001 to try those suspected of involvement in the attacks on US soil, 300 law professors challenged the plan as unconstitutional."); *see also* Colleen E. Hardy, The War on Terror and the Detention of Unlawful Enemy Combatants: An Examination of Rights and Processes Granted to United States Citizen Unlawful Enemy Combatants and Guantanamo Bay Detainees (Apr. 3, 2007) (unpublished Ph.D. dissertation, George Mason University) (on file with ProQuest Dissertations and Theses).

[415] It should be noted that the vigorous and sustained coverage of the issue provided by Glenn Greenwald of Salon.com is a notable exception. *See, e.g.*, Glenn Greenwald, *The Due-Process-Free Assassination of U.S. Citizens Is Now Reality*, SALON (Sept. 30, 2011, 4:31 AM), http://www.salon.com/2011/09/30/awlaki_6/.

[416] Mark Hosenball, *Secret Panel Can Put Americans on "Kill List,"* REUTERS (Oct. 5, 2011, 7:59 PM), http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005.

Not only is there no law addressing the due process rights of Americans with respect to targeted killing, but no law on this subject can be made. The executive branch has prevented the judiciary from addressing the killing of citizens by asserting that the courts do not have jurisdiction over these cases because they present political questions. Since the judiciary may not adjudicate the claims of those about to be killed, the prevailing law of the land now comes in the form of secret memoranda created by the executive's Office of Legal Counsel ("OLC").[417]

The executive branch now has the final say on the constitutionality of its decision to kill an American citizen, since it asserts that no court has jurisdiction to review its opinion. This is executive privilege beyond James I's wildest dreams. While the administration insists that the OLC memorandum did not formulate general criteria for deciding whether Americans accused (impliedly, but not formally) of treason may be tortured or killed,[418] its version of events is actually worse than the alternative. The administration advances the position that a citizen suspected of treason may be killed after a singular determination within the executive branch that this would not violate the citizen's due process rights. "[I]f that's true, then the Obama Administration is playing legal Calvinball, making decisions based on individual cases, rather than consistent legal criteria."[419] Unfortunately, this has been confirmed to be true: the recommendations for targeted killings are reportedly made on a case-by-case basis by "a grim debating society" of "more than 100 members of the government's sprawling national security apparatus," who provide no indication of using legal principles when determining such issues as which sort of "facilitators" of terrorism should be marked for death.[420] This sort of Star Chamber is precisely what the rule of law was designed to protect us against.

After months of silence, Attorney General of the United States Eric Holder traced out the rationale for the targeted killing of an American citizen.[421] Rebutting this article's thesis, he argued:

> Some have argued that the president is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of Al Qaeda or associated forces. . . .

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[417] *See* Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845, 846–50 (2009).

[418] *Id.* (stating that the Memorandum "interpreted the federal criminal prohibition against torture" and other issues "including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability").

[419] Spencer Ackerman, *So Is It a State Secret or Not?*, ATTACKERMAN (Oct. 19, 2011, 5:01 AM), http://spencerackerman.typepad.com/attackerman/2011/10/so-is-it-a-state-secret-or-not.html.

[420] Jo Becker and Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

[421] Charlie Savage, *U.S. Law May Allow Killings, Holder Says*, N.Y. TIMES, Mar. 5, 2012, at A18.

> This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.[422]

Given the Obama Administration's decision not to release the OLC memorandum or even acknowledge that they did in fact kill Al-Awlaki,[423] this will likely be the most comprehensive description of the legal case for targeted killings the American people ever receive. Its arrogance is stunning. Attorney General Holder appears to rely implicitly on a Court decision holding that those having their social security benefits terminated are not entitled to a hearing in advance in support of another proposition. Namely, that some unspecified degree of procedural fairness apportioned in secret within the executive branch is all that is required before an American citizen can be killed. The Constitution, and a tradition of resistance to arbitrary executive power that it reaffirmed that extends back to the Magna Carta, is being held for naught—on the basis of a holding from an administrative law case wrenched forcibly out of context. With this flimsy justification, the administration rationalizes the creation of a new Star Chamber, newly empowered to administer capital punishment in secret and unchallengeable proceedings. Should this pass unchallenged, this may herald the end of the rule of law in America.

At this moment, we must ask: Why is the alarm of tyranny not being rung throughout the land? Why are prominent public intellectuals opining that this action is entirely consistent with Framers' views,[424] despite the fact that they were the heirs of those constitutionalists who had resisted Stuart absolutism and executive privilege? This sanguine response only seems to be possible if we ignore the constitutionalist context in which the Framers' wrote the Constitution and the Bill of Rights. Pretending that the Founding Fathers left the door open to revisit these issues is to ignore that they were settled centuries earlier. If we believe that Magna Carta and the documents that followed have no bearing upon the constitutional rights of American citizens in the twenty-first century, perhaps we forget that we might easily return to the dark ages if we extinguish the flame of constitutionalism and allow the executive branch to impose the death penalty without a trial.

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[422] *Id.*

[423] *Id.*

[424] Steven Hayward, *What Could Go Wrong?*, POWERLINE (Oct. 12, 2011), http://www.powerlineblog.com/archives/2011/10/what-could-go-wrong.php.