The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens

Ryan P Alford, Ave Maria School of Law
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Ryan Patrick Alford*

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 of great public interest.¹

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

INTRODUCTION

During the spring of 2010, President Obama authorized the targeting killing of Anwar Al-Awlaki.³ He is the first U.S. citizen known to have been the subject of such any order from the executive calling for his death; 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. While Al-Awlaki is now being described as a traitor who has waged war against the United States⁴ (although the government has never made these allegations via any official channel, as their position is that this designation is a state secret), he has never been indicted for treason or even for any terrorism-related crime in the United States.⁵

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² Magna Carta, cl. 29 (1297) (25 Ed. 1) (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.
⁵ Al-Awlaki was, however, convicted in absentia of inciting the murder of Jacques Spagnolo, a French energy contractor, on January 17, 2011. It should be noted, however,
To understand the gravity of this order, and the importance of the opinion of the District Court which held that it is unreviewable under the political question doctrine, we should begin by considering the influence of a similar case, which, despite its great age is perhaps the most pertinent point of comparison: the case of David ap Gruffydd (1238-1283). Gruffydd was a Welsh prince—the last ruler of an independent Wales—who nevertheless owed personal fealty to the realm of England, as he had paid homage to King Henry III in 1253. In 1282 he waged war against Henry’s son Edward I, and was the subject of a royal order from King Edward that he be killed. We must return to the Middle Ages for a relevant comparator because the thirteenth century was the last time when the executive branch of any country governed by the common law had asserted that it was legal to kill a citizen on the basis of an executive order, without the involvement of either the judicial or the legislative branches—that is, until the case of Anwar Al-Awlaki.

It is notable that the case against Gruffydd for treason was defective: “David had not apparently defied his liege lord in formal manner”, which was perhaps the reason why he was not tried by the king’s nobles in the manner that the nascent English constitutional tradition required, following Magna Carta’s famous Clause 29: “neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers . . .” which had been acknowledged to be binding law (for the first time) by Edward’s father. Accordingly, instead of being arraigned Gruffydd was declared an outlaw by King Edward without the benefit of a trial supervised by judges with his fellow peers sitting in judgment, and hung, drawn and quartered pursuant to that royal order.

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 that 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/2011/01/20111117133558339969.html


7 J. G. Bellamy, The Law of Treason in England in the Late Middle Ages 26 (1970) (“Sir Thomas Grey of Heton and the author of the Brut aver quite bluntly that David was sentenced at the king’s command.”).

8 Id. at 177–205 (describing how acts of attainder had been appropriated by Parliament during the fourteenth century.

9 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 the article refers to this provision. The emphasis in the quotation from this clause is added the present author.

10 The course of proceedings makes it clear that Edward understood this action was of dubious legality; he attempted to insulate himself from the charge that he had denied Gruffydd due process of law by convening a Parliament before passing sentence, which
Edward repeatedly failed to observe the nascent legal norms related to the trial of alleged traitors during his campaigns to subdue Wales and Scotland (where Sir William “Braveheart” Wallace had been made the subject of another dubious execution). Owing in part to unease among his Barons about his ability to pronounce judgments of outlawry and to sentence alleged traitors to death, Edward was later pressed into reissuing the Magna Carta; this enactment is still the law of the United Kingdom today. Additionally, after Edward and his heir’s manifold abuses of the law of treason, including having his nobles attainted on the basis of facts read into evidence upon royal command, 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.”

In these statutes, the right not to be deprived of life without due process was extended to all, and the king implicitly acknowledged that the royal practice of personally sentencing those he accused of crimes had damaged the realm. 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. Additionally, after the Treason Statute (1351) was put into place, the legal community retroactively condemned the cases in which Edward II had issued death warrants without trial: “[t]he method condemned was the summary conviction of the accused on the king’s own word that he was in fact guilty;” the “act was of the greatest significance legally, politically and constitutionally . . . [its] importance was second only to that of the Magna Carta.” Accordingly, there have been no executive death warrants issued in England—or any of its former colonies—from Edward III’s time until now. The targeted killing of Al-Awlaki, if successful, will bring to an end seven consecutive centuries of faithful observance to Magna Carta’s command: that no one may be killed by the executive without a trial.

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.

It was problematic because Wallace had been declared an outlaw despite the fact that he had allegedly never sworn fealty to Edward.


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.).

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

Id. at 100. Bellamy here cites Edward Coke for the proposition that the Treason Statute (1351) was of the utmost constitutional significance.
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, one which catalyzed the first safeguards against extrajudicial orders that someone be killed on the basis of the executive power’s allegation that they had committed treason. Owing to their position as the bedrock of fundamental legal rights, these protections survived numerous constitutional crises, although over the centuries that followed, their enforcement depended upon the vigilance of the legal profession. It appears that it is now incumbent upon this generation of jurists to decide whether a return to the early medieval paradigm of executive death warrants is warranted. If they agree that this would constitute a decisive and perilous rejection of rule of law, the concept of law itself and the destruction of our constitutional tradition (as this article will argue below), then they can set that inquiry aside permanently, and turn instead to the question of how this can be stopped.

I. 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 it 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.\textsuperscript{16}

The \textit{Al-Aulaqi} lawsuit makes it clear that the arguments that the Plantagenet and Stuart kings used in attempts to weaken Magna Carta and subsequent constitutional protections have been revived in a more modern form. While the complaint correctly asserts that “[t]he right to life is the most fundamental of all rights;”\textsuperscript{17} the response to the defendants’ motion to dismiss notes that the “the upshot of its arguments is that the executive, which 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.”\textsuperscript{18}

\textsuperscript{16} Duncan v. Kahanamoku, 327 U.S. 304, 328–29 (1946) (Murphy, J., concurring).
\textsuperscript{17} Complaint for Declaratory and Injunctive Relief at ¶ 2, Al-Aulaqi v. Obama, 2010 WL 3478666 (D.D.C. 2010) (No. 1:10-cv-01469).
\textsuperscript{18} Reply Memorandum in Support of Plaintiff’s Motion for a Preliminary Injunction and in Opposition to Defendants’ Motion to Dismiss at 1, 2010 WL 4974323 (D.D.C. 2010)
These arguments were of no avail in the District Court, which held that these allegations were indeed unreviewable in any court, merely because the executive had asserted, purportedly correctly, that addressing the violation of the right of life would involve a nonjusticiable political question.

Accordingly, seven hundred years after the executive death warrants issued by the Plantagenet King Edward I (and four hundred years after the decisive rejection of the Stuart King James I’s attempts to revive the practice), we appear to be at a similar crossroads of history; however, it remains to be seen whether the executive order to kill an American citizen will lead to a backlash that reaffirms the importance of the bulwarks against the 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.

Owing to the importance of the early history of the resistance to arbitrary executive authority to the worldview and legal theory of the Framers of the Constitution, this article argues that this provides the best lens through which we might scrutinize the constitutionality of the targeted killing of American citizens. In doing so, it will also attempt to bring back to the forefront the question of what is at stake in this lawsuit: not merely the potential for harm to one particular person, but the damage this might inflict on our constitutional tradition. More particularly, the article will argue that should the courts uphold a decision which states 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 those alleged to be traitors. This article’s historical survey will demonstrate that the Framers’ approach to due process and extraordinary executive power drew upon the lessons of several periods of struggles against theories of extraordinary executive power. These periods were the colonial struggle with the arbitrary power represented by

(No. 1:10-cv-01469).

19 Note the equivalence of the act of treason with the status of a traitor (which is important to the argument below. See THE OXFORD ENGLISH DICTIONARY entry for “traitor” (sense two): “One 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.”)
an sovereign, yet unrepresentative legislature, the crisis of the English Civil War (when the rule of law was threatened by theories of executive power propounded 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. We will see that the responses to these arguments were cumulative: a constitutionalist tradition was developed across time by the common lawyers who championed the ideals of the rule of law, each generation building upon those 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 will argue that key question that an advocate of the rule of law must ask when confronted by Al-Aulaqi v. Obama is 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 in the common law world and of even the Western legal tradition. The best way for a legal historian to tackle this question is to consider the ways which this holding runs against the grain of hundreds of years of commentary on this subject, in which the concepts that comprise the raw material for the Constitution were elaborated. If this theory of executive power is antithetical to the tradition in which every leading common lawyer since Henry of Bracton has helped to construct, then it is not alarmist to consider whether this decision might catalyze a post-constitutional paradigm, since it would be a radical departure from the common law tradition, in every sense of the word.

This historical background is necessary to answer the specific question of 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 which undergirds the Constitution. This question is premised upon 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.”20 It also proceeds from the assumption that in order to understand the meaning of these constitutional principles, we need to better 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, a term:

[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.\textsuperscript{21}

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 whom they saw as their own antecedents.

Accordingly, to understand the principles that elucidate the content of the constitution, and in particular those that shed light on the Framers’ conception of the rule of law, we must understand the historical context in which these principles were first developed. The article will demonstrate that the founding fathers’ conception of the rule of law and of the constitutional principles that enact and protect it were derived from their participation in a constitutionalist tradition.

That said, before addressing the question of whether the targeted killing of Al-Awlaki, pursuant to an executive death warrant, is inconsistent with the rule of law, we should first consider whether it is explicitly prohibited by the text of the Constitution itself. A strong argument will be made that it does, although we will see that conclusive proof that this sort of action will need to wait until our analysis of the context and the constitutional tradition that makes the scope of its due process guarantees clear. However, 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, witnessed by the fact that the two constitutional provisions that are most relevant to our 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.

II. 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 the executive. Were it joined to 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, the judge might behave with violence and oppression.22

The simple question with which our inquiry must begin is this: 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 this not explicitly forbidden by the Constitution, in the same manner as the prohibition on bills of attainder passed by Congress? Close attention to the text of the Constitution reveals that the Framers may not have believed that such an explicit command was unnecessary, a conclusion that will be upheld by the historical context detailed in the sections that follow.

The second half of the Constitution’s Article I, § 9, Clause 3 is commonly known as the Bill of Attainder Clause. It simply states: “No Bill of Attainder . . . shall be passed.” 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.23 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”.24 However, the intended scope of this unqualified protection against extrajudicial death sentences is not immediately clear.

Owing to the fact that it refers specifically to bills, it has become customary to construe the meaning of the clause as forbidding any “legislative act which inflicts punishment without judicial trial,” following the definition of that term found in the opinion of the watershed case of

23 See, e.g., The Attainder of the Duke of Monmouth, 1685, 1 Jac. 2, c. 2 (Eng.).
Cummings v. Missouri (which also concluded that a bill of attainder, which ordered execution, was sufficiently similar to a bill of pains and penalties for the Bill of Attainder Clause to be construed to forbid both).\textsuperscript{25} However, since that case involved the applicability of the clause to a state constitution, it is unclear whether this was intended to be a restrictive definition.

Accordingly, it was possible for a court recently to conclude that despite over a century of intervening jurisprudence, 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.”\textsuperscript{26} However, in concurrences, at least two Justices expressed the intention to expand the protection of the clause to actions of the executive, in circumstances far less troubling that those detailed in Al-Aulaqi.

In his concurrence to an opinion disposing of a case challenging the actions of the Attorney General, Justice Hugo Black argued 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.\textsuperscript{27}

Justice Douglas later joined Black in a dissent that articulated a similar argument.\textsuperscript{28}

Justices Black and Douglas’ theory of the applicability of the Bill of Attainder clause to executive punishment was not without antecedents. For example, in a case before the United States District Court for the Southern District of New York decided in 1874, the court applied the standards of Cummings to decide whether an Italian-American extradition convention (“independent of statute or treaty”), wherein “the executive of the United States has the right to surrender a fugitive from justice,” constituted a Bill of Attainder.\textsuperscript{29} However, as in many cases involving constitutional challenges to executive acts involving the Bill of Attainder Clause, the

\textsuperscript{25} 71 U.S. (4 Wall.) 277, 323 (1867).
\textsuperscript{27} Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 143 (1950) (Black, J., concurring).
\textsuperscript{28} Uphaus v. Wyman, 360 U.S. 72, 108 (1959) (Black, J., dissenting, joined by Douglas, J.) (involving contempt order issued against a recalcitrant witness subpoenaed to testify before an investigative committee chaired by the New Hampshire Attorney General).
\textsuperscript{29} In re De Giacomo, 7 F. Cas. 366, 369 (S.D.N.Y. 1874).
court’s holding did not address this issue directly, since the executive act was held not to constitute punishment.

That said, there were also subsequent later cases in which lower courts held by implication that an executive act, if it constituted punishment, might offend against the Bill of Attainder Clause. Pertinently, in *Hoffa v. Saxby*, 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. In addressing 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 . . . . [regardless of the fact that] [w]e 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. 

According to Michael P. Lehmann: “The court in *Hoffa*, then, seems to accept and apply the theory . . . devised by Justice Black.” Additionally, Lehmann noted that other federal courts have expressed a greater willingness to reason that an executive act might constitute a bill of attainder if “Congress had delegated rulemaking authority to the executive branch.” As a result of these cases, it would be possible to bring a nonfrivolous constitutional challenge to the targeted killing program on the basis that it violates the Bill of Attainder Clause *stricto sensu*, or by arguing that the executive action is exercising rulemaking authority delegated by Congress (namely, when the President and the National Security council exercise the power to add names to the targeted killing list pursuant to the Congressional authorization that they do so, which they argue was granted by Congress when it passed the Authorization for Use of Military Force Against Terrorists). However, such a holding would seem to run against

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32 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*
the grain of the majority of the lower court cases, which seized on the
language of Cummings, despite the fact that it is dicta; this specific question
was not at issue in that case, that a bill of attainder must be a legislative act.\textsuperscript{33}

In response, one might argue that this second counterargument runs
directly against the spirit of the Clause. In his seminal hornbook on
constitutional law, Laurence H. Tribe wrote in favor of Justice Black’s
conclusion on 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 no matter who 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 participations for such persons [targeted for
executive action] should be understood not 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[].\textsuperscript{34}

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 its constitutionalist context. However, there is another way—which is
perhaps more readily accessible to jurists who do not possess the historical
knowledge that is necessary to fully understand Tribe’s reasoning—to make
the argument that Justice Black was correct when he argued 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:

\[\text{H}e\ \text{meant\ that\ the\ restrictions\ on\ legislative\ power\ embodied}\]
in the proscriptions against bills of attainder should be applied,
\textit{mutatis mutandis}, to executive acts. Such an application would

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\textsuperscript{33} See, e.g., Korte v. Office of Personnel Management, 797 F.2d 967 (Fed. Cir. 1986)
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(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.”) (citation removed).
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\textsuperscript{34} Laurence H. Tribe, \textit{American Constitutional Law} 500–01 (1978) (internal
quotation marks omitted).
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Goldsmith, \textit{Is the Obama Administration Relying on Article II for Targeted Killing?}, (Sept.
17, 2010), http://www.lawfareblog.com/2010/09/is-the-obama-administration-relying-on-
article-ii-for-targeted-killing/.
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 procedural guarantees of due process.\(^{35}\)

This seems to be the correct reading of Black’s statements in *McGrath* about the constitutional limitations on the powers of the executive branch. His argument was, in essence, that the founding fathers believed that the punishment of alleged traitors was necessary, but citing James Madison (Federalist No. 42), Black argued that constitutional safeguards such as the Bill of Attainder Clause and the Treason Clause had been necessary to prevent allegations of “new-fangled and artificial treasons,” and had done so by exclusively vesting the power to punish these crimes in the courts, so as to avoid an end-run around the guarantees of due process. However, Justice Black’s theory about what the Bill of Attainder Clause tells us about how the Constitution’s guarantees of due process 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, an issue to which this article will return shortly before its conclusion.

**B. The Framers’ Rationale for the Clause, and What it Presupposes**

The context in which the Constitution was framed and the words of the Framers themselves establish that what motivated its guarantees of due process (in particular the Bill of Attainder Clause) was not a fear of the legislative branch in particular, but rather the concern that punishment for treason could not be inflicted “without a *judicial* declaration of guilt.”\(^{36}\) To illustrate this point, we must begin by considering the ongoing discussions of the rationale of the proposed prohibition on bills of attainder being circulated in 1787.

In Federalist No. 78, Alexander Hamilton (who wrote the bulk of the Federalist Papers) made it clear that this clause was merely the particular application of a much more general principle, when he stated what was by then a truismin—entirely uncontroversial to the American constitutionalists—that “[t]here is no liberty if the power of judging be not separated from the legislative and the executive powers.”\(^{37}\) It is only in the light of this statement that we can understand the true meaning of what follows in the next paragraph:

\(^{35}\) *Lehman,* supra note 31.

\(^{36}\) *Welsh,* supra note 24.

\(^{37}\) *The Federalist No. 78* (Alexander Hamilton).
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 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.\(^{38}\)

If Hamilton believed that the power of punishment should be vested solely in the judiciary, his statements about why the Constitution contains “specified exceptions to the legislative authority” but not to the executive authority become clearer. It appears to suggest that at the time in which 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 such crimes as high treason.

That said, there was no contemporary dispute over the purported power of the executive to punish: this issue had been decided a century earlier, and the question had been answered in the negative. The Star Chamber had been abolished in 1641; conversely, at the time of the American Revolution, the British Parliament continued to assert its power to attain purported traitors for treason. The fact that the Constitution prohibits bills of attainder and not (by then long obsolete) royal proclamations of attainder should not be taken as evidence that the Framers were endorsing 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. It was by then the consensus position that the common law could not countenance such an anticonstitutionalist idea, and hardly bore mentioning.

Detailed proof for this conclusion will be follow in section II, 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, it should be noted that there is also some additional textual evidence of this fact in the Constitution for this conclusion, although it is not found in the Bill of Attainder Clause, but in its more famous (but by now almost forgotten) cousin, the Treason Clause.

\(^{38}\) Id.
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 it could be considered 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.” That is, “[t]he matter which dominated all references, however, was . . . its careful limitation . . . . [T]he limitations of the treason clause must reflect deeply held notions of individual security against official oppression.”

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”) stated that “if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power.” Accordingly, to understand the Framers’ views of the limits of the government’s powers in this particularly sensitive area, we should also pay close attention to another of the “great forgotten clauses of the Constitution.”

We should begin by noting that the Constitution’s Treason Clause is found within 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, §1 states that “The 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, Chief Justice Marshall opined that this clause made it clear that the “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.”

That said, by placing the definition of the crime of treason (note also that treason is the only crime defined within the Constitution) in Article III, the Framers unreservedly stipulated that the power to adjudicate and

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42 Larson, supra note 40, at 865.
44 5 U.S. 137, 173 (1803).
sentence the crime of treason rested with the judiciary alone. Furthermore, the section of the Treason Clause describing the heightened evidentiary requirements also provide additional evidence that the Framers intended that the crime was only to 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.”45

Accordingly, Carlton F.W. Larson has argued persuasively 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.”46 What follows naturally from this 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.”47 To do otherwise would be to contradict the constitutional requirement that those accused of treason be tried in “open Court” 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, plead 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.48 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 only extant alternative for punishing an alleged traitor (other than after trial) —the bill of attainder, had been explicitly prohibited by the Framers. When these clauses are read together, we can conclude on the

45 U.S. Const. Art. III, §3, cl. 2 (emphasis added).
46 Larson, supra note 40, at 865 (emphasis added).
47 Id. at 894. 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 ostensibly permanently. 377 U.S. 163, 169 (1964) (“Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance).
face of the Constitution alone that the Framers intended it to exclude the possibility of any other means of sentencing and punishing treason 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 primarily concerned with preventing trials for treason within Congress than with the possibility of secret trials within the executive branch and concomitant executive death sentences, which already by 1787 were seen as extraconstitutional abuses that had been done away with long ago. Additionally, as the next section shall detail, there is clear evidence that some of the Framers later took action to curtail attempts to avoid the guarantees of due process for traitors which they had provided in the Constitution. In doing so, they provided further evidence that the executive death warrant currently at issue would have been abhorrent to them, 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 forgoing analysis rests upon the assumption that there is no general exception to the requirements the Bill of Attainder Clause in wartime, the article must address a possible counterargument at this time, before returning to the question of the source of the Framers’ views on the dangers of unbridled executive power. It might be argued that the above sections have no relevance to Al-Awlaki’s case, as he is being targeted by the military, pursuant to President Obama’s executive orders. Leaving aside the fact that Al-Awlaki is allegedly on targeted killing lists maintained by both the Joint Special Operations Command and the Central Intelligence Agency, there are responses to this that can be formulated on the basis of both the Constitution itself and the way that it was interpreted by the Framers subsequently.

As a preliminary matter, it should be noted that the Framers intended that the Constitution carefully circumscribe the President’s war powers.49 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 Constitution’s Marque and Reprisal Clause,50 which is found within the list of the enumerated powers reserved to Congress in Section 8 of Article I. (Reprisal was the practice whereby Congress would authorize acts of a warlike nature that were short of “perfect” war.) Placing

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49 The history of the interpretation of these powers during the twentieth century is outside of the scope of this article.
Constitutionalism and Targeted Killing

This Clause into Article I of the Constitution was the means by which the Framers made it clear that Congress, and not the President, possessed the power to authorize acts involving the military that would fall short of the sort of actions that would lead to war, such as the seizure of persons and property: “the Marque and Reprisal Clause was inserted in Article I to ensure that lesser forms of hostilities came within congressional power.”

Accordingly, it remains clear even today even when there has not been a declaration of war, the President’s authorization of military acts that fall short of war (i.e., the approval of ‘Predator drone’ strikes within nations that vigorously assert that the United States has no right to do so, but who will not declare war should the President authorize these regardless, such as Pakistan—or in Awlaki’s case, Yemen) are governed and limited by the authorization granted by Congress (here, the Authorization for Use of Military Force Against Terrorists). (It should also be noted that if the military’s power to carry out these acts can only 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 it was forbidden to perform by the Constitution.)

It was likewise made clear in the course of subsequent events that the Founding Fathers held that the Constitution prevented the President from ordering military action which Congress had failed to authorize, or even to exceed the narrow bounds of what had been authorized, even only slightly. When President Washington discussed a potential military expedition against the Cree tribe, he stated that “no offensive expedition of importance can be undertaken until after [Congress] shall have deliberated upon the subject, and authorized such a measure.” Likewise, President Jefferson requested an authorization from Congress to authorize offensive measures against Tripolitan pirates even after the schooner Enterprise had repelled an attack. 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, 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

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51. Lobel, supra note 50, at 70.
54. See Jackson, supra note 53, at 378–79.
55. 6 U.S. 170 (1804).
authorized the President to order the seizure of ships entering French ports. 56

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,” and the 1806 amendments to this statute “carefully limited military jurisdiction, even in time of war, to those who were not citizens or who did not otherwise owe allegiance to the United States” (i.e., to those persons who were not subject to the Treason Clause). 57 President James Madison, often called the “Father of the Constitution” owing to the fact that 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.’” 58

Accordingly, it seems clear that the Framers would not have countenanced arguments that the President, by authorizing an executive death warrant to be executed by the military, could evade the bar on Bills of Attainder, 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 and the fact that the Father of the Constitution clearly continued to believe that the President’s powers as the Commander in Chief could not trump the fundamental requirements of liberty.

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

The facts alleged (and, as the plaintiff’s subsequent briefs make clear, essentially admitted by the government) in Al-Aulaqi’s pleadings reveal that the current administration’s approach to executive death warrants is precisely the opposite of what the Framers intended. Here, Al-Awlaki has been explicitly accused of levying war against the United States (indeed, he

56 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 (2009) (noting (following Stephen Vladek) also that the decision in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), followed from the holding in Little, insofar as the President was held not to have the power to create military commissions to try Guantanamo Bay detainees because it would conflict with the Congressional intention expressed in the Uniform Code of Military Justice (which creates—exclusively—the United States’ military jurisdiction) and the Geneva Conventions).


58 Id. at *24, (quoting Case of Clark the Spy, 1 THE MILITARY MONITOR, AND AMERICAN REGISTER, Feb. 1, 1813, at 121–22).
was effectively labeled a traitor on this basis in a resolution presented to the House of Representatives), but 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, and an executive death sentence was issued—via an act of attainder of which the Framers could scarcely have even conceived—which the President now claims is not reviewable in any court. In summary, Al-Awlaki is to be 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 to be extraconstitutional during the four centuries that preceded the ratification of the Constitution.

Given that this is the situation in which we now find ourselves, it could be argued that it is high time to devote some attention to the legal context in which the Framers drafted those sections of the Constitution that relate to the limits of the punishment of treason. Ignoring the constitutional tradition that underlies the constitutionalist vision of the rule of law subjects us to the risk of stepping outside of the perspective engendered by the common law, and making 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 the President’s death warrant is not merely against our constitutional order, and the rule of law that it establishes. Rather, it destroys its 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. However, to understand the scope of the dangers of these changes, we need to understand the particular content of the idea of the rule of law that was embraced by the Framers and embedded in the Constitution. To do this, we must turn to history.

II. THE FRAMERS’ KEY SOURCES: BLACKSTONE, HALE, COKE, 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

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collected only from adjudged cases . . . . But those 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.*

The Framers drafted the Constitution in a particular intellectual context, one in which the Magna Carta, and the works of Coke, Hale and Blackstone were the most significant influences. To understand the Constitution adequately for the purposes of this article, we must examine precisely how the Founding Fathers drew upon these sources, and more particularly, why they considered themselves as the 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 upon these writings as the antecedents of the Constitution, which formed the backdrop that allows us to see its principles clearly and in all their dimensions. After the position of the Framers within the constitutionalist tradition is clarified, it will be possible to address the question of 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 that one should always turn to when considering the context of the framing of the Constitution is William Blackstone’s *Commentaries on the Laws of England*, which had an unparalleled influence on the American lawyers who drafted that document: it “served as a conduit through which English jurisprudential developments influenced the Framers and thus affected the development of the Constitution;” and 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.’” Upon the very moment of their publication, the Commentaries were an “immediate success.” This was particularly true in America, as

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60 In re Burr, 8 U.S. 470 (Marshall, C.J.).
“[w]hen Blackstone’s commentaries were published (1765-1769), Americans were among his most avid customers;” “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.”\(^63\) Accordingly, “[t]he influence of Blackstone's ideas on the Framers of the Federal Constitution is well known.”\(^64\)

Owing to this decisive influence on American legal thought at this hinge moment of the nation’s history, it is scarcely an exaggeration to say that “The Framers discovered their inspiration for the founding documents of the United States in Blackstone[s].”\(^65\) Accordingly, we turn first to Blackstone’s views on the subject when investigating 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, viz. 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. However, with respect to 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.

He then proceeds to outline in detail later in this chapter the bounds that are placed upon the king in particular with respect to these practices, and in


\(^{64}\) DANIEL BOORSTEIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (1941).

addition those 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.*

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

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 Star-Chamber, 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 Star-Chamber, 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.*

Here, we see clearly that Blackstone was not proposing a new constitutional framework for executive authority, but was merely describing what had by now become established as the definitive theory of the balance of powers in Britain. First, that the king has no authority to execute the laws (as he might understand them) without the consent of the legislature. Second, that 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, and 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). That said, we should turn to Blackstone’s most explicit statements about the proper boundaries of the executive’s powers, which 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.*

It should be noted that among the Founding Fathers, the key source of resistance to Blackstone was made on the basis of his view of executive power, but not that it was too weak, but rather that it was too strong: accordingly, to consider that the Framers would have given powers to the President greater than those of a king —note that the Constitution explicitly does give the President the power to sign treaties, but subject to ratification, and to veto bills, subject to this being overruled by the requisite supermajority, and even the President’s pardon power is not stated in absolute terms, as it does not apply “in cases of Impeachment.”

Blackstone’s *Commentaries* was also clear on the constitutional relationship between the executive and the courts, a theme that would find its 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.*

Again, Blackstone was making the case for the constitutional limitations on the executive’s role in the administration of justice within a monarchy, and consequently it scarcely seems possible to argue that the Framers would

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have vested implied powers in the executive branch that it would have denied to the legislature. 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 which also clearly influenced the Framers), but they did not have to deny this power to the executive, since this point had been established within the British constitutional framework.

It should also be noted that 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, 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.”67 This importance is recognized not only by scholars, but 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 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 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 of trial, would be so gross 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. 68

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67 Brief of Amicus Curiae Law Professors, supra note 58, at *3
Note here how Blackstone, writing only a decade before the American Revolution, 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, since they would be “so gross an act of despotism” as to be considered tyranny, of the sort that virtually mandated a general uprising (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). 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, and were so abhorrent to the constitutional order that they required no written law to forbid them.

The Revolution, and the constitutional framework that it created, gave further prominence to Blackstone’s ideas, indeed, the Constitution’s vision of the separation of powers was viewed by the Framers’ contemporaries as Blackstone’s. It is entirely clear from *Marbury v. Madison* 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, such that his decision to rest his momentous argument upon this authority was not seen as particularly controversial. However, the disagreements between the Framers and Blackstone on the question of parliamentary supremacy have obscured the degree to which their own thoughts and expressions were shaped by his on this topic.

Starting with Federalist No. 78, 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 accordingly where “there happens 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.”

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. It does so by assigning constitutional significance to certain acts that recognize these rights (the acts do not create them, being at bottom natural rights). Blackstone lists these acts that set out the “fundamental laws of England”: the Great Charter of Liberties (i.e. Magna Carta as altered and reconfirmed, mentioning my name the Confirmation of Charters), the Petition of Right, the Habeas Corpus Act, the English Bill of Rights, and the Act of Settlement.
Accordingly, it can be said that the very idea of American constitutional rights, as we understand them, is derived from the constitutionalist tradition, 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.\textsuperscript{69} 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.”\textsuperscript{70} “True it is, that what the Parliament does, no authority upon any earth can undo . . . . [T]he power of Parliament is absolute.”

This was true in England at the time owing to the triumph of Parliament over the king in the Civil War, and because the Glorious Revolution and the Act of Settlement had established the conditions under which the House of Hanover would take and hold the throne: under Parliamentary authority. “The Glorious Revolution was ‘the triumph of liberty, but of a liberty that had been institutionalized in Parliament’s supremacy over the crown.’”\textsuperscript{71} 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 adopted by the American colonies in their revolutionary struggle with Britain, thereby framing the constitutional conflict that led to the American Revolution and, ultimately to the American Constitution and Bill of Rights.\textsuperscript{72}

In essence, “by the mid-1700s, a competing understanding of the English constitution had taken its place alongside higher-law constitutionalism.”\textsuperscript{73} Owing to this change, Blackstone was forced to acknowledge that while a court might treat a statute that led to an absurd result void, it “was without power to enforce this rule, even against


\textsuperscript{70} 1 WILLIAM BLACKSTONE, COMMENTARIES *123.


\textsuperscript{72} Gedicks, \textit{supra} note 71, 611–12.

\textsuperscript{73} \textit{Id.} at 613.
parliamentary violations of fundamental English rights.” 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.

Moreover, the American Whigs had a constitutional theory to compete with parliamentary supremacy close at hand: Coke’s. While Blackstone had ignored Bonham’s Case, the Americans remembered that Coke had asserted that acts both royal and parliamentary could be declared void, if they offended against the Magna Carta: and 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 against these could also be ignored. However, before turning to the ways in which the Framers’ adapted 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. 75

There remains the question of whether in 1787 the Founding Fathers intended the Constitution alone to serve as the fundamental law of the United States. Accordingly, it should be noted that the Framers believed that the States had already adopted the most important elements of the fundamental laws that Blackstone had enumerated. The colonies had already passed reception statutes. Some of these were passed long before the revolution, such as South Carolina’s reception statute of 1712 (“All and every part of the common law of England, where the same is not altered by this act or inconsistent with the Constitution, customs and laws of this state, is hereby continued in full force and virtue within this state in the same manner as before the adoption of this act”), while others were passed shortly beforehand, or even after the outbreak of hostilities (e.g., that found within the New York State Constitution of 1777: “[S]uch parts of the common law of England, and of the statute law of England and

74 Id. at 613 n.149.
Great Britain . . . shall be and continue the law of this State”) are virtually identical.”

The Judiciary Act of 1789 imported the fundamental law, as adopted by the states, into the federal courts by virtue of defining its jurisdiction by reference to the common law, and because 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,” as the laws of all the states included reception statutes, or constitutional provisions or judicial decisions that had the same effect. For this reason, “English statutes enacted before the emigration of the American colonists constituted a part of the common law on its adoption in this country . . . [and] part of our judicial heritage.”

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, in particular 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 in the United States after the passage of the Constitution. This is a point of vital importance to the issue at hand: 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 in force after the Constitution was ratified, owing to 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 constraining the President from passing executive acts of attainder, since these had already been clearly prohibited by the fourteenth century at the latest, and the statutes that outlawed these acts, such as the Great Charter, were clearly still in force, and on Coke’s reading, could never be repealed or altered. Accordingly, all that was required were restraints on similar legislative acts, given the parliamentary supremacy.

To understand why this constitutional framework—which triumphed in the wake of the demise of the early Stuarts—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. Accordingly, we must turn to the ideas of Matthew Hale, who along with Coke (who will be discussed in the next subsection), was the

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most important influence over both Blackstone’s (who “consciously built on Hale”)\(^78\) 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.”\(^79\)

Sir Matthew Hale was one of the most influential jurists of the late seventeenth century, who in addition to serving many years as Chief Justice of the King’s Bench, authored several influential treatises. Of these, *The History of the Pleas of the Crown* is often thought to be the most significant, having been accepted as one of the “books of authority” by the courts of England and Wales. However, his *History and Analysis of the Common Law of England* 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.”\(^80\) It provided the inspiration for Blackstone’s *Commentaries*, not only in terms of subject matter, but by being the first modern example of a comprehensive treatise of English law: “It was Hale who first articulated a general theory of historical jurisprudence which was implicit in Coke’s portrayal of the English common law.”\(^81\) He created a vital link between Coke (and through him, the earlier medieval juridical tradition) and the modern jurists that followed by comprehensively reorganizing Coke’s seminal abridgment of Littleton’s *Tenures*.

That said, for the purposes of this article, it is another writing of Hale’s which is particularly pertinent: his *Reflections on Hobbes’ Dialogue of the Laws*.\(^82\) It is this work that best illustrates the decisive difference between

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\(^80\) Berman, supra note 79, at 1707.

\(^81\) Id. at 1703.

\(^82\) Sir Frederick Pollock, *Sir Matthew Hale on Hobbes*, 37 L.Q. REV. 274, 275 (1921). This was not printed in Hale’s lifetime, although it circulated in manuscript form and was frequently copied, as was Hobbes’ work before it was itself posthumously printed.
the constitutionalist tradition that influenced the founders and the theory of sovereignty that they rejected, which 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.83

Hobbes’ dialogue was a strenuous criticism of Coke’s theory of sovereignty and his theory of why the laws are binding. Prefiguring positivism, Hobbes wrote that “Law . . . . is the command of a sovereign which, though it may be iniquitous, cannot be unjust. Neither case law, nor custom, is truly law.”84 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.”85 It should be noted that Hobbes, in making this argument against Coke, was setting himself against not only the constitutionalist tradition, but 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.”86 Hale, following other early modern treatise writers,87 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.”88

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

Hobbes, like his royalist antecedents, claimed that the subjects of the sovereign cede to it all of their natural rights, as condition of the protection that the sovereign provides from the potential ‘war of all against all.’ In

83 Id. at 276.
84 Id. (citing 6 WORKS OF HOBBS 25–26).
85 Berman, supra note 7980, at 1718.
86 NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW, 89 (1990).
87 See e.g., HENRY FINCH, LAW, A DISCOURSE THEREOF 75 (4th ed. D. Pickering 1759) (laws contrary to the natural law “lose their force, and are no laws at all”).
88 Pollock, supra n.82.
order to provide this protection, the sovereign had a right to demand all ultimate authority. Hobbes disdains the desirability of the separation of powers, and consequently a Hobbesian sovereign would possess ultimate military, judicial, spiritual, and civil authority. On his theory, all this power is ceded to the sovereign by the people when they acquiesce to the social contract, which establishes both the society and the sovereign’s authority over that society. As Hale summarized Hobbes’ 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.  

It is true that Hobbes did not believe that the sovereign had necessarily to be a monarch, but in *Leviathan* he states that of the three forms of Commonwealths (following Aristotle’s taxonomy), that monarchy is superior to the others, having the greatest “aptitude to produce the peace and security of the people.” Accordingly, it is unsurprising that Hale would not be sympathetic to Hobbes’ views, since as a participant in the constitutionalist tradition, Hale’s theory of law is that it imposes limitations “both on the sovereign and the lawmaking power.” This is a natural consequence of the fact that the constitutionalist lawyers (whose views had prevailed during the English Civil War) “had emphasized the ancient tradition of limitations upon the royal prerogative.”

Accordingly, in the second part of Hale’s response to Hobbes (entitled “Of Sovereign Power”) he “countered Hobbes’ ideal type [of an absolute monarchy as a model for the English polity] not with only moral and political arguments but also with the reality of English constitutional history, to which he attached normative significance,” 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. Writing at a time before the king was clearly subjected to Parliamentary control, he noted that the king was bound by his coronation oath to observe the nation’s fundamental laws, and that it mentioned in

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90 THOMAS HOBES, LEVIATHAN.
91 Berman, *supra* note 80, at 1708.
92 *Id.*
93 *Id.*
particular the liberties of the subject that had been named in such acts as the Magna Carta. He further noted that the law itself has a power to render void acts that are in opposition to these constitutional principles. In doing so, he argued that “the sovereignty of the king exists within a legal framework,” 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.

Bracton had argued in the thirteenth century: “The king [is] under the law, because the law makes the king... for there is no king where will rules rather than law.” Hale, when refuting Hobbes’ notion that any sovereign can be bound by the laws is an absurdity, elaborated upon the medieval tradition of constitutionalism the 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.”

Furthermore, in response to Hobbes’ 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 of 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 seven years.” Here, we see 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 reference to the need to safeguard the security of the realm.

From the fact that Hale was an influence on the Framers, we obtain further evidence of their 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 because of a desire to protect the nation during emergencies and crises. Hale, in opposition to Hobbes, clearly believed that the sovereign was bound by the laws and that the ancient constitution restricted the sovereign’s authority, both expressly and impliedly. He rejected the idea that the executive could possess certain implied powers owing to his duty to preserve order in a crisis.

94 Id. at 1720.
95 Henry De Bracton, 2 De Legibus et Consuetudinibus Angliae 33 (1968).
96 Hale, supra note 82, at 301.
97 Id. at 302.
Hale refers only to the limitations on the powers of the king, and unlike Blackstone, not to the powers of parliament, because of contemporary ideas of who was the sovereign. 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. 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 passage of the Declaratory Act of 1766. When Parliament repealed the Stamp Act, a concession which might have defused tensions between England the American Whigs, it also passed this Act, which 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.” 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 Americans. The question that this poses was “[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 Magna Carta” did this not abolish all of the liberties of the subject, which had existed and been elaborated upon from 1275 onward?

The American Whigs thought so. They believed that “Parliament had 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, and to the Instrument of Government, the first written constitution of the English-speaking world] and James II his throne [in the Glorious Revolution that led to the English Bill of Rights of 1689, one of the fundamental laws of

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99 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.” *The Agreement of the People, as presented to the Council of the Army, printed in S.R. Gardiner, ed. CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 335 (1906).*
England, described below].” 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.”

Why was the adoption of this Hobbes’ theory of sovereignty so incendiary? It was because the American theory of sovereignty was diametrically opposite to Hobbes’, as it was largely Hale’s. Hobbes’ view that “the preservation of life itself depended essentially upon power and not law . . . was a significant inversion . . . of the earliest tradition that of Hooker and Coke, Eliot and Hale, who would have repudiated all arbitrary government whatsoever, whether by king or parliament.” It is impossible to understand the outcry against the Declaratory Act, and the fury at the idea that it purported to allow Parliament to repeal the Magna Carta, without appreciating the influence of Hale’s view of sovereignty (and by implication, his explicit rejection of Hobbes’ views) on the American Whigs. They had already adopted Hale’s constitutionalist views, in particular that the sovereign was itself 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.” Again, it is because the idea of fusing the judicial power with executive power had already been decisively rejected and because in the eighteenth century it was Parliament that was attempting to usurp the power to declare the law that the Framers did not focus on the dangers of executive judgment. However, the American reaction to the Declaratory Act demonstrated that a constitutional theory which embraced a robust version of the rule of law (in line with Hale’s) had already taken root in America, and that there was “a consensus in the colonies where theorists hearkened back in time to the seventeenth century jurisprudence of Sir Edward Coke and Sir John Hampden —to the ‘fixed constitution limiting the king, and therefore the legislature.’”

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 was clearly revered by the founders more than either Blackstone

100 ARTHUR L. GOODHEART, LAW OF THE LAND 60 (1966).
104 Reid, supra note 101, at 127.
or Hale (and the admiration for these latter figures was clearly 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 the formation of 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 Cokeian 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.105

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. 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.”106 Accordingly, it is notable to anyone considering the context of the founders’ views on the powers proper to the executive and the judiciary that Coke’s chief claim to fame during his own lifetime had been his willingness to oppose the King’s (and not merely Parliament’s) encroachment up the law.

King James I, much like Hobbes, believed that the sovereign’s powers (in this case, his own) were boundless. James had written a book while the King of Scotland that was so frank about his views on the powers of the monarch as to arouse great resentment in his new kingdom when he acceded to the English throne. This book, “The True law of Free Monarchies” (here, “free monarchy” means monarchy that is without restraint, as it is the king who allegedly deserves freedom, not his subjects)

went to inordinate lengths to defend the divine right of kings. He argued that kings had been appointed by God directly, enjoying apostolic succession from Saint Peter that gave them the power to serve as God’s vice-regent, a claim that had previously been made only by Popes. As for the powers this entails over his subjects, James wrote the following:

It manifest that the king is over-lord 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.107

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 as follows:

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 hath 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.108

That said, owing to the resistance that he faced from Coke and other constitutionalist lawyers, James was never able to assert his powers to the extent that he thought was legitimate. The battles that were fought over James’ assertion that he could imprison his enemies indefinitely in the Tower of London (and that they 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’ reign.109

107 JAMES I, TRUE LAW OF FREE MONARCHIES 71 (Daniel Fischlin et al., eds.) (1996).
108 Speech of James I of 1609, reprinted in James Harvey Robinson, 2 READINGS IN EUROPEAN HISTORY 219–21 (1906).
Coke was consistent across decades of struggle, asserting and reasserting though 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.” He ruled that the King had no right to serve as a judge, contradicting James’ statements on this subject directly and openly, and argued that this principle extended so far as to prevent the King from intervening in litigation that concerned the prerogative or from interfering in the functioning of the administration of justice in any way. However, despite the importance of these decisions, they pale in comparison to the influence of his ruling in *Bonham’s Case*.

This case’s facts were not particularly portentous—they involved the right of a doctor who was not licensed by the College of Physicians to practice medicine in London—but the holding outlined two principles that would echo down 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.

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:

> The Censors [the College’s disciplinary officers] can’t 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

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112 Case of Commendams, Hobart 140-66 (1616).

113 Brownlowe v. Mitchell (De Rege Inconsulto), 1 Les Reports de Henry Rolle 188, 288, 206 (1616).

114 Bonham’s Case, 8 Co. 118a (1610).
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.\textsuperscript{115}

In this decision (which was so significant that the King himself demanded that Coke censor it in his law reports), and 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, \textit{Cessavit} 42, appears to be on point),\textsuperscript{116} and in his \textit{Institutes} he relies largely on the same sources, although greater in number.\textsuperscript{117} 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, the most enduring influence of \textit{Bonham’s Case} is a result of Coke’s ability to put the theories of sovereignty and law underlying its holding into practice, most particularly when he helped to author the Petition of Right.

In order to prevent the encroachments of the early Stuart kings on the liberties of the subject (in particular, taxation without parliamentary approval and the denial of the right to habeas corpus), the Petition of Right was passed by Parliament. It was the first major constitutional restriction on the powers of the king over his subjects since the enlargement of Magna Carta;\textsuperscript{118} the petition itself, however, states that it merely confirms ancient liberties, many of which date to the time of Edward I and Edward III (discussed in the next subsection below).

The Petition of Right was duly given royal assent by Charles I after it was passed (following a long struggle) by both Houses of Parliament. Charles then proceeded to ignore it in practice, leading to the \textit{Case of the Ship Money}, where the King, through intimidation, obtained the approval of the Justices 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.\textsuperscript{119} Discontent about how this offended against the Petition of Right escalated tension with the King considerably, leading to the English Civil War. The ideas contained in the Petition of Right—Coke’s ideas—had enduring influence because of their power and clarity.

\textsuperscript{115} \textit{Id}. (author’s idiomatic translation from Latin).
\textsuperscript{117} \textit{2 Edward Coke, Institutes} 46 (1817); see also F.T. Plunkett, \textit{Bonham’s Case and Judicial Review}, 40 HARV. L. REV. 30, 36 (1926).
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 Knight’s Case*. The reasoning of the lawyers in the *Five Knight’s Case* (one of whom was John Selden, a close associate of Coke)\(^{120}\) had tracked the underlying principles of *Bonham’s Case* closely: the King could not order something which was repugnant to the ancient constitution (in this case, he asserted that ordering imprisonment by special command offended against clause 29 of the Magna Carta). The King had argued that this prerogative to do so for reasons of state was not bound by the laws, but his was not accepted by the court, which rendered an equivocal and narrow decision, which nevertheless did not explicitly curtail such abuses of executive power.

Accordingly, in the Petition of Right, Coke drafted a law that stated that the King had no prerogative to violate the boundaries of the ancient liberties of the English subject, most particularly, to be free from arbitrary arrest, imprisonment, taxation, forced billeting of troops, martial law, and from the suspension of habeas corpus.\(^{121}\) These rights are explicitly connected with the Magna Carta and other Charters (which form the law of the land, under which the King rules, as Coke interpreted Bracton), which are asserted to have a force to bind the sovereign. For example, as clause seven of the Petition of Right states:

> [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 whatsoever 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.\(^{122}\)

The reassertion of the idea that the king ruled under and subject to the law of the land, as found in the Magna Carta’s guarantees of liberty and

\(^{120}\) Berman, *supra* note 78, at 1695.

\(^{121}\) See *Petition of Right*, 1627, 3 Car. 1, c. 1.

\(^{122}\) *Id.*
elsewhere, did not immediately prevail in Stuart England, but after the Civil War and the Glorious Revolution, these ideas were incorporated wholesale into the English Bill of Rights of 1689 (and the United States’ Bill of Rights, authored a century later). 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 “absolute rights of every Englishman.”

As described above, Coke had an unparalleled popularity among jurists at the time of the American Revolution (even after the publication of Blackstone’s *Commentaries*, “Coke’s higher law constitutionalism remained the more influential school of thought before and after the revolution”), 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 during the time in which the colonies were initially charted and settled; at the time in which the colonies needed constitutional guidance, Coke’s *Reports* and *Institutes* were close at hand, and as such they exercised decisive influence at a formative moment. Accordingly, 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 [] [t]he colonists and the Whig minority . . . continued to understand the colonies’ relationship to the king and Parliament in terms of [Coke’s] seventeenth-century higher-law constitutionalism.”

As Coke’s views were still dominant in America when Parliament began to enact increasingly repressive measures, it was not surprising that *Bonham’s Case* would resurface. This occurred in one of the first public challenges to abuses of justice being performed by British forces, long before the Declaratory Act, the Stamp Act, or those other Intolerable Acts that followed. 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 merchant’s houses. 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,” and the violation of the right to enjoy one’s property was against, *inter alia*, the Magna Carta, that the

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123 Gedicks, *supra* note 71, at 614.
124 *Id.* at 615.
judges had a right to declare the statutes that authorized the issuance of 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.”

While Otis lost his clients’ case, his argument electrified his audience, which comprised of Boston’s legal community and others who would later become important revolutionary leaders: “John Adams and other important statesmen attended Otis’s argument in Boston. According to Adams . . . Otis’ attack on the writs of assistance was “the first scene of the first act of opposition to the arbitrary claims of Great Britain;” 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 liberty was born.” Furthermore, its significance carried far further than earshot: “after 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.”

Frederick Gedicks charted the degree to which these Cokeian arguments permeated the American Whig’s discourse of liberty during the 1760s and 1770s. In addition to influencing people like John Adams directly, similar arguments (clearly influenced by Otis’) based on Bonham’s case were heard and reported by such figures as Thomas Jefferson and George Mason.

Accordingly:

126 Gedicks, supra note 71, at 616 (quoting Paxton’s Case of the Writ of Assistance (Mass. Bay. Super. Prov. Ct. 1761), reported in I Josiah Quincy, Jr., Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772, at app. I-I, at 520-21; see id. app. I-I, at 521 n.23 (citing Bonham’s Case)).
129 Gedicks, supra note 71, at 617.
130 Id. at 618.
By the time the colonists 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. Pre-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 common law and granted to English subjects.

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 view such that “they regularly invoked Coke and 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.” Additionally, “Benjamin Franklin, who represented the colonial cause in England, also founded his case upon the ‘common rights of Englishmen, as declared by Magna Carta, and the Petition of Right.’” Accordingly, it is scarcely hyperbole to describe Coke’s influence in this manner:

The American Revolution was a lawyer’s 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.

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131 Id. at 619 (quoting Clarence Manion, The Natural Law Philosophy of Founding Fathers, 1 U. NOTRE DAME NAT. L. INST. PROC. 3, 25 (1949)).
Unfortunately for the American Whigs, the rights granted expressly by the Petition of Right and the English Bill of Rights appeared only to the limit the powers of the king, who had clearly been the sovereign until the Glorious Revolution. In the wake of the new constitutional settlement that followed, it was parliament that exercised the powers of sovereignty. However, on the most fundamental level Coke’s ideas were still pertinent, and could be applied just as easily to an overreaching Parliament as to an overreaching King (as will be demonstrated below). However, it should also be noted here how Coke argued that the medieval Charters which limited the sovereign’s powers against his subjects were relevant to the early modern age, the triumph of which was reflected by their recognition as binding—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 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 particular tradition which informed their subsequent interpretation of the Magna Carta and the newly developing American law.135

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 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.”136

136 Davies, supra note 105, at 15.
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.”’

It is important to note that while the Framers’ understanding of Magna Carta was derived largely from Coke’s, this does not mean that they inherited a novel and ahistorical appreciation of the Great Charter: “The tradition which Coke revived was, however, 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.”

While it is true that 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. Although it was originally a limited grant of liberties to a specified group, 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 restraint of his possessions. 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.”

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,” 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, but instead appealed to Pope Innocent III to declare it invalid so that he might “be free of its obligations,” which 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.” Second, the idea behind the Magna Carta managed to endure and grow: as Richard Helmholz asserted:

138 Corwin, supra note 110, at 175–76.
140 Id. at 176.
142 Id. at 362.
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.\textsuperscript{143}

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 of all the classes in its benefits.”\textsuperscript{144}

That the Charter was reissued as a concession to the Barons after King John’s death (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 to the Charter) suggests how important the idea of the King ruling under the law had become in such a short time. Corwin’s assertion of the appeal of the Charter of Liberties to all classes seems to be confirmed by the fact that when it was reissued (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.\textsuperscript{145} 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.\textsuperscript{146}

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

\begin{quote}
[All justices, sheriffs, mayors, and other misters 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
\end{quote}

\textsuperscript{143} Id. at 299.
\textsuperscript{144} Corwin, \textit{supra} note 110, at 176–77.
\textsuperscript{145} Id. at 177.
\textsuperscript{146} \textsc{William S. McKechnie}, \textit{Magna Carta, A Commentary on the Great Charter of King John} 154 (2d ed. 1914).
against all those that by deed, aid or counsel” proceeded “contrary to the aforesaid Charter[].”

Once again, a King later regretted binding himself legally (and in fact, making 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. This was granted, but it was too late, as the ideas contained with the Magna Carta had by now permeated the common law and had become widely known and accepted as a source of law.

That said, 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 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.” 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 Clause 29. The most important of these is the Statute of 28 Edward III. 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 put to death without being brought in Answer by due process of the Law.”

It was now abundantly clear that Magna Carta’s protections applied to everyone.

Parliament also acted repeatedly to make sure that the protections of the Great Charter (as clarified and extended by the six statutes) were made 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. In this statute, we can see that already by this date that the Charter is now seen to have 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 anything from henceforth be done to the country, it shall be void in the law, and holden for error.”

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147 Id. at 178 (quoting Adams and Stephens, Select Documents of English History 86–87 (1911)).
149 Adams and Stephens, supra note 147, at 150 I Statutes of the Realm 345 (1810).
150 I Statutes of the Realm, supra note 151, at 345.
Additionally, Parliament attempted to make sure that the people were aware of the protections of the Charter and ready to enforce their rights. Repeatedly, they 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 for when it was broken.\textsuperscript{152} The clergy were also called upon to excommunicate those who offended against it, and they did so.\textsuperscript{153} 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.

That said, as William Koch correctly noted,

\begin{quote}
[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 but rather in the meaning that future generations have read into its words.\textsuperscript{154}
\end{quote}

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: “\textit{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. It can be translated as ‘or’ or rather as ‘and’. This seemingly minor grammatical point was in fact of great significance. If it meant ‘and’, then 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 \textit{Institutes}, insisted that this was incorrect,\textsuperscript{155} while Ellesmere 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 cuase

\begin{footnotes}
\footnote{\textit{Id} at 669.}
\footnote{2 \textit{EDWARD COKE, INSTITUTES} 50 (1797) (Garland ed. 1979).}
\end{footnotes}
of defending this doctrine. 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; 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 Magna Carta’s guarantees of due process, and thus constitutionally unacceptable.

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, of course, is the only conception of the law of the land that we would now recognize, since “[i]n 1789, ‘due’ process meant process due according to the law of the land [i.e., the common law, and not due according to some other law of the land, i.e., martial law], and the Supreme Court has long reaffirmed that proposition on the authority of Sir Edward Coke.” This was also the interpretation which was most faithful to the evidence of the context of the Great Charter and its reaffirmations, particularly the six statutes. Accordingly, we should now turn to the question of how this interpretation of the Magna Carta helped to shape the Constitution.

1. 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.” 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;” “Chapter [29], which figured so prominently in Parliament’s resistance to the Stuarts, soon found its way to America.” This, however, had at first largely been the result of the timing of these foundings — they occurred when Coke’s influence over English legal

156 See e.g., LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE 322–23 (1970), reprinting Egerton, A Breviate for the King’s Council (1977).


158 Julian Mann III, Due Process; A Detached Judge; and Enemy Combatants. 28 NAT’L ASS’N L. JUD. 1, 26 (2008).

159 Id.
thought had been at its zenith. Nevertheless, enthusiasm over Coke’s work soon translated into respect for the Magna Carta itself.

That said, 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 which were recorded. This, however, can be explained by the fact that by this point in history, the delegates were most concerned with their differences with the British constitutional tradition than with the commonalities. Accordingly, 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, one must remember that he believed that “the British Constitution was the ‘mirror of political liberty’; it’s secret lay in the fact that the legislative and executive powers were not united in the same hands.”\footnote{A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE 219 (1968) (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS).} Of course, by the time of the American Revolution, the British no longer believed that this was the correct interpretation of their constitution, as they had developed a theory of parliamentary supremacy.

Additionally, the Framers of the Constitution were concerned at the time primarily with establishing the machinery of government. For this reason, the terms of the Magna Carta are 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. (Additionally, it should be noted that the state constitutions drafted during the period that contained provisions similar to what would later be included in the Bill of Rights; they 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.”)\footnote{James W. Ely Jr., The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 CONST. COMMENTARY 315, 323 (1999).}

The failure to consider the need to insert provisions based on Magna Carta into the Constitution was already a source of friction even before it was ratified; this oversight had been a miscalculation by the Federalists, especially since the Great Charter 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,”\footnote{Howard, supra note 160, at 222–23.} compared to which the Constitution appeared deficient as a document guaranteeing ancient liberties. However, even the opponents of a bill of rights had great respect of Magna Carta. Howard points to the example of
James Wilson’s arguments at the Pennsylvania ratifying convention, where he claimed 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. He conceded that “[t]he Magna Charta of England is an instrument of high value.”\(^{163}\) 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 certain powers that the people consider their “birthright, comprised in Magna Carta.”\(^{164}\)

Again, in Virginia’s convention, “Magna Carta figured in the discussion of whether or not the Constitution should have a bill of rights.”\(^{165}\) This was because the delegates were primarily concerned with the right to trial by jury, which was not guaranteed by the Constitution. Accordingly, Virginia’s proposal for a declaration of rights “added several provisions drawn directly from Magna Carta . . . chapter [29] was restated almost verbatim.”\(^{166}\) (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.”)\(^{167}\) On the basis of 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 Magna Carta onwards.

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

While the Americans did indeed go beyond anything which Magna Carta, whether in its initial documents 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 that we had inherited from our English ancestors.”\(^{168}\)

\(^{163}\) Howard, supra note 160, at 225.
\(^{164}\) Id. 226.
\(^{165}\) Id. 227.
\(^{166}\) Id. 232.
\(^{167}\) Id. 233.
\(^{168}\) Id. at 240 (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).
Magna Carta’s enduring appeal in late eighteenth and early nineteenth century America is also attested to by the reception statutes discussed in the last section: 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. As will be demonstrated in the following section, it is critical when addressing the constitutionality of the target 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. This is because the constitutional text on its face does not always reveal their concern with limiting the powers of the executive, because the issue of the day was legislative overreaching, and because the constitutionalist tradition had long ago 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. To do so would require ignorance of what was demonstrated in this section: the great respect that the Framers had for all of the fundamental laws discussed in this section—all of which limit the executive, and not the legislative branch—and the debate they owed to the thinkers discussed in the preceding sections. 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, before we consider the ultimate question of whether or not these particular executive death warrants that it describe might ever be considered consistent with the Constitution or the constitutionalist tradition that informed it, and if not, what damage might ensue from this divergence.

IV. 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 revealed by the District Court’s memorandum opinion of December 7, 2010, 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.

“Anwar Al-Awlaki is a Muslim cleric with dual U.S.-Yemeni citizenship, who is currently believed to be 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.” In a story dated April 6, 2010, the *New York Times* reported that President Obama had authorized the targeted killing of Al-Awlaki, after a discussion within the National Security Council, which apparently believes that the appropriate lens through which to view the legality of this killing is international law (more particularly, the laws of war) rather than domestic law, thus sidestepping the issue of the constitutional protections possessed by a citizen of the United States accused of treason. Later that month, Congressman Charlie Dent introduced a resolution calling for the State Department to issue a certificate of loss of nationality stripping Al-Awlaki of his citizenship.

In early July of 2010, Al-Awlaki’s father (Nasser Al-Aulaqi) retained attorneys from the American Civil Liberties Union (the “ACLU”) and the Center for Constitutional Rights (“CCR”) to file a lawsuit that sought to enjoin the targeted killing of his son. On July 16, 2010, the Treasury Department (for the first time) added Al-Awlaki to the list of Specially Designated Global Terrorists pursuant to Executive Order 13224, an action that would make it a criminal offense for the ACLU and CCR to file the Al-Aulaqi lawsuit without receiving a license from the Treasury Department.

This action was taken because of the Obama administration’s view that Al-Awlaki was a leader of a group known as 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 above fall within the definition of the act of waging war against the United States (for the purposes of defining treason).

At the time this designation was made, the Department’s Undersecretary for Terrorism and Foreign Intelligence alleged publically 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.”

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CCR filed suit against the Treasury Department, alleging that the Department has no statutory authority under the International Emergency Economic Powers Act to bar U.S. lawyers from representing an American citizen *pro bono*, the Department granted the necessary license. Accordingly, the *Al-Aulaqi* lawsuit was filed on August 30, 2010.

The Complaint details that the Plaintiff sought to enjoin the President, the Secretary of Defense, and the Director of the Central Intelligence Agency (the “CIA”) from intentionally killing Anwar Al-Awlaki. It argued that Al-Aulaqi had standing to bring the suit as his son’s next friend because he “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.” It also asserted that the targeted killing policy infringed on Al-Awlaki’s Fourth and Fifth Amendment rights.

Al-Aulaqi sought a declaratory judgment that would declare that the targeted killing program, insofar as it targeted U.S. citizens who did not present concrete, specific and imminent threats to life of physical safety, was unconstitutional, and an order requiring defendants to disclose the criteria that are used when determining whether the executive will carry out the targeted killing of citizen of the United States.

On August 25, 2010, Defendants filed a motion to dismiss, arguing that Plaintiff lacked standing to file the claim, that adjudicating the claims would require the court to decide non-justiciable political questions. (The motion also presented additional reasons for the suit’s dismissal—including the state secrets privilege—but since these were not reached by the District Court when ruling on the motion, they will not be discussed here.) On December 7, 2010, the District Court granted Defendants’ motion to dismiss, on both the ground that the plaintiff lacked standing and because that the suit purportedly presented nonjusticiable political questions.

1. The Court’s Reasoning that Al-Aulaqi 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 concludes that “[Anwar] Al-Awlaki can access the U.S. judicial system by presenting himself in a

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176 *Id.* at ¶¶ 27–30.
177 *Id.* at 11.
peaceful manner” since “[a]ll U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully.”\(^ {179}\) 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. Second, the court believes that Al-Awlaki can do so because of its conclusion that “there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen.”\(^ {180}\)

Since Nasser Al-Aulaqi has asserted in an affidavit exactly the opposite, 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 give every favorable inference that may be drawn from these allegations to 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,”\(^ {181}\) 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.’”\(^ {182}\)

However, the court’s conclusion that Al-Awlaki could turn himself over at the American Embassy and that he also had the capacity to retain legal representation while in hiding is not clearly supported by the record: indeed, it appears to require many inferences in favor of the defendants, something which turns the standard of review of a motion to dismiss onto its head. First, the notion that Al-Awlaki could simply turn himself over at the United States Embassy ignores the fact that he is in hiding hundreds of miles from the capital, and that there is nothing in the record that suggests that he would be safe from targeted killing while making that journey; the defendants had only argued that he would be safe should he “surrender or otherwise present himself to the proper authorities,”\(^ {183}\) something which can only be done in Sana’a.

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

\[\text{[I]}t\text{ 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}

\(^{179}\) Id. at 18. The author has adjusted the court’s spelling of Anwar Al-Awlaki to correspond with the way it has been transliterated within this article.

\(^{180}\) Id. at 17.

\(^{181}\) Id. at 11.

\(^{182}\) Id. at 17 n.3 (quoting Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1160 n.2 (9th Cir. 2002)).

\(^{183}\) Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Motion to Dismiss at 3, Al-Aulaqi v. Obama, 2010 WL 4974324 (D.D.C. 2010) (No. 1:10-cv-01469)
proceedings possible even where the plaintiff himself cannot physically access the courtroom . . . There is no reason why -- if Al-Aulaqi wanted to seek judicial relief but feared the consequences of emerging from hiding -- he could not communicate with attorneys via the Internet from his current place of hiding.\textsuperscript{184}

There is, however, no evidence in the record that Al-Awlaki has any direct access to videoconferencing equipment or the Internet where he is thought to be located, in the “remote mountains of Yemen.”\textsuperscript{185} The fact that video footage purportedly featuring Al-Awlaki has been disseminated and the allegation that he can be contacted via e-mail might merely establish, with respect to the former, that someone with a video camera has had contact with Al-Awlaki, and as for the latter, (at most) that someone who claims to have access to Al-Awlaki might have the ability to relay messages received by e-mail to Al-Awlaki, who might be able to respond through that intermediary. None of this, without a chain of adverse inferences, tends to support the conclusion that Al-Awlaki has the means to initiate a privileged electronic communication with American lawyers for the purpose of retaining or interacting with them.

2. \textit{Al-Aulaqi’s Alarming Extension of the Political Question Doctrine}

The court also dismissed the suit for presenting a nonjusticiable political question. The court rests its reasoning chiefly on the precedent provided by the case of \textit{El-Shifa v. United States}.\textsuperscript{186} 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.”\textsuperscript{187} The court reasoned:

[T]he plaintiff asks this court to do exactly what the D.C. Circuit forbid in \textit{El-Shifa} -- assess the merits of the President’s (alleged) decision to launch an attack on a foreign target. \textit{Although the ‘foreign target’ happens to be a U.S. citizen, the same reasons

\begin{footnotesize}
\begin{enumerate}
\item Al-Aulaqi, 727 F. Supp. 2d at 19 n.4.
\item 378 F.3d 1346 (D.C. Cir. 2004)
\item Al-Aulaqi, 727 F. Supp. 2d at 69.
\end{enumerate}
\end{footnotesize}
that counseled against judicial resolution of the plaintiffs’ claims in *El Shifa* apply with equal force here.\(^{188}\)

Perhaps because denying a citizen of the United States judicial review of an executive death warrant because he is allegedly a “foreign target” might seem problematic, the court (after it determined that it would not address Al-Awlaki’s claim that he should not be killed without due process) opined further:

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 citizenship -- standing alone -- renders the political question doctrine inapplicable to plaintiff’s claims.\(^{189}\)

The court reaches this conclusion because earlier cases have brought “habeas petitions . . . [that] are much more amenable to judicial resolution than the claims brought 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*.”\(^{190}\) The court points to the Suspension Clause as evidence of the Framers’ clear concern with imprisonment by the executive; accordingly, 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 doing so would interfere with its powers. As demonstrated above, this is an argument that appears to depend on a total lack of knowledge of the constitutionalist context of the framing.

Owing to this skewed perspective, and reflecting 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*,”\(^{191}\) the court held that the claims were nonjusticiable, purportedly a felicitous result that avoids demonstrating

\(^{188}\) Id. at 70 (emphasis added) (transliteration of Al-Awlaki’s name modified).

\(^{189}\) Id. at 75 (transliteration of Anwar Al-Awlaki’s name modified).

\(^{190}\) Id. (emphasis added).

\(^{191}\) Id. at 77 (quotation marks removed; emphasis added).
“a lack of respect due to coordinate branches of government,” and also avoids creating “the potentiality of embarrassment of multifarious pronouncements by various departments on one question.”

In summary, the court decided 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 on two grounds. First, because of speculation and adverse inferences that led to the conclusion that his next of friend had no standing to bring the suit (despite the fact that this is a prudential consideration that has been waived when “human lives are at stake,” as in that situation Justices have expressed concern for whether a decision should turn on “fine points of procedure or a party’s technical standing to bring a claim.” 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 does not believe that a court has the power to determine the constitutionality of a decision by the President to issue an executive death warrant. Rather, that is held to be the sort of decision that 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 positioned at this crossroads, a place that we could have only reached due to great ignorance of our constitutionalist heritage and its importance.

B. Al-Aulaqi and the Dangers of Ignoring of the Constitutionalist Context

The Al-Aulaqi decision was predicated on this determination: that the question of whether the executive death warrant at issue violated an American citizen’s constitutional rights is best left to the Executive branch—the same branch that had issued the death warrant. Here, using the threshold matter of whether the issue is justiciable due to the political question doctrine, the court effectively decides the merits of the case: the executive’s actions fall into the realm of the conduct of warfare, which the judiciary will not second-guess. However, this requires the use of circular logic: the court will not adjudicate the question of whether or not the action taken by the executive is constitutional because it has determined that the executive is 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 accordingly, of essential content. As a result, the opinion’s view of the

192 Id. at 72, 77.
Constitution is revealed at various stages to be two-dimensional, in a manner that led to bizarre results. The first and most obvious of these moments is the discussion of why the judiciary purportedly has more authority to challenge executive detention than extraconstitutional killing. The court argued that

While the Suspension Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account . . . [thus] reflect[ing] a textually demonstrable commitment of habeas corpus claims to the Judiciary . . . [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].\textsuperscript{194}

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 argued that these rights were exclusive, the fear that led directly to the drafting of the Bill of Rights after the discussions of the Virginia ratifying convention discussed in the last section. 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.”\textsuperscript{195} 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. However, the common law writ of habeas corpus, so named in the Suspension Clause, 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, we must remember that the right already existed (and had long limited the powers of the executive because of the actions of Coke, this right was considered inviolable), and that 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, while specifying that this right can only be suspended in certain enumerated instances.

\textsuperscript{194} Al-Aulaqi, 727 F. Supp. 2d at 75 (citation and quotation omitted).
\textsuperscript{195} U.S. Const. Art. I, § 9, cl. 2.
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, that are not themselves established by the Constitution. One of these is habeas corpus. The question that this begs, and which the Al-Aulaqi opinion ignores, is this: what is the source of these rights? In the case of habeas corpus, the answer is obvious. The right to habeas corpus had been explicitly recognized by the Habeas Corpus Acts of 1679 and 1640, but Blackstone (and all those influenced by Blackstone, including the Framers) believed that the right had been established by Magna Carta’s Clause 29.196 (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).

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 Magna Carta and other fundamental laws of England, then the argument that the Constitution contains no “textually demonstrable commitment” to the judiciary of claims about extralegal killing is meaningless: Clause 29 of the Great Charter, in addition to addressing executive detention, addresses assassination: that “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.” 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 (which 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.

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 (a recognition of which destroys the specious argument that the Framers sought to enumerate all the ancient liberties, an argument upon which 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

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196 RALPH V. TURNER, MAGNA CARTA 219 (2003).
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—particularly Blackstone’s fundamental laws of England—and by the constitutionalist tradition that produced them. When we see the claim through this lens, the danger of executive death warrants—not only to our fellow citizens but to the living fabric of our legal tradition—becomes clear.

C. Executive Death Warrants and the constitutionalist Idea of Due Process

The issue presented by Al-Aulaqi is whether the Constitution vests the executive with the power to issue a death warrant calling for the execution of 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 order of the President would have been anathema to the Framers. The preceding sections demonstrated the constitutionalist influences on the Founding Fathers: in order to see exactly 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 in this article’s first section, the Founding Fathers were particularly concerned with making sure that alleged traitors were afforded constitutional protections. In short, our constitutionalist tradition makes it clear that nothing could have been more abhorrent to the vision of the rule of law as a bulwark against arbitrary rule,
as the Framers understood it, than the executive death warrant at issue in Al-Aulaqi. 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.

1. Magna Carta’s Influence on the Due Process Clause is Decisive

Great respect for Magna Carta is the first reason why the Framers would have concluded that the constitutionalist tradition, which they took for granted when considering questions of natural rights, had long precluded a return to executive assassination. Clause 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.” Echoing this, the Fifth Amendment states that “nor shall any person . . . be deprived of life . . . without due process of law.” 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. Magna Carta had been fought for by constitutionalists over centuries, precisely so that nothing like the execution of David ap Gruffydd might ever again occur.

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. Even in the periods of greatest peril, this had been 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.

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”, and by arbitrary he meant power which did not recognize the limits of 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 course of justice, and by course of law.” At the time the Constitution and Bill of Rights were drafted, a breach of this norm would have been inconceivable: “To bereave
a man of life . . . without accusation of trial would be so gross an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom.” This was the effect the enduring respect for the Great Charter, which was brought to this country and flourished, as Justice Harlan wrote, some seven hundred years after Magna Carta was first enacted: “The 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.’”197 Accordingly, it is difficult to imagine how a breach of Magna Carta through an executive death warrant, as in Al-Aulaqi, would not have been considered by the Framers as particularly deplorable.

2. Coke’s influence on the Framers Illuminates the Due Process Clause

The Founding Fathers’ reverence for Coke is also plain from the historical record. 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’ arguments), affirmed the power of a judge to strike down laws where they 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.” Coke then wrote the Petition of Right (which was recognized by Blackstone as one of the fundamental laws): it stated that “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.” It further stated that “no offender of what kind [what]soever is exempted” 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.”

It is plain that the Framers would have considered the actions of the Obama administration in issuing executive death warrants to have been entirely incompatible with Coke’s ideas. Rather, they would likely have reminded the Framers of the ideas of his chief opponent, 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 “ha[s] power of life and death over everyone . . . [and is] not subject or bound” by the law. 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’ argument

and again gave Coke’s the force of law: “for 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.”

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 another reason to believe that the Framers decisively rejected the view that the executive was competent to judge, and they believed that it had no power to do so. 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 power[.]” 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 very good evidence that they would not have anticipated that the documents that they wrote would be taken to support a theory of executive power that would itself constitute a step back from Coke’s views, to a paradigm of justice that had already been obsolete for three hundred years at the time that Coke struggled with James I over whether it could be resuscitated.

3. 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’, after the restoration of James’ grandson, King Charles II. Hobbes’ 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. The reaction to this theory on behalf of the representatives of the constitutionalist tradition had a decisive influence on the American patriots; accordingly, 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 will only be used sparingly by the sovereign, and despite the fact that he will not be bound by the laws, he can be counted upon to act in the best interests of the citizenry. 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. 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. Conversely, Hale noted that Hobbes’ sovereign is “alone judge of all public dangers and may appoint such remedies as he please,” something which he thought was incompatible with the constitutionalist tradition; the framers agreed.

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. Hale, like Coke, believed that 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. The potential for problems during emergencies created by a balance of powers did not deter Hale, who argued that “it is a madness to think that the model of laws of government is to framed according to such circumstances as very rarely occur.”

As described in the previous section, Hale was “particularly well known” within the colonies; this was particularly evident during the period of turmoil when James Otis was making his arguments about the general warrants being issued by the colonial governments. 

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, Parliament had adopted powers over the colonies that were widely considered arbitrary. In doing so, Reid argued that “Parliament adopted wholeheartedly the doctrine of sovereignty as stated by Hobbes.” The Declaratory Act, which was held by the American Whigs to purport to assert Parliament’s right to repeal Magna Carta (contrary to Hale’s views) of its powers, had lit the fuse of the American Revolution.

Accordingly, given the antipathy towards Hobbes’ 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, precisely because they had learned much from Hale’s refutation of Hobbes, and because to read in 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 made explicit, and in the most clear (and clearly bounded) manner possible. This serves as further evidence that the targeted killing of an American citizen falls outside of the broadest possible conception of our constitutionalist tradition.

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198 Bailyn, supra note 10379, at 30 n.11.
199 Id.
200 Reid, supra note 101, at 60.
4. The Patriots Orientation Towards Blackstone and What it Reveals

As detailed in the last section, there is ample evidence that Blackstone was the jurists who had exercised the most influence on colonial American thought. He had produced an eloquent defense of the balance of powers as a bulwark of liberty, and 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 minister of state,” and that the executive’s violation of the longstanding prohibitions against extraconstitutional killing “would be so gross an act of despotism, as must convey the alarm of tyranny throughout the whole kingdom.”

The key dispute that the Framers had with Blackstone’s ideas was that he had appeared to accept the prevailing view about the wide-ranging powers of the legislative branch, i.e., 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 or 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.\(^{201}\)

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. This explains why the Bill of Attainder Clause mentions only bills and not executive orders of attainder. The omission makes no sense otherwise, as for the Framers, “the antithesis of arbitrary power was limited power;”\(^{202}\) 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 The

\(^{201}\) Id. at 134–36.

\(^{202}\) Id., at 135.
Federalist No. 78) that the judiciary should be given the power to “declare all acts contrary to the manifest tenor of the Constitution invalid,” in particular those relating to “bills of attainder,” he clearly 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.

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. That this was the contemporary understanding was best demonstrated by James Madison’s actions during the War of 1812, when he directed that a citizen accused of what amounted to treason be arraigned by the civil courts and released from military custody. Madison, of course, had witnessed as Secretary of State the passage of the 1806 amendments to the acts establishing military jurisdiction, which “carefully limited military jurisdiction, even in times of war, to those who were not citizens.”

The Constitutional limits of the President’s powers were also affirmed by the Supreme Court in the cases brought during the Quasi-War with France, in particular Little v. Barreme. The Treason Clause, the Marque and Reprisal Clause and the Bill of Attainder Clause 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, or otherwise. They are the most comprehensive and elegant constitutionalist document yet produced for that reason. That said, modern analysis of constitutional protections have focused on the Bill of Rights’ guarantee of Due Process, and for this reason, and so that this article’s discussion of why executive death warrants are unconstitutional might not be seen as antiquarian and obsolete, it must reiterate that the issue at present is largely whether in the light of the constitutionalist context for the Due Process Clause described above, one might successfully make Justice Black’s argument “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.  

D. 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, unless the political question doctrine is taken to warrant a radical departure from the constitutionalist tradition and its concern for the rule of law, since 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. It is this: what would be the consequences of 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 Blackstone had correctly argued—rights of this kind:

Can be preserved in practice no other way than through the medium of 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.

One might well ask: where are we heading if constitutional rights against the executive are unenforceable whenever the executive makes that determination? The best explanation is provided by Giorgio Agamben, who drew upon the works of Carl Schmitt (although reversing the valuation of executive power). In State of Exception, Agamben noted how the power of the executive to operate above the laws after it has declared an emergency situation creates incentives that lead inexorably towards totalitarianism.

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204 GIORGIO AGAMBEN, STATE OF EXCEPTION (2005).
It is notable that 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 and Napoleon’s tyranny. 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. However, 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 the masses, but which is rejected by the elect who deserve to govern in secret). 205 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.

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. 206

From 2001 to 2004, the constitutional order of the United States was severely tested. In Hamdi v. Rumsfeld, 207 the Supreme Court held that the writ of habeas corpus extended to a United States citizen held at Guantanamo Bay. Eight of the nine Justices agreed that the Executive Branch does not have the power to hold a citizen indefinitely, without access to basic due process protections enforceable in open court. This case was rightly seen as a watershed, a rejection of theories of executive detention that were incompatible with the basic tenets of our common law tradition. 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 and old and considerably more fundamental: as Blackstone made it clear, habeas corpus was originally necessary because it was a prophylactic protection for Magna Carta’s right not to be killed.

207 Id. at 507.
To turn a blind eye to executive death warrants would be to trample upon numerous principles that the Framers believed so important as to put into a document that outlines the parameters of the state itself, and which 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 comprehensive view of due process, which also precluded the use of military justice against civilians. In fact, 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.  

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*), while the administration’s decision to issue executive death warrants has lead to so little. Apart from the decision of the American Civil Liberties Union and the Center for Constitutional Rights 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. Why (to use Blackstone’s words) is the alarm of tyranny not being rung throughout the land?

This only seems to be possible if we have forgotten 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 the fact that they had been settled centuries earlier. If we believe that Magna Carta and the documents that follow 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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209 It should be noted that the vigorous and sustained coverage of the issue provided by Glenn Greenwald of Salon.com is a notable exception.