

Magna Carta and the Contemporary Presidency

James P. Pfiffner

George Mason University
pfiffner@gmu.edu
pfiffner.gmu.edu

Eight hundred years after King John affixed his seal on an agreement with his rebellious barons (it was not called Magna Carta then) the “Great Charter” is celebrated as the classic embodiment of the fundamental principles of rule of law, limited government, and individual rights. Despite this adulation, scholars have pointed out that much of the mythology of Magna Carta is not historically accurate (Holt 1964, 9; Lepore 2015; Radin 1947). Rather than being in effect “in perpetuity,” it was in legal effect for only ten weeks (Breay 2002, 40). It was intended to bring peace, but it quickly resulted in civil war. Rather than a statement of justice for all, it was meant to serve the purposes of the aristocracy of England in the 13th century. It did not authoritatively bind the English Kings of the Tudor or Stuart dynasties (Carpenter 2015, 435). Most of its 63 clauses concerned archaic details about inheritance and specific taxes, and the British Parliament has repealed all but four of its articles. It was not even translated into English until 1300, having been written in Latin and quickly translated into the vernacular, which in 1215 was French (Lepore 2015).

Although these points may be historically accurate, they are beside the point. Historical events have an impact according to the significance attributed to them in future years. Over the past 800 years, Magna Carta formed the basis and inspiration for historic statements of English liberties and limited government, and its legacy heavily affected the United States Constitution and Bill of rights. This paper will first examine the historical circumstances surrounding the agreement at Runnymede of June 15, 1215. It will then examine the influence of Magna Carta in fighting Stuart absolutism in the 17th century. Finally, it will argue that the timeless principles embedded in Magna Carta continue to be relevant to contemporary governments, particularly the US presidency.¹

Historical Context of Magna Carta

The original purpose of Magna Carta was not to assert individual rights, but rather to curb what was seen as the despotism of King John. Specifically, Magna Carta concerned feudal prerogatives of the king and his relationship with the barons of his kingdom. John’s need for money to conduct his wars in France led to the abuses of traditional taxes collected by English kings (Carpenter 2015, 70, 202). John inherited the Angevin empire, including significant portions of France, but he was not successful militarily in defending them. In 1204 he lost

¹ The passages of Magna Carta of 1215 quoted in this paper are from Breay 2002, 49-54. The terms: articles, chapters, clauses, and provisions, will all refer to the numbered clauses of Magna Carta.

Normandy, and in 1214 he lost the rest of the Angevin holdings in Europe at the battle of Bouvines . The most powerful barons in England had chafed under John's often arbitrary and capricious rule, particularly his continuing demands for more money to regain lost territories on the continent.

In the fall of 1214 the complaints of the barons came to a head and they confronted John, demanding that he grant them rights dating back to the coronation charter of Henry I and the promises of Edward the Confessor before him (Vincent 2012, 11). The particularly objected to the "scutage" (payments in lieu of military service) he demanded to support a return to France to reclaim his empire. They did not object in principle to scutage, "amercements," fines and other demands for taxes, but John had increased the amounts significantly without consulting them and his demands were administered arbitrarily and coercively.

When John saw dissent becoming serious, he hired mercenaries to supplement the minority of barons who remained loyal to him and began to fortify castles. In the spring of 1215 the objecting barons gathered together to take up arms and oppose John, and in May they renounced their fealty to him. This amounted to treason and the threat of civil war. On May 17 they captured London, a serious blow to John's sovereignty. Since the military force that the barons put together was formidable, John decided to negotiate and met them at Runnymede in June. They drew up their demands in the "Articles of the Barons," which were the basis for Magna Carta. The threat of violence convinced John to have his seal affixed to the formal documents of Magna Carta of 1215 (about 13 copies) that were to be distributed throughout the kingdom.

John, however, had no intention of adhering to the demands of the barons, and he was confident that the agreement would be nullified by Pope Innocent III. In April 1213 John had reconciled his dispute with the Pope over the appointment of the Archbishop of Canterbury, and pledged fealty to the Pope in exchange for a payment of 1000 marks annually. Thus legally, the Pope was the overlord of England as well as the spiritual head of the church (Breay 2002, 20). Predictably, immediately after sealing Magna Carta John sent a plea to the Pope to nullify the agreement, which Innocent did, pronouncing in a Papal Bull proclaiming that the Charter was "null, and void of all validity for ever" (Carpenter 2015, 400). Thus Magna Carta was formally in legal effect for only 10 weeks, with war breaking out in September 1215.

Aside from the formal legality of Magna Carta, neither side to the agreement kept its promises (Carpenter 2015, 403; Holt 1992, 359). In September 1215 King John and his loyalists moved militarily against the barons to seize their lands, but the barons would not give up London or lay down their arms and agree to support John. Once the fighting began, the barons, not recognizing the legitimacy of King John, invited Prince Louis of France to replace John as King and swore fealty to Louis, who invaded England in May of 1216 in order to join the barons and depose John.

In October of 1216 John died, leaving his son, Henry III as his nine year old heir. William Marshall, a loyalist to John, acted as regent, running the country in the young king's place until he reached majority. Marshall acted quickly to make peace with the barons, who had grown tired of the arbitrary actions of the French troops who had come to help them overthrow

John. At the end of 1216, Marshall drew up a modified Charter that satisfied the rebelling barons, ending the civil war and bringing the country back into the kingdom. Henry again reissued Magna Carta, with significant changes from the 1215 original in 1217 and 1225.

Provisions of Magna Carta

In their demands, the rebelling barons did not intend to assert a broad range of human rights. Rather, they were concerned with what they saw as the specific abuses that John had imposed on them. The 1215 Magna Carta had 63 clauses (“chapters”), though the Latin text of the actual document was run together, and the separate clauses only were assigned numbers by the great jurist Sir William Blackstone in 1759.

Most provisions concerned feudal relationships between the king and his subjects, such as inheritance, marriage, debt collection, fines, use of forests, property, and King John’s abuses of these relationships (Palalitto 2015, 4; Carpenter 2-15, 124). For instance, a number of clauses forbade the king from using his power to interfere with the inheritance of property.² A number of other clauses forbade the seizure of property by the king without due process of law and just compensation.³ Prior to Magna Carta, the king determined what constituted justice, and King John used the courts as a source of revenue, and he would “sell” justice to the highest bidder (Holt 1992, 326). He assessed “scutage” or “aids” in the significantly greater than traditional payments to the king.⁴

In addition to the articles concerning specific acts of John, several of the 63 clauses of Magna Carta addressed issues of fundamental justice and the rule of law in England; they constitute the primary heritage of Magna Carta:

Chapter 38 declared: “In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.”

Chapter 39 proclaimed that “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we [King John] proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.”

Chapter 40 promised: “To no one will we sell, to no one deny or delay right or justice.” These declarations speak to the principles of justice and the prevention of arbitrary rule by the king or sovereign and they indicate the injustices of which King John was accused.

² For instance, previously if a person died leaving only a minor heir, the estate reverted to the king, who could assign (or sell) it to be kept until the heir’s majority, in the mean time milking the estate for his own gains. Previously, widows had to pay money to keep their inheritance and could be forced to marry. These issues of inheritance were addressed in Clauses 4, 5, 6, 7, 8, 26, 27, 43).

³ For instance, previously the king could appropriate corn, wood or other “movable goods” without compensating the owner. Chapters 9, 28, 29, 30, and 31 dealt with these takings.

⁴ Scutages and fines were dealt with in Chapters 3, 12, 14, 15, 20, 21, 22, and 55.

Magna Carta foreshadowed the expansion of liberty and the reining in of arbitrary rule. The seeds of due process and rule of law lie in “law of the land” and “credible witnesses.” In interpreting Magna Carta, in 1354 the words “due process of law” appeared in English statutes for the first time (Holt 1964, 10; Howard 1964, 15). Parliament interpreted “the lawful judgement of his equals” to mean “trial by peers or trial by jury” (Holt 1992, 10). Chapters 12 and 14 forbid the assessment of “aid” or “scutage” without “general consent of the realm,” foreshadowing the principle that taxes cannot be raised without the consent of Parliament, though Parliament did not exist at that time.

Expansion of Rights and Limits on Government

Although the intentions of the barons in forcing John to agree to Magna Carta was for their narrow self interest, over the next several centuries, the Great Charter was used in later assertions of limited government and individual rights. As the scholar J.C. Holt argued, “The history of the document is a history of repeated re-interpretation The class and political interests involved in each stage of the Charter’s history are one aspect of it; the principles it asserted, implied or assumed are another” (Holt 1964, 18). One early account captured the profound implications and revolutionary potential of Magna Carta: “A new state of things began in England; such a strange affair as had never before been heard; for the body wished to rule the head, and the people desired to be masters over the king: (Vincent 2015). In effect, Magna Carta asserted that some individual rights were inherent in individuals rather than being granted by the grace of the king.

Short Term effects of Magna Carta: Reissues of 1216, 1217, 1225

The most radical provision of the Charter was clause 61, the enforcement clause, which takes up about one ninth of the 3550 words of the 1215 Magna Carta (Carpenter 2015, 342). Section 61 provided that 25 barons would be elected to enforce the Charter if King John were to violate its provisions. If John did not keep up his side of the agreements, the 25 barons were authorized to use force (“distrain upon and assail us in every way possible”) to seize his castles, lands and possessions. In section 61 John also promises not to try to have the charter invalidated, and if anyone (i.e. the Pope) did so, it would be “null and void.” This concession on John’s part struck at the very base of sovereignty, the monopoly on the use of lawful force. If the barons, in their own determination, could legitimately use force against the king, there would be no sovereign. In effect chapter 61 authorized treason.

Finally, chapter 63 declared that “all these liberties, rights, and concessions” are given to “men in our kingdom,” not merely free men; and that the liberties were to be kept by all of their heirs . . . in all things and all places for ever.” The king swore to act in “good faith and without deceit.” Magna Carta was “Given by our hand in the meadow that is called Runnymede” on June 15, 1215.

As described above, neither King John nor the barons kept their side of the agreement, and civil war ensued. The civil war was settled within a year of King John’s death by the reissue of Magna Carta, which granted many of the demands of the barons, but protected the rights and

sovereignty of the king. While the enemies of the king designed the 1215 Magna Carta, the new king's supporters drew up the 1216 version.

The 1216 version dropped 23 clauses, leaving 37 intact (Vincent 2012, 86; Howard, 1964, 24), and notably, the enforcement clause was one of those deleted (Carpenter 2015, 409). It was reissued again in November 1217, with minor changes and was approved by the Pope (Vincent 2012, 84). At the same time, the Charter of the Forest was issued, allowing access to the huge forests that had been claimed by the king. In order to distinguish the two Charters, the term "Magna Carta" (the Great Charter) came into use for the first time, in order to distinguish it from the lesser Charter of the Forest (Carpenter 2015, 417).

One key difference between the 1225 Magna Carta and previous ones was that King Henry III granted it voluntarily, acting for himself at age 15, in exchange for increased taxes. This lack of coercion was important because, in general, contracts entered into through the threat of force are void (Carpenter 2015, 419-420). This was a factor in gaining papal approval and support of the new charter. The 1225 version expanded those covered by the Great Charter; in the last clause Henry promised to guaranty the liberties granted not merely to free men, but for "all of our kingdom . . . in our kingdom of England in perpetuity" (Carpenter 2015, 421).

The 1225 version is the "definitive" version, which was confirmed by English Monarchs more than 40 times over the next 200 years, and was confirmed by great councils or parliaments more than fifty times by 1422 (Vincent 2012, 88; Hogue 1966, 52). In 1354 a statute cited "due process of law" for the first time, and the phrase "no free man" was broadened to "no man of whatever estate or condition he may be" (Holt 1992, 10). The 1225 version contained the language of the few clauses that remain as part of the statutes of England (Hogue 1966, 52). Most of the chapters were repealed at various times over the centuries, and of the 1215 version there remain only chapters 1 (ensuring freedom of the English Church); 13 (guaranteeing the city of London "all its ancient liberties and free customs"); 39 (establishing due process and rule of law); and 40 (no selling of justice) (Vincent 2012, 102).

Several decades after the reissue of Magna Carta, Henry Bracton wrote *On the Laws and Customs of England*, which was said to have been influenced by Magna Carta. In his writings Bracton said "'For his [authority] is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care . . . it is . . . the majesty of a ruler that the prince acknowledge himself bound by the laws" (Tamanaha 2004, 27). Bracton distinguished the rule *of* law, in which binds rulers as well as the ruled from *by* law, in which only the ruled are subject to the law.

Thus in the short term, Magna Carta changed expectations about the nature of kingship in that the king was no longer considered to be above the law but bound by it (Carpenter 2015, 450). It set the expectation that there had to be consultation before the king imposed taxes. It created the expectation that justice was not dispensed at the whim of the monarch and that courts could enforce the law at local levels. It laid the groundwork for the rule of law, the due process of law, trial by jury, and individual liberty (Tamanaha 2004, 25-27). Of course these principles were not explicitly stated in Magna Carta, and English monarchs did not always abide by them. But the

expression of a basic formulation of these principles gave ammunition to those who would fight for them in the future.

Longer term effects of Magna Carta

In the 15th and 16th centuries Magna Carta was not prominent in major battles with the English monarchy (Holt 1993, 57), partly because of the willingness of Parliament to consent to the dominance of the Tudors (Howard 1964, 25; Pfiffner 2008, 44-47). With the ascendancy of the Stuarts and their insistence on the divine right of kings and absolute monarchy, however, Magna Carta was revived as a symbol of ancient rights and liberties.

In the 17th century, Sir Edward Coke, in opposing Stuart absolutism, challenged the notion that the king was above the laws. Coke appealed to the mythic ancient rights of the realm, even before Magna Carta, and saw the Great Charter as the embodiment of that customary and fundamental law, rather than the creation of new rights (Holt 1992, 4; 1993, 65). Challenging what he saw as abuses of Charles I, Coke helped draft the Petition of Right in 1628. The petition echoed parts of Magna Carta in proclaiming rights of Englishmen, including trial by jury, “no arrest without cause shown,” as well as no quartering of troops without consent, and no martial law in peacetime.

As with King John, Charles consented to the Petition in order to raise the funds he needed, but soon reneged and dissolved Parliament. That led to “The Grand Remonstrance,” of 1641, a compilation of Charles’s abrogations of the rights of the people.⁵ These demands and the abuse of his taxing power led to the English Civil war of the 1640s and the elevation of Parliament to share sovereignty with the king. Coke also argued for the principle that the sovereign, both Parliament and king, were subject to the law: “*if any Statute be made contrary to the great Charter, or the Charter of the Forest, that shall be holden for none*” (Burgess 1996, 176; Pallitto 2015, 26-30; italics in Coke’s original).

With the restoration of the monarchy, Parliament established the principle that it was superior to the crown by insisting that, before they were coronated, William and Mary agree to the English Bill of Rights in 1689. The Bill’s provisions expanded the range of liberties initiated by Magna Carta, including provisions that the king could not suspend the laws, interfere with free elections to Parliament, raise taxes without parliamentary consent, raise a standing army in times of peace, or impose excessive bail or cruel and unusual punishment” (Howard 1964, 27; Pfiffner 2008, 40). This peaceful revolution led to the establishment of constitutional monarchy in England.

Coke also helped draft the Virginia Charter of 1606 that promised the colony “all Liberties, Franchises, and Immunities” of Englishmen . . . as if they had been abiding and born within this our realm of England” (Vincent 2012, 93). The denial of the “rights of Englishmen,” which stemmed from Magna Carta and English Bill of Rights, became one of the major

⁵ Among other deprivations of rights, the Grand Remonstrance chastised the Court of Star Chamber for “mutilations, whippings, pillories, gags, confinements, banishments.” The text can be found at: [citehttp://www.constitution.org/eng/conpur043.htm](http://www.constitution.org/eng/conpur043.htm).

provocations that induced the American colonists to declare independence in 1776. In the Declaration of Independence the colonists accused King George III and Parliament of “absolute Despotism,” dissolving legislatures of the colonies, controlling judges, establishing standing armies, quartering armed troops, imposing taxes without consent, suspending trial by jury, etc.

Magna Carta has been equally or more revered in the United States as it was in England. The US Constitution established the principle that the sovereign was not above the law and that government should be limited by the law. As Thomas Paine declared: “In America THE LAW IS KING. For as in absolute governments the king is law” (Paine 1995, 34). The separation of powers was to provide an internal check on government. Congress was to make the law and the president was to “take Care that the Laws be faithfully executed.” Neither the president nor Congress was above the law. Sixteen of the United States have written the provisions of Magna Carta into their Constitutions (Lepore 2015).

Two hundred years after the English Bill of Rights many of the same liberties were embedded in the Bill of Rights of the American Constitution. The first ten amendments to the Constitution were intended explicitly to protect the rights of individuals as against the government. The American Bill of Rights was drawn in part from the series of declarations of rights that stemmed from Magna Carta, including:

Amdt. 5: the right not to be “deprived of life, liberty, or property without due process of law” (MC 39, “law of the land”);

Amdt. 5: “private property” cannot be taken “without just compensation.” (MC 28, “No constable of other royal official shall take corn or other movable goods from any man without immediate payment.”)

Amdt. 6: the right to a “speedy and public trial” (MC 40, “to no one will we sell, to no one will we deny or delay right or justice”)

Amdt. 6: the right to trial “by an impartial jury” (MC 39, 52, “by the lawful judgement of his equals”),

Amdt. 6: the right “to be confronted with the witnesses against him” (MC 38, “produce credible witnesses to the truth of it:),

In addition, several provisions of the US Bill of Rights echo the English Bill of Rights, which prohibited: “raising or keeping a standing army,” “excessive bail,” “excessive fines,” “cruel and unusual punishments” and “quartering soldiers.”

In echoes of clause 39 of Magna Carta (“No man shall be seized or imprisoned . . . except by . . . the law of the land”), Parliament passed the Habeas Corpus Act in 1640, renewed in 1679, mandating that a prisoner could appeal his imprisonment and force the government to demonstrate that the arrest was made with just cause. The specific processes of habeas corpus

were derived from the types of writs used by royal courts in the 14th and 15th centuries, and more specifically to the arguments of Edward Coke in the early 17th century (Halliday 2010, 16-18).⁶

The right to “The Great Writ” of Habeas Corpus was so important to the Framers of the Constitution that they placed it in Article I, preceding the Bill of Rights by several years. Alexander Hamilton in Federalist 84 declared that “The practice of arbitrary imprisonments have been in all ages the favourite and most formidable instruments of tyranny.” Habeas Corpus in the US context is the right of a person accused of a crime to challenge his arrest or imprisonment before an independent court. If the judge finds that the person was arrested without sufficient evidence that the law was broken, the court can order that the person be set free. Habeas Corpus has also been used In the United States by accused (or convicted) persons to argue that the government violated the due process of law and that they should be set free.

The United States Presidency

Despite the separation of powers in the Constitution and the Bill of Rights, presidential power has developed in ways that threaten the rule of law and the individual rights of due process. Magna Carta established the principle of limited government, and legislatures can pass laws that abrogate fundamental rights, but in the 20th century United States, presidents tend to be the greater threat. With the coming of the Cold War, presidential power expanded, beginning with President Truman’s decision to go to war in Korea without congressional consent. The Cold war, with its need for quick and unified reaction to potential nuclear attacks, presidents became the center of national security policy making.

The atrocities of 9/11 greatly increased presidential discretion, which led to some infringements on individual rights and threats to the rule of law. This section will examine only assertions of presidential authority that are related the rule of law or individual liberties that stem from Magna Carta, particularly actions of Presidents George W. Bush and Barack Obama. The actions of Presidents Bush and Obama raise the issue of the extent to which presidents are bound by law. That is, can the president suspend the law at his discretion for purposes of national security?

Torture and Suspending the Law

After the attacks of 9/11, the leadership of the Bush administration determined that in order to discover potential future attacks, the United States had to resort to brutal interrogations by extracting “actionable” intelligence from terrorist suspects. But since these interrogation tactics amounted to torture, the US laws against torture had to be evaded. Thus administration

⁶ See the discussion in Pallitto 2015, 147-148. For an argument that habeas corpus was not implied in Magna Carta see Halliday 2010, 11-18. Halliday argues that “Nothing in Magna Carta spoke to a *specific process* to prevent imprisonment contrary to ‘the law of the land’” (emphasis added; 210, 16). But if the requirement of specific processes is the criterion, virtually no practices of modern jurisprudence could be traced to Magna Carta. Whereas, the argument of this paper is that Magna Carta has had significant influence on the development of Anglo-American jurisprudence.

lawyers needed explain why US laws did not apply to interrogations aimed at discovering plots against the United States.

In order to do this, lawyers in the Office of Legal Counsel of the Justice Department wrote memoranda that justified harsh interrogations by narrowing the definition of torture to acts “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death” (Bybee 2002, 1). More broadly, they asserted that the president was Commander in Chief of the armed forces, and thus Congress (i.e. the law) could not constrain presidential decisions about interrogation. “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield” (Bybee 2002, 34). Any such law would be unconstitutional (Bybee 2002, 39). In addition, since the Geneva Conventions forbid torture, President Bush issued a memo on February 7, 2002 that suspended the Geneva requirements with respect to al Qaeda, despite Article VI of the Constitution, which states that treaties are “the supreme Law of the Land.” Thus the administration asserted that it was not bound by US anti-torture laws, the Geneva Conventions, or international law⁷

The purpose of these legal maneuvers by the administration was to ensure that US interrogators could use Enhanced Interrogation Techniques (EITs) to gain intelligence about potential terrorist activities. The administration wanted to ensure that its interrogators did not get charged with breaking the law or war crimes. Consequently, US military personnel abused suspected terrorists at Guantanamo, Bagram Air Force base in Afghanistan, and Abu Ghraib in Iraq. These illegal actions have been documented in a number of military investigations, and the policies that allowed them have been reversed. Under a separate memorandum, the CIA was authorized to use Enhanced Interrogation Techniques, which amounted to torture. CIA torture was documented by a US Senate Report, released in November 2014 (Senate 2014).

Thus, during the war on terror, President Bush undermined the rule of law by asserting that he did not have to obey the law or comply with the Geneva Conventions. Although President Obama, by executive orders, forbade the use of EITs, Republican presidential candidates in 2012 and 2015 argued that EITs were essential to national security. Future US presidents might again accept the legal arguments of the Bush administration and employ torture during interrogations.

Thus President Bush rejected Magna Carta’s principle that the executive is not above the law as well as the framers of the US Constitution who refused to grant the president an absolute veto or the “power to suspend any legislative act” (Farrand1966, 103-104).

Habeas Corpus and Indefinite Detention

On November 13, 2001 President Bush signed an order that required that military commissions try suspects of terrorism and that detainees could not appeal their detention in federal courts. In effect, the order allowed the executive branch to imprison “enemy combatants” indefinitely, and they would not have recourse to the usual due process requirements the Fifth Amendment. The detainees would be charged by the executive, imprisoned by the executive,

⁷ For details on these legal and constitutional arguments, see Pfiffner 2010, Ch. 5.

tried by the executive, and any appeal would be decided within the executive branch. When prisoners in Guantanamo attempted to make habeas corpus appeals to challenge the grounds for their imprisonment, the administration argued that as enemy combatants they had no such right and that the president alone could determine their fate.

The Supreme Court delivered several setbacks to President Bush's claims to executive power. In *Rasul vs. Bush* (542 U.S. 466, 2004), the Court held that federal courts had jurisdiction, and non-citizens could challenge their detentions through habeas corpus petitions. In *Hamdi vs. Rumsfeld* (542 U.S. 507, 2004) the Court ruled that U.S. citizens had the right to challenge their imprisonment at Guantanamo in court. Justice O'Connor wrote for the Court: "an unchecked system of detention carries the potential to become a means for oppression and abuse . . ." Justice Scalia argued that the Court majority did not go far enough in defending Hamdi's right to Habeas Corpus, and declared, "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."

In *Hamdan vs. Rumsfeld* (548 U.S. 557, 2006) the Court ruled that the president was bound by the Geneva Conventions and that the tribunals set up by the Military Commissions Act lacked the due process requirements of a fair trial established by US law and the Geneva Conventions. In *Boumediene vs. Bush* (553 U.S. 723, 2008), the Court held that the court stripping provisions of the Detainee Treatment Act were unconstitutional and that Guantanamo detainees had a constitutional right to writs of habeas corpus. Justice Kennedy, writing for the majority argued that habeas corpus "became the means by which the promise of Magna Carta was fulfilled." Further, the Court stated that "the habeas privilege . . . was designed to protect against cyclical abuses of the writ by the Executive and Legislative Branches." Despite the *Boumediene* decision, however, most lower court decisions decided in favor of the government and the continued imprisonment of detainees (Pallitto 2015, 152-159).

When Barack Obama became president, the US prison at Guantanamo Bay, Cuba still held about 200 prisoners. After an analysis of those detainees, the administration determined that most of the detainees could be set free without undue risk to the United States. About 35 could be tried in court for crimes, either by military courts or Article III courts. But the 50 or so remaining, had to be held indefinitely without trial because their prosecution was compromised by the fact that evidence against them was obtained through torture or they had themselves been tortured.

Most problematic with respect to habeas corpus and rule of law, was Obama's determination that some Guantanamo prisoners would be held indefinitely without trial. If they were considered to be prisoners of war, they could be legally detained until the end of hostilities; but they were considered illegal "enemy combatants" and ineligible for release. There was no clear way of resolving this situation; the continued detention of the detainees could not be reconciled with the principles of Magna Carta and judicial due process.

NSA Surveillance without Warrants

Before 1978 presidents authorized wiretaps and searches concerning national security based on their own executive and national security authority. After the abuses uncovered by the

Church Committee (Church 1975), Congress passed the Foreign Intelligence Surveillance Act (FISA), which was designed to codify the use of national security surveillance within the United States. The Act created the Foreign Intelligence Surveillance Court (FISC) to review surveillance programs, judge their legality, and issue orders (in effect, warrants) allowing the National Security Agency (NSA) to monitor the communications of individuals believed to be connected to foreign powers.

The law applied to domestic surveillance, and left the president free to conduct any surveillance outside the United States (of foreign persons) that he thinks necessary. After the attacks of 9/11, President Bush initiated surveillance programs that authorized NSA to collect domestic communications data on US citizens without first obtaining the legally mandated warrants from the FISC, violating the law. President Bush did this secretly, on the assumption that he had the inherent power as chief executive to violate the law for purposes of national security.

When the secret programs were revealed by the *New York Times* in 2005, civil liberties advocates criticized the Bush administration for violating the law and for disregarding the Fourth Amendment requirement that prohibits “unreasonable searches and seizures” and requires that “no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized.” President Bush defended his actions as within his presidential authority and necessary for national security. Nevertheless, he convinced Congress to pass several laws to legally authorize the programs.

The USA Patriot Act (Section 215) was amended to allow the collection of metadata (rather than content) of phone calls within the United States that are “relevant” to an authorized investigation. But the FISC was convinced by the Bush administration to interpret Section 215 to allow collection of all meta data from US phone calls. The bulk collection of telephony metadata of all Americans was antithetical to the purposes of FISA. FISA was created to preclude the types of surveillance programs that before 1978, collected data on hundreds of thousands of Americans without a specific determination that their actions were suspect (Church 1975). In effect, this interpretation of section 215 amounted to a general warrant, which is specifically rejected by the Fourth Amendment to the Constitution.

When President Obama came to office, he did not reject this interpretation of Section 215, and the program was continued. However, Edward Snowden’s release of classified NSA documents in June 2013 disclosed this use of Section 215, which raised concerns about the extent of electronic surveillance and domestic data collection of Americans’ communications.

Despite the congressional amendment to Section 215 of the Patriot Act and its interpretation by the FISC, on May 7, 2015 in *ACLU v. Clapper*, the Second Circuit Court of Appeals decided that the “government’s expansive use of section 215” was “not contemplated by Congress” (*ACLU v. Clapper* 2015, 47; emphasis in original). “Congress cannot reasonably be said to have ratified a program of which many members of Congress – and all members of the public – were not aware” (79). The court found that the FISA orders (warrants) were not limited to specific suspects, but included “metadata concerning every telephone call made or received in the United States . . . for an indefinite period extending into the future . . . they extend to every

record that exists, and indeed to records that do not *yet* exist . . .” (61; emphasis in original). The court found that the government’s argument is “irreconcilable with the statute’s plain text” (75).

Thus the court judged that the FISC interpretation of the law was not intended or foreseen by Congress and thus violated the law. Members of Congress, concerned about the expansive scope of the program, passed the USA Freedom Act on June 2, 2015. The Act prohibits NSA from collecting bulk metadata of US phone calls, but allows telecommunication companies to store the data in their own servers. NSA can have access to the data upon the presentation of a warrant from FISC for access to a specific person or entity suspected of foreign terrorist links.

The surveillance of Americans without warrants by President Bush presents another case in which his administration argued that the president was not bound by the law when dealing with national security.⁸ The expansive interpretation of the law by the FISC illustrates how a secret court, acting with the executive branch can construe laws in ways not anticipated by those voting for the law in Congress. That President Obama, who had been critical of NSA surveillance by the Bush administration, continued the program when he came to office, demonstrates that, as the Framers of the Constitution expected, executives continually seek more autonomy and power. The most important check on executives and legislatures, as established in Magna Carta, is the rule of law.

Signing Statements

Signing statements are statements formally issued by the president upon signing a bill into law. Most signing statements are rhetorical and intended to show presidential support for the legislation or occasionally to record presidential reservations about a law. The most controversial use of signing statements has been to question the constitutionality of a law that the president has just signed. This type of signing statement can undermine the rule of law insofar as a president, although mandated by the Constitution to “take Care that the Laws be faithfully executed,” implies that law does not bind the executive.

Although many other presidents had issued signing statements, President George W. Bush used signing statements to an unprecedented extent. He issued more than 1000 constitutional challenges to provisions in 150 laws in his first six years in office. He used signing statements to assert the unilateral and unreviewable right of the executive to choose which provisions of laws to enforce and which to ignore. For instance, he used them to indicate that he did not feel bound by parts of the provisions of laws regarding: reporting to Congress pursuant to the PATRIOT Act; the torture of prisoners; whistle-blower protections for the Department of Energy; the number of U.S. troops in Columbia; the use of illegally gathered intelligence; and the publication of educational data gathered by the Department of Education.⁹

Occasionally Congress does pass laws that arguably impinge on the president’s constitutional authority. But President Bush used signing statements systematically, in a

⁸ For details and documentation of NSA surveillance, see Pfiffner 2008, Chapter Seven and Pfiffner 2015.

⁹ For details and documentation, see Pfiffner 2008, Chapter Seven.

strategic way often with objections of a general and vague type, rather than a specific objection accompanied by legal reasoning. He did not use them only when the law seemed to present an exceptional challenge to presidential authority, but as a matter of course. President Bush took this practice to extremes, both in volume and in intent.

The implications of these sweeping claims to presidential authority undermine the very meaning of the rule of law. Despite the Constitution's granting lawmaking power to the Congress, the Bush administration maintained that executive authority and the commander in chief clause can overcome virtually any law that constrains the executive. President Bush was thus claiming unilateral control of the laws. If the executive claims that it is not subject to the law as it is written but can pick and choose which provisions to enforce, it is essentially claiming the unitary power to say what the law is. The "take care" clause of Article II can be effectively nullified.

The struggle of Parliament in England to wrest the power of making law from the absolute right of the king lasted centuries. One of the key turning points in the struggle for rule of law was Magna Carta. And even after kings had lost the exclusive power to make all laws, the crown still had the authority not only to nullify a law through an absolute veto, but also had the power to suspend the law for specific purposes when it suited their interests. During the Constitutional Convention, the Framers overwhelmingly rejected three proposals for an absolute veto (May 1787). They also unanimously rejected a proposal to give the executive the power to suspend the law for a limited amount of time (Farrand 1966, 98-103).

Although President Obama did not use signing statements nearly as often as President Bush – issuing 30 objections to provisions in 20 laws (as of 2014) -- he argued that they were occasionally necessary when there was a serious disagreement about the constitutional authority of the president and Congress.

Since some laws do impinge on executive authority, there is no easy or clear way to prevent presidents from using signing statements to threaten not to execute the law. It would be better for presidents to use their veto power to object to the constitutionality of some laws, but it is unrealistic to expect them to give up the right to issue signing statements. Future presidents now have significant precedents to use signing statements in order to avoid congressional intent, and only self restraint on the part of presidents can alleviate this problem.

Drones: Extra-judicial killing

President Bush used armed drones to carry out targeted killings of suspected leaders of terrorist organizations, ordering about 50 strikes. President Obama greatly increased the use of drones, with more than 400 strikes killing between 2,000 and 4,000 suspected terrorists and a significant number of civilians. The Obama administration justified the extra-judicial killings by traditional just war criteria: just cause, competent authority, probability of success, last resort, proportionality, and distinguishing civilians from combatants. Using the rules of war in combating terrorism seems reasonable, but most of the killings took place far from hot battlefields. Targets are based on intelligence about the activities of individuals, and in the case of "signature strikes," the evidence consists of the activities observed by drone operators of

unknown individuals who are behaving in ways consistent with the preparation of terrorist activities. Some of those killed were US citizens.

The problem with this from a rule of law perspective, is that decisions about which people to kill are made within the executive branch, with no hearing or opportunity of a victim to argue his innocence. The administration argued that strict procedural safeguards are built into targeting decisions, and that President Obama is often involved in making final decisions. With respect to due process, there is no external check, such as a judge examining the evidence and agreeing or disagreeing with the decision to kill the individual (or group). This practice raises the issue of depriving a person of his life without Magna Carta's requirement of "the lawful judgement of his equals or by the law of the land" or "due process of law" in the Fifth Amendment.

In 2011 the Obama administration released a formal "White Paper" on US drone policy which argued that the Authorization to use Military Force of 2001 provided the necessary congressional and legal justification for the use of lethal force in confronting enemy combatants. The White Paper argued that in making lethal decisions, due process did not necessarily mean judicial process (Pallitto 2015, 169). It argued that the administration used strict criteria in making its decisions: there must be a "legitimate target;" the decision must be made by "an informed, high level official," the target must pose an "imminent threat of violent attack against the United States;" and "capture is infeasible" (Justice 2011, 9). But the White Paper also stipulated that there does not have to be evidence that a specific individual was plotting an attack, since "certain members of al Qaeda . . . are continually plotting attacks," and would engage in attacks if they were able to do so (Justice 2011, 8).

The justness of these targeted killings depends on the quality of intelligence and certainty that the individual is involved in planning an imminent attack on the United States, but the Obama administration's definition of "imminent" is elastic, as noted above. The accuracy of the intelligence is more difficult to judge when the individuals targeted are designated by a foreign government, and may be political enemies of the host country rather than terrorists intending to attack the United States.

Fundamental elements of the rule of law, stemming from Magna Carta, include: laws should be public; laws should apply to all equally; no one is above the law; the government must abide by the law; and the law is applied by an independent judiciary (Abizaid and Brooks 2014, 33-39). As is clear from the above analysis, targeted killings do not conform to many of the rule of law criteria.

The above illustrations of presidential overreach demonstrate the continuing relevance of the principles of Magna Carta and subsequent enactments of the rule of law and due process of law. In chapter 39, Magna Carta forbade imprisonment without lawful judgment of equals or the law of the land. The violations of habeas corpus by Presidents Bush and Obama illustrate the continuing relevance of that passage. The use of torture by President Bush, NSA surveillance during the Bush and Obama administrations, and signing statements illustrate the continuing relevance of the rule of law and limited executive and governmental power established in Magna

Carta. US drone policies raise the troubling issue of extra-judicial killing without due process of law.

Conclusion

This paper has argued that Magna Carta acted as a constraint on King John's successors and as an inspiration for fundamental acts of Parliament. It continues to be important as a classic statement of the rule of law, limited government, and individual rights. Its declarations are also potent symbols that can and have been used as arguments for restraining government in general and executives in particular. Though it began as a constraint on the king, the principle of rule of law now applies to legislative bodies as well as executives.

Magna Carta is part of the Constitution of the United Kingdom; though the British Constitution is unwritten in the sense of one coherent document, the accumulated fundamental laws of Britain constitute its Constitution. Ideally, constitutions place limits on governments, and the remaining provisions of Magna Carta are part of that Constitution. McIlwain puts it this way, "constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law" (McIlwain, 1940, 21).

Although Magna Carta of 1215 was limited in scope, subsequent assertions of its principles have greatly broadened freedom for individuals. In the words of Ellis Sandoz, "The history of the document is a history of repeated re-interpretation . . . there is no inherent reason why an assertion of law originally conceived in aristocratic interests should not be applied on a wider scale" (Sandoz 1993, 6). J.C. Holt argues that "Magna Carta was simply a stage in an argument" for the expansion of liberty. The appeal to ancient ideals and principles was a "potent train of thought" that was part of "a program, the intellectual ammunition for a political movement" (Holt 1993, 20, 68, 72).

As a practical matter, individual rights can only be enforced by the threat of force of a sovereign. And executives, who control military force, can only be constrained by their own restraint. Those who control legitimate coercive power must believe that acting within the law is in their own self interest, otherwise they would use force to implement their own preferences. Constitutions and laws create the expectations that executives should be limited in pursuing their own will, and other institutions of a polity must enforce those expectations. The ideals expressed in Magna Carta and its progeny can create political reality by broadening the principles of individual rights and limited government that are eventually accepted by polities, which create enforcement mechanisms to restrain governments and executives.

All principles of good government evolve and the principles of limited government and individual liberty require continual attention and renewal or they will atrophy. The US Constitution created a government of limited powers and an executive that was to be constrained by the other two branches of government. At times, the system has worked well in constraining governmental power. But at times it has failed to constrain presidents' assertions of executive prerogatives. Constraints on presidents can only be preserved by the other two branches of

government and a vigilant citizenry. As James Madison warned, “if Tyranny and Oppression come to this land, it will be in the guise of fighting a foreign enemy” (Hunt 1906, 174).

James P. Pfiffner is University Professor in the School of Policy, Government, and International Affairs at George Mason University. He has written or edited sixteen books and more than 100 articles. His recent books include *Power Play: The Bush Presidency and the Constitution* (Brookings 2008) and *Torture as Public Policy* (Paradigm Publishers, 2010).

References

Abizaid, John P. and Rosa Brooks. 2014. *Stimson Task Force Report on US Drone Policy*. Washington: Stimson Center (June).

ACLU v. Clapper. 2015. US Second Circuit Court of Appeals . Docket No. 14-42-cv, May 7.

Blackstone, Sir William. 1809. *Commentaries on the Law of England*, Volume I, London.

Breay, Claire. 2002. *Magna Carta: Manuscripts and Myths*. London: British Library.

Burgess, Glenn. 1996. *Absolute Monarchy and the Stuart Constitution*. New Haven, CT: Yale University Press.

Bybee, Jay S. 2002. Assistant Attorney General, Office of Legal Council, Department of Justice “Memorandum for Alberto R. Gonzales, Counsel to the President,” *Re: Standards of Conduct for Interrogation under 18 U.S.C. sec. 23240-2340A*, August 1.
<http://documents.nytimes.com/justice-department-memos-on-interrogation-techniques#p=1>.

Carpenter, David. 2015. *Magna Carta*. London: Penguin Classics.

Church Committee. 1975. *U.S. Senate Select Committee on Intelligence Activities Within the United States* (Church Committee Report) 1975, reprinted by Red and Black Publishers. St. Petersburg, Florida: 2007.

Farrand, Max. ed. 1966. *The Records of the Federal Convention of 1787*, Vol. I. New Haven, CT: Yale University Press.

Halliday, Paul D. 2010. *Habeas Corpus: From England to Empire*. Cambridge, MA: Harvard University Press.

Hogue, Arthur R. 1966. *Origins of the Common Law*. Indianapolis: Liberty Fund

Holt, J.C. 1992. *Magna Carta*, 2nd Ed. Cambridge University Press.

Holt, J.S. 1993. The Ancient Constitution in Medieval England. in Ellis Sandoz. 1993. *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law*. Indianapolis, IN: Liberty Fund.

Hunt, Gaillard. Ed. 1906. *The Writings of James Madison*. Vol. 6. (Correspondence, 1790-1802) NY: Putnam.

Justice, Department of. 2011. Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force. Draft, November 8.

Lepore, Jill. 2015. Magna Carta, the Bill of Rights, and the hold of time. *New Yorker*, April 20.

May, Christopher N. 1994. Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative. *Hastings Constitutional Law Quarterly* Vol. 21 (Summer), pp. 876-881.

McIlwain, Charles Howard. 1940. 1975. *Constitutionalism: Ancient and Modern*. Indianapolis: Liberty Fund.

Moberg, Erik. 2015. Towards a Science of States: their Evolution and Properties. Self published book, cite URL.

Paine, Thomas. 1995. *Collected Writings*, edited by Eric Foner. Washington: Library of America.

Pallitto, Robert M. *In the Shadow of the Great Charter* (Lawrence, KC: University Press of Kansas, 2015).

Pfiffner, James P. 2008. *Power Play: The Bush Presidency and the Constitution*. Washington: Brookings.

Pfiffner, James P. 2010. *Torture as Public Policy*. Boulder, CO: Paradigm Publishers.

Pfiffner, James P. 2015. Presidents Bush, Obama and the surveillance of Americans. In *The Quest for Leadership: Essays in Honor of Thomas E. Cronin*. Michael Genovese, ed. Amherst, NY: Cambria Press.

Radin, Max. 1947. The Myth of Magna Carta. *Harvard Law Review* vol. 60.

Sandoz, Ellis. 1993. *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law*. Indianapolis, IN: Liberty Fund.

Tamanaha, Brian A. 2004. *On the Rule of Law*. UK: Cambridge University Press.

U.S. Senate, Select Committee on Intelligence. 2014. *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Findings and Conclusions, Executive Summary*, December 3.

Vincent, Nicholas. 2012. *Magna Carta: A Very Short Introduction*. Oxford University Press.

Vincent, Nicholas. 2015. Consequences of Magna Carta. British Library website. <http://www.bl.uk/magna-carta/articles>.