of old, to endeavor a depravation, or subversion of these ancient rights and privileges by acts of parliaments . . . inconsistent with our Great Charter. . . . Parliaments are said to err when they cross its bounds."[11]

William Penn thought the best remedy for legislative violation of due process of law was to be found in an enlightened public. Consequently he undertook the task of educating people in England and America regarding their rights in this respect. So successful was he that henceforth the right of trial by jury seems not to have been questioned. This then is another of many illustrations found in history where the establishment of fundamental law and individual rights became the fruit of an act of government corruption. Due process has often been fortified by the lessons of history.

As a result of Penn's trial, the colonial records show that the colonists generally considered a regular indictment as an essential element to criminal proceedings according to due process of law. The damage which might be done to innocent parties by forcing them to stand trial before being regularly indicted was well understood. And unless indictments were made according to the recognized rules of the common law they would be of little value as a protection.

THE AMERICAN REVOLUTION

Due process of law was a major theme underlying the causes for the American Revolutionary War. The King and Parliament had repeatedly violated the basic rights of the colonists through acts and decrees that were not by the *law of the land*. The Declaration of Independence lists some of the many due process violations that were committed under King George.

11 *William Penn's Case,* 6 Howell State Trials (1670), 951 at 990.

When the English officials in Boston decided to enforce the Navigation Acts by means of arbitrary general search warrants, the stage was set for the opening scene of the American Revolution.[12] Although these warrants or "writs of assistance" had been used in the mother country, the merchants of Boston were not about to permit, without a legal battle, any promiscuous invasion, search, or seizure of their property.

The 39th Chapter of *Magna Carta* was used by the American Revolutionary patriots James Otis and John Adams against the writs of seizure, as well as against the Stamp Act, the customs duties, and the quartering of troops. They viewed such acts to be unlawful according to the "law of the land." The colonists asserted that "the primary, absolute, natural Rights of Englishmen as frequently declared in Acts of Parliament from *Magna Charta* to this Day, are Personal Security, Personal Liberty and Private Property."[13]

Public interest had seldom been so aroused as it was in 1761, when Paxton, the collector of the port of Boston applied for writs from the Superior Court of Massachusetts. The arguments of the lawyer James Otis against the writs made a powerful popular impression. In his argument in this case Otis went to the very heart of the difficulties of parliamentary control over the colonies. Otis cited the words of Lord Coke in *Dr. Bonham's Case* and insisted that regardless of the question of representation, the power of Parliament was not unlimited. He went even further by laying down in the clearest possible language the doctrine of judicial review, contending that when acts of Parliament were contrary to

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12 John Fiske, *The American Revolution* (Boston, 1891), Vol. I, p. 12.

13 From a letter by James Otis, Thomas Cushing, Samuel Adams, and Thomas Gray in Boston to Dennys de Bert, Dec. 20, 1765. Samuel Adams, *Writings,* Vol. I, p. 65. The letter adds: "and these Rights the Colonists are entitled to by Charters, by Common Law, and by Acts of Parliament."

natural equity or the constitution of England "the Executive Courts must pass such Acts into disuse."[14] Otis coupled this line of reasoning with Magna Carta, citing the law of the land provision as a part of the fundamental law of the English Constitution which the courts must enforce.

Although Otis was unable to convince the court, the effect of his argument on the colonists was electrical. Otis at once jumped into tremendous popularity. When the issue of the arbitrary writs were granted, Otis thundered that *"Every one with this writ may be a tyrant."* Later, John Adams commented on this stand and declaration by Otis saying:

> *Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there American Independence was born.*[15]

The colonists knew no way of resisting the writs as they were deemed "legal," by the courts, yet they knew that they were in direct violation of due process of law—they were not a writ original at common law. The spirit of revolution was now beginning to show itself.

The occasion for the next protest which was to involve the question of due process of law was the levying of the stamp tax in 1765. The Stamp Act was so unpopular that it was soon evident it would be impossible to enforce. The Act provided that a stamp be placed on most all paper used. One of its provisions was that all offenses against the Stamp Act could be tried in any part of the colonies, instead of at the scene of the offense, and in the vice admiralty court without jury. The court was to consist of one judge appointed by the Crown whose salary should be paid by those whom he condemned. Thus a judge was motivated to condemn the

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14 William Tudor, *Life of James Otis,* (Boston, 1823), pp. 70, 71.

15 Thomas B. Lawler, Essentials of American History, Boston: Ginn and Company, 1902, p. 131.

innocent, support a corrupt legal system, and defy true law, for his salary depended upon doing so, much as it does today.

It was the claim of James Otis and Samuel Adams that the fundamental character of the British constitution was quite generally recognized as being unalterable by simple parliamentary fiat. They based their authority partly on Coke and Locke, and partly on the doctrine of rights reserved to the people. Others argued that the act was void as against Magna Carta which was the heart of the fundamental law and hence must be considered as unalterable because it summed up principles of the English constitution and inherent rights of Englishmen.[16]

Samuel Adams, writing in the *Boston Gazette,* clearly indicated the viewpoint of advocating resistance to laws which were unconstitutional, and cited for his authorities not only English writers but works on civil and natural laws as well. He wrote of principles of due process in his article stating:

> Magna Carta * * * is affirmed by Lord Coke to be declaratory of the principal grounds of the fundamental laws and liberties of England, * * * and thus cannot be altered in any of its essential parts, without altering the constitution. * * * Mr. Hume says, the only rule of government is the established practice of the age, upon maxims universally assented to. * * * I think it follows that an act of parliament made against Magna Charta in violation of its essential parts is void.[17]

The Colonists regarded many of the taxes unlawful as they were not levied under the principle of consent and representation, and since this was an established maxim of

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16 James Otis, *The Rights of British Colonies,* (3d Ed., Boston, 1776), p. 55, 109. Otis emphatically said, "Lawyers know that there are limits, beyond which if Parliaments go, their acts bind not. 4 Inst. 122." Mott, p. 128.

17 Article signed "Candidus," a pseudonym used by Samuel Adams, *Boston Gazette,* Jan. 27, 1772. Samuel Adams, *Writings* (ed. by H. A. Cushing, N.Y., 1904), Vol. II, pp. 324-326.

law, it was the taking of property contrary to Magna Carta and "the law of the land."

In November of that same year (1772), Samuel Adams wrote a pamphlet in which he clearly expressed the rights of the colonists and the law that Parliament was bound to keep:

> The absolute rights of Englishmen and all freemen, in or out of civil society, are principally personal security, personal liberty, and private property. * * * The Legislative has no right to absolute, arbitrary power over the lives and fortunes of the people. * * * The Legislative cannot justly assume to itself a power to rule by extempore arbitrary decrees; but it is bound to see that justice is dispensed, * * * These are some of the first principles of natural law and justice, and the great barriers of all free states and of the British Constitution in particular. It is utterly irreconcilable to these principles and to many other fundamental maxims of the common law, common sense, and reason, that a British House of Commons should have a right at pleasure to give and grant the property of the Colonists. * * * Now what liberty can there be where property is taken away without consent.[18]

Here Adams was challenging the British Parliament's right of seizure of their property. He asserts that in order to be lawful such acts must conform to the established "principles of justice" and the "fundamental maxims of the common law." This is exactly what due process of law is in its nature— the requirement that the actions of government proceed by known and established law when affecting the liberty or property of citizens, rather than by arbitrary modes which it devises by itself for itself.

In all their disputes and conflicts with the British government, the patriots of the Revolutionary period rested their cases on the fundamental rights of Englishman

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18 Samuel Adams, *The Rights of the Colonists* (1772). See, W. V. Wells, *Life of Samuel Adams* (1865) Vol. I, p. 506.

according to the unwritten British Constitution—which they regarded as the *law of the land,* and as such was immutable. It matters not how legally accurate they were in their interpretation of Magna Carta and its 39th chapter, for the important consideration, in regards to the meaning of *due process of law,* is what the founders of our country considered the content of that phrase to be. Their appeal was, actually, more to the spirit of the Great Charter than to particular parts of it.

It was the founders' opinion that their rights of Life, Liberty and Property could not be deprived or annulled by the acts of government or by laws passed for that purpose which accomplished that result. They viewed their rights of liberty and property to be free from all encroachment except by their consent or the established processes and maxims known under the common law of England. Thus, in the *Declaration and Resolves of the First Continental Congress,* October 14, 1774, it was asserted:

> Resolved, 2. *That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.*[19]

As a consequence of possessing these ancient rights, the colonists declared that many statutes and acts of Parliament were "unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights." The English government was attempting in many cases to circumvent the *"law of the land,"* and to tear away established rights and principles of law from the unwritten Constitution — the cornerstone of English liberty. It was this political usurpation, subversion and tyranny that led directly to the American Revolution.

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19 *Documents Illustrative of the Formation of the Union of the American States,* 69 Congress, 1st Sess., House Doc. No. 398.

The *Declaration of Independence* may be looked upon as the culmination of the protests raised by the early Americans against the unlawful and arbitrary actions of the King and Parliament in deviating from the Law of the Land. The doctrine that whatever law Parliament enacts is the *law of the land* continued to be the main issue of contention up to 1776. It is this practice of tyrannical legislatures which is now again destroying the life, liberty and property of citizens.

With one or two notable exceptions, all of the pamphlets and resolutions mentioning the Great Charter and due process of law were published before July 4, 1776. The constitutional struggle of the colonies over the meaning of due process of law was practically ended in 1775, when the resistance to royal authority caused many of the governors to flee to the decks of waiting warships, leaving the government in the hands of the self-constituted *Committees of Correspondence.*

The meaning and intent of the phrases "law of the land" and "due process of law," which they had acquired by July 4, 1776, was complete and is their meaning today. They cannot be changed by judges or legislators. It was these phrases and their meaning that the freedom fighters transferred to the American state constitutions of 1776 and 1777, and the U.S. Constitution. Thus the due process clause which was adopted in each of the original and succeeding State Constitutions, though verbally different, have all the same legal effect.[20]

The common law rights and "fundamental principles" of "judicial procedure, whether in civil or criminal cases, as they existed and were recognized in the courts of England and American colonies prior to the adoption of the federal and state constitutions, are intended to be preserved by this

20 Cooley, *Constitutional Limitations,* 352.

guaranty of due process of law."[21] This is what constitutes a significant portion of the Law of the Land.

FUNDAMENTAL LAW NOT TO BE CHANGED

The colonists' idea of a fundamental law was that there was a body of laws that existed from time immemorial, and which could not rightly be changed by the fiat of government. In that sense the Common Law in its principles and maxims comprised a body of law which was fundamental to England and formed its "Constitution." In this country the great body of English law was adopted with modification and is our unwritten constitution—the Law of the Land.

This fundamental law which constitutes the "unwritten Constitution" does not change with time, but operates on new conditions with the same intent and principles as it did in the past. It is like a written constitution, of which Justice Sutherland said, "the meaning does not change with the ebb and flow of economic events."[22]

The abrogation of this unwritten constitution by government constitutes a revolutionary act. Thus, the Common Law, as it existed anciently in England, and that which was established by the formation of the American nation, is the "Law" that is to be used to both guide and limit the acts of government in all its branches and functions. The American doctrine regarding the Law of the Land was clearly not the same which prevailed in England, where the omnipotence of Parliament over the common law was generally practiced or admitted. Those who fought for this constitution and the rights it contains, held it to be unalterable by king or Parliament.

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21 *State v. Height,* 91 N.W. 935, 936 (Iowa 1902).

22 *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 402 (1936).

It is clear that the colonists adopted Lord Coke's opinions on the Law of the Land, that it was supreme and could not be altered. Coke had repeatedly emphasized in his *Institutes* the danger of changing the principles of the Common Law:

> *"So dangerous a thing it is to shake or alter any of the rules or fundamental points of the Common Law, which in truth are the main pillars, and supporters of the fabric of the Commonwealth"* (2 Inst. 74).
>
> *"And it is worthy the observation, how dangerous it is . . .to change an ancient Maxim of the Common Law"* (2 Inst. 97).
>
> *"It is a certain and true observation, that the alteration of any of those maxims of the Common Law is most dangerous"* (2 Inst. 210).

The colonists, and especially the men who fought for independence, embraced this idea, and asserted it is beyond the power of Parliament to change the Fundamental Law of the Land, which included the Common Law. They held fast to the ancient laws of their ancestors. Even in 1215, when Magna Carta was signed, there was an "old law of the land" recognized as existing at that time.

Since the turn of the century legislatures have ignored this concept of a pre-existing fundamental law which cannot be changed by legislative act. They have not only enacted measures contrary to fundamental law, but have specifically abrogated Common Law principles, maxims, procedures, rules, crimes and punishments. This is not only "dangerous" it is tyrannical and traitorous to do so, just as much as is changing or abrogating a specific provision of the written constitution. It has been often said that "fundamental and sacred principles of the common law," are "regarded as an integral part of the law of the land" even though they are "not stated in express terms in the State Constitution."[23]

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23 *State v. Birckhead,* 124 S.E.2d 838, 841, 256 N.C. 494.