

# THE ORIGINAL MEANING OF THE CONSTITUTION'S "EXECUTIVE VESTING CLAUSE"—EVIDENCE FROM EIGHTEENTH-CENTURY DRAFTING PRACTICE

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## ABSTRACT

Advocates of presidential power from the days of George Washington at least to the time of George W. Bush have claimed that the Constitution's so-called "Executive Vesting Clause," the first sentence of Article II, not only designates the President as chief executive, but also confers broad authority. Some commentators support that view, while others maintain that the President's powers are limited to those enumerated elsewhere in the Constitution.

This study addresses the previously-overlooked question of which interpretation is more consistent with contemporaneous drafting customs. It concludes that treating the "Executive Vesting Clause" as a mere designation is consistent with those customs, while treating it as a grant is not. Indeed, the grant interpretation would result in a document structure so anomalous as to render it unlikely that the Founders intended that interpretation.

This study marshals evidence overlooked by prior commentators, such as the royal commissions to American colonial governors, power-granting documents employed by the Continental Congress, and the eighteenth-century law governing grants.

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1. *Bibliographical Note:* This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources and short form citations used are as follows:

*The Attorney’s Compleat Pocket-Book* (5th ed., His Majesty’s Law Printer 1764) [hereinafter *Pocket-Book*].

Thomas Branch, *Principia Legis & Aequitatis* (Henry Lintot 1753) [hereinafter *Branch*].

Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541(1994) [hereinafter *Calabresi & Prakash*].

Nicholas Covert, *The Scrivener’s Guide* (4th ed., E. & R. Nutt & R. Gosling 1724) [hereinafter *Covert*].

*The Documentary History of the Ratification of the Constitution* (Merrill Jensen et al. eds., 1916) [hereinafter *Documentary History*].

## I. INTRODUCTION

From the administration of George Washington<sup>2</sup> at least through the administration of George W. Bush,<sup>3</sup> promoters of presidential power have argued that the first sentence of Article II of the

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Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed., J. B. Lippincott & Co. 1836) (1941 ed., 5 vols. inserted in 2 vols.) [hereinafter *Elliot's Debates*].

*The Records of the Federal Convention of 1787* (Max Farrand ed., Yale U. Press 1937) [hereinafter Farrand].

Alexander Hamilton, John Jay & James Madison, *The Federalist* (George W. Carey & James McClellan eds., Liberty Fund, Inc. 2001) [hereinafter *The Federalist*].

The Heritage Found., *The Heritage Guide to the Constitution* (Edwin Meese III et al. eds., Regnery Publ., Inc. 2005) [hereinafter *Heritage Guide*].

*The Colonial Records of North Carolina: Instructions for Our Trusty and Welbeloved [sic] Gabriel Johnston Esq.* (William L. Saunders ed., P.M. Hale 1886) [hereinafter *Instructions for Gov. Johnston*].

Giles Jacob, *The Accomplish'd Conveyancer* (2d ed., Henry Lintot 1750) [hereinafter Jacob].

Job Mill, *The Present Practice of Conveyancing* (Henry Lintot 1745) [hereinafter Mill].

Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case W. Res. L. Rev. 243 (2004) [hereinafter Natelson, *Necessary and Proper*].

*Royal Instructions to British Colonial Governors 1670-1776* vol. 2 (Leonard Woods Labaree ed., Octagon Books, Inc. 1935) [hereinafter *Royal Instructions*].

Anthony Stokes, *A View of the Constitution of the British Colonies* (B. White 1783) (available at <http://books.google.com/books?id=VmNzusdnHlC&printsec=frontcover&dq=anthony+stokes#PPP7,M1>) [hereinafter Stokes].

Charles C. Thach, Jr., *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* (Liberty Fund, Inc. 2007) (originally published 1923) [hereinafter Thach].

*The Federal and State Constitutions: Colonial Charters, and Other Organic Laws* (Francis Newton Thorpe ed., Govt. Prtn. Office 1909) [hereinafter Thorpe].

Emer de Vattel, *The Law of Nations* (Béla Kapossy et al. eds., Liberty Fund, Inc. 2008) (originally published 1758) [hereinafter Vattel].

\* Ed. note: Many of the eighteenth century sources not listed above may be found on Eighteenth Century Collections Online. For purposes of clarity, where the long “s” appears in the original text (i.e., the version of the letter that looks much like “f”), it was replaced with a modern “s.”

2. *Infra* n. 140.

3. See Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. Rev. 309, 339-40 (2006) (where the Bush-era claims are summarized from a skeptical point of view).

Constitution—the so-called Executive Vesting Clause<sup>4</sup>—is a plenary grant of “executive Power” to the President. If so, then the President arguably enjoys an “immense” reservoir of power comparable to that of the eighteenth-century British king, qualified only by explicit limitations located in the Constitution.<sup>5</sup> If, on the other hand, the initial sentence of Article II merely designates the holder of the “executive Power,” then the President’s authority is limited to the powers specifically enumerated in the Constitution<sup>6</sup> and their implied incidents.<sup>7</sup>

There is no dispute that the comparable sentence in Article I is a designation clause only, and confers no power. This is because that sentence provides that “[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States . . . .”<sup>8</sup> However, the words “herein granted” are absent from the initial sentence of Article II.

In recent years, the debate over the “Executive Vesting Clause” has been waged with great passion and ability.<sup>9</sup> Both sides have marshaled evidence from the Constitution’s text, from Founding-Era political theories, and from the records of the federal convention and the ratification process.<sup>10</sup>

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4. U.S. Const. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

5. Calabresi & Prakash, *supra* n. 1, at 578-79.

6. *E.g.* U.S. Const. art. I, § 7, cl. 2 (power of veto); *id.* at art. II, §§ 2-3 (other enumerated powers).

7. These are substantial. *Infra* nn. 158-62 and accompanying text.

8. U.S. Const. art. I, § 1 (italics added).

9. For strong arguments that the first sentences of Articles II and III are “vesting clauses,” see *e.g.* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 Nw. U. L. Rev. 1377 (1994); Calabresi & Prakash, *supra* n. 1, at 571 (stating, “The Vesting Clause of Article III is widely conceded to be a general grant of power to the federal judiciary”); *id.* at 570-78 (arguing that the first sentence of Article II also is a grant); *Heritage Guide*, *supra* n. 1, at 179 (“The Executive Vesting Clause . . . grants the President those authorities that were traditionally wielded by executives.”); *id.* at 234 (“In sum, Article III’s introductory language has always been read as granting federal courts the ‘judicial Power’ ”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 257-58 (2001). This view is questioned in Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 47-48 (1994). Perhaps the most persuasive and thorough argument against the vesting-clause hypothesis is Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 555 (2004).

10. See sources cited, *supra* n. 9.

They have largely overlooked, however, the Anglo-American drafting tradition that informed the writing and adoption of the Constitution. To be sure, commentators on the “Executive Vesting Clause” have examined state constitutions and a few other documents. But the drafting tradition was far more extensive. It encompassed also a wide range of instruments by which one person, group of persons, or entity conveyed enumerated powers to another person, group, or entity. These instruments included powers of attorney, corporate and colonial charters, statutes empowering public officials, and “commissions” of all sorts. Among the relevant “commissions” were those by which the British Crown enumerated and defined the powers of colonial governors—instruments that were the direct ancestors of Article II.

The leaders who wrote the Constitution and guided it to ratification knew these documents well. Most were, or had been, practicing attorneys and public officials.<sup>11</sup> Those who, like George Washington, were not lawyers, were nevertheless familiar with legal documents from government service and economic enterprise.<sup>12</sup> If the drafting tradition included customs that dictated how enumerated-power instruments were structured, we would expect the Framers to follow those customs and the ratifiers to read the Constitution by their light.

After three introductory parts, this study sets forth in Part IV a report on my investigation into how power-granting instruments were drafted at the time. There were, broadly speaking, two prevailing patterns for instruments conferring enumerated powers. One was unlike any of the Constitution’s articles, but the other served as the template for Article I. In my view, it also served as the template for Article II (and, moreover, for Article III). This structure is consistent with reading the first sentence of Article II as a designation alone, but inconsistent with reading it as a grant of authority. In order to read that

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11. On the delegates to the federal convention, see e.g. Clinton Rossiter, *1787: The Grand Convention* 79-137 (MacMillan 1966).

12. For example, planters such as Washington and George Mason made wide use of commodity factors (brokers) to sell their crops abroad; larger planters served as factors themselves. Louis B. Wright, *The Cultural Life of the American Colonies, 1607-1763* 7, 11-12 (Harper Torchbooks 1957). Factors received their authority from powers of attorney. *A General Treatise of Naval Trade and Commerce* vol. 2, 400 (E. & R. Nutt 1753) (“A Factor is a Merchant’s Agent, residing beyond the Seas, or in any remote Parts, constituted by Letter or Power of Attorney, to sell Goods and Merchandize [sic], and otherwise act for his Principal . . .”).

sentence as a “vesting clause”—a grant of authority—one has to suppose an organizational structure for Article II so anomalous as to be virtually unprecedented in Anglo-American drafting practice.

Part V provides some additional evidence—much of it new—tending to corroborate the conclusion that the first sentence of Article II merely designated the chief executive and did not grant authority. The new evidence includes eighteenth-century sources shedding light on the scope of the President’s incidental powers, a formerly-unnoticed limitation on the authority of the British king, and the influence of an eighteenth-century rule of conveyancing law. Part VI briefly concludes this study.

## II. STRUCTURE OF ARTICLE I

All acknowledge that the first sentence of Article I was merely a designation clause because it referred to grants later in the instrument.<sup>13</sup> Taking it as such, Article I was organized in this way:

- \* Designation of Congress as the legislative branch (Section 1).
- \* Organizational details (Sections 2-7).
- \* Enumerated powers of Congress (Section 8).
- \* Restrictions on enumerated congressional powers (Section 9).
- \* Restrictions on the states (Section 10).

This study uses the term “Article I structure” to refer to those documents that conveyed enumerated powers and featured the first three elements of Article I in the same order. In other words, a document following the Article I structure first contained a provision (which might or might not be in the form of a recital) naming or appointing the designee, but granting no authority. Next, it contained one or more diversions into other subjects. Finally, it enumerated the powers conveyed from the grantor to the grantee. Additional provisions might or might not follow.

## III. ALTERNATIVE STRUCTURES FOR ARTICLE II

If Article II followed the Article I structure, then Article II was organized this way:

- \* Designation of the President as chief executive (Section 1, first sentence).

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13. U.S. Const. art. I, §1 (“herein granted”).

- \* Organizational details (remainder of Section 1).
- \* Enumerated powers of the President (Sections 2 and 3).
- \* Removal of the President (Section 4).

On the other hand, if the first sentence of Article II conferred power, then it was organized as follows:

- \* Plenary grant of power and designation (Section 1, first sentence).
- \* Organizational details (remainder of Section 1).
- \* Further grants and/or restrictions, explanations, or qualifications (Sections 2 and 3).
- \* Removal of the President (Section 4).

As noted in Part II, this study labels the structure of the first alternative the “Article I structure.” The second alternative will be called the “vesting-clause structure.” The vesting-clause structure was characterized by these three provisions in succession: (1) A general, indefinite grant, (2) one or more diversions into other subjects, and (3) what were, in form, specific enumerated powers, but actually might have served to qualify the initial broad grant.

#### IV. THE STRUCTURES OF EIGHTEENTH-CENTURY DOCUMENTS CONFERRING ENUMERATED POWERS

##### A. INTRODUCTION

Founding-Era life was replete with documents by which one or more persons conferred enumerated powers on others. Indeed, the general public of the time probably was more conversant with such documents than the general public is today.<sup>14</sup> Instruments conferring enumerated powers included powers of attorney, corporate charters, colonial charters, the royal commissions by which the British Crown had bestowed authority on colonial governors, commissions to diplomats, military officers, and other agents, the early state constitutions, and the Articles of Confederation. This study examines each of these.<sup>15</sup>

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14. See generally Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239, 247-48 (2007).

15. *Infra* Parts IV, subs. B-H.

## B. POWERS (LETTERS) OF ATTORNEY

During the constitutional debates of 1787-1788, the Federalists sometimes made explicit the connection between the Constitution and other documents conferring enumerated powers. At the North Carolina ratification convention, for example, Federalist spokesman James Iredell compared the Constitution to “a great power of attorney.”<sup>16</sup> Iredell knew his audience: The power of attorney (or, as it was then often called, the letter of attorney) was a widely known document, employed in a range of business transactions.<sup>17</sup>

Members of the Founding Generation employed several different power-of-attorney forms. One common form simply stated that A was appointing B as his agent, and then proceeded to further enumeration. An illustration of such is a letter of attorney to the bailiff (manager) of a manor, which appeared in a conveyancing manual by Giles Jacob, a popular and prolific treatise writer.<sup>18</sup> The letter began with the words, “Know all *Men* by these Presents, That I . . . *Have* made, constituted and appointed A. B. . . . my Bailiff . . . to collect, gather, ask, require, demand and receive of and from all and every my Tenants . . . .”<sup>19</sup> After the designation, it proceeded to enumerate the bailiff’s powers.<sup>20</sup> Another kind of form set forth recitals before the appointment and grant of powers. At the end of the enumeration, there was frequently a general conferral of authority in a manner reminiscent of, or foreshadowing, the Necessary and Proper Clause.<sup>21</sup> For example, a letter of attorney form in the 1764 edition of *The Attorney’s Compleat Pocket-Book* authorized an agent to receive a legacy on behalf of the principal.<sup>22</sup> The first two sentences were “whereas” recitals describing the existence of the will leaving a legacy to the principal, the fact of

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16. *Elliot’s Debates*, *supra* n. 1, vol. 4 at 148 (“[The Constitution] may be considered as a great power of attorney, under which no power can be exercised but what is expressly given.”). *See also id.* at 148-49, 166.

17. On Founding-Era powers of attorney, *see* Natelson, *supra* n. 14, at 251-52.

18. Jacob, *supra* n. 1, at 430-31.

19. *Id.* at 430.

20. *Id.* at 430-31. Other examples of this form are *A Letter of Attorney to Execute a Deed*, Mill, *supra* n. 1, at 369, and William Newnam, *Power of Attorney from Executors*, in *The Complete Conveyancer* vol. 2, pt. 1 at 211-12 (1786).

21. *See* Robert G. Natelson et al., *The Origins of the Necessary and Proper Clause* (Cambridge U. Press forthcoming 2010) (ms. on file with Author); Natelson, *Necessary and Proper*, *supra* n. 1, at 274-76 (setting forth numerous illustrations).

22. *Pocket-Book*, *supra* n. 1, vol. 1 at 186-87.



probate, and the name of the executor.<sup>23</sup> The words “Now know ye” then introduced a sentence stating that the principal “do[es] make, ordain, constitute, depute and appoint” two persons as his “true and lawful attorney[sic] jointly. . . .”<sup>24</sup> Following was an enumeration of the agents’ powers, including a general clause ratifying whatever the attorneys might lawfully do.<sup>25</sup> A transcript of this form is reproduced at the end of this Article as Appendix A.

These forms followed neither an Article I structure (designation—other matter—enumerated powers) nor the vesting-clause structure (indefinite power grant—other matter—specific enumerations and qualifications). Instead, they exemplified a *direct-grant structure*: A pattern in which an instrument, with or without preliminary recitals, granted powers to named persons or entities and then proceeded directly to an enumeration.

Occasionally, a power of attorney would designate the agent in a recital, and therefore arguably assume an Article I structure. A “Letter of Attorney to receive Monies due from Several Persons” recited a debt owed to a creditor, explained why the principal was assigning a debt owing to the principal to the creditor, and then made the grant of enumerated powers.<sup>26</sup>

I uncovered no powers of attorney that followed the vesting-clause structure.<sup>27</sup>

### C. CORPORATE CHARTERS (OTHER THAN FOR COLONIES)

Another power-delegating instrument was the royal charter bestowing privileges and powers on a group of people, such as a municipality, charity, or business corporation—often while granting corporate status. The Gale database *Eighteenth Century Collections Online* contains a substantial selection of these charters.<sup>28</sup>

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23. *Id.*

24. *Id.* at 187.

25. For another form with recitals, see Mill, *supra* n. 1, at 373-74.

26. Covert, *supra* n. 1, vol. 1 at 134-35.

27. Other letters of attorney can be found in *id.* at 135-58; Jacob, *supra* n. 1, vol. 1 at 420-36; *Pocket-Book*, *supra* n. 1, vol. 1 at 184-91.

28. A title search with the word “charter” shows that the database includes approximately thirty such documents, excluding duplicates, abstracts, excerpts, and colonial charters; the exact number depends on how one counts. Most, but not all, are eighteenth-century documents; the others are older instruments republished in the

Approximately half began with recitals stating the name of the entity or persons being empowered, then set forth other recitals, and then proceeded to grant enumerated powers. In other words, those charters followed the Article I structure. Entirely typical was the celebrated royal charter that created Dartmouth College (1769), the same instrument litigated in the Supreme Court's *Dartmouth College Case*.<sup>29</sup> The Dartmouth Charter first recited background facts, including the college founder's recommendation that named persons serve as trustees, and that the founder "desire[d], that the trustees aforesaid may be vested with all that power therein, which can consist with their distance from the same."<sup>30</sup> In a further recital, the charter named the trustees. After yet another recital, the charter introduced the enumeration of powers with the phrase "KNOW YE, THEREFORE."<sup>31</sup> Thus, the Dartmouth Charter followed the Article I pattern of "designation—other matter—enumerated powers." Many other royal charters did so as well.<sup>32</sup>

Some royal charters employed a direct grant structure,<sup>33</sup> particularly older documents,<sup>34</sup> or those empowering a large number of

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eighteenth century.

29. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

30. *Id.* at 519-23; also available as *The Charter of Dartmouth College* 4 (1769).

31. *Id.* at 519-24.

32. *E.g.* The Charter of the Royal Canal Company (1789); A Translation of a Charter, Granted to the Inhabitants of the City of Exeter (1785); The Charter of the City of Albany (1771); The Charter, Laws, and Catalogue of Books, of the Library Company of Philadelphia (1770); The Royal Charter of the Hospital and Free-School of K. Charles the Second, *Dublin* (1768); The New Charter, Granted to the Mayor and Commonalty of *Colchester*, In *Essex* (1764); A Copy of the Charter of the Corporation of the Governor and Company of the Bank of England (1758); Charter of Incorporation of the London-Hospital (1758); A True Copy of the Charter of Havering-atte-Bower, in *Essex* (1757); A Copy of His Majesty's Royal Charter for Incorporating the *Governors and Guardians* of the Hospital for the Relief of Poor Lying-In-Women, In *Dublin* (1757); An Authentic Copy of the Charter, and Bye-Laws, &c. of the City of *Rochester*, in the County of *Kent* (1749); Charter of the *British Linen Company* (1746) (containing an Article I structure within an Article I structure); The Charter of the Royal Lustring Company (1720); Charter by King James VI. in Favour of the Town of Perth (1600).

*See also* The Charter for Sutton's Hospital, in *The Case of Sutton's Hospital* [1612] 10 Co. Rep. 1, 1a-22b, 77 Eng. Rep. 937, 945-59—a case lawyers in the founding generation studied because of the popularity of Coke's reports.

33. *E.g.* The New Charter, Granted to the Mayor and Commonalty of *Colchester*, In *Essex* (1764); His Majesty's Royal Charter, Granted on the Eleventh Day of October 1750 . . . for Incorporating the Society of the *Free British Fishery* (1751); The Charter

people who could not conveniently be named twice.<sup>35</sup> There also were charters that followed unique forms.<sup>36</sup>

Only two charters were found that arguably followed the vesting-clause structure of “indefinite power grant—other matter—specific enumerations and qualifications.” One of these was very old: Translated from Latin and republished in 1763, but dating from the time of Henry VIII (reigned: 1509-1547).<sup>37</sup> This instrument incorporated the town of Sutton-Coldfield.<sup>38</sup> It first granted corporate status, then named the town, then granted perpetual succession and stated the qualifications of successors, then proceeded to grant more powers.<sup>39</sup> However, the charter bespoke more of disorganization than specifically of a vesting-clause structure.

The other was a charter creating two courts for the town of Gibraltar (i.e., at the straits by that name).<sup>40</sup> The instrument first named a “Court of Civil Pleas,” then listed its powers, and later named a “Court of Appeals,” then listed its powers.<sup>41</sup> The structure of the document is ambiguous because it is not clear whether the designation clauses for each of the two courts also conveyed power to those courts. The designation clause for the first tribunal stated, that “[w]e . . . do . . . grant, ordain, direct, and appoint, that a Court of Judicature be erected: And we do hereby erect and constitute a Court at *Gibraltar* aforesaid, to be called by the Name of *The Court of Civil Pleas . . .*”<sup>42</sup> The second designation clause provided that “we . . . grant, ordain, constitute and appoint, that a Court of Judicature be erected at *Gibraltar* aforesaid, to be called by the Name of *The Court of*

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of His Majesty King *George* II. for Erecting and Endowing St. *Patrick's* Hospital (1746).

34. *E.g.* The Charter of the Governours of the Grey-Coat-Hospital in *Tothill-Fields*, of the Royal Foundation of Queen Anne (1712); The Charter of Queen Anne, to the City of *Bristol* (1710); *A Translation of the Charter of K. H. the 8th . . .* (1514).

35. *E.g.* Charter and Statutes of the Royal Irish Academy (1786).

36. *E.g.* Charter of the *Royal Hospital* of King Charles II. &c. near *Dublin* (1760).

37. A Genuine Translation of the Royal Charter Granted by King Henry the Eighth, to the Corporation of Sutton-Coldfield (1763).

38. *Id.*

39. *Id.*

40. The Royal Charter for Establishing a Civil Government at *Gibraltar* (1742).

41. *Id.* at 2-27

42. *Id.* at 2-3.

*Appeals.*”<sup>43</sup> These clauses probably only erected the courts rather than empowered them, particularly since enumerated powers follow each of them, but the presence of the words “grant” and “constitute,”<sup>44</sup> enable one to argue the contrary.

Nevertheless, as this examination of royal charters shows, the Article I structure was extremely common and the vesting-clause structure—if used at all—was very rare.

#### D. COLONIAL CHARTERS

From an American point of view, the most significant royal charters were those that served as the colonies’ basic laws.<sup>45</sup> The charters of Carolina, Connecticut, Maryland, Massachusetts, Pennsylvania, Rhode Island, and the 1606 and 1611-1612 charters of Virginia all fit the Article I structure. They featured a designation in the recitals, followed by signaling words (“Now Know Ye,” in the case of Connecticut), followed by grants.<sup>46</sup> However, the Georgia charter<sup>47</sup> and the 1609 Virginia charter<sup>48</sup> listed the power-holders in a grant authorizing them to act in the corporate form, and then immediately enumerated their other powers. They thus adopted the direct-grant structure.

I found no colonial charters adopting the vesting-clause structure.

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43. *Id.* at 15.

44. *See infra* nn. 131-32 and accompanying text (discussing the contemporaneous meanings of “constitute”).

45. *See e.g. Elliot’s Debates, supra* n. 1, vol. 3 at 75, 172, 212, 317, 466 (referring to various colonial charters at the Virginia ratifying convention).

46. Carolina Charter (1665), Thorpe, *supra* n. 1, vol. 5 at 2761; Conn. Charter (1662), *id.*, vol. 1 at 529; Md. Charter (1632), *id.*, vol. 3 at 1677; Mass. Charter (1691), *id.*, vol. 3 at 1870; Pa. Charter (1681), *id.*, vol. 5 at 3035; R.I. Charter (1663), *id.*, vol. 6 at 3211; Va. Charter (1606), *id.*, vol. 7 at 3783; Va. Charter (1611-1612), *id.*, vol. 7 at 3802.

An additional Virginia charter is not commonly available. This was a three-page document issued in 1676 that converted (or announced the conversion) of Virginia into a royal colony. A large part of the charter was devoted to the confirmation of Virginians’ existing privileges. To the extent it followed a scheme of organization, it reflected the direct-grant structure. Va. Charter (Oct. 10, 1676), United Kingdom Public Record Office, Colonial Office, *Entry Book of Letters, Commissions, Instructions, Charters, Warrants, Patents, Grants & c.*, C.O. 5/1355 (reproduced in Folio 95-96, Reel 28, Film 1609, The Library of Virginia, Richmond VA).

47. Ga. Charter (1732), Thorpe, *supra* n. 1, vol. 2 at 766.

48. Va. Charter (1609), *id.*, vol. 7 at 3790, 3795.

E. *STATUTES EMPOWERING AGENTS*

Statutes sometimes conveyed enumerated powers to designated agents. Illustrative are the land enclosure acts, which Parliament enacted to enable the owners of scattered land holdings to rearrange title so as to consolidate those holdings. Each enclosure act appointed commissioners and empowered them to survey the land, measure the amount of land belonging to each owner, reset the boundary lines, lay out access roads, and the like.

The exact patterns for the enclosure acts varied. Some, such as an act for the area known as Little Kington, followed the Article I structure.<sup>49</sup> Others, such as the statute governing Fillingham Manor,<sup>50</sup> adopted what appears to be a direct-grant structure.<sup>51</sup> The direct-grant structure was a common mode of organization employed in other sorts of power-conferring statutes as well.<sup>52</sup> I have found no statutes employing the vesting-clause structure.

49. An Act for Allotting, Dividing, and Inclosing the Open and Common Fields, and Common or Commonable Meadows . . . within the Manor of *Little Kington* . . . , *Private Acts*, 12 Geo. 3, c. 19 1772. The designation of commissioners (which at first looks like a conferral of powers, but was not), *id.* at 2-3, was followed by administrative details and conferral of powers, *id.* at 5.

*See also* An Act for *Dividing and Inclosing the Common Fields . . . in the Manor and Lordship of Carlton upon Trent* . . . , *Private Acts*, 5 Geo. 3, c. 72 1765 (setting forth the designation, *id.* at 3; next, other matters, and then commencing the powers later, *id.* at 4.)

50. *An Act for Dividing and Inclosing Several Common Fields and Grounds, within the Manor of Fillingham, in the County of Lincoln*, *Private Acts*, 32 Geo. 2, c. 8 1759.

51. The statute first designated certain persons as commissioners to supervise the work. *Id.* at 2. Whether the designation itself conveyed authority is doubtful, but in any case, it was followed, without intermediate digression, by grants of enumerated powers. *Id.* at 2-3.

Also adopting the direct-grant structure is *An Act for Inclosing the Common or Waste called Lightwood Forest* . . . , *Private Acts*, 7 Geo. 2, c. 14 1734. (The designation of the office of commissioner, *id.* at 2; the commissioners' powers begin, *id.* at 3).

*See also* An Act for *Dividing and Inclosing the Common Fields, within the Parish of Lutcham* . . . , *Private Acts*, 33 Geo. 2, c. 9 1760, and *An Act for Dividing and Inclosing Several Open Fields and Pastures, or Commons, in the Township of Nunburnholme* . . . , *Private Acts* 28 Geo. 2, c. 27.

52. *See e.g.* An Act for Making and Widening a Passage or Street . . . , 8 Geo. 3, c. 16 1768; *Documentary History of Yale University* 21-23 (Franklin Bowditch Dexter ed., 1916) (reproducing the 1701 Connecticut statute that gave Yale its charter); J. Contl. Cong. 1774-1789 vol. 21, 1187-90 (Dec. 31, 1781) (ordinance incorporating national bank).

## F. COMMISSIONS TO ROYAL GOVERNORS

Another class of power-conferring documents consisted of the colonial-era “commissions” by which the Crown empowered and directed colonial governors. A commission named the governor as a person worthy of trust, appointed him, recorded his duties, and enumerated his powers. Short instructions were often intermingled with the enumerated powers.<sup>53</sup> When a new governor arrived in a colony, his commission was read aloud to the colony’s executive council, a body staffed by local residents.<sup>54</sup> The commission was supplemented with a lengthy list of instructions, which remained secret at the time but were subject to later disclosure.<sup>55</sup>

The leading Founders, who had served under colonial governors, naturally were cognizant of those documents. As Associate Justice Bradley observed in later years, “[t]he framers of the Constitution . . . were familiar with the [colonial] governments . . . They had first drawn their breath under these governments; they had helped to administer them.”<sup>56</sup> Indeed, the framers of the 1780 Massachusetts and 1784 New Hampshire constitutions largely copied the executive military powers clauses of those constitutions from the language of royal commissions;<sup>57</sup> and the instructions drafted by the Continental and Confederation Congresses resembled in form the former royal instructions.<sup>58</sup> Among the enumerated powers in Section 3 of Article II of the federal constitution is wording distinctly reminiscent of the royal instructions, most notably the admonition to “take Care.”<sup>59</sup>

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53. See *infra* Appendix B (setting forth the form of a commission to a royal governor, and including, for example, the requirement of oath-taking and oath-administering).

54. *Instructions for Gov. Johnston*, *supra* n. 1, at ¶ 2.

55. *Royal Instructions*, *supra* n. 1 (containing numerous clauses from royal instructions to colonial governors). See *infra* nn. 61-62, 64-66.

56. *Knox v. Lee*, 79 U.S. 457, 558-59 (1870) (Bradley, J., concurring).

57. Mass. Const. ch. II, § 1, art. VII (1780); N.H. Const. pt. II, sub. *Exec. Power* (1783); Stokes, *supra* n. 1, at 158-60.

58. See *infra* n. 83 (citing examples of instructions from the Continental and Confederation Congresses).

59. In the initial royal instructions to North Carolina governor, Gabriel Johnston, the phrase “take care” was employed at least twenty times, in addition to several variations of the phrase: “taking care,” “take particular care,” “take due care,” “take especial care,” “take effectual care.” *Instructions for Governor Johnston*, *supra* n. 1, at 92-94, 96-97, 100, 102-06, 108-11, 113-17.

The phrase also appeared in other power-granting instruments. See e.g. *A Deputation*

Under the circumstances, it is odd that modern commentators have overlooked these commissions and instructions and their constitutional significance.<sup>60</sup>

The organizational pattern for royal commissions changed little in the century before Independence<sup>61</sup>—as shown by individual commissions still extant.<sup>62</sup> In 1788, Anthony Stokes, the former chief justice of the Georgia colony, was able to distill into a single form the

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*or Warrant from a Lord of a Manor to his Game-Keeper*, in Covert, *supra* n. 1, vol. 1 at 484 (“to look after and take care to preserve the Game there”); *id.* vol. 2 at 986 (nominating “overseers” of a will, and charging them “to take Care and see the same performed according to my true Intent and Meaning”); *Record of Nisi Prius, Pocket-Book*, *supra* n. 1, vol. 2 at 276 (“The prothonotaries to take care that every record . . . be ingrossed . . .”). Many of the instructions issued by the Continental and Confederation Congresses included similar language. See e.g. J. Contl. Cong. 1774-1789, vol. 14, 957 (Aug. 14, 1779) (“take especial care”); *id.* at 962 (“taking care”); *id.*, vol. 18 at 1136 (Dec. 9, 1780) (“taking care”); *id.*, vol. 20 at 616 (Jun. 8, 1781) (“[y]ou shall take especial care”).

“Take care” language also appeared in the executive provisions of the contemporaneous constitutions of New York and Pennsylvania. N.Y. Const. art. XIX (1777) (stating that the governor is “to take care that the laws are faithfully executed to the best of his ability”); Pa. Const., § 20 (1776) (providing that the state president and council “are also to take care that the laws be faithfully executed”).

60. A search in the Westlaw “journals and legal periodicals” database with the query “constitution /20 ‘royal commission’ /s governor governour” (i.e., “constitution” within twenty words of “royal commission” appearing in the same sentence with “governor” or “governour”) yielded only four results, three of which were articles in foreign journals and another that was inapposite. Search of Westlaw (Nov. 14, 2009).

61. *Royal Instructions*, *supra* n. 1, at 809 (noting the lack of variation). Thus, the commission designating Edmund Andros governor of the “Dominion of New England,” issued in 1688 was organized under much the same Article I structure characteristic of commissions issued during the eighteenth century and discussed in the text. *Commission of Sir Edmund Andros for the Dominion of New England. April 7, 1688*, Thorpe, *supra* n. 1, vol. 3 at 1863.

62. Three are reproduced in *Royal Instructions*, *supra* n. 1: That for Patrick Tonyn as Governor of East Florida (1773), *id.* at 825; for James Glen as Governor of South Carolina (1739), *id.* at 816; and for Sir Jonathan Atkins as Governor of Barbados (1673), *id.* at 809. See also *Draft Commission for Arthur Dobbs as Governor of North Carolina* (Feb. 1753) (microfilmed at British Public Record Office, Colonial Office, Class 5 Files: Part 4: Royal Instructions and Commissions to Colonial Officials, 1702-1784, U. Publications Am. Watson Lib., the U. of Kansas, reel 8, v. 200); *Draft Commission for William Anne, Earl of Albermarle as Governor of Virginia* (Oct., 6, 1737), *id.* at reel 6, v. 195; *Draft Commission for Gabriel Johnston as Governor of North Carolina* (Apr. 5, 1733), *id.*; *Commission of Sir Edmund Andros for the Dominion of New England* (Apr. 7, 1688), Thorpe, *supra* n. 1, vol. 3 at 1863.

pattern that all of them followed.<sup>63</sup> Excerpts from that form appear at the end of this article as Appendix B.

A commission began by reciting that the gubernatorial nominee, designated by name, was “trusty and well beloved.” It next contained an appointment clause in the form of a royal command that the named person serve as governor. It is clear that neither the recital nor the appointment clause was a conferral of power. The royal command was that the nominee act “according to the several Powers and Authorities granted or appointed you by this present Commission”<sup>64</sup>—which powers and authorities were enumerated later. Following was a requirement that the designee take and administer certain oaths and subscribe a declaration. Then the commission granted the nominee a series of discrete powers, using phrases such as “We do hereby give[] and grant unto you,” and adding any qualifications to them.<sup>65</sup> The governor’s powers included several later granted by the Constitution to the President, including authority to act as commander-in-chief, and the right to grant pardons and reprieves, veto laws, and appoint judges. The commissions also conferred powers the Constitution did not grant to the President, such as authority to establish fairs, markets, and courts. After the enumeration of powers, a royal commission provided for a substitute to serve in the governor’s absence, set forth a habendum clause indicating that the governor served at the will of the Crown, and ended with a testimonium clause.<sup>66</sup>

Thus, the overall organization of royal commissions—designation, other details, enumerated powers, and provision for removal—was the Article I structure. I have found none that followed any other structure.<sup>67</sup> Given the close relationship between the commissions and Article II, this is useful evidence of the plan of Article II.

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63. Stokes, *supra* n. 1, at 150-64.

64. *Royal Instructions*, *supra* n. 1, at 817 (quoting from the commission of James Glen to be governor of South Carolina, June 15, 1739); *see also* Stokes, *supra* n. 1, at 151 (setting forth similar language in a typical commission form).

65. *E.g.* *Royal Instructions*, *supra* n. 1, at 818-24; Stokes, *supra* n. 1, at 153-63.

66. *Royal Instructions*, *supra* n. 1, at 824-25; Stokes, *supra* n. 1, at 156, 163.

67. However, the Continental Congress’s commission to General Washington, a somewhat analogous document, did not enumerate powers. It simply appointed him as commander-in-chief and stated that he was “vested with full power and authority to act as you shall think for the good and welfare of the service.” Several instructions followed. J. Contl. Cong., 1774-1789 vol. 2, 96 (June 17, 1775).



G. *COMMISSIONS IN THE JOURNALS OF THE CONTINENTAL CONGRESS*

Beginning in 1774, the Continental Congress<sup>68</sup> met regularly until the federal government was organized under the Constitution in early 1789. The congressional journals reproduce numerous power-granting documents. These include the commissions or “credentials” by which state legislatures and conventions authorized named individuals to serve as delegates in Congress; military commissions; and commissions granted to congressional agents, such as diplomats, judges, and representatives to the Indian tribes.

In the early years of the Continental Congress, some commissions authorizing delegates to act on behalf of their states enumerated their powers, although the enumerations generally were quite short—consisting only of two or three powers. These commissions generally followed the direct-grant structure, with or without a preamble.<sup>69</sup> In accordance with Crown practice, the states sometimes inserted brief instructions in these commissions.<sup>70</sup> In later years, after the customary duties of congressional delegates were fully understood, state commissions merely conferred the office and its powers in a single grant. In other words, they were no longer enumerated-powers instruments.<sup>71</sup> Some of these commissions described the delegates

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68. It is more precise to refer to Congress after adoption of the Articles of Confederation on March 1, 1781 as the “Confederation Congress,” but the term “Continental Congress” is frequently used for the entire period before the convening of the Federal Congress. *Id.*, vol. 19 at 208 (Mar. 1, 1781).

69. *E.g.* J. Contl. Cong. vol. 4, 353-54 (May 14, 1776) (reproducing Rhode Island commission to delegates in Congress and enumerating powers to join with other delegates, consult and advise on particular measures, enter into measures, and adjourn); *id.*, vol. 5 at 489-90 (June 22, 1776) (reproducing New Jersey commission to delegates); *id.*, vol. 6 at 962 (Nov. 19, 1776) (reproducing Maryland commission to delegates); *id.*, vol. 6 at 1000 (Dec. 2, 1776) (reproducing Delaware commission to delegates); *id.*, vol. 10 at 100 (Jan. 30, 1778) (reproducing Delaware commission to delegates).

70. J. Contl. Cong. 1774-1789 vol. 20, 628-29 (June 12, 1781) (reproducing Massachusetts commission requiring delegates to honor later instructions).

71. *E.g.* J. Contl. Cong. 1774-1789 vol. 11, 811 (Aug. 19, 1778) (reproducing Virginia commission to delegates); *id.*, vol. 13 at 260-61 (Mar. 1, 1779) (reproducing New York commission to John Jay); *id.*, vol. 16 at 399-400 (May 1, 1780) (reproducing New York commission to James Duane); *id.*, vol. 24 at 107, 341, 510 (reproducing North Carolina and Massachusetts commissions of various dates in 1783); *id.*, vol. 34 at 1-9 (Jan. 21, 1788) (reproducing all states’ commissions for the year).

Sometimes it is unclear whether the document should be read as containing a single

appointed as “trusty and well beloved”<sup>72</sup>—language imitating the royal commissions that preceded them.<sup>73</sup>

Commissions to military officers usually did not enumerate powers.<sup>74</sup> However, letters of marque and reprisal<sup>75</sup> were enumerated-power documents, listing in detail what privateering ships could and could not do. The Continental Congress issued letters of marque and reprisal using the direct-grant structure.<sup>76</sup>

Some commissions to diplomats did not enumerate powers, but merely appointed the designee to an office with pre-arranged or otherwise-understood powers,<sup>77</sup> or with separate accompanying instructions.<sup>78</sup> On the other hand, many diplomatic commissions did contain enumerations. These also adopted the direct-grant structure, usually with a preamble.<sup>79</sup> (A sample is reproduced below as

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or multiple grants. *See e.g. id.*, vol. 7 at 25-26 (Jan. 9, 1777) (reproducing Massachusetts commission to delegates).

72. *E.g.* J. Contl. Cong. 1774-1789 vol. 16, 399 (May 1, 1780) (reproducing that language in a New York Commission); *id.*, vol. 34 at 2-3 (Jan. 21, 1788) (reproducing that language in a Massachusetts commission). *Cf. id.*, vol. 23 at 581 (Sept. 16, 1782) (reproducing a commission with the direct-grant structure to George Washington describing him as “trusty”).

73. *See* Appendix B (setting forth the form of a commission to a royal governor).

74. *E.g.* J. Contl. Cong. 1774-1789 vol. 2, 96 (June 17, 1775) (reproducing commission of George Washington); *id.*, vol. 12 at 1212 (Dec. 11, 1778) (reproducing revised form of officer’s commission); *id.*, vol. 16 at 380 (Apr. 20, 1780) (reproducing naval officer’s commission). *But see id.*, vol. 23 at 581 (Sept. 16, 1782) (reproducing an enumerated-power commission with the direct-grant structure to George Washington to enter into prisoner-exchanges).

75. *Cf.* U.S. Const. art. I, § 8, cl. 11 (authorizing Congress to issue letters of marque and reprisal).

76. *E.g.* J. Contl. Cong. 1774-1789 vol. 4, 247-48 (Apr. 2, 1776) (reproducing “form of a commission” to privateers with a direct-grant structure); *id.*, vol. 7 at 339-40 (May 8, 1777) (reproducing amended form); *id.*, vol. 16 at 404-05 (May 2, 1780) (reproducing another form).

77. *E.g.* J. Contl. Cong. 1774-1789 vol. 17, 536-37 (June 20, 1780) (designating John Adams and Francis Dana to undertake responsibilities previously given to Henry Laurens); *id.*, vol. 20 at 652-54 (June 15, 1781) (reproducing commission to ministers plenipotentiary).

78. J. Contl. Cong. 1774-1789 vol. 18, 1134-36 (Dec. 9, 1780) (designating William Palfrey as consul to France, with accompanying instructions).

79. *E.g.* J. Contl. Cong. 1774-1789 vol. 5, 833 (Sept. 28, 1776) (reproducing form of “letters of credence” for diplomats); *id.*, vol. 8 at 518-19 (July 1, 1777) (reproducing commission of William Lee); *id.*, vol. 8 at 519-22 (July 1, 1777) (reproducing the commissions of Ralph Izard, Benjamin Franklin, and Arthur Lee); *id.*, vol. 11 at 547 (May 28, 1778) (reproducing new diplomatic commission form); *id.*, vol. 23 at 621-22

Appendix C.) Also following the direct-grant structure was Congress' commission to the Court of Appeals that Congress constituted to hear maritime cases.<sup>80</sup> However, the congressional commission to secretaries to foreign ministers arguably fit the Article I structure.<sup>81</sup> I have not been able to find any congressional documents from this era that followed the vesting-clause structure.<sup>82</sup>

Congress frequently followed the Crown practice of accompanying commissions with sets of instructions.<sup>83</sup>

#### H. *POST-INDEPENDENCE AMERICAN CONSTITUTIONS*

After Independence, but before the 1787 federal convention, Americans prepared a number of important constitutional documents. The Continental Congress drafted the Articles of Confederation. That

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(Sep. 28, 1782) (reproducing a direct-grant commission to Franklin to negotiate with Sweden); *id.*, vol. 24 at 376-77 (June 2, 1783) (reproducing a direct-grant commission to Oliver Pollock as a commercial agent; the preamble, if it be such, consists of only a few words); *but see id.*, vol. 4 at 219 (Mar. 20, 1776) (reproducing a direct-grant commission to diplomats to Canada *without* a preamble).

80. J. Contl. Cong. 1774-1789 vol. 16, 121 (Feb. 2, 1780) (reproducing form of commission to judges of the Court of Appeals).

81. J. Contl. Cong. 1774-1789 vol. 15, 1159-60 (Oct. 9, 1779) (reproducing form of commission leading with appointment clause, followed by brief instructions, followed by authorization to undertake various duties upon the minister's death).

82. The closest are the credentials from New Hampshire for its delegates in Congress during congressional consideration of the territorial dispute over the land that would become Vermont. Since Congress was charged with resolving the dispute, New Hampshire decided to tack onto its delegates' commissions language authorizing them to represent the state in the proceedings. J. Contl. Cong. 1774-1789 vol. 20, 498-99 (May 14, 1781) (reproducing credentials); *id.*, vol. 21 at 1100-01 (Nov. 5, 1781) (reproducing credentials). However, the credentials contain only one enumerated power rather than several (as would be required to comply with the vesting-clause structure), seemingly inserted as an afterthought.

83. *E.g.* J. Contl. Cong. 1774-1789 vol. 3, 339-41 (Nov. 8, 1775) (reproducing committee instructions); *id.*, vol. 4 at 215-19 (Mar. 20, 1776) (reproducing instructions of commission to go to Canada); *id.*, vol. 7 at 38-39 (Jan. 15, 1777) (reproducing instructions to Indian agent); *id.*, vol. 8 at 519-21 (July 1, 1777) (reproducing instructions to diplomats); *id.*, vol. 18 at 1135-36 (Dec. 9, 1780) (reproducing instructions to William Palfrey as consul to France); *id.*, vol. 20 at 616-17 (June 8, 1781) (reproducing diplomatic instructions to John Adams); *id.*, vol. 32 at 66-69 (Feb. 20, 1787) (reproducing instructions of Indian affairs superintendents).

The foregoing examples are only a few from several formal instructions issued by Congress to its agents during the Continental and Confederation periods.

instrument first identified the states as parties;<sup>84</sup> next set forth certain preliminary information,<sup>85</sup> including the designation of Congress as the representative of the states;<sup>86</sup> and then bestowed enumerated powers.<sup>87</sup> In other words, the Articles of Confederation adopted the Article I structure.

In addition, eleven states adopted constitutions. (Connecticut and Rhode Island merely modified their royal charters.) The executive provisions of the following constitutions followed the Article I structure: Massachusetts (1780), Virginia (1776), South Carolina (its second, adopted in 1778), New Hampshire (1784), and New Jersey (1776). For example, in the Massachusetts Constitution, Chapter II—the executive provision—began with a pure designation clause: “There shall be a supreme executive magistrate, who shall be styled—The Governor of the Commonwealth of Massachusetts; and whose title shall—be His Excellency.”<sup>88</sup> Chapter II next prescribed the rules for the governor’s election, and then enumerated his powers.<sup>89</sup> The executive provisions of the New Hampshire Constitution followed the same pattern.<sup>90</sup> The Virginia Constitution identified the governor as the “chief magistrate”;<sup>91</sup> provided for his election, term and salary; and then listed his powers.<sup>92</sup> The 1778 South Carolina Constitution also contained a pure designation clause—“the executive authority be vested in the governor and commander-in-chief, *in manner herein mentioned*”<sup>93</sup>—and in later parts of the document, listed his powers. The designation clause of the New Jersey Constitution also employed the word “vested,” but in such a general way that no designee was vested with any particular sphere of authority: “[T]he government of this Province shall be vested in a Governor, Legislative Council, and General Assembly.”<sup>94</sup> After information on various other matters (such as elections), the New Jersey instrument enumerated the

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84. Arts. Confed., preamble.

85. *Id.* at arts. I-IV.

86. *Id.* at art. V.

87. *Id.* at arts. VIII-IX.

88. Mass. Const. ch. II, § 1, art. I (1780).

89. *Id.* at arts. II-XIII.

90. N.H. Const. pt. II, sub. *Exec. Power* (1784).

91. Va. Const. (1776) (articles not designated).

92. *Id.*

93. S.C. Const. art. XI (1778) (emphasis added).

94. N.J. Const. art. I (1776).

governor's authority: "[S]hall have the supreme executive power, be Chancellor of the Colony, and act as captain-general and commander in chief . . . ."<sup>95</sup>

As the "supreme executive power" phrase in the New Jersey Constitution shows, some of these documents did grant governors very broad executive authority—but not in the designation clause. Indeed, several had no designation clauses, and therefore did not follow the Article I structure, the vesting-clause structure, or the direct-grant structure. The North Carolina Constitution (1776) enumerated some powers of the governor, and then added *afterwards* that he could "exercise all the other executive powers of government, limited and restrained as by this Constitution is mentioned, and according to the laws of the State."<sup>96</sup> The first South Carolina Constitution (1776) utilized the same pattern as North Carolina's.<sup>97</sup> The Maryland instrument (1776) lacked an executive designation clause, but granted broad executive authority with the wording: "[T]he Governor . . . may alone exercise all other the executive powers of government . . . ."<sup>98</sup>

The Constitution of Georgia (1777)<sup>99</sup> also lacked a clause that merely designated the governor, although an early part of the constitution provided for his election.<sup>100</sup> A general grant of authority was inserted later in the instrument: "The governor shall, with the advice of the executive council, exercise the executive powers of government."<sup>101</sup> An enumeration of specific powers followed immediately.<sup>102</sup> Thus, the Georgia Constitution conformed to the direct-grant structure,<sup>103</sup> the only contemporaneous state constitution to

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95. *Id.* at art. VIII.

96. N.C. Const. art. XIX (1776).

97. S.C. Const. art. XXX (1776).

98. Md. Const. art. XXXIII (1776).

99. Ga. Const. (1777).

100. *Id.* at art. II.

101. *Id.* at art. XIX. The full article reads:

The governor shall, with the advice of the executive council, exercise the executive powers of government, according to the laws of this State and the constitution thereof, save only in the case of pardons and remission of fines, which he shall in no instance grant; but he may relieve a criminal, or suspend a fine, until the meeting of the assembly, who may determine therein as they shall judge fit.

102. *Id.* at arts. XIX-XXII.

103. *Supra* text following n. 25 (describing this structure).

do so. Perhaps it was influenced by the direct-grant structure of the Georgia colonial charter.<sup>104</sup>

The New York (1777) and Pennsylvania (1776) Constitutions included the term “vest” in their designation clauses,<sup>105</sup> and these designation clauses were physically separated from enumerations of power. If, therefore, the designation clauses conferred power, then the New York and Pennsylvania Constitutions would follow the vesting-clause structure. Unfortunately, there is no convincing evidence that their designation clauses granted anything at all. Some scholars maintain that the Latin predecessors of the word “vest” suggest that the word connoted immediate assumption of power.<sup>106</sup> However, at least three other American Constitutions had designation clauses that employed “vest” in ways that *excluded* any inference that those clauses granted power: The New Jersey Constitution,<sup>107</sup> the 1778 South Carolina Constitution,<sup>108</sup> and the designation clause in Article I of the U.S. Constitution.<sup>109</sup>

In sum, grants of authority in state constitutions sometimes followed the Article I structure, in one case followed the direct-grant structure, and sometimes adopted other forms of organization. None clearly followed the vesting-clause structure.

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104. *Supra* n. 47 and accompanying text.

105. N.Y. Const. art. XVII(1777) (“And this convention doth . . . ordain, determine, and declare that the supreme executive power and authority of this State shall be vested in a governor”); Pa. Const. § 3 (1776) (“The supreme executive power shall be vested in a president and council.”).

The 1784 New Hampshire constitution did the same in its legislative provisions. N.H. Const. pt. II (1784) (stating that “[t]he supreme legislative power . . . shall be vested in the senate and house of representatives,” providing for assembly of the legislature, and then enumerating powers). The New Hampshire instrument generally followed that of Massachusetts, which, however, did not use the word “vest” in its legislative designation clause. Mass. Const. ch. I, § 1, art. I (1780).

106. *E.g.* Calabresi & Prakash, *supra* n. 1, at 572-73. The argument sometimes is buttressed by the fact that educated members of the founding generation were familiar with Latin. Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. Rev. 375, 387 (2008).

107. The New Jersey Constitution could not have vested specific powers in specific officers, because of its wording: “[T]he government . . . shall be vested in a Governor, Legislative Council, and General Assembly.” There was no statement as to which branches were to exercise what kind of authority. N.J. Const. art I (1776).

108. S.C. Const. art. XI (1778).

109. U.S. Const. art. I, § 1, cl. 1.

V. OTHER EVIDENCE CONFIRMING THAT ARTICLE II FOLLOWS THE  
ARTICLE I STRUCTURE

This part briefly summarizes evidence confirming the implications for Article II of contemporaneous drafting practice. Although some of this confirmatory evidence appears in the relevant literature, much of it does not.

A. *THE ORGANIZATION OF ARTICLE III*

The organization of Article III sometimes is cited as a reason for concluding that the first sentence of Article II was a vesting clause. The argument runs like this: (1) Other than its first sentence, Article III contained no grant of judicial power, so (2) the first sentence of Article III *must* have been a vesting clause,<sup>110</sup> and (3) therefore the first sentence of Article II, which was similarly worded (both omit the Article I phrase “herein granted”) was probably a vesting clause as well.

If Article III was organized according to the vesting-clause structure, this certainly increases the chances that Article II also was so organized. There is a fundamental difficulty with the vesting clause argument, however—the assumption that Article III contained no grants other than in its first sentence is in error.

Article III originated from two resolutions adopted by the Constitutional Convention and forwarded to the Committee of Detail, which was charged with preparing the Constitution’s first draft.<sup>111</sup> One member of the Committee of Detail was Nathaniel Gorham, a businessman and a former president of Congress.<sup>112</sup> But the other four

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110. See e.g. Calabresi & Prakash, *supra* n. 1, at 574 (“Put more simply, there are no other powers ‘herein granted’ in Article III once we get beyond the Vesting Clause.”); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1012 (2007) (“the only power directly granted to the federal courts by the Constitution is the ‘judicial Power’ granted by the Article III Vesting Clause.”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 257 (2001) (“Moreover, the Judicial Power Clause—Article III’s counterpart to the Executive Power Clause—must vest power with the federal judiciary, because it is the only clause that could possibly vest any power with the federal judiciary.”).

111. John R. Vile, *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America’s Founding* vol. 1: A-M, 106, 384-85 (ABC-CLIO 2005).

112. *Id.* at 323.

members were lawyers who ranked among the most learned and prominent in their respective states: Oliver Ellsworth of Connecticut, James Wilson of Pennsylvania, Edmund Randolph of Virginia, and John Rutledge of South Carolina.<sup>113</sup> (Ellsworth, Wilson, and Rutledge were eventually to serve on the Supreme Court; Randolph was to become the first attorney general of the United States.)<sup>114</sup>

One of the two convention judicial resolutions submitted to the committee called for a “Supreme Tribunal” with certain designated powers.<sup>115</sup> The other resolution specified that “the national Legislature be empowered to appoint inferior Tribunals.”<sup>116</sup> The committee was bound by these resolutions, but it had not received any resolution listing powers for the inferior courts.

Nor could it expect to, in light of the rules by which people knowledgeable about law then understood power grants. Those grants were to be conveyances from the people as sovereign to federal officials and agencies,<sup>117</sup> and the rules governing those grants were broadly similar to those governing private conveyances.<sup>118</sup> Pursuant to contemporaneous law, a grant was “*always accompanied with delivery of possession, and [took] effect immediately . . .*”<sup>119</sup> In other words, grants, like most other conveyances, could not be “pre-set” to spring into effect at a future date.<sup>120</sup>

Thus, under the resolutions of the convention, Congress would determine whether and when inferior tribunals were created. Congress might never create inferior tribunals, or it might do so long after the

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113. *Id.* at 106.

114. *Id.*, vol. 2 at 242, 649, 690, 841.

115. Farrand, *supra* n. 1, vol. 2 at 132-33.

116. *Id.* at 133.

117. U.S. Const. preamble; *cf.* William Blackstone, *Commentaries* vol. 1, \*262 (noting that in Britain, the Crown, as sovereign, granted).

118. *E.g.* Letter from Edmund Pendleton to Richard Henry Lee, June 14, 1788 (reprinted in *Documentary History*, *supra* n. 1, vol. 10 at 1625-26) (comparing the people's grant of power to various real estate conveyances and to the agency. Pendleton chaired the Virginia ratifying convention). *See also supra* n. 16 and accompanying text (reporting James Iredell comparing the Constitution to a private power of attorney).

119. William Blackstone, *Commentaries* vol. 2, \*441 (emphasis added). *See also* Matthew Bacon, *A New Abridgment of the Law* vol. 2, 656 (1786) (no grant permitted of a “bare Possibility”).

120. *Cf. id.* at \*165 (“ . . . no estate of freehold can be created to commence *in futuro*; but it ought to take effect presently either in possession or remainder . . .”).



ratification of the Constitution. Because contingent, “springing” grants were foreign to the law, the Constitution was not a proper medium for conveying powers to tribunals whose existence, if any, would not begin until sometime after ratification. The best the Framers could do would be to equip Congress with the ability to convey the necessary powers. Therefore, the Committee of Detail—and, ultimately, the convention—adopted a scheme for the judicial power<sup>121</sup> that relied not merely on Article III, but on provisions located at various places in the document.

Article III began by designating the agencies (the Supreme Court and any inferior courts Congress might create) that were to execute the judicial power and by adding certain attributes of the judicial offices.<sup>122</sup> Next, Article III listed nine categories of cases and controversies within the judicial power.<sup>123</sup> This must be understood as merely a list; no powers were granted at this point. Next came the provision granting enumerated powers to the Supreme Court, which employed the preceding list of cases and controversies as a reference:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.<sup>124</sup>

This clause thus granted to the Supreme Court original jurisdiction over three of the nine items on the “Cases and Controversies” list; it also granted the Court appellate jurisdiction over the other six items.<sup>125</sup> It further provided that Congress could divest the Supreme Court of any of the six areas of appellate jurisdiction.

Some commentators have resisted the conclusion that Congress enjoyed such wide divesting power.<sup>126</sup> But this conclusion was almost

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121. Edmund Randolph suggested the strategy when drafting his outline of a constitution for the Committee of Detail. Farrand, *supra* n. 1, vol. 2 at 146-47. See the final Committee product. *Id.* at 172-73.

122. U.S. Const. art. III, § 1.

123. *Id.* at § 2, cl. 1.

124. *Id.* at cl. 2.

125. In light of such clear wording, it is difficult to understand how some commentators could have concluded that Article III contained no vesting provision outside of its first sentence.

126. See e.g. the summary of views in *Heritage Guide*, *supra* n. 1, at 260.

certainly the Founding-Era understanding. The applicable maxim was, “The designation of the justices is by the King, but ordinary jurisdiction [is defined] by law.”<sup>127</sup> American state constitutions usually recognized, either implicitly or explicitly, the legislative prerogative to define courts’ jurisdiction.<sup>128</sup> The notes of the Committee of Detail show that it expected Congress to have wide authority over jurisdiction.<sup>129</sup> And several leading Founders (including Committee of Detail member Gorham) stated expressly that Congress was to have such power.<sup>130</sup>

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127. Branch, *supra* n. 1, at 19 (*Designatio Justiciariorum est a Rege, Jurisdictio Vero Ordinaria à Lege*) (translated by the author).

128. State Constitutions contained almost no restrictions on the legislature’s authority to create courts or define their jurisdiction. *See e.g.* N.J. Const. art. XXII (1776) (containing no restrictions); N.Y. Const. art. XLI (1777) (same); Mass. Const. ch. III (1780) (containing few restrictions, and affirmatively authorizing the legislature to alter some jurisdictional lines); Pa. Const. § 26 (1776) (containing few restrictions and providing that, “the legislature shall have power to establish all such other courts as they may judge for the good of the inhabitants of the state.”).

129. Randolph’s initial outline stated, “The jurisdiction of the supreme tribunal shall extend 1[.] to all cases, arising under laws passed by the general <Legislature> 2. to impeachments of officers, and 3. to *such* other cases, as the national legislature may assign, as involving the national peace and harmony . . . .” Farrand, *supra* n. 1, vol. 2 at 146-47. Randolph’s outline added, “But this supreme jurisdiction shall be appellate only, except in <Cases of Impeachmt. & (in)> those instances, in which the legislature shall make it original.” *Id.* at 147. The final Committee draft provided that, “[t]he Legislature may (distribute) <assign any part of> th(is)e Jurisdiction <above mentd.,—except the Trial of the Executive—>, in the Manner and under the Limitations which it shall think proper (among) <to> such (other) <inferior> Courts as it shall constitute from Time to Time.” *Id.* at 173.

130. Rufus King and Nathaniel Gorham wrote that “in a few enumerated instances the supreme Court have original & final Jurisdiction—in all other cases which fall within the federal Judicial, the supreme court *may or may not have appellate Jurisdiction as congress shall direct.*” *Supplement to Max Farrand’s The Records of the Federal Convention of 1787* 283 (James H. Hutson ed., Yale U. Press Supp. 1987) [hereinafter *Farrand-Supp.*] (italics added); *see also* Farrand, *supra* n. 1, vol. 2 at 431 (showing that “exceptions” modified “appellate,” with “law and fact” inserted for other purposes). Around the same time, Roger Sherman of Connecticut, who had played a key role at the federal convention, observed that the judicial powers “cannot be extended beyond the enumerated cases, *but may be limited by Congress . . . .*” *Farrand-Supp.*, *supra*, at 288 (italics added). During the Virginia Ratification Convention, John Marshall (later Chief Justice) stated in the course of defending the Constitution:

What is the meaning of the term *exception*? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions

Note that Article III granted no power to the inferior courts. Instead, Article I conveyed to Congress broad authority to “constitute” such courts.<sup>131</sup> During the Founding Era, to “constitute” a court meant either: (1) To establish it, or (2) to depute and empower it.<sup>132</sup> To depute and empower a court—and therefore “constitute” it—Congress need not establish it first. As the Continental Congress had done, it could “constitute” an existing tribunal (such as a state court) to hear particular matters.<sup>133</sup>

Article III did grant Congress authority to “Regulat[e]” the Supreme Court’s appellate jurisdiction.<sup>134</sup> The need for this clause followed from congressional power to “constitute” inferior courts, since part of regulating appellate jurisdiction was determining the lower courts from which appeals were to be heard.

In private law terms, this judicial vesting scheme was analogous to a conveyance (a) in which Peter<sup>135</sup> listed his nine parcels of land as Parcels 1 through 9, (b) conveyed Parcels 1, 2, and 3 to Sam in fee simple absolute, (c) conveyed one-half of each of Parcels 4 through 9 to Sam in fee simple subject to divestment, and (d) gave a power of appointment to Carole entitling Carole, at her discretion, to distribute to Ira, Irene, Iris or to anyone else the remaining halves, or all, of Parcels 4 through 9.<sup>136</sup>

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certainly go as far as the legislature may think proper for the interest and liberty of the people.

*Elliot’s Debates*, *supra* n. 1, vol. 3 at 560.

131. U.S. Const. art. I, § 8, cl. 9 (“To constitute Tribunals inferior to the supreme Court”); *id.* at art. III, § 1 (“such inferior Courts as the Congress may from time to time ordain and establish”).

132. *See e.g.* Samuel Johnson, *A Dictionary of the English Language* (Times Books 1755) (unpaginated) (defining “constitute” and “depute”).

133. J. Contl. Cong. 1774-1789 vol. 19, 354-56 (Apr. 5, 1781) (“constituting” state courts to hear cases of piracies and felonies on the high seas).

134. U.S. Const. art. III, § 2, cl. 2.

135. In this illustration, “Peter” is the analogue to the people, “Sam” to the Supreme Court, “Carole” to Congress, and Ira, Irene, and Iris to the inferior courts.

136. Professor Gary Lawson has suggested to me that construing the Judicial Vesting Clause as a class gift subject to open (i.e., subject to partial divestment) eliminates the *in futuro* grant problem. By this reading, the Clause granted the entire judicial power to the Supreme Court, subject to Congress enlarging the class with lower tribunals that would take part of the power away. By this interpretation, the Judicial Vesting Clause would remain a grant, which would increase the odds that the first sentence of Article II also was a grant.

Professor Lawson’s suggestion is ingenious. However, if the Judicial Vesting

Once this scheme is understood, it becomes clear that Article III approximately followed the Article I structure. Article III's initial sentence designated the entities that would wield judicial authority. The rest of Section 1 provided organizational detail. Section 2 granted power to the Supreme Court. It granted no authority to inferior courts—but not because the grant was in the so-called “Judicial Vesting Clause,” but because such an *in futuro* grant would have been inconsistent with the law and practice of the time. Instead, Article I granted Congress the power to “constitute” (erect and/or depute) inferior tribunals, and Article III granted it the ancillary power to mesh Supreme Court appeals practice with the lower courts it had constituted. Finally, Article III qualified the judicial powers with rules requiring juries in criminal trials and restricting the law of treason.<sup>137</sup>

That both Article I and Article III followed the same pattern certainly suggests that Article II did as well.

#### B. *THE UNCERTAIN SCOPE OF THE “EXECUTIVE POWER”*

The vesting-clause interpretation of the initial sentence of Article II holds that it was a grant of “those authorities that were traditionally wielded by executives.”<sup>138</sup> However, there was no Founding-Era tradition authoritatively defining the scope of executive power. Each of the thirteen states allocated a somewhat different set of prerogatives to the executive, and all of those sets differed from that exercised by the royal governors and the British king.<sup>139</sup> For example, the British king could make treaties, but in America people argued over whether

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Clause was a class gift subject to open, it would be so different in character from the first sentence of Article II that it would serve as weak, if any, evidence of the nature of the latter. More importantly, treating the Judicial Vesting Clause this way does not eliminate the *in futuro* problem. Article III, Section 2, Clause 2 makes it clear that the Supreme Court never received—not for an instant—the entire judicial power. Specifically, it did not receive original jurisdiction over most federal cases (the “remaining halves . . . of Parcels 4 through 9” in the text’s analogy). Hence, the lower courts had to receive their original jurisdiction from a source other than the Supreme Court—either from the Judicial Vesting Clause directly (unlikely because that would be a grant *in futuro*) or from Congress (as I argue in the text).

137. U.S. Const. art. III, §§ 2-3.

138. *Heritage Guide*, *supra* n. 1, at 179 (“The Executive Vesting Clause . . . grants the President those authorities that were traditionally wielded by executives.”).

139. Thach, *supra* n. 1, at 13-44 (summarizing the different components of executive power in the states).

that was an executive or legislative power.<sup>140</sup> The British king had no authority to make specific recommendations to the legislature, but some state governors did.<sup>141</sup> Royal governors could suspend members of the upper house of the legislature<sup>142</sup>—but no one claims that prerogative is within the scope of the President’s “executive Power,” even though the Constitution did not withhold it explicitly. Moreover, advocates of the vesting-clause hypothesis have not agreed among themselves whether the measure for the “executive Power” was the British Crown or some other executive magistrate, such as the governor of New York.<sup>143</sup>

### C. THE RATIFICATION RECORD

During the ratification debates, Anti-Federalists were casting about for arguments proving that the presidency would be too powerful, but no one seems to have suggested that Article II’s initial sentence was a source of authority beyond the powers specifically enumerated. On the pro-Constitution side, Alexander Hamilton, writing as “Publius,” offered a detailed analysis of most of the enumerated presidential powers, and then introduced a brief discussion of the remainder with the phrase, “The only remaining powers of the executive[] are . . . .”<sup>144</sup> Neither he, nor any other Federalist, seems to have suggested before ratification that the first sentence of Article II was a grant, as well as a designation. The vesting-clause hypothesis seems not to have been dreamt of until someone suggested it during the First Federal Congress, *after* the Constitution had been ratified.<sup>145</sup>

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140. *E.g.* Farrand, *supra* n. 1, vol. 2 at 537 (quoting George Mason as stating that treaties were “more of a legislative nature” than appointing ambassadors); *see also id.*, vol. 1 at 65-66 (quoting James Wilson as opining that the King’s powers over war and peace were more of a legislative than an executive nature).

141. *E.g.* N.Y. Const. art. XIX (1777).

142. *See* Stokes, *supra* n. 1, at 153.

143. *See* Calabresi & Prakash, *supra* n. 1, at 577-79 (measuring executive power, before specific constitutional qualifications, by the authority of the British king); Thach, *supra* n. 1, at 159-60 (claiming that the relevant model was the New York governorship).

144. *The Federalist*, *supra* n. 1, No. 77 at 399-400.

145. Thornton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress 186-87* (Pa. St. U. Press 1993); Thach, *supra* n. 1, at 135-37. Hamilton picked up the argument in 1793 in his first “*Pacificus*” essay, thereby contradicting (not for the only time) his representations in the *Federalist Papers*. Alexander Hamilton, *Pacificus, No. 1*, in *The Founders’ Constitution* (Philip B. Kurland & Ralph Lerner

D. *THE GRANTS IN SECTIONS TWO AND THREE IN HISTORICAL CONTEXT*

There are several reasons for believing that the terms of Sections 2 and 3 of Article II are only grants (some of which are qualified), rather than limitations on British-style regal authority as the vesting-clause advocates would have it.<sup>146</sup> First, they are phrased as grants: The Vacancy Clause, for example, states flatly that “[t]he President shall have Power to fill up all Vacancies;”<sup>147</sup> the Commissioning Clause states “he . . . shall Commission all the Officers of the United States.”<sup>148</sup> Second, at least one of the items in the enumeration could not have been a qualification on British-style executive authority, for it was a power the king did not enjoy. This was the President’s right to “recommend to [congressional] Consideration such Measures as he shall judge necessary and expedient.”<sup>149</sup> Although the king could use his “speech from the throne” to draw Parliament’s attention to general subject areas, he was not permitted to recommend specific measures to the legislature in the way that the President could.<sup>150</sup> So this provision is certainly a grant rather than a qualification, and its status as a grant suggests that the other items on the list are grants as well.<sup>151</sup> If they are, then interpreting the first sentence of the Article as a “vesting clause” would violate the rule of construction against interpretation that results in surplus<sup>152</sup>—one of the many rules of construction taken very seriously during the Founding Era.<sup>153</sup>

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eds., 1986) (available at [http://press-pubs.uchicago.edu/founders/documents/a2\\_2\\_2-3s14.html](http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s14.html)) (arguing that the first sentence of Article II is a plenary grant of power).

146. *E.g.* Calabresi & Prakash, *supra* n. 1, at 578 (“Thus, Article II, Section 2, when read in conjunction with Article I, Section 8, makes clear that the President will not have many of the arguably ‘executive’ powers of King George III.”).

147. U.S. Const. art. II, § 2, cl. 3.

148. *Id.* at § 3.

149. *Id.*

150. Jean Louis (J.L.) De Lolme, *The Constitution of England* 164-65, 184, 283 (4th ed. 1784) (re-issued, David Lieberman ed., 2007).

151. Branch, *supra* n. 1, at 71. “*Noscitur ex Socio qui non cognoscitur ex se*” (“What is not known by itself alone is known by its associate”) (translated by the Author).

152. The Constitution does contain surplus clauses, such as the Necessary and Proper Clause, and the Founders represented them as such. *Infra* n. 149 and accompanying text. But none is on the order of that resulting when one imposes a vesting-clause structure on Article II—that is, two full sections.

153. It is not generally recognized, I believe, how committed to these maxims

Advocates of the vesting-clause hypothesis sometimes counter that treating the first sentence of Article II as a mere designation also violates the rule against surplus. Of course, the amount of surplus would be much less than that created by the vesting-clause hypothesis. In any event, however, a description or designation is not surplus. The designation clause in Article I informed the reader of the agency that would exercise the legislative power. The designation clause in royal commissions identified the new governor by name. Similarly, the first sentences of Articles II and III each informed the reader that, just as Congress would be the sole legislature, the President would be the sole executive, and the Supreme Court and any lower courts ordained by Congress would comprise the judiciary.

To be sure, the first sentence of Article II, unlike the first sentence of Article I, omitted the words “herein granted.” But we should not read too much into this. Under the Constitution’s governmental scheme, the scope of domestic executive power was defined by the scope of the legislative power. The President was to “take Care that the Laws be faithfully executed”—meaning the laws passed by Congress.<sup>154</sup> Because the legislative powers already were limited to those “herein granted,” there was no need to add similar words to the executive power.<sup>155</sup> As for the foreign affairs portion of executive

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Founding-Era lawyers were. Contemporaneous law placed them on the same stratum of authority as statutes. Thomas Wood, *An Institute of the Laws of England* vol. 1, 6 (10th ed., 1772) (“Maxims . . . are of the same Strength as Acts of Parliament when once the Judges have determined what is a Maxim”). *Accord State v. —*, 2 N.C. 28, 1 Hayw. 28 (1794). These maxims were seen as ways to infer the “intent of the makers” of a document. Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 Ohio St. L.J. 1239, 1273-81 (2007) (discussing the contemporaneous use of rules of construction).

The Founders certainly expected future generations to employ those rules in constitutional interpretation. *E.g.* *The Federalist*, *supra* n. 1, No. 32 at 156 (Hamilton) (discussing negatives pregnant); *id.*, No. 78, at 404-05 (Hamilton) (discussing competing maxims); Anti-Federalists made much of how the Constitution might be abused by judges misapplying Anglo-American interpretive techniques to it. *See e.g.* *Timoleon*, N.Y. J. (Nov. 1, 1787), reprinted in *Documentary History*, *supra* n. 1, vol. 13 at 535 (creating a fictional judicial opinion, complete with legal maxims, to allow the federal government to suppress freedom of conscience and of the press).

154. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1895 (2005).

155. *Id.* at 1894-96 (explaining that the scope of executive power is limited by the scope of legislative power).

authority, we shall see that the President's enumerated powers and their incidents gave him ample capacity in that arena.<sup>156</sup>

E. *THE BROAD SCOPE OF PRESIDENTIAL EXPRESS AND IMPLIED POWERS—INCLUDING THOSE OVER FOREIGN AFFAIRS*

A final reason for concluding that Article II partakes of the Article I structure is that this construction results in an executive with sufficient "energy" (effectiveness) to be acceptable to the Founding Generation. This is a crucial point, because a lynchpin of the vesting-clause hypothesis is the belief that limiting the President to Article II's enumerated powers would result in an executive too weak, particularly in foreign affairs, for what the Founders were trying to accomplish.

That argument probably overstates the amount of executive authority acceptable to the Founding Generation, for even construed narrowly, the enumerated powers gave the President a sphere of action greater than that of any state governor. This was why the Anti-Federalists could credibly attack the office as too potent.<sup>157</sup>

The argument also understates the scope of authority the President received from the enumerations in Article II, Sections 2 and 3. Those sections, together with other parts of the Constitution, conveyed at least sixteen enumerated powers, some of them, such as the veto,<sup>158</sup> which was very significant indeed. Moreover, in absence of express provisions to the contrary, documents bestowing express powers also granted implied, incidental powers. This was what the Necessary and Proper Clause was designed to communicate for congressional authority. But the presence or absence of a necessary and proper clause made absolutely no substantive difference, as prominent Founders repeatedly stressed.<sup>159</sup> The President's authority

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156. *Infra* Part V, sub. E.

157. *E.g. Elliot's Debates, supra* n. 1, vol. 3 at 56 (quoting Patrick Henry at the Virginia ratifying convention as decrying the Constitution because it would create "a great and mighty President, with very extensive powers—the powers of a king.").

158. U.S. Const. art. I, § 7, cl. 2.

159. *E.g. The Federalist, supra* n. 1, No. 33 at 158 (Hamilton) ("[The Necessary and Proper Clause and Supremacy Clauses] are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."); *id.*, No. 44 at 234-35 (Madison) ("Had the constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication.");



was as broad as if the Constitution had declared that, “the President may issue all orders which shall be necessary and proper for carrying into Execution his enumerated powers.”

The presidency was particularly so in the realm of foreign affairs. The Constitution designated the President commander-in-chief of the armed forces.<sup>160</sup> He was empowered, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”<sup>161</sup>—treaties that were to be the “supreme Law of the Land.”<sup>162</sup> He could “nominate, and by and with the Advice and Consent of the Senate . . . appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>163</sup> He was to “receive Ambassadors and other public Ministers” and “take Care that the Laws be faithfully executed, and . . . Commission all the Officers of the United States.”<sup>164</sup>

Even narrowly construed, the foregoing gave the President command of the military and the power to appoint, subject to senatorial approval, all senior federal employees with foreign affairs responsibilities. These included diplomats (“Ambassadors, other public ministers”) and the “Consuls” who supervised American trade abroad.<sup>165</sup> Congress could “vest the Appointment” of lesser foreign affairs officers “in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>166</sup> But the President was to commission all of them.<sup>167</sup>

One must now add to the mix the implied foreign affairs powers that flowed from the President’s express authority. The duties of the foreign affairs employees appointed by the President would be

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*Elliot’s Debates*, *supra* n. 1, vol. 4 at 141 (Archibald [or William; the text does not indicate] MacLaine, speaking at the North Carolina ratifying convention: “This clause gives no new power, but declares that those already given are to be executed by proper laws.”).

160. U.S. Const. art. II, § 2, cl. 1.

161. *Id.* at cl. 2.

162. *Id.* at art. VI, cl. 2.

163. *Id.* at art. II, § 2, cl. 2.

164. *Id.* at § 3.

165. Vattel, *supra* n. 1, at 279, 682 (discussing the various grades of diplomatic and foreign trade officers).

166. U.S. Const. art. II, § 2, cl. 2.

167. *Id.* at § 3.

established by law. But the President would supervise their execution, for he had the responsibility to “take Care that the Laws be faithfully executed.”<sup>168</sup> These duties would include not only international negotiation, but all the accoutrements of a foreign ministry. They would include research; short-, medium-, and long-range planning; and general departmental administration. How foreign affairs officials prioritized and executed their duties was for the President to say. For as the First Congress recognized,<sup>169</sup> the President had authority—incidental to both the appointment power and the “take Care” power—unilaterally to remove any and all foreign policy employees for any reason and at any time.<sup>170</sup>

More power flowed from the President’s responsibility to “receive Ambassadors and other public Ministers.”<sup>171</sup> As the leading eighteenth-century international law treatise makes clear, the power to

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168. *Id.*

169. *See Parsons v. U. S.*, 167 U.S. 324, 328-30 (1897) (summarizing this debate); Thach, *supra* n. 1, at 144-45 (discussing the First Congress’s grant to the President of broad discretion in running the foreign affairs department).

170. It is beyond the scope of this paper to discuss all the reasons why I believe the determination of the First Congress was correct. However, the following points are germane:

*First:* As nearly all those who addressed the issue in Congress agreed, the removal power was incidental to the appointment power. The real dispute was only over who had the appointment power—the President alone or the President and Senate.

*Second:* Article II states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States.” U.S. Const. art II, § 2, cl. 2. This section makes it clear that it is the *President* who appoints, with senatorial consideration a mere condition precedent.

*Third:* Article II subsequently provides that “the Congress may by Law vest the Appointment of such inferior Officers, as [Congress] think[s] proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id.* This *implies*, although it does not state, that the appointment power normally is joint.

*Fourth:* The Founders expected the Constitution to be interpreted by maxims of construction. As already noted, *supra* n. 152, they enjoyed very strong authority.

*Fifth:* Two maxims break the conflict in favor of the first clause. One is the rule that more specific terms override more general terms: *Generalibus Specialia derogant*, and *Generalia sunt praeponenda Singularibus*. Branch, *supra* n. 1, at 34. The other maxim is that in grants, earlier terms override later, inconsistent ones. William Blackstone, *Commentaries* vol. 2, \*381 (“THAT, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected”).

171. U.S. Const. art. II, § 3.

“receive” foreign diplomats included the power *not* to receive them.<sup>172</sup> This enabled the President to refuse to recognize any foreign government.

The Constitution did not include a clause stating, “The President shall have general Controul over the foreign Policy of the United States.” But his enumerated powers and their incidents clearly gave him such control, subject to some senatorial check. In foreign affairs at least, a plenary grant in the first sentence of Article II would have been superfluous.

## VI. CONCLUSION

If one interprets the first sentence of Article II as a mere designation clause, then Article II follows the same structure as Article I: Designation, followed by organizational details, followed by power grants. If one interprets the first sentence of Article II as a conveyance of executive power, then the structure is quite different: A plenary grant followed by organizational details, followed by specific grants and qualifications.

This study has examined relevant eighteenth-century drafting practice—a source of evidence almost entirely overlooked by prior constitutional commentators. The study has included the royal commissions to colonial governors,<sup>173</sup> a source of evidence also overlooked, even though those royal commissions were direct ancestors of Article II. Also considered has been the structure of Article III, as properly understood in the light of eighteenth-century legal rules.

Article I followed a very common drafting template, but the alternative proposed for Article II by the vesting-clause advocates was, virtually non-existent. This renders much more probable that Article II actually followed the pattern of Article I, so that the first sentence was merely a designation clause rather than a conferral of power. This conclusion is confirmed by a mass of other evidence.

One may, therefore, analyze Article II as consisting of four parts. With one exception, the boundaries between the parts fall along section lines, as they do invariably in Article I. The first is the initial sentence,

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172. This is, I think, a fair reading of Vattel, *supra* n. 1, at 685-86 (discussing when a sovereign can or should refuse to receive).

173. *Supra* Part V, sub. F (describing the organization of royal commissions).

which designates the President as the single chief executive officer, but conveys no power.<sup>174</sup> The second part comprises the remainder of Section 1. It contains the details of the President's selection, including his term of office, mode of election, and qualifications.<sup>175</sup> The third part, making up all of Sections 2 and 3, consists of the grants of enumerated powers—intermingled or overlapping, as contemporaneous commissions sometimes were, with brief instructions.<sup>176</sup> The last portion of Article II, Section 4, is a provision for removal by impeachment.<sup>177</sup>

The grants in Article II, Sections 2 and 3, and their incidents, together with a few other specific grants located elsewhere in the Constitution,<sup>178</sup> thus defined the outer limits of the President's authority.

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174. U.S. Const. art. II, § 1, cl. 1 (first sentence).

175. *Id.* at § 1.

176. *Id.* at cls. 2-3. The “take Care” provision is arguably an instruction as well as a power. On the Founding-Era practice of adding brief instructions to power-granting documents, *see supra* nn. 53 & 70 and accompanying text.

177. U.S. Const. art. II, § 4.

178. *E.g. id.* at art. I, § 7, cls. 2-3 (providing for a veto power).

## APPENDIX A

POWER OF ATTORNEY—DIRECT GRANT STRUCTURE<sup>179</sup>

**Know all men** by these presents, That **whereas** A. K. late of \_\_\_\_\_ by her last will and testament, bearing date \_\_\_\_\_ did give and bequeath unto me M. G. of \_\_\_\_\_ 500 l.<sup>180</sup> to be paid unto me upon my sealing and delivering a general release to the executors of the said A. K. and made and constituted F. B. of \_\_\_\_\_ her executor, and shortly after died: **And whereas** the said F. B. hath proved the said will, and the said M. G. hath sealed such general release to the said F. B. as by the said will is directed, and left the same in the hands of her attornies herein afternamed, to be delivered to the said F. B. on payment of the said 500 l. **Now know ye**, That [] the said M. G. **have** made, ordained, constituted, deputed and appointed, and by these presents **do** make, ordain, constitute, depute and appoint F. E. of \_\_\_\_\_ and F. S. of \_\_\_\_\_ my true and lawful attornies jointly, and either of them singly, for me, and in my name, and to my use, to ask, demand and receive of and from the said F. B. the said legacy of 500 l. so given and bequeathed to me the said M. G. by the said A. K. in her said will as aforesaid; and upon receipt thereof by my said attornies, or either of them, to deliver the said general release so sealed as aforesaid, or to give such other discharge as shall be sufficient; I hereby ratifying, allowing and confirming all and whatsoever my said attornies, jointly or separately, shall lawfully do in the premises. **In witness, &c.**

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179. *Pocket-Book*, *supra* n. 1, vol. 1 at 186-87.

180. That is, £500.

## APPENDIX B

EXCERPTS FROM FORM OF COMMISSION TO COLONIAL GOVERNOR—ARTICLE I STRUCTURE<sup>181</sup>

(Author's Explanatory tabs in **bold type** added.)

G. R.

*GEORGE the Third, by the Grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth: To our trusty and well beloved A. B. Esq;*

GREETING:

**Preamble: Notice of revocation of authority of previous governor**

WHEREAS we did, by our Letters Patent under our Great Seal of Great Britain, bearing date at Westminster the first day of January, in the eighteenth year of our reign, constitute and appoint C. D. Esq; Captain-General and Governor in Chief in and over our Province of F\_\_\_\_, and the territories depending thereon in America, for and during our will and pleasure; as by the said recited Letters Patent (relation being thereunto had) may more fully and at large appear: Now know you, that we have revoked and determined, and by these presents do revoke and determine the said recited Letters Patent, and every clause, article, and thing therein contained.

**Preamble continued: Designation of new governor**

And further know you that we, reposing especial trust and confidence in the prudence, courage and loyalty of you the said A. B. of our especial grace, certain knowledge, and mere motion, have thought fit to constitute and appoint you the said A. B. to be our Captain-General and Governor in Chief in and over our Province of F\_\_\_\_, and the territories depending thereon in America:

**Royal command to governor to act**

And we do hereby require and command you to do and execute all things in due manner that shall belong unto your said command, and the trust we have reposed in you, according to the several powers and directions granted or appointed you by this present commission, and instructions herewith given you, or by such further powers, instructions, and authorities, as shall at any time hereafter be granted or

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181. Stokes, *supra* n. 1, at 150-64.

appointed you under our Signet and Sign Manual, or by our order in our Privy Council, and according to such reasonable laws and statutes as now are in force, or hereafter shall be made and agreed upon by you, with the advice and consent of our Council, and the Assembly of our said Province under your government, in such manner and form as is herein after expressed.

**Royal command to take oaths**

And our will and pleasure is, that you the said A. B. after the publication of these our Letters Patent, do, in the first place, take the oaths appointed to be taken by an Act passed in the first year of the reign of King George the First, intituled, "An Act for the further security of his Majesty's person and government, and the succession of the Crown in the heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors." . . . As also, that you make and subscribe the declaration mentioned in an Act of Parliament made in the twenty-fifth year of the reign of King Charles the Second, intituled, "An Act for preventing dangers which may happen from Popish recusants." And likewise, that you take the oath usually taken by the Governors in the Plantations, for the due execution of the office and trust of our Captain-General and Governor in Chief in and over our said Province of F\_\_\_\_, and the territories depending thereon, for the due and impartial administration of justice . . . all which being duly performed, you shall yourself administer unto each of the Members of our said Council; as also to our Lieutenant-Governor . . . .

**Enumerated powers begin, with applicable qualifications**

And we do hereby give and grant unto you full power and authority to suspend any of the Members of our said Council from sitting, voting, or assisting therein, if you shall find just cause for so doing; and if there shall be any Lieutenant-Governor, him likewise to suspend from the execution of his command, and to appoint another in his stead until our pleasure be known: and if it shall at any time happen, that, by the death, departure out of our said Province, or suspension of any of our said Councillors, or otherwise, there shall be a vacancy in our said Council (any three whereof we do hereby appoint to be a quorum), our will and pleasure is, that you signify the same unto us by the first opportunity, that we may, under our Signet and Sign Manual, constitute and appoint others in their stead. But that our affairs may not suffer at that distance, for want of a due number of

Councillors, if ever it should happen that there be less than seven of them residing in our said Province, we do hereby give and grant unto you the said A. B. full power and authority to chuse as many persons out of the principal Freeholders, inhabitants thereof, as will make up the full number of our said Council to be seven, and no more; which persons, so chosen and appointed by you, shall be, to all intents and purposes, Councillors in our said Province, until either they shall be confirmed by us, or that, by the nomination of others by us, under our Sign Manual and Signet, our said Council shall have seven or more persons in it.

And we do hereby give and grant unto you full power and authority, with the advice and consent of our said Council, from time to time as need shall require, to summon and call General Assemblies of the said Freeholders and Planters within your government, according to the usage of our Province of F\_\_\_\_\_. And our will and pleasure is, that the persons thereupon duly elected by the major part of the Freeholders of the respective Counties and places, and so returned, shall, before their sitting, take the oaths mentioned in the said Acts . . . .

And we do hereby declare, that the persons so elected and qualified shall be called and deemed The General Assembly of that our Province, and the territories depending thereon.

And you the said A. B. by and with the consent of our said Council and Assembly, or the major part of them respectively, shall have full power and authority to make, constitute, and ordain laws, statutes, and ordinances, for the public peace, welfare, and good government of our said Province, and of the people and inhabitants thereof, and such others as shall resort thereto, and for the benefit of us, our heirs and successors: which said laws, statutes, and ordinances, are not to be repugnant, but as near as may be agreeable to the laws and statutes of this our kingdom of Great Britain.

Provided that all such laws, statutes and ordinances, of what nature or duration soever, be, within three months or sooner after the making thereof, transmitted unto us under our Seal of F\_\_\_\_\_, for our approbation or disallowance of the same; as also duplicates thereof by the next conveyance.

And in case any or all of the said laws, statutes, and ordinances, being not before confirmed by us, shall at any time be disallowed, and not approved, and so signified by us, our heirs or successors, under our or their Sign Manual and Signet, or by order of our or their Privy



Council, unto you the said A. B. or to the Commander in Chief of our said Province for the time being; then such and so many of the said laws, statutes and ordinances, as shall be so disallowed, and not approved, shall from thenceforth cease, determine, and become utterly void and of none effect; any thing to the contrary thereof notwithstanding.

And, to the end that nothing may be passed or done by our said Council or Assembly, to the prejudice of us, our heirs or successors, we will and ordain, that you the said A.B. shall have and enjoy a negative voice in the making and passing of all laws, statutes and ordinances, as aforesaid: and you shall and may likewise, from time to time, as you shall judge it necessary, adjourn, prorogue, and dissolve all General Assemblies as aforesaid.

And our further will and pleasure is, that you shall and may use and keep the Public Seal of our said Province of F\_\_\_\_\_, for sealing all things whatsoever that pass the Great Seal of our said Province under your government. . . .

And we do further by these presents give and grant unto you the said A. B. full power and authority, with the advice and consent of our said Council, to erect, constitute, and establish such and so many Courts of Judicature and public Justice, within our said Province under your government, as you and they shall think fit and necessary for the hearing and determining of all causes, as well criminal as civil, according to law and equity, and for awarding execution thereupon; with all reasonable and necessary powers, authorities, fees, and privileges belonging thereunto: as also, to appoint and commissionate fit persons in the several parts of your government, to administer the oaths mentioned in the aforesaid Act . . .

And we do hereby authorise and empower you to constitute and appoint Judges, and in cases requisite, Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary Officers and ministers in our said Province, for the better administration of justice, and putting the laws in execution; and to administer, or cause to be administered unto them, such oath or oaths as are usually given for the due execution and performance of offices and places, and for the clearing of truth in judicial causes.

And we do hereby give and grant unto you full power and authority, where you shall see cause, or shall judge any offender or offenders in criminal matters, or for any fines or forfeitures due unto

us, fit objects of our mercy, to pardon all such offenders, and to remit all such offences, fines, and forfeitures, treason and wilful murder only excepted; in which cases, you shall likewise have power, upon extraordinary occasions, to grant reprieves to the offenders, until, and to the intent that, our royal pleasure may be known therein.

And we do, by these presents, authorise and empower you to collate any person or persons to any churches, chapels, or other ecclesiastical benefices within our said province and territories aforesaid, as often as any of them shall happen to be void.

And we do hereby give and grant unto you the said A. B. by yourself or by your captains and commanders, by you to be authorised, full power and authority to levy, arm, muster, command, and employ all persons whatsoever, residing within our said Province of F\_\_\_\_, and other the territories under your government; and, as occasion shall serve, to march them from one place to another, or to embark them, for the resisting and withstanding of all enemies, pirates, and rebels, both at sea and land; and to transport such forces to any of our plantations in America, if necessity shall require, for the defence of the same against the invasions or attempts of any of our enemies; and such enemies, pirates, and rebels, if there shall be occasion to pursue and prosecute in or out of the limits of our said Province and Plantations, or any of them; and if it shall so please God them to vanquish, apprehend, and take, and being taken, either according to law to put to death, or keep and preserve alive, at your discretion; and to execute martial law in time of invasion, war, or other times, when by law it may be executed; and to do and execute all and every other thing and things, which, to our Captain General and Governor in Chief, doth or ought of right to belong.

And we do hereby give and grant unto you full power and authority, by and with the advice and consent of our said Council, to erect, raise, and build, in our said Province of F\_\_\_\_, and the territories depending thereon, such and so many forts and platforms, castles, cities, boroughs, towns, and fortifications, as you, by the advice aforesaid, shall judge necessary; and the same, or any of them, to fortify and furnish with ordnance, ammunition, and all sorts of arms fit and necessary for the security and defence of our said Province; and, by the advice aforesaid, the same again, or any of them, to demolish or dismantle, as may be most convenient.

And forasmuch as divers mutinies and disorders may happen by persons shipped and employed at sea, during the time of war; and to the end that such as shall be shipped and employed at sea during time of war, may be better governed and ordered, we do hereby give and grant unto you the said A. B. full power and authority to constitute and appoint Captains, Lieutenants, Masters of Ships, and other Commanders and Officers, and to grant to such Captains, Lieutenants, Masters of Ships, and other Commanders and Officers Commissions, to execute the law martial during the time of war, according to the directions of an Act passed in the twenty-second year of the reign of our late Royal Grandfather, intituled, “An Act for amending, explaining, and reducing into one Act of Parliament the laws relating to the government of his Majesty’s ships, vessels, and forces by sea”; and to use such proceedings, authorities, punishments, corrections, and executions upon any offender or offenders, who shall be mutinous, seditious, disorderly, or any way unruly either at sea, or during the time of their abode and residence in any of the ports, harbours, or bays of our said province and territories, as the case shall be found to require, according to the martial law, and the said directions, during the time of war as aforesaid.

Provided that nothing herein contained shall be construed to the enabling you, or any by your authority, to hold plea, or have any jurisdiction of any offences, cause, matter, or thing committed or done upon the high sea, or within any of the havens, rivers, or creeks of our said Province and territories under your government, by any Captain, Commander, Lieutenant, Master, Officer, Seaman, Soldier, or other person whatsoever, who shall be in our actual service and pay, in or on board any of our ships of war, or other vessels acting by immediate commission or warrant from our Commissioners, for executing the office of our High Admiral of Great Britain; or from our High Admiral of Great Britain for the time being, under the Seal of our Admiralty; but that such Captain, Commander, Lieutenant, Master, Officer, Seaman, Soldier, or other person so offending, shall be left to be proceeded against, and tried, as their offences shall require, either by commission under our Great Seal of Great Britain, as the Statute of the twenty-eighth of Henry the Eighth directs, or by Commission from our said Commissioners for executing the office of our High Admiral of Great Britain, or from our High Admiral of Great Britain for the time being, according to the aforementioned Act, intituled, “An Act for amending, explaining, and reducing into one Act of Parliament the

laws relating to the government of his Majesty's ships, vessels, and forces by sea, and not otherwise."

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And our further will and pleasure is, that all public monies raised, or which shall be raised by any Act to be hereafter made within our said Province, and other the territories depending thereon, be issued out by warrant from you, by and with the advice and consent of our Council, and disposed of by you for the support of the government, and not otherwise.

And we do hereby likewise give and grant unto you full power and authority, by and with the advice and consent of our said Council, to settle and agree with the inhabitants of our province and territories aforesaid, for such lands, tenements, and hereditaments, as now are, or hereafter shall be in our power to dispose of, and them to grant to any person or persons upon such terms, and under such moderate quit-rents, services, and acknowledgments, to be thereupon reserved unto us, as you, by and with the advice aforesaid, shall think fit: which said grants are to pass, and be sealed by our Seal of our said Province of F\_\_\_\_; and being entered upon record by such officer or officers, as are or shall be appointed thereunto, shall be good and effectual in law against us, our heirs, and successors.

And we do hereby give you the said A. B. full power and authority to order and appoint fairs, marts, and markets, as also such and so many ports, harbours, bays, havens, and other places for the convenience and security of shipping, and for the better loading and unloading of goods and merchandises in such and so many places, as by you, with the advice and consent of our said Council, shall be thought fit and necessary.

**Command to others to obey governor**

And we do hereby require and command all Officers and Ministers, civil and military, and all other inhabitants of our said Province and Territories depending thereon, to be obedient, aiding, and assisting unto you, the said A. B. in the execution of this our Commission, and of the powers and authorities herein contained; and in case of your death or absence out of our said province and territories depending thereon, to be obedient, aiding, and assisting unto such person as shall be appointed by us to be our Lieutenant Governor, or Commander in Chief of our said Province for the time being; to whom we do therefore by these presents give and grant all and singular the

powers and authorities herein granted, to be by him executed and enjoyed during our pleasure, or until your arrival within our said province and territories.

**Succession on absence or death**

And if, upon your death or absence out of our said province and territories depending thereon, there be no person upon the place commissioned or appointed by us to be our Lieutenant Governor, or Commander in Chief of our said Province, our will and pleasure is, that the eldest Councillor, whose name is first placed in our said instructions to you, and who shall, at the time of your death or absence, be residing within our said Province of F\_\_\_\_\_, shall take upon him the administration of the government, and execute our said commission and instructions, and the several powers and authorities therein contained, in the same manner, and to all intents and purposes, as other our Governor and Commander in Chief of our said Province, should or ought to do in case of your absence until your return, or in all cases, until our further pleasure by known therein.

**Term and removal from office**

And we do hereby declare, ordain, and appoint that you the said A. B. shall and may hold, execute, and enjoy the office and place of our Captain General and Governor in Chief in and over our Province of F\_\_\_\_\_, and the territories depending thereon, together with all and singular the powers and authorities hereby granted unto you, for and during our will and pleasure.

**Testimonium Clause**

In witness whereof, we have caused these our Letters to be made Patent.

Witness ourself at Westminster, the first day of January, in the twenty-third year of our reign.

By Writ of Privy Seal,  
YORKE and YORKE.

The  
Great Seal  
of  
GREAT BRITAIN.

## APPENDIX C

CONTINENTAL CONGRESS DIPLOMATIC COMMISSION—DIRECT  
GRANT STRUCTURECOMMISSION TO WILLIAM LEE<sup>182</sup>

The delegates of the United States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia—To all who shall see these presents, send greeting.

Whereas a friendly and commercial connexion between the subjects of his imperial majesty, the emperor of Germany, and the people of these states, will be beneficial to both nations:—Know ye, therefore, that we, reposing special trust and confidence in the zeal, fidelity, abilities and assiduity of William Lee, esquire, of the state of Virginia, have appointed and deputed, and by these presents do appoint and depute the said William Lee our commissioner, giving and granting to our said commissioner full power and authority to communicate and treat with his imperial majesty, the emperor of Germany, or with such person or persons as shall be by him for such purpose authorized, of and upon a true and sincere friendship, and a firm, inviolable, and universal peace, for the defence, protection and safety of the navigation and mutual commerce of the subjects of his imperial majesty and the people of the United States; and to do not only all such things as may conduce to those desirable ends, but also, to transact and execute all such other matters as shall hereafter be given him in charge.

Done in Congress, at Philadelphia, the first day of July, in the year of our Lord, one thousand seven hundred and seventy-seven. In testimony whereof the President, by order of the said Congress, hath hereunto subscribed his name and affixed his seal.

(Signed)JOHN HANCOCK, *President*.

Attest,

CHARLES THOMSON, *Secretary*.

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182. J. Contl. Cong. 1774-1789 vol. 8, 518-19 (July 1, 1777).