



## A Reply To Sam Bray: The Drafting History of the Impeachment Clause

Josh Blackman  
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A few weeks ago, Sam Bray wrote a [post](#) about Section 3 and "Officers of the United States." That post was cited in several amicus briefs, and an attendee at the San Diego conference asked me about it today. Here, I will provide a reply.

The Impeachment Clause provides, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment . . . ." The Colorado District Court held that the Impeachment Clause "separates" the President and Vice President "from the category" of "all civil Officers of the United States." While the Appointments Clause refers to "all other Officers of the United States," the Impeachment Clause refers only to "all civil Officers of the United States."

Sam disagreed with this position, and offered an explanation for why the President and Vice President are separated out from "all civil Officers of the United States."

And in the Impeachment Clause it is not even the case that the phrase excludes the President, since it merely has an overlap with a very good reason for the additional specification. **It is so important to make clear that the President and Vice President may be impeached—no small point against the background of royal prerogative power in England—that they are spelled out specifically.** That does not mean they are not officers, and the brief's suggestion that "all *other* civil officers" would have to be used does not fit the legal drafting culture of the late eighteenth and nineteenth centuries.

One way to understand the "legal drafting culture" 1787 is to review the drafting history of the Impeachment Clause during the Constitutional Convention. Tillman reviewed that history in [Part III](#) of our series (p. 364):

As late as September 8, 1787, the Impeachment Clause only extended to the President. That day, a motion was made to add "[t]he [V]ice-President and *other* Civil officers of the U. S." to the scope of the clause. 2 Farrand's Records 552 (emphasis added). The motion was passed unanimously. *Id.* at 545, 552. The use of the word "other" suggests that the President and Vice President are properly characterized as "Civil officers of the United States." Here again, Morris and the Committee of Style changed the text. The amended text stated: "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment . . . ." *Id.* at 600. The phrase "and *other* Civil officers of the U.S." was changed

to "and *all* civil officers of the United States." The word *other* was not merely dropped; it was changed to *all*.

We have no good reason to believe that the Committee dropped the word "other" by accident or happenstance. On the contrary, omitting the word "other" provides some evidence that the meaning was altered. Arguably, Morris and his committee recognized that the President and Vice President were excluded from the category of "Civil officers of the U.S." Why else remove the word "other"?

Earlier in the convention, only the President was subject to impeachment. Later in the convention, the Vice President and "other Civil Officers of the United States" were made subject to impeachment. Finally, the Committee of Style dropped the word "other."

Justice Story, in discussing the *Blount* trial, observed that the absence of the word *other* in the Impeachment Clause "lead[s] to the conclusion" that the President is not "included in the description of civil officers of the United States." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 791 (1833).

Story published his *Commentaries on the Constitution* in 1833. At the time, Madison's records of the federal convention had not yet been made public. These documents, which recorded the Constitution's drafting history, would be published in 1840, a few years after Madison's death. See 1 Farrand's Records at xv. Today, we know what Story did not know in 1833. According to Madison's records and other records from the Convention, Story's inference is well supported by the Constitution's drafting history.

I have not seen any evidence that the drafting of the Impeachment Clause was premised on some concern about the royal prerogative. The Blackman-Tillman position is consistent with the "legal drafting culture" at the Constitutional Convention, at which surgical changes were made to the office- and officer- language in the Impeachment Clause, the Religious Test Clause, and the Succession Clause. (See pp. 360-365 of *Part III*.)

*Josh Blackman is an associate professor of law at the South Texas College of Law Houston who specializes in constitutional law, the U.S. Supreme Court, and the intersection of law and technology. Blackman is the author of the critically acclaimed Unprecedented: The Constitutional Challenge to Obamacare.*