Twitter Thread by Jonathan Urick



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Hot take: Courts might be able to review the legality of this impeachment, even under current political-question doctrine. Here's why and how the issue might arise:

> Honest Q: Some people argue in good faith that an impeachment trial after POTUS leaves office is unconstitutional. I think they\u2019re wrong. But let\u2019s say they\u2019re right, yet senate does it anyway. Does anyone seriously think SCOTUS reverses verdict (or even can)?
>
> — Jonah Goldberg (@JonahDispatch) January 17, 2021

Suppose Senate convicts and disqualifies Trump from ever holding federal office. Trump files paperwork to run anyway, but state officials deny his application, citing his Senate impeachment judgment. Trump sues, arguing that the judgment is void.

Normally a legal dispute about a prospective candidates eligibility to run would certainly present a justiciable case or controversy. But are courts bound to accept the Senate impeachment judgment as valid? Maybe not. Here's why:

According to Article I, "The Senate shall have the sole Power to try all Impeachments." This is a small amount of judicial power vested in Congress. When trying impeachments, the Senate sits as a court.

The Senate's judicial power includes the power to decide relevant legal questions that arise, such as what procedures are sufficient to constitute a "trial" w/in the Constitution's meaning. Such legal determinations are conclusive, as SCOTUS held in Nixon v. United States (1993).

The constitutionally required procedures and what offenses constitute impeachable "high crimes and misdemeanors" are impeachment "merits" questions, so to speak. The Senate has the "sole" power to decide such questions. But *who* may be impeached is arguably different.

Who may be impeached and tried by the Senate is arguably a question of the Senate's impeachment "subject-matter jurisdiction." Without such jurisdiction, the Senate has no power at all to try. The resulting purported impeachment judgment would be void, just as would a court's.

Imagine that the House purported to impeach an indisputably private citizen that never served as a federal official for federal crimes, and the Senate purported to try and convict them.

I'm fairly confident that we'd all agree that the Senate's judgment would be completely void, and a court could certainly recognize this invalidity in some sort of collateral proceeding presenting the issue of the judgment's validity.

So if we consider the who-may-be-impeached question as a matter of the Senate's subject-matter jurisdiction to try impeachments, then later courts can likely review that question when it arises in disputes about the purported impeachment judgement's collateral legal consequences.

A court's subject-matter jurisdiction can pretty much always be challenged in a subsequent collateral proceeding that turns on the validity of the prior court's judgment. This is an ancient and basic rule of judicial power. A purported judgment rendered w/o jurisdiction is void.

Senate impeachment judgments should be no different, because the Senate sits as a court when trying impeachments, exercising *judicial* power. So it all comes down to whether to consider the *who* question an issue of the Senate's impeachment jurisdiction.

Nixon v. US presumes that the Senate has the power to try, which makes its factual and legal determinations conclusive. But if the Senate doesn't even have the power to try in the first place—because it lacks jurisdiction over the defendant—then its "sole power" doesn't apply.

So while I agree with @steve_vladeck, @WilliamBaude, and others that Trump indeed *can* be lawfully impeached and tried, I disagree that courts cannot answer that legal question when it arises in a normal case or controversy.

(And perhaps the more precise label for the *who* question is *personal* jurisdiction, rather than subject-matter jurisdiction, but that label doesn't affect justiciability because either way it's a jurisdictional question.)