

Twitter Thread by Shockratees ■■■■■■■■■■

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@ThatShockratees



THREAD: a point worth addressing is "how would/should VP respond if GOP retained its majority, then voted to suspend/amend a Senate Rule depriving the presiding officer of power." Paragraph 6 of the article wasn't as strong as it could have been, on that point.

This piece by @ThatShockratees is the best thing you will read today.

We know Biden will replace Trump as President. We didn't know MVP Kamala can replace Mitch as presiding officer of the Senate. <https://t.co/vSOlywz8Hn>

— Greg Olear (@gregolear) December 15, 2020

The problem with that attack is encapsulated in the Senate's official history (cited graf 7) - <https://t.co/UwF93b9YaA>

The Senate's official history on its <https://t.co/gLTPXi8eiT> site recounts the Constitutional fact that the majority leader's presiding powers are derivative.

A power informally delegated by the VP can be taken back, so the Senate history accurately describes the majority leader as "an emperor without clothes." So, if the VP used presiding power to give priority to a senator moving a House-passed bill to the floor, and . . .

. . . the House purported to override that action by 1) self-recognizing the ML to do something different, and then 2) sustaining a point of order limiting the VP's presiding power, what would be the legal basis and remedy for that action?

Several principles intersect here that arise from agency rulemaking. But first, we have to recognize the Supremacy Clause - the Constitution is a superior law to any other law, rule or precedent.

The Senate Rules describe the powers of the Presiding Officer, and can be suspended or amended by the majority, but that action would not be valid if it deprived the VP of her constitutional presiding power. The Constitution is supreme over the rule, not the other way around.

Then, look at Senate Rules restricting the presiding power like other rulemaking - it must be within the scope of statutory (or, here, constitutional) authorization. The Constitution endows Senate with power to "chuse its other officers" BUT not the

presiding officer.

Only a Constitutional amendment could divest the VP. So to the extent Senate Rules were applied to do so, it would violate Art. 1 Sec. 3 and the Supremacy Clause.

And then, return to the idea that the majority leader's presiding power is derivative/delegated by the VP . . .

. . . or, a glass cannot be smaller than the water poured from it. If the Senate limited the presiding officer's powers, those limitations must apply to the majority leader and VP equally, or conversely would be an unconstitutional limitation of the VP's presiding power.

We have precedent in the agency context, analyzing whether a rulemaking exceeds statutory authority. The Constitution being the supreme statute under its own Supremacy Clause, rulemaking that made the derivative ML power larger than VP's power would violate those precedents.

How would that play out? If VP recognized a Senator to move a bill, and Mitch tried to stop her? A floor fight on this topic COULD generate a Supreme Court petition, and in this hypothetical, VP would have standing to petition, and I believe the court would hear it. . . .

. . . and resolve in her favor. Would that take more than a minute? Sure? Is it worth teeing up and doing? Good God, there are hundreds of House-passed bills that would save and improve American lives.

Many have wide popular support and would draw enough GOP votes to pass the Senate, or cause the rejecting Senators to lose their seats if their votes were on record. Sure, it's worth doing. And even the possibility of divesting the ML's power, seriously posed, could deter abuse.

Another point was raised - didn't the early Senate successfully rebel against the VP's presiding powers? Such data prior to *Marbury v. Madison* isn't relevant to the framework here, because at that time, SCOTUS did not assert jurisdiction to review laws or rulemaking.

I hope this is helpful, and I am still happy to address any "debunking" if it is cited. Several have said "but this was already debunked," but thus far no one has presented that putative "debunking" to me for review.

My head was seemingly doing this constitutional/rulemaking analysis when I wrote the article, but I failed to fully unpack and explain it. Always a mistake, whether for judges or the public! So consider this thread my reply brief, if you will.