Twitter Thread by National Security Counselors



National Security Counselors
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There is a now-relevant parallel here to the difference here between matters before a judge & matters before a jury. Judges are far more reluctant to strike testimony or evidence if they are the only recipients of it, with the theory being that they are really smart about ...

> To the extent that precedents matter in this trial, when hearsay has been challenged in past trials, it's been admitted if it's probative. And it's been noted that senators aren't *regular* jurors, but rather people of learning who can figure on their own how to weigh evidence.
>
> — Ira Goldman \U0001f986\U0001f986\U0001f986 (@KDbyProxy) January 24, 2020

law stuff & will know what they can & can't consider. For instance, there is a long-held rule that a fact witness can't make legal arguments, only a lawyer. So what will happen in a motion for summary judgment, where the entire proceeding is on paper, will play out like this:

1) Defendant makes a motion for summary judgment. It includes a sworn declaration from some fact witness.

2) The declaration includes all sorts of legal arguments about why the defendant should win. Often the declaration includes arguments the brief didn't even make.

Defendants (especially DOJ-represented ones) often do this to get around the word or page-limits placed on briefs.

3) Plaintiff moves to strike the declaration for its inclusion of inadmissible legal arguments.

4) Judge denies the motion to strike, on the grounds that a ...

judge is a sophisticated consumer of evidence & can choose what to consider & what to ignore, unlike a jury.

The legal fiction behind this impeachment exception is that Senators are also smart enough to know what to listen to & what to ignore. Now, that may not be ACCURATE, ...

but, like all legal fictions, in the eyes of the law it is, just like the idea that an overworked judge can suss out & apply on his own every evidentiary issue in complex written testimony in every case.

The U.S. legal system is adversarial expressly because judges are human ...

too, but legal fictions like this are still prevalent to represent the idea that when it comes down to it, it's really only about keeping the simple jurors from being confused. So a Senator might have a reasonable objection to being presented with hearsay evidence, but unless ...

that same Senator is willing to advocate that that the rules of evidence must apply as strictly to matters before judges as to matters before juries, then that's not the Senator's real objection.

Additionally, it should be noted that it is logistically impossible for a ...

Senator to disregard any testimony on the grounds that it is "hearsay" in this case & still vote to acquit Trump on substantial grounds. Literally the entire defense substantive case rests on hearsay. Every time a defense lawyer tells you how Trump felt, that's hearsay. Every ...

time a defense lawyer tells you what Trump did in the White House, that's hearsay. The House Managers are literally the only people to have introduced admissible evidence in this case. So if you're complaining about hearsay, you can't acquit Trump by saying you were convinced ...

by his lawyers' defense.

A few caveats here. First, I am ignoring the people who will acquit him saying that he can't be impeached because he's not President. That's not an acquittal based on the substance. That's a purely legal question where evidence plays zero role.

Personally I think it's monumentally stupid, but that's not the focus of this thread.

Second, there are plenty of other reasons things like hearsay don't apply in impeachments, which I & other people discussed at length last January. Tl;dr this is a political proceeding, not ...

legal one, just like every other impeachment. So the above analysis isn't the only response to "but but HEARSAY." It's just one that hasn't seen a lot of coverage because it's so in the weeds, but it's still a clear example of hypocrisy by the people complaining about hearsay.