Patsy Spaw

AUG 15 2023

CLERK OF THE COURT

THE SENATE OF THE STATE OF TEXAS
SITTING AS A HIGH COURT OF IMPEACHMENT

IN THE MATTER OF	§
WARREN KENNETH	§
PAXTON, JR.	§

HOUSE MANAGERS' RESPONSE TO
PAXTON'S MOTION TO DISMISS ARTICLE II
(Issuance of COVID-19 Foreclosure Opinion to Benefit Nate Paul)

To the Honorable Dan Patrick, President of the Court of Impeachment:

The Texas House of Representatives Board of Managers ("House Managers") file this response to the Motion to Dismiss Article II ("the Motion") filed by Warren Kenneth Paxton Jr. ("Paxton").

INTRODUCTION

Article II concerns the unusual actions taken by Paxton, against his senior staff's advice, to use the legal advisory power of his office for the specific purpose of stopping scheduled foreclosures on properties owned by his friend and benefactor, Nate Paul. Tellingly, Paxton's motion does not deny that he knew about the impending Nate Paul foreclosures, that he overrode his own staff's legal conclusions that foreclosures could lawfully proceed, that he used a Senator as a strawman to conceal his nefarious plan, or that his actions immediately and significantly benefitted Nate Paul.

Instead, he attempts to move the goal post by claiming he did not "issue written legal opinions under Subchapter C, Chapter 402, Government Code" concerning foreclosures as alleged in Article II. Therefore, he argues, Article II must be dismissed as a matter of law.

Paxton's eleventh-hour maneuver is, procedurally, an improper attack on the House's decision to impeach him and, substantively, not consistent with the authority granted to the Attorney General under the Texas Constitution or Texas statutes. The heart of Article II is that Paxton abused the immense power of his office to rush out an authoritative opinion to benefit a private individual and attempted to hide that malfeasance at the expense of both his loyal staff and unsuspecting members of the Legislature. That is the factual issue to be tried by the Senate. The motion to dismiss Article II should be denied.

FACTUAL BACKGROUND

The nation was in the height of the COVID-19 pandemic in the Summer of 2020. Yet by then, Texas Governor Greg Abbott had created a "Strike Force to Open Texas" with the express goal to "safely and strategically restart[] and revitalize[] all aspects of the Lone Star State."[1] The Governor's strategic plan to "Reopen Texas" continued incrementally through the summer, and by July 2020, even more restrictions were lifted.[2]

Most statewide leaders were eager to "Open Texas" and find the least restrictive means for Texans to conduct business. Statewide leaders who advocated for more restrictions on businesses faced criticism during this time, including Governor Abbott, who by July 2020 was censured by eight county Republican parties for what they considered his too-restrictive "Open Texas" strategy. Indeed, Paxton was a leader for the re-opening charge. On July 28, 2020, not even a week before his foreclosure opinion issued, Paxton rendered an opinion that local health authorities "may not issue blanket orders closing all schools on a purely preventative basis."[3] And yet at the same time, Paxton was contemplating a blanket opinion prohibiting all foreclosure sales across the entire state.

Late on Friday, July 31, 2020, a mere three days after his school opening opinion issued, Paxton contacted Ryan Bangert, Deputy AG for Legal Counsel seeking research on whether in-person foreclosure sales, which occur outdoors, violated COVID restrictions. Paxton wanted the opinion out by the end of the weekend.

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[1] Executive Order GA-17 (April 17, 2020).

[2] Executive Order GA-28 (June 26, 2020), amended (July 2, 2020).

[3] Ken Paxton, *Section 418.193 Letter to Doug Svien of Stephenville*, ATTORNEY GENERAL OF TEXAS (July 28, 2020). This letter was authorized by law. *See* TEX. GOV'T CODE § 418.193.

When Bangert asked who had made the request, Paxton provided a phone number. Bangert called the number expecting that the requestor was one of the limited individuals who could request an opinion from the Office of Attorney General ("OAG") [4] and to get the request in writing, as the law required.[5] To Bangert's surprise, the person who answered was completely unfamiliar with the issue. After internal discussions, staff decided to reach out to Senator Bryan Hughes, who chaired the Senate's State Affairs committee (and, thus a proper requester), and asked him to serve as the official requestor. He agreed.

Vassar got to work in haste, as his boss had requested the opinion be complete over that same weekend. His conclusion? *Foreclosure sales could proceed and did not violate COVID restrictions*. This opinion was reached in consultation with other senior staff members.

That was not the answer that Paxton (and Nate Paul) wanted. So Paxton instructed Bangert to change the opinion and find a way to stop foreclosures. The revised opinion issued in the early hours on Sunday, August 2, 2022. The opinion advised that public foreclosure sales are subject to 10-person attendance limits and, so limited, would not comply with statutory requirements that non-judicial foreclosures be held as a "public sale."

These actions by Paxton the weekend of July 31, 2020, raised eyebrows for a number of reasons. As described below, the opinion process typically takes much longer—often over six

[4] An opinion may be requested by the governor, the head of a department of state government, a head or board of a penal institution, a head or board of an eleemosynary institution, the head of a state board, a regent or trustee of a state educational institution, a committee of a house of the legislature, a county auditor authorized by law, or the chairman of the governing board of a river authority. TEX. GOV'T CODE § 402.042(b).

[5] Each request for an opinion must be addressed to the office of the attorney general in Austin and "must be in writing and sent by certified or registered mail, with return receipt requested," or a request can be sent "electronically to an electronic mail address designated by the attorney general for the purpose of receiving requests for opinions." TEX. GOV'T CODE § 402.042(c).

months or more. At the very least, the process typically includes input from stakeholders and multiple levels of review internally.

But more alarming than the rush to issue the opinion was its intended benefactor. Public foreclosure sales across the State of Texas happen on the first Tuesday of every month. The date for public foreclosures in August 2020 was August 4th. *Up for foreclosure that month were 12 to 13 Nate Paul properties*. *In sworn discovery, Nate Paul admitted that he contacted Paxton about foreclosure sales before the opinion issued*. No surprise, then, that Paxton's senior staff believe Paxton rushed the opinion out to prevent the slated foreclosures of Nate Paul properties.

ARGUMENTS & AUTHORITIES

I. Paxton's Motion to Dismiss improperly attacks the House's decision to impeach him.

Paxton's Motion to Dismiss is nothing more than an attempt to dispute the import of the specific factual allegations set forth in the Articles of Impeachment. He does not make any legal arguments, and he does not and cannot dispute at this time whether the allegations occurred. However, whether the alleged acts rise to the level of an impeachable offense is for the Senate to decide *after* the parties finish presenting the evidence. Indeed, as set forth in the House Managers' Response to the No Evidence Summary Judgment, there is a compelling amount of evidence showing Paxton's repeated pattern of abusing the Office of the Attorney General ("OAG") to benefit his close friend and donor, Nate Paul. Thus, the Senate should not summarily dismiss any of the Articles of Impeachment.

The Texas Constitution Article XV, § 1 grants the House the sole authority to charge a person and prefer articles of impeachment to the Senate.[6] It is the House's role to determine

[6] TEX. CONST. art. XV, § 1 ("The power of impeachment shall be vested in the House of Representatives."); *see also* Record of Proceedings of the High Court of Impeachment on the Trial of O.P. Carrillo, Judge, 229th District Court, at 239.

"whether one of the people's servants has done an official wrong worthy of impeachment," and to decide "whether or not there is sufficient ground to justify the presentment of charges" to the Senate.

The Texas Constitution states that the Senate "shall" try the articles preferred by the House.[7] And as the Senate recognized in Senate Rule 13(b), the issues before the Senate are whether "the allegation in each article presented to you has been proven beyond a reasonable doubt, and if so, shall the article of impeachment be sustained which would result in removal of office."[8] As such, Paxton has no basis for asking the Senate to summarily dismiss the House's finding that (1) sufficient evidence supported preferring the Articles of Impeachment to the Senate for trial, and (2) the conduct rose to the level of impeachable offense such that the Senate should proceed to try the Articles preferred.[9] Regardless, Paxton's Motion to Dismiss lacks merit.

II. The Foreclosure Opinion was a 402 Opinion.

Paxton insists that the Foreclosure Opinion was "informal legal guidance" and was not issued under Chapter 402. This argument has no legal support and thus cannot be the basis for dismissing Article II. The sole authority to provide written advice to a legislator, as was done by the Foreclosure Opinion, is Chapter 402. Whether the Foreclosure Letter is labeled "formal" or "informal" is a distinction without a difference. The opinion was *authoritative*, contradicted both Paxton's own reopening efforts and the advice of his senior staff, and was deliberately used to

[7] *See* TEX. CONST. art. XV, § 2.

[8] Senate Rule 13(b).

[9] The House Managers have further addressed why the following complaints are improper: (1) the Articles are allegedly vague, *see* House Managers' Response to Paxton's Motion to Quash; (2) the Articles somehow lack evidentiary support, *see* House Managers' Response to Paxton's No Evidence Motion for Summary Judgment; and (3) the Articles purportedly fail to allege an impeachable offense, *see* House Managers' Response to Paxton's Request for Bill of Particulars.

benefit Nate Paul. Paxton then hid from his own staff and other officials the nefarious motive behind the opinion's issuance. And the advice Paxton rendered had the desired effect—it stopped the scheduled Nate Paul foreclosures. That is the epitome of abuse of power as charged in Article II.

Under well-established law, "the Attorney General [can] exercise[] only those powers authorized by the Constitution or statute."[10] The Attorney General's opinion writing power derives from—and is limited by—both sources.

The Texas Constitution provides:

> The Attorney General shall . . . ***give legal advice in writing to the Governor and other executive officers, when requested by them***, and perform such other duties as may be required by law.[11]

Thus, the Attorney General's *constitutional* authority to issue opinions is limited to advising "the Governor and other executive officers" and only when "requested by them." The Foreclosure Opinion did not originate from a request by the Governor or an executive officer.

The Legislature has also granted the Attorney General *statutory* authority to provide written advice. The primary source for this authority is Chapter 402 of the Government Code.[12] This chapter provides detailed procedures that must be followed in the request for, and dissemination

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[10] *City of Galveston v. State*, 217 S.W.3d 466, 470 (Tex. 2007); *see also Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) ("[T]he Attorney General can only act within the limits of the Texas Constitution and statutes, and courts cannot enlarge the Attorney General's powers."); *Dry Land & Cattle Co. v. State*, 4 S.W. 865, 867 (Tex. 1887) ("[I]n a government in which the duties of all officers, as well as their powers, are defined by written law, no power ought to be exercised for which warrant is not there found.").

[11] TEX. CONST. art. IV, § 22 (emphasis added).

[12] Other statutes also provide authority and procedures for written advice from the Attorney General. *E.g.*, TEX. GOV'T CODE § 552.011 (open records decisions); TEX. GOV'T CODE § 418.193 (opinions upon declaration of a natural disaster). None of those authorizations apply here.

of, written opinions. Paxton followed none of these protocols when issuing the foreclosure opinion. The request was not in writing. The request was not summarized for publication in the *Texas Register* so that the public could provide input on the advice, as the statute requires.[13] And the request came from a strawman requestor. Only after the request from Nate Paul, and in an effort to legitimize the request, did Paxton's office, at his direction, reach out to Chairman Hughes, who could not have known the sordid backstory.

The public relies on legal advice from the State's top lawyer. It is important that those opinions be right. And so by long-standing tradition, the OAG has internal protocols intended to ensure the accuracy of opinions, including input from stakeholders and layers upon layers of internal review. First, the request is tracked and summarized so the public and other stakeholders know of the pending request and can participate, through briefing, in the opinion process.[14] Second, the opinion is internally assigned a drafter and another attorney for peer review. Once these two attorneys are satisfied with the draft opinion, the draft runs through a handful of entire divisions: the entire Opinions Committee, other agency divisions as appropriate, the General Counsel Division, and the Executive Division. The sheer volume of attorneys who review an opinion ensures it is accurate[15] and is the reason why the Legislature allows the Office a full six

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[13] TEX. GOV'T CODE § 2002.011.

[14] In addition to publication in the *Texas Register*, TEX. GOV'T CODE § 2002.011, the OAG has a feature for the public to register to receive e-mail notification of any new opinion requests received. The Opinions Committee itself also identifies and contacts stakeholders who might be interested in participating in the process for a particular opinion.

[15] Paxton argues in his motion to dismiss that Foreclosure Opinion was "consistent with local, state, and federal orders" and attempts to defend the legal analysis in the foreclosure opinion. Perhaps the Court would have confidence in the analysis had the number of lawyers who typically review opinions reviewed this one. In any event, the accuracy of the legal analysis is irrelevant. The U.S. Supreme Court eloquently discounted the same (common) tactic of public officials facing corruption charges: "A mayor is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid. That is frequently the

months to complete the process.[16] All of this protocol was ignored in order to rush out an opinion that would benefit Nate Paul.

Prior OAG administrations have issued what they term "informal" letter opinions. As stated on the current OAG website, then Attorney General John Cornyn ended this practice 1999. As Paxton now represents to the public, "[a]ll attorney general opinions are now issued under the Attorney General's initials, i.e., Attorney General Ken Paxton's opinions would be named KP-0001, KP-0002, etc."[17] Even in the former era of informal opinions, the attorney general would track and publish those opinions in a single location. This was important because, as Paxton himself explains, the informal opinion designation "does not mean that a document is any less authoritative than one denominated by reference to the particular attorney general's initials."[18]

In truth, an opinion is an opinion.[19] And all OAG opinions are authoritative. Officeholders rely on them. Texans rely on them. And so did Nate Paul when he requested and used the opinion to his own benefit. Paxton cannot whitewash the effects of his abuse of power by slapping a label that he prefers on the legal advice he issued on August 2, 2022 for the purpose of benefitting Nate Paul. Whatever the label, his statutory and constitutional authority "to give legal advice in writing"

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defense asserted to a criminal bribery charge—and though it is *never valid in law*, it is often plausible in fact." *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 378 (1991) (internal citations omitted) (emphasis added).

[16] TEX. GOV'T CODE § 402.042(c)(2).

[17] OAG website.

[18] OAG website.

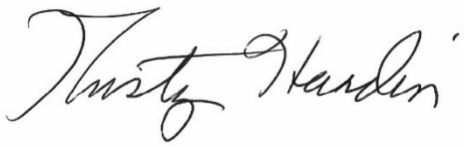
[19] TEX. GOV'T CODE § 402.042(a) ("… 'opinion' means advice or a judgment or decision and the legal reasons and principles on which it is based").

was abused, and the Senate must hold him to account by trying Article II as the Texas Constitution demands.

CONCLUSION

Paxton's motion confuses his authority to issue legitimate legal opinions with his wrongful weaponization of the process to benefit Nate Paul and himself. In Paxton's world, the fact that he used the power of his office for the benefit of a private individual—while his shocked executive staff warned him the law was not supportive—is not an impeachable offense. Paxton's worldview simply does not comport with public integrity laws. The motion should be denied and Article II tried by the Court of Impeachment as the Texas Constitution establishes.

Respectfully submitted,



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I certify that a true and correct copy of the foregoing was served on the following counsel for Paxton on August 15, 2023:

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