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

Patsy Spaw

AUG 15 2023

CLERK OF THE COURT

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

HOUSE MANAGERS' RESPONSE TO PAXTON'S
MOTION TO DISMISS ARTICLE V
(Cammack Engagement)

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

Warren Kenneth Paxton Jr. ("Paxton") filed a motion to dismiss Impeachment Article V (Cammack Engagement) ("Motion"). Below is the response to the Motion by the Texas House of Representatives Board of House Managers ("House Managers").

INTRODUCTION

Article of Impeachment V asserts that Warren Kenneth Paxton Jr. ("Paxton") misused his official powers by violating the laws governing the appointment of prosecuting attorneys pro tem. The evidence conclusively establishes the facts set forth Article V, namely that:

- Paxton engaged Brandon Cammack, a five-year criminal defense attorney with no prosecutorial experience, to intimidate and harass Nate Paul's adversaries.
- Paxton misled and manipulated Cammack into investigating a baseless complaint, during which Cammack issued 39 grand jury subpoenas.
- Paxton's engagement of outside counsel and the investigation he directed Cammack to conduct were designed to benefit Nate Paul or his businesses.

To participate in the grand jury process like Cammack did, the law requires that he serve in an official capacity. Outside Counsel to the Office of the Attorney General, without more, does not suffice. Thus, the dispute over Article V boils down to this: When Brandon Cammack was serving grand jury subpoenas to Nate Paul's adversaries, was he acting as a special prosecutor or a prosecutor pro tem?

Cammack was neither a special prosecutor nor a prosecutor pro tem. The Travis County District Attorney did not ask for OAG's assistance with an investigation, she did not grant Cammack permission to investigate, nor did she control the targets of his investigation or the investigatory powers he utilized. He was not appointed by a judge, and he did not swear an oath.

Paxton deceived Cammack, and he continues to try to deceive the public, into believing Cammack possessed legal authority when he didn't. Paxton's orchestrated a situation that caused

Cammack to perform, or attempt to perform, the duties of an attorney representing the state, with the resource available only to the state, to further the private interests of two individuals: Nate Paul and Ken Paxton.

FACTUAL BACKGROUND

In August 2019, as part of a joint investigation by the FBI and State Securities Board (the "SSB"), federal agents executed three search warrants on Nate Paul's home and businesses.[1] Shortly thereafter, Nate went to his friend, the Attorney General, for help in finding out what the feds knew and how they knew it.

In May 2020, Paxton orchestrated a lunch with Nate Paul and prosecutors from the Travis County District Attorney's Office (the "TCDAO"). Over the course of two and a half hours, the prosecutors listened to Nate Paul tell an "unbelievable" tale of "abusive, rude" and, according to Nate Paul, illegal behavior by joint task force members from the FBI, SSB, and Department of Public Safety (the "DPS") during the execution of the search warrants. To appease the Attorney General and avoid the appearance of conflicts of interest, TCDAO referred the matter back to the OAG for review—*not investigation or prosecution*. TCDAO "intend[ed] to have the OAG review the matter and determine whether or not it rose to the level of a formal criminal investigation. As far as our office was concerned, the matter was tabled on our end until further notice from the OAG."[2]

Inside the OAG, Paxton pressured David Maxwell, the Director of Criminal Law Enforcement, to meet with Paul and listen to his complaint. The first of two interviews with Paul

[1] Exhibits 21, 22, and 24.

[2] Exhibit 80.

and his attorney, Michael Wynne, occurred on July 21, 2020 and was audio and video recorded.[3] During the interview, Paul claimed a federal prosecutor in Austin altered search warrants after they were signed and issued by a federal Magistrate judge.[4] Paul's concerns were based on his belief that the metadata in the search warrants showed "changes" subsequent to the date they were signed and issued by the Magistrate. At one point, Paul "claimed that the search warrants were entirely fake." Many of Paul's complaints—if true—were beyond the scope of State law and alleged violations of the Federal Rules of Criminal Procedure.[5]

Maxwell, and Deputy Attorney General for Criminal Justice, Mark Penley, asked OAG's forensic examiners to review the documents Paul's attorney, Michael Wynne, provided. The Forensic Examiners found no evidence of nefarious activity and identified numerous explanations for the "changes" in metadata.[6] Maxwell and Penley did not find Paul's metadata theory credible and concluded that it did "not support probable cause to believe that a crime occurred under Texas state law."[7] They recommended OAG close the file.

Penley came to believe Paul "was using the OAG to create a smokescreen regarding the federal investigation" into Paul and his businesses. Penley warned Paxton:

> Paul and Wynn[e] have not been open or honest with this Agency. I believe Paul is seeking to use the name and authority of this agency to manipulate our office into conducting a criminal investigation of federal prosecutors and possibly law enforcement agents without any supporting evidence, solely for his personal benefit. … *Mr. Paul was trying to manipulate me to use my power as a senior*

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[3] Exhibits 2, 2-A. The second interview occurred on August 5, 2020. Exhibits 3, 3-A.

[4] Exhibits 2, 2-A, 3, 3-A, 86.

[5] Exhibit 97.

[6] Exhibit 91.

[7] Exhibit 97.

> *prosecutor for the Agency to conduct an investigation for his personal benefit* without providing me with all relevant facts.

Penley was adamant: Nate Paul "*does not get to direct our investigation*."[8] Paxton ignored—or was unable to comprehend—Penley's legal, ethical, and professional concerns. Frustrated that he couldn't compel his deputies to conduct an investigation they believed to be "illegal"[9] and "unethical,"[10] Paxton went behind his deputies' backs.

At the recommendation of Paul's attorney, and unbeknownst to *anyone* within OAG[11] or the TCDAO,[12] Paxton hired Brand Cammack—a five-year attorney with no prosecutorial experience[13]—as Outside Counsel engaged to "investigate" Paul's claims against the FBI, DPS, SSB, and a federal Magistrate Judge. Cammack reported to Paxton[14] and Paul.[15]

At Paxton's direction, Cammack falsely represented himself as "Special Prosecutor for the Office of the Attorney General" so that he could obtain grand jury subpoenas designed to harass and intimidate (1) one of Paul's largest creditors, (2) a court-appointed receiver controlling Paul's companies and attempting to pay their debts, (3) a charity suing Paul for fraud and demanding to see the books, and (4) federal law enforcement agents actively investigating Paul and his

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[8] Exhibit 97.

[9] Exhibit. 134.

[10] Exhibit 95.

[11] Exhibits 55, 98.

[12] Exhibit 15 at 21:9-22:19.

[13] Exhibit 110, 111.

[14] Exhibit 61, 113.

[15] Exhibit 112.

companies.[16] Cammack obtained 39 grand jury subpoenas, some of which he and Paul's attorney served together.[17]

ARGUMENTS & AUTHORITIES

An "attorney pro tem" is distinct from a "special prosecutor." On this point, the parties agree. Basically, an "attorney pro tem" is appointed by the district court, and after taking the oath of office assumes the duties of the elected district attorney. In effect, the attorney pro tem replaces the district attorney in performing germane functions of office for purposes contemplated by that appointment.[18] On the other hand, a "special prosecutor," is permitted by the elected district attorney to participate in a particular case to the extent allowed by the prosecuting attorney, without being required to take the constitutional oath of office."[19] Cammack held neither title and, at Paxton's direction, unlawfully obtained grand jury subpoenas compelling personal information about Nate Paul's adversaries.

I. Cammack was not a "special prosecutor."

Paxton claims Cammack was a "special prosecutor" appointed under Chapter 402.028(a) of the Texas Government Code.[20] Under 402.028(a), upon "the request of a district attorney … the attorney general may provide assistance in the prosecution of all manner of criminal cases,

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[16] Exhibit 82.

[17] Exhibit 6.

[18] *Stephens v. State*, 978 S.W.2d 728, 731 (Tex. App.—Austin 1998, pet. denied).

[19] *State v. Rosenbaum*, 852 S.W.2d 525, 529 (Tex. Crim. App. 1993) (Clinton, J. concurring)(emphasis omitted).

[20] Ex. 111 at OAG_SUB-00004005—06.

including participation by an assistant attorney general as an assistant prosecutor when so appointed by the district attorney … .”[21]

Here, the District Attorney did not “request” the OAG’s “assistance in the prosecution” of Nate Paul’s claims. As former First Assistant D.A. Mindy Montford explained, TCDAO did not “request” anything; it referred a matter to the OAG for “review” to determine whether to initiate “a formal criminal investigation.”[22] Cammack could not have been assisting in a “prosecution” because formal charges were not being pursued.[23]

Additionally, the District Attorney did not retain control over the management of the case. [24] “Control” for purposes of determining whether a special prosecutor improperly controls prosecution, means control of crucial prosecutorial decisions including, but not limited to, what targets of prosecution to select and what investigative powers to utilize.[25] “The rationale for requiring the district or county attorney to retain control of the prosecution is to assure that the interests of society in providing justice and a fair trial are not secondary to the interests of private parties who, in some cases, pay fees to special prosecutors.”[26] TCDAO retained no such control here. In fact, the District Attorney had no idea who Cammack was or what he doing.[27] Absent such

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[21] TEX. GOV’T CODE § 402.028(a).

[22] Exhibit 80.

[23] Exhibit 111.

[24] *Mai v. State*, 189 S.W.3d 316 (Tex. App.—Fort Worth 2006), pet ref’d n.r.e.

[25] *Hartsfield v. State*, 200 S.W.3d 813, 817 (Tex. App.—Texarkana 2006, pet. denied); *Faulder v. Johnson*, 81 F.3d 515, 517 (5th Cir. 1996).

[26] *Id*.

[27] Exhibit 15 at 21:9-22:19.

knowledge, and for all of the reasons previously discussed, Cammack was not—and could not have been—a "special prosecutor."

II. At Paxton's insistence, Cammack improperly exercised the powers of an attorney pro tem without being appointed to serve in that capacity.

An "attorney pro tem" is appointed by the district court in accordance with statutory provisions.[28] After taking the required constitutional oath of office, the appointee assumes the duties of the elected district attorney and, in effect, replaces her in performing germane functions of the office for purposes contemplated by the appointment.[29]

Here, a district court did not appoint Cammack as an "attorney pro tem." And Cammack did not take an oath of office. For Cammack to be appointed "attorney pro tem," Paxton would have had to disclose the existence, nature, and purpose of his investigation and TCDAO's position that, at this stage, a criminal investigation was not warranted.[30] Instead, Paxton directed Cammack to perform the duties of an attorney representing the state without being properly appointed and sworn. In doing so, misused his official powers as Attorney General by violating the laws governing the appointment of prosecuting attorneys pro tem.

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

The Texas Constitution Article XV, § 1 grants the House the sole authority to charge a person and prefer articles of impeachment to the Senate.[31] It is the House's role to determine

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[28] *Stephens v. State,* 978 S.W.2d 728, 731 (Tex. App.—Austin 1998, pet. denied)(citing TEX. CODE CRIM. PROC. Art. 2.07).

[29] *Id*.

[30] Exhibit 15 at 25:3-16.

[31] 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.

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."[32] Accordingly, 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.[33] Regardless, as shown, Paxton's Motion lacks merit.

II. Paxton's conduct in Article V is impeachable.

Misconduct can support impeachment whether or not it constitutes an indictable crime.[34] The Texas Supreme Court explained that "*the wrongs justifying impeachment need not be statutory offenses or common-law offenses, or even offenses against any positive law*."[35]

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[32] Senate Rule 13(b).

[33] 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.

[34] *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS xii, 70-71 (1974) (noting that history shows that "indictable crimes are not a prerequisite to impeachment."); CHARLES L. BLACK, JR. & PHILLIP BOBBITT, IMPEACHMENT: A HANDBOOK, NEW EDITION 35 (2018) (concluding that based on the language of the U.S. Constitution, impeachable offenses should include "those offenses which are rather obviously wrong, whether or not 'criminal,' and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power their perpetrator.").

[35] *Ferguson v. Maddox*, 263 S.W. 888, 892 (Tex. 1924).

Impeachment is not meant to punish the wrongdoer. Rather, it seeks to protect the State and its citizens against conduct that undermines the integrity of the office, disregards constitutional duties and oaths of office, abuses government process and power, and adversely impacts the system of government.[36] The conduct alleged in Article V (Cammack Engagement) is precisely the type that the Framers were concerned about when they included impeachment in the Constitution:

> In framing the impeachment provisions, the concern of the framers was not limited to crimes of which private citizens and public officials could be equally guilty. Had that been their concern, impeachment might not have been necessary, as such offenses could be handled by the ordinary courts. What the framers seemed greatly concerned about during their discussion of impeachment was the abuse or betrayal of a public trust, offenses peculiar to public officials.… The debates reveal that the framers were heavily motivated in fashioning the impeachment provisions by the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office. Offenses of this character, involving as they do the highest officers of the country, required a special forum."[37]

The conduct alleged in Article V clearly rises to the level of impeachable offense and Paxton's attempts to explain it away cannot support the Senate summarily dismissing the Article.

CONCLUSION

For these reasons, the House Managers request that the Motion to Dismiss Article V be denied.

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[36] Report of the Texas House Select Committee on Impeachment at 8, July 23, 1975.

[37] John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 53 (1970).

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CERTIFICATE OF SERVICE

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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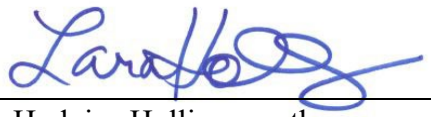

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