

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

*Aetsy Daw*

AUG 15 2023

CLERK OF THE COURT

IN THE MATTER OF  
WARREN KENNETH  
PAXTON, JR.

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§

HOUSE MANAGERS' RESPONSE TO PAXTON'S  
MOTION TO DISMISS ARTICLE VII AND XV

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

Warren Kenneth Paxton Jr. (“Paxton”) filed a motion to dismiss Impeachment Articles VII and XV (Whistleblower Investigation and Report) (“Motion”). Below is the Response to the Motion by the Texas House of Representatives Board of House Managers (“House Managers”).

The first draft of the internal investigative report states that “[t]his investigation is broad in nature in that it seeks to find answers to questions with a *focus on what the actual evidence and documents show.*”<sup>1</sup> Not surprisingly, this language never appeared again in any subsequent draft of the report.<sup>2</sup> The final report certainly did not contain it.<sup>3</sup> Why? Because this “investigation” was *never about the truth* of the complaints of the employees that Paxton fired for reporting him to law enforcement (the “Whistleblowers”). The goal of both the investigation and report was to remain “loyal” to Paxton, protect his interests, and shred the credibility of the Whistleblowers. In directing this effort, Paxton misused public resources and created false statements in official records, which is impeachable conduct. Paxton’s Motion must be denied.

**INTRODUCTION**

Article VII states that Paxton misused public resources by directing employees of the Office of Attorney General (“OAG”) to conduct a sham investigation into the Whistleblowers’ complaints and to create and publish a lengthy written report containing false or misleading statements in Paxton’s defense (the “Whistleblower Report”).<sup>4</sup> Article XV states that Paxton made

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<sup>1</sup> See Exhibit 147, 12.4.20 Initial Draft Report (emphasis added).

<sup>2</sup> See Exhibit 148, 12.21.20 Revised Draft Report.

<sup>3</sup> See generally Exhibit 108, Report on the Investigation into Complaints Made and Actions Taken by Former Political Appointees of the Texas Attorney General.

<sup>4</sup> Paxton Articles of Impeachment, Article VII.

false and misleading statements in official records to mislead both the public and public officials, specifically by making or causing to be made multiple false or misleading statements in the Whistleblower Report.<sup>5</sup>

Paxton moves to dismiss these Articles because allegedly (1) they do not describe impeachable conduct; (2) the conduct at issue does not violate Texas law; and (3) they do not provide adequate notice of the false statements in the Whistleblower Report. Each argument fails as explained below.

### ARGUMENTS & AUTHORITIES

#### **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.<sup>6</sup> It is the House’s role to determine “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.”<sup>7</sup> 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

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<sup>5</sup> Paxton Articles of Impeachment, Article XV.

<sup>6</sup> 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, 229<sup>th</sup> District Court](#), at 239.

<sup>7</sup> [Senate Rule 13\(b\)](#).

(2) the conduct rose to the level of impeachable offense such that the Senate should proceed to try the Articles preferred.<sup>8</sup> Regardless, Paxton’s Motion lacks merit.

## **II. Paxton’s act of creating a false and self-serving “investigative” report as described in Articles VII and XV is impeachable conduct.**

Paxton ignores that legally permissible acts are impeachable when performed with an improper purpose that results in a private benefit, whether to the officeholder or another. Misconduct can support impeachment whether or not it constitutes an indictable crime.<sup>9</sup> 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.*”<sup>10</sup>

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.<sup>11</sup> The conduct alleged in Articles VII (conducting a sham investigation and writing

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<sup>8</sup> 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.

<sup>9</sup> *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.”).

<sup>10</sup> [\*Ferguson v. Maddox\*](#), 263 S.W. 888, 892 (Tex. 1924).

<sup>11</sup> [Report of the Texas House Select Committee on Impeachment](#) at 8, July 23, 1975.

a report with false statements) and XV (making false statements to state officials) 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.”<sup>12</sup>

Indeed, similar to O.P. Carrillo, who was removed from office by the Senate for conspiring with others “to use for his personal benefit materials and supplies owned by Duval County and other governmental entities, which he was not entitled to receive,”<sup>13</sup> Articles VII and XV allege that Paxton misused the OAG. As such, the conduct alleged in Articles VII and XV clearly rises to the level of impeachable offense.

### **III. The Whistleblower Report was not an “independent” investigation of the Whistleblowers’ claims against Paxton; it was an effort to discredit them using any means necessary, including lies.**

Paxton claims that the Whistleblower Report was the result of “OAG’s painstaking work” investigating the complaints with an “earnest inquiry into the truth.” That is absurd. The investigation and the Whistleblower Report were nothing more than a concerted effort to defend Paxton and smear the Whistleblowers, both at the expense of the truth.

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<sup>12</sup> John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, [39 FORDHAM L. REV. 1](#), 53 (1970).

<sup>13</sup> See [Record of Proceedings of the High Court of Impeachment on the Trial of O.P. Carrillo, Judge, 229<sup>th</sup> District Court](#), at 140-42.

*First*, the question a non-conflicted employer would have investigated is whether *Paxton* had engaged in misconduct by blatantly retaliating against the Whistleblowers for reporting his misconduct to law enforcement officers. Instead, Paxton’s handpicked legal team spent significant time and resources trying to prove that the Texas Whistleblower Act (“Whistleblower Act” or “Act”)<sup>14</sup> did not apply to Paxton as an elected official. In other words, Paxton’s loyal legal team never addressed whether Paxton violated the law by his conduct, which he did.<sup>15</sup> They focused instead on proving that he was above the law. He is not.<sup>16</sup>

*Second*, Paxton’s handpicked investigative team did not search for the truth regarding the Whistleblowers’ complaints. Instead, Paxton’s loyal investigators searched for and pretended to find good cause for Paxton’s blatant retaliation against the Whistleblowers for their alleged misconduct.<sup>17</sup> For example, the interview notes show that these alleged independent investigators asked ridiculous questions like whether the Whistleblowers were “loyal” to Paxton.<sup>18</sup> And the documents clearly show that Paxton was consulted throughout this “independent investigation.”<sup>19</sup>

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<sup>14</sup> [TEX. GOV’T CODE ANN. § 554.001](#) *et seq.*

<sup>15</sup> See [Office of the Attorney Gen. of Tex. v. Brickman](#), 636 S.W.3d 659, 670–75 (Tex. App.—Austin 2021, pet. abated) (rejecting identical arguments that the Whistleblower Act did not apply to Paxton as an elected official).

<sup>16</sup> See [id.](#)

<sup>17</sup> See generally Exhibit 108, Report on the Investigation into Complaints Made and Actions Taken by Former Political Appointees of the Texas Attorney General. The first line of the Whistleblower Report makes clear that the purpose was to investigate the Whistleblowers, not Paxton.

<sup>18</sup> See Exhibit 76, 11.16.20 Notes from Webster Meeting with Vassar, HBOM00186011; See Exhibit 75, 11.2.20 Notes from Webster Meeting with Penley, HBOM00186014.

<sup>19</sup> See, e.g., Exhibit 78, 12.23.20 Email from Webster, HBOM00019066 (circulating a draft of the Whistleblower Report to discuss “substantive changes” with Paxton).

*Third*, the Whistleblower Report was also plainly prepared to exonerate Paxton. One obvious example is the repeated reference to the Whistleblowers as “political appointees,” rather than as only “employees” as the initial draft report referenced them.<sup>20</sup> This was done to advance Paxton’s defense that the Whistleblower Act did not allegedly apply to his blatant retaliatory actions against his “political appointees.”<sup>21</sup>

*Fourth*, and similarly, the Whistleblower Report contained numerous outright lies to discredit both the Whistleblowers and their complaints. The lies included not only false factual statements,<sup>22</sup> but also false statements of Texas law.<sup>23</sup> These are not merely “petty disputes” or “trifling disagreements” as Paxton grossly mischaracterizes them.

*Fifth*, for the false proposition that Paxton owed no legal duties to the Whistleblowers, Paxton’s Motion repeatedly cites cases in which an at-will employee asserts a common law claim not recognized under Texas law against a private employer. None of these cases are relevant to the issues here. The Whistleblowers did not claim that Paxton was liable under Texas common law

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<sup>20</sup> Compare Exhibit 108, Report on the Investigation into Complaints Made and Actions Taken by Former Political Appointees of the Texas Attorney General with Exhibit 147, 12.4.20 Initial Report, HBOM00025478.

<sup>21</sup> See *Brickman*, 636 S.W.3d at 670–75 (arguing that Paxton was free to choose and dismiss the Whistleblowers at will because they were political appointees).

<sup>22</sup> See, e.g., Exhibit 108, Report on the Investigation into Complaints Made and Actions Taken by Former Political Appointees of the Texas Attorney General, at 17 (falsely claiming that “Mateer agreed with AG Paxton that it was appropriate to hire outside counsel” to investigate Paul’s claims when Mateer did not); 8 (falsely claiming that Penley “misled the 460th Criminal District Court”); and 5 (falsely claiming that Paxton’s involvement in the Mitte Foundation lawsuit was adverse to Paul, when it was in fact directly to Paul’s benefit).

<sup>23</sup> See, e.g., Exhibit 108, Report on the Investigation into Complaints Made and Actions Taken by Former Political Appointees of the Texas Attorney General, at 5 (falsely claiming that his actions were “in line with his required duties and legal obligations” when, in fact, he violated his duty under Texas law to protect the Mitte Foundation); and 5–6 (falsely asserting that Cammack had authority to act as a Special Prosecutor under Texas law when he did not).

for intentionally inflicting emotional distress on them during the investigation of their complaints.<sup>24</sup> Nor did they assert common law negligence claims against Paxton for an inadequate, reckless, or even malicious investigation or investigative report.<sup>25</sup> Rather, the Whistleblowers asserted their *statutory* right to be free from retaliation by their state governmental employer because they made a good faith report to law enforcement about numerous violations of law.<sup>26</sup> The Whistleblower Act was enacted for exactly this purpose.

In the end, the House did not impeach Paxton “because his agency conducted an internal review of his employees” or for “publish[ing] a report that includes legal conclusions with which some persons disagree.” The House impeached Paxton because he misused state property in violation of the law by directing OAG to conduct a sham investigation and issue a false report.<sup>27</sup> And the evidence fully supports that he did both.<sup>28</sup>

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<sup>24</sup> See [Creditwatch, Inc. v. Jackson](#), 157 S.W.3d 814, 817–18 (Tex. 2005) (refusing to recognize a claim for intention infliction of emotional distress for an at-will employee who alleged sexual harassment).

<sup>25</sup> See [Tex. Farm Bureau Mut. Ins. Companies v. Sears](#), 84 S.W.3d 604, 605 (Tex. 2002) (deciding the issue of “whether an insurance company owes its at-will independent agent a common-law duty of ordinary care in investigating the agent’s alleged misconduct[.]”).

<sup>26</sup> See Exhibit 125, Second Amended Petition.

<sup>27</sup> State law limit the use of state property, including state employee time, to state purposes. See TEX. CONST. [art. III, § 51](#), [art. XVI, § 6](#); [TEX. GOV’T CODE § 2203.004](#).

<sup>28</sup> Paxton’s continued claims that he does not have notice of the allegations against him are without merit. As set forth in the House Managers’ Response to the Motion to Quash and the Request for Bill of Particulars, the Articles and the hearings in the House provide him more than sufficient notice. Moreover, Paxton cannot ask the Senate to review how the House chose to prefer the Articles of Impeachment.



**CONCLUSION**

The upcoming trial is not about holding a private employer liable for negligently investigating an employee's complaint. This trial is about Paxton's deliberate manipulation of the process to benefit himself and mislead the public. His Motion must be denied.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served on the following counsel  
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