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 OR HOLD IN ABEYANCE ARTICLES XVI-XX

(Conspiracy, Misappropriation of Public Resources, Dereliction of Duty, Unfitness for Office, Abuse of Public Trust)

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

The arguments that Warren Kenneth Paxton Jr. ("Paxton") makes in his Motion to Dismiss or Hold in Abeyance Articles XVI through XX ("the Motion") substantively mirror, in many respects, his Motion to Quash and Request for Bill of Particulars. The Texas House of Representatives Board of Managers ("House Managers") refuted these arguments in the responses to those filings, and they incorporate those responses here.

Paxton's "vagueness in the indictment" arguments morph, in this Motion, to a new argument about how the Senate will be charged on the various Articles of Impeachment ("Articles"). Specifically, Paxton claims Articles XVI-XX ("the Challenged Articles") are "unconstitutionally aggregate" and moves to dismiss on those grounds. In a familiar refrain throughout many of his motions, Paxton attempts to graft complex (and inapplicable) aspects of criminal procedure onto these proceedings. Again, Paxton's arguments reflect a fundamental misunderstanding of the nature of the proceedings and the role of the Senate. This Motion should be denied.

INTRODUCTION

Over a century ago, the Texas Supreme Court cautioned that the ultimate purpose of an impeachment trial is not to punish the offender, but to protect the State.[1] The Court has likewise cautioned against any attempt to establish required "elements" for what constitutes impeachable conduct.[2] In other words, the Senate has the power to determine what is impeachable conduct and can do so in a way that it alone deems necessary to protect the State from wrongdoing.

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[1] *Ferguson v. Maddox*, 2d63 S.W. 888, 889 (Tex. 1924); *see also* *Ferguson v. Wilcox*, 28 S.W.2d 526, 536 (Tex. 1930).

[2] *Ferguson v. Maddox*, 263 S.W. at 892 ("[T]hese offenses cannot be defined, except in the most general way.").

Ignoring this fundamental precept of constitutional impeachment law, Paxton entices the Senate down a side-lane of complicated criminal procedure called "the Rule of Unanimity."[3] Equally treacherous would be a journey down a similar concept in Texas civil procedure as it relates to an award of punitive damages. Neither is appropriate, as it is well-settled that impeachment is neither criminal nor civil. And there is no need to stray from the path. The Senate has the authority to handle any of these issues during its deliberations. For now, it can confidently deny this Motion, as the issue raised is simply not a ground for dismissing or holding in abeyance the Challenged Articles.

BACKGROUND EXAMPLE

To assist in understanding what Paxton is requesting with his "unconstitutional aggregation" theory, an example from one of the Challenged Articles is helpful. Article XVIII charges Paxton with "Dereliction of Duty," *to wit*, "violating the Texas Constitution, his oaths of office, statutes, and public policy against public officials acting contrary to the public interest by engaging in acts described in one or more articles." Prior Articles also charge Paxton with Disregard of Official Duty: Article I (Protection of Charitable Organization); Article 2 (Abuse of Opinion Process); Article 3 (Abuse of Open Records Process); Article 4 (Misuse of Official Information); and Article 5 (Engagement of Cammack).

Paxton's position is that to sustain the impeachment on Article XVIII, two-thirds of the Senate would have to agree on a specific predicate act that would serve as a basis for their vote. In other words, if 21 Senators vote to sustain Article XVIII but have differing factual predicates in mind—say, 4 Senators believe he failed to protect charitable organizations; 4 believe he abused

[3] In its simplest form, this means that the jury must agree "upon a single and discrete incident that would constitute the commission of the offense alleged" but the jury is not required to agree "about the specific manner and means of how the offense was committed."

the opinion process; 4 believe he abused the open-records process; 4 believe he misused official information; 5 believe he abused his office by engaging Cammack—then, according to Paxton, the vote to sustain would be an "unconstitutional" outcome. More astounding, his position is that the *mere possibility* of that outcome requires immediate dismissal of the Challenged Articles. Paxton's position is, to put it bluntly, absurd.

As detailed below, the Senate is not a judicial court with a separate judge and a jury bound by procedural rules in the civil or criminal codes. An impeachment proceeding is its own tribunal, both judge and jury,[4] bound only by the Constitution and the rules it sets for itself. The Senate has the authority to deliberate on the Articles as it so chooses. And Articles XVI-XX offer the Senate the opportunity to protect the public from Paxton's myriad of wrongdoings as it sees fit. The relief Paxton seeks (dismissal)[5] is both unprecedented and the antithesis of the Senate's constitutional obligations to try the impeachment articles.

[4] The unique role of Senators in an impeachment trial was discussed in the Clinton Impeachment, and ultimately endorsed by Chief Justice John Roberts.

[5] The alternative request in Paxton's motion is to hold these matters in abeyance. As shown below, the matter presented is one to be addressed, if at all, in the Senate's deliberation and not by dismissal or abeyance.

ARGUMENTS & AUTHORITIES

I. Impeachment trials are neither criminal nor civil proceedings, and the Senate has the constitutional authority to determine how to conduct this trial and its deliberations.

The nature of impeachment proceedings bears repeating.[6] Impeachment is not a criminal or civil proceeding.[7] It is uniquely political—not in the sense of party affiliation, but as an action by the representatives of the people challenging official actions that are contrary to the public interest.[8] Even though the Senate sits as a "court" for purposes of impeachment, it is not acting as a judicial court, and the Senate is not a typical jury.[9]

The nature of impeachment grants the Senate leeway in how it conducts its proceedings. "Each house is invested with independent responsibilities and duties, and *is the sole judge of its*

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[6] *See* House Manager's Response to Motion to Quash.

[7] *See* *Ferguson v. Maddox*, 263 S.W. 888, 889 (Tex. 1924) ("Said judgment and impeachment proceedings constituted a quasi-criminal action, . . ."); *Mecham v. Gordon*, 751 P.2d 957, 963 (Ariz. 1988) ("Trial of impeachment articles in the Senate is not a criminal proceeding.… It is neither civil nor criminal in nature."). *See also* BERGER, *supra* at xii; Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framer's Intent*, 52 MD. L. REV. 437, 445-54 (1993) (noting that during the first impeachment in the U.S. Senate after the Constitution was adopted, the senators debated whether the proceedings were criminal in nature such that rights afforded criminal defendants should be given to a person subject to impeachment. Many of the senators had participated in drafting the U.S. Constitution and they overwhelmingly reject the theory that an impeachment was criminal in nature and thereby refused to grant Sixth Amendment rights to the person being tried for impeachment).

[8] THE FEDERALIST NO. 65 (Alexander Hamilton); *Hastings v. United States Senate*, 716 F. Supp. 38, 41-42 (D.D.C. 1989), *affirmed without opinion*, 887 F.2d 332 (1st Cir. 1989) ("The Framers understood that impeachment trials were fundamentally political …."); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 5 (1989) ("[I]mpeachment is by nature, structure, and design an essentially political process. James Wilson, a Constitutional Convention delegate, Supreme Court Justice, and constitutional scholar, explained that impeachments are 'proceedings of a political nature ... confined to political characters,' charging only 'political crimes and misdemeanors,' and culminating only in 'political punishments.'").

[9] *Ritter v. United States*, 84 Ct. Cl. 293, 299 (U.S. 1936).

own rules of procedure…."[10] This authority includes the authority to determine for itself how the body will deliberate on the Articles of Impeachment. Paxton certainly cannot dictate how the Senate will conduct its deliberations, much less insist that Articles be dismissed or held in abeyance based on a presumption that it will do so ineffectively.

II. There is no need to "silo" Paxton's wrongdoing.

The Challenged Articles (XVI-XX) are each independent grounds for impeachment. In the unlikely event the Senate, after hearing all the evidence presented at trial, declined to sustain any of Articles I through XV, individually, it could still determine that Paxton's conduct is impeachable under the Challenged Articles.

Understanding how Paxton's wrongdoing came to light within his own agency makes this point and, thus, is worth emphasizing. The senior staff that ultimately reported Paxton to law enforcement for perceived bribery and abuse of office were each from different divisions within a legal office comprised of 4,000 employees in 38 divisions. As disturbing Nate-Paul-related events played out in various divisions, employees in their respective silos expressed concern to their management team. But very few leaders in OAG had the full picture of what was happening throughout the agency.

According to witnesses, these divisional silos converged on September 28, 2020. This was the Monday that the first of Brandon Cammack's subpoenas was received. As senior staff attempted to figure out why a third-party was purporting to be a special prosecutor, conversations began. The grain in each division's silo began to drop and, for the first time, key advisors were

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[10] *Terrell v. King*, 14 S.W.2d 786, 789 (Tex. 1929) (emphasis added); see also *Ferguson v. Maddox*, 263 S.W. at 890 ("Each [house of the Legislature], in the plainest language, is given separate plenary power and jurisdiction in relation to matters of impeachment."); *see also* *Nixon v. United States*, 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (concluding that the Senate has the sole discretion to choose impeachment procedures).

stunned to see the full bulk of Paxton's corruption. With that voluminous mess in full sight, the senior staff felt they had no choice but to report to law enforcement and confront their boss.

Fortunately for the Senate, the siloed walls of Paxton's corruption have fallen and the Senate will see the full scope of his wrongdoing. As it deliberates, the Senate, individually or collectively, may decide to filter presented evidence to only a particular Article. But that is not how the evidence from the House Managers will be presented. It will be presented as the complete story, overlapping each grain of corruption so the Senate can see throughout the trial what those high-level advisors suddenly connected on that grim September Monday morning.

The Articles of Impeachment were drafted to allow the Senate to view the evidence through either prism, as is the Senate's prerogative. While the Challenged Articles are slightly broader grounds for impeachment, that breadth was purposeful. While still tied to the allegations in the prior articles, the Challenged Articles allow the Senate to respond to Paxton's pattern of unlawful conduct. This pattern is itself an impeachable offense under one or more of Articles XVI-XX.

This approach in no way undermines the Senate Rule that Articles are "not divisible."[11] Voting will still occur separately on each article. Following deliberations, each article will be read and put to the written vote: "*Shall this article of impeachment be sustained?*" The article will only be sustained if two-thirds of the Senate agree that the House Managers proved beyond a reasonable doubt that the evidence supports that Article.

CONCLUSION

The Senate understands that the impending impeachment trial is neither criminal nor civil. It spent considerable time drafting, debating, and then adopting its own rules of procedure for the trial. This included Rules on the Final Question presented to the Senate. The Rules require only

[11] Senate Rule 28.

that the Articles be indivisible—*i.e.*, votes presented and taken on each article separately. The Rules require nothing more. The issue raised is not a ground for dismissal; it is a decision to be made, if at all, during deliberations. The Motion should be denied.

Respectfully submitted,

Rusty Hardin
State Bar No. 08972800
Lara Hudgins Hollingsworth
State Bar No. 00796790
Jennifer Brevorka
State Bar No. 24082727
Daniel Dutko
State Bar No. 24054206
Leah M. Graham
State Bar No. 24073454
Armstead Lewis
State Bar No. 24102089
Aisha Dennis
State Bar No. 24128655
RUSTY HARDIN & ASSOCIATES, LLP
1401 McKinney Street, Suite 2250
Houston, Texas 77010
Telephone: (713) 652-9000
Facsimile: (713) 652-9800
rhardin@rustyhardin.com
lhollingsworth@rustyhardin.com
jbrevorka@rustyhardin.com
ddutko@rusthardin.com
lgraham@rustyhardin.com
alewis@rustyhardin.com
adennis@rustyhardin.com

and

Dick DeGuerin
State Bar No. 05638000
Mark White, III
State Bar No. 24008272
DeGuerin and Dickson
1018 Preston
Houston, Texas 77002
Telephone: 713-223-5959
ddeguerin@aol.com

and

Harriet O'Neill
State Bar No. 00000027
Law Office of Harriet O'Neill, PC
919 Congress Ave., Suite 1400
Austin, Texas 78701
honeill@harrietoneilllaw.com

and

Erin M. Epley
State Bar No. 24061389
Epley Law Firm
erin@epley-law.com

and

Mark E. Donnelly
State Bar No. 24032134
Parker, Sanchez, & Donnelly, PLLC
700 Louisiana, Suite 2700
Houston, Texas 77002
Mark@psd.law

and

Donna Cameron
State Bar No. 03675050

and

Terese Buess
State Bar No. 03316875
Buesster@gmail.com

and

Ross Garber
D.C. Bar No. 438838
The Garber Group LLC
1300 I Street, N.W., Suite 400E
Washington, D.C. 20005
rgarber@thegarbergroup.com

and

Lisa Bowlin Hobbs
State Bar No. 24026905
Kuhn Hobbs PLLC
3307 Northland Drive, Suite 310
Austin, Texas 78731
lisa@kuhnhobbs.com

Counsel for the Texas House of Representatives Board of Managers

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:

Judd E. Stone II (judd.e.stone@proton.me)
Christopher D. Hilton (christopher.d.hilton@proton.me)
Allison M. Collins (allison.collins23@proton.me)
Amy S. Hilton (amy.s.hilton@proton.me)
Kateland R. Jackson (kateland.jackson@proton.me)
Joseph N. Mazzara (joseph.mazzara86@proton.me)
Dan Cogdell (dan@cogdell-law.com)
Tony Buzbee (tbuzbee@txattorneys.com)

Lara Hudgins Hollingsworth