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 CHALLENGING JURORS FOR CAUSE

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

Warren Kenneth Paxton, Jr.'s ("Paxton") motion seeking to challenge jurors for cause ("the Motion") is effectively asking the Senate to amend Senate Resolution No. 35 ("the Senate Rules") governing his impeachment. Specifically, he is asking the Senate to provide him the opportunity to disqualify selective Senators from participating in the impending impeachment trial. And similar to his other motions, he now urges that the Senate apply a standard for disqualification that two months ago Paxton rejected as "unthinkable," "impossible, unconstitutional, and inappropriate[.]"[1] Paxton was right then and wrong now. Despite Paxton's willingness to flip positions based on what he thinks will benefit him most, there is no reason for the Senate to follow suit.

ARGUMENTS & AUTHORITIES

I. Paxton seeks to amend the Senate Rules for impeachment.

Although framed as a motion challenging jurors for cause and, alternatively, to voir dire three Senators, Paxton's plea to disqualify those Senators for alleged bias and prejudice is, in effect, a motion to amend the Senate Rules to adopt procedures and a standard the Senate previously considered and properly rejected.

On June 15, 2023, the Texas House of Representatives Board of House Managers ("House Managers") wrote to the Senate Rules Committee. They noted: "[t]here is no law, statute, or rule within the impeachment trial context regarding when or how a Senator is disqualified or may be recused" the House Managers identified two juror-disqualification standards used in challenges for cause: (1) if a juror has a bias or prejudice in favor of or against the defendant; or (2) if the

[1] *See* June 16, 2023, Letter from Christopher Hilton to Lt. Gov. Dan Patrick and Senators of the Rules Committee *re*: Response to House Board of Managers' Memorandum Regarding Senate Procedures, at 5 ¶ 17.

juror is related within the third degree of consanguinity or affinity.[2] Without seeking adoption of those standards, the House Managers asked the Rules Committee to "address the issue of when a Senate member is disqualified or subject to recusal."[3]

Paxton responded that such standards are "impossible, unconstitutional, and inappropriate" for disqualifying senators.[4] He further argued that adopting such a standard would "require a voir dire process as regards every member of the Senate" and decried that possibility as "unthinkable."[5]

The Senate voted not to adopt any rule permitting (1) voir dire of Senators to suss out bias or prejudice or (2) challenges for cause for bias or prejudice.[6] Instead, Senate Rule 31 properly adopted the disqualification standard in Article III, § 22 of the Texas Constitution—"[a] member who has a personal or private interest in any measure or bill, proposed, or pending before the Legislature, shall disclose the fact to the House, of which he is a member, and shall not vote thereon"—and ruled that a member of the Senate who is the spouse of a party to the court of impeachment has a conflict under that provision.[7]

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[2] June 15, 2023, Letter from House Board of Managers to Members of the Texas Senate Special Committee on Rules of Procedure for Impeachment Trial *re*: Information Regarding Senate Procedures for an Impeachment Trial, at 3-4 ¶ 17.

[3] *Id.* at 4 ¶ 17.

[4] *See* June 16, 2023, Letter from Hilton to Lt. Gov. Dan Patrick and Senators of the Rules Committee, at 4 ¶ 17.

[5] *See id.*

[6] Tex. S. Rule 17, S. Res. 35, 88th Leg., 1st C.S. (2023) ("Senate Rules").

[7] Senate Rule 31. During President Clinton's impeachment trial, a Senator objected to a house manager referring to the senators as "jurors," because senators are not like regular jurors. The Senator noted several distinctions between senators acting as an impeachment court and jurors in a judicial case. The Chief Justice sustained the objection. https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/harkintext011599.htm

Having prevailed and defeated the adoption of voir dire and challenges for cause using a bias-or-prejudice standard, Paxton refuses to take the Senate's "yes" for an answer. In an about face, he now seeks to use those previously rejected procedures and standard to challenge three Senators from serving as jurors. In effect, Paxton is asking the Senate to reconsider and amend the Rules selectively for his sole benefit. Again, seeking special treatment.[8]

The Senate should reject Paxton's implicit request to amend the Rules. The Senate spent a considerable amount of time and effort crafting a fair and balanced framework to try the Articles of Impeachment preferred by the House of Representatives ("House"). Paxton should be required to play by the existing Rules, which omitted voir dire and challenges for cause as he insisted. As shown below, permitting voir dire and challenges for cause using the bias-or-prejudice standard he proposes is inappropriate and unnecessary for Paxton to receive an impartial trial as required by Texas Constitution, Article XV, § 3.

II. The Senate should not permit Paxton to disqualify Senators and prevent them from fulfilling their constitutional obligation to try the charges preferred by the House.

A. Voir dire and bias-or-prejudice challenges for cause are inappropriate.

It is well recognized that an impeachment trial is neither criminal nor civil.[9] For that reason, voir dire bias-or-prejudice challenges are unworkable and inappropriate in an impeachment trial. As the preeminent impeachment scholar Charles Black, put it:

> It must almost aways be the case that many senators find themselves either definitely friendly or definitely inimical to the [impeached party]. In an ordinary

[8] Senate Rule 7 ("The rules may be amended on the vote of two-thirds of the members of the court present and eligible to serve as jurors ….").

[9] *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* House Managers' Response to Paxton's Motion to Quash the Articles of Impeachment.

> judicial trial, persons in such a position would of course be disqualified to act, whether as judges or as jurors. It cannot have been the intention of the framers that this rule apply in impeachments for its application would be absurd; a great many senators would inevitably be disqualified by it, and it might easily happen that trial would be by a quite small remnant of the senate.[10]

Similarly unworkable and inappropriate is Paxton's attempt to conduct "targeted" voir dire of Senators Jose Menedez, Roland Gutierrez, and Nathan Johnson. As Paxton previously conceded, if he is allowed to voir dire Senators, the House Managers may do so as well.[11] Then "both sides would require a voir dire process as regards every member of the Senate[,]" which Paxton accurately described as an "unthinkable possibility[.]"[12]

An impeachment trial is a solemn event. But it would become a circus if voir dire of individual Senators is permitted. It would wholly consume the limited time allotted for the trial. Paxton cites no historical precedent for voir dire of Senators—targeted or otherwise—and the House Managers are similarly unaware of any instance in which Senators have undergone voir dire. The only authority found on this point held that Senate rules that did not permit voir dire of Senators would ***not*** make an impeachment trial "unfair in any sense."[13]

B. Voir dire and bias-or-prejudice challenges are unnecessary.

Voir dire and challenges for cause using a bias-or-prejudice standard are not only inappropriate in an impeachment trial, but they are also unnecessary. The Texas Constitution

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[10] CHARLES L. BLACK, JR. & PHILLIP BOBBITT, IMPEACHMENT: A HANDBOOK, NEW EDITION 12 (2018).

[11] *See, e.g.*, Jonathan Tilove, *Bryan Hughes on Paxton: 'Ken is squeaky clean, he's a straight shooter',* Austin American-Statesman, Oct. 12, 2016 updated Sept. 26, 2018.

[12] June 16, 2023, Letter from Hilton to Lt. Gov. Dan Patrick and Senators of the Rules Committee, at 5 ¶ 17.

[13] *Mecham*, 751 P.2d at 963.

already provides built-in protections preventing bias or prejudice from affecting the outcome of an impeachment trial, and no authority requires them.

First, when the Senate is sitting as a court of impeachment, the Texas Constitution requires Senators to swear an oath that they will "impartially . . . try" the impeached party.[14] In furtherance of that directive, the Senate adopted Rule 19(b), which requires each Senator who is eligible to serve as a juror to take the following oath:

> I do solemnly swear or affirm that I will impartially try Warren Kenneth Paxton, Jr., Attorney General of Texas, upon the impeachment charges submitted to be by the House of Representatives and a true verdict render according to the law, and the evidence, so help me God.[15]

That oath will "impress upon [Senators] the solemnity of their duty[]"[16] and morally commit them publicly and before God to impartially try Paxton. The taking of the oath marks an important shift, when Senators take on a different role and transition from politician to juror.[17]

The oath taken by each Senator guards against the natural biases inherent in a trial before a legislative body and avoids the need for applying unworkable procedures and standards from courts of law—like voir dire and challenges—into an impeachment trial:

> The remedy [to the problem that senators may naturally find themselves favorably or unfavorably disposed towards the impeached party] has to be in the conscience of each senator who ought to realize the danger [of bias] and try as far as possible to divest himself of all prejudice. I see no reason why this cannot produce a satisfactory result.[18]

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[14] TEX. CONST. art. XV, § 3.

[15] Senate Rule 19(b).

[16] TEX. CONST. art. XV, § 3 interp. commentary.

[17] BLACK, *supra*, at 10.

[18] *Id*. at 12.

Paxton vigorously agreed with this two months ago when he informed Lieutenant Governor Patrick and the Senators of the Rules Committee that the "Attorney General has great confidence that each Senator will take and honor this oath."[19] This was no throwaway line. Paxton further explained that "the Attorney General trusts and expects" that "each Senator" would, as "the Constitution requires[,]" "set aside personal or partisan interest and take an oath to act impartially," "listening to the evidence and setting aside everything other than their legal duty."[20]

But that was then, and this is now. And now, Paxton asserts that three of those Senators cannot be trusted to hear the evidence, perform their legal duty, and honor their oaths, and are so biased and prejudiced against him they must be disqualified from serving as jurors. In reaching this conclusion, Paxton presumes without evidence that Senators Jose Menedez, Roland Guttierrez, and Nathan Johnson will not honor their oaths to impartially try him.[21] This baseless affront to these three Senators demeans the Senate as a whole and undermines its reputation as *the* deliberative body capable of providing a fair impeachment trial:

> Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in its own situation, to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers.[22]

Paxton's attack on the honor of these targeted Senators should fall on deaf ears in the Senate.

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[19] June 16, 2023, Letter from Christopher Hilton to Lt. Gov. Dan Patrick and Senators of the Rules Committee, at 4 ¶ 17.

[20] *Id.* at 5 ¶ 17.

[21] Paxton's lack of "evidence" is discussed below.

[22] THE FEDERALIST NO. 65 (Alexander Hamilton) (internal capitalization omitted).

Regular "[j]urors are presumed to follow their oath[s]."[23] Senators acting as jurors in an impeachment trial are entitled to the same presumption. Thus, Paxton had it right two months ago when he told Lt. Governor Patrick and the Rules Committee that "[t]he Senate should be trusted to follow the Constitution."[24]

Second, the Texas Constitution also guards against bias and prejudice infecting an impeachment trial by requiring a two-thirds vote of the Senators present to convict:[25]

> [T]here is a danger that senators, chosen as representatives of the people, under the banner of a particular political party, may be swayed, consciously or unconsciously, by considerations that should not influence them in the trial of a political officer. …Therefore, the requisite of a two-thirds vote was placed in the federal constitution and carried over into the Texas Constitution to secure an impartial trial and to guard public men from being sacrificed to the immediate impulses of popular resentment or party predominance.[26]

Third, as the Senate recognized *sua sponte* when it adopted Rule 31, Article III, § 22 of the Texas Constitution negates another potential source of bias or prejudice by prohibiting a member who has a personal or private interest in any measure pending before the Legislature from voting on the measure.[27]

The Texas Constitution gives the Senate the sole power "to try the party impeached"[28] and states that "[e]ach House may determine the rules of its own proceedings …."[29] Combined, these

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[23] *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017).

[24] June 16, 2023, Letter from Christopher Hilton to Lt. Gov. Dan Patrick and Senators of the Rules Committee, at 5 ¶ 17.

[25] TEX. CONST. art. XV, § 3.

[26] *Id.* interp. Commentary.

[27] Senate Rule 31.

[28] TEX. CONST. art. XV, § 3.

[29] TEX. CONST. art. III, § 10.

constitutional powers authorized the Senate to adopt the Rules omitting voir dire and challenges for cause for bias-or-prejudice.[30]

Paxton cites no authority trumping the Senate's rule-making authority in an impeachment trial. Instead, he attempts to rely on the Sixth Amendment to the U.S. Constitution and Article I, Section 10 of the Texas Constitution. But those provisions apply only to "criminal prosecutions,"[31] which this impeachment trial is not.[32] For the same reason, Paxton's reliance on Texas Court of Criminal Appeals cases and section 35.16 of the Texas Code of Criminal Procedure miss the mark: "[T]rial in the Senate is *not* the equivalent of a criminal trial within the judicial system" and "the rights of a person accused of a crime are not co-extensive with the privilege of remaining in public office."[33] Paxton's citations to Texas Supreme Court cases addressing civil litigation are similarly unavailing—this impeachment trial is not a civil proceeding either.[34]

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[30] *See* *Nixon v. United States*, 938 F.2d 239, 243 (D.C. Cir. 1991), *aff'd*, 506 U.S. 224 (1993). (the Senate's power to "determine the Rules of its Proceedings" gave "the Senate independent discretion to set procedural rules for impeachment trials . . . ."); *Mecham*, 751 P.2d at 963 (holding that "the Constitution gives the Senate, rather than this Court, the power to determine what rules and procedures should be followed in the impeachment trial); *Horton v. McLaughlin*, 149 N.H. 141, 144 (N.H. 2003) ("[T]he legislature's exclusive power to conduct impeachment proceedings necessarily carries with it the full authority to make, implement and interpret rules pertaining to impeachment.").

[31] U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

[32] *See* House Managers' Response to Paxton's Motion to Quash the Articles of Impeachment; 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).

[33] *Mecham*, 751 P.2d at 961, 963-64; *Hastings*, 716 F. Supp. at 40 ("[N]or does the verb 'try' [in the constitutional provision giving the Senate the power to try impeachments] necessitate granting the accused [in an impeachment trial] all the requirements of modern criminal due process . . . .");

[34] *See* *Ferguson v. Maddox*, 263 S.W. at 889; *Mecham v. Gordon*, 751 P.2d at 963.

Paxton mentions two federal impeachment proceedings that entertained motions to disqualify biased Senators from participating in the impeachment trial but buries the lead—the results. "There have been two trials in which attempts were made to disqualify certain Senators, and in both instances, the Senators involved were permitted to vote."[35] In the first trial, three Senators were permitted to vote during the impeachment trial of Judge John Pickering, even though they had voted on the question of his impeachment while members of the U.S. House of Representatives.[36] In the second trial, Senator Benjamin Wade was permitted to vote during the impeachment trial of President Andrew Johnson, even though he would have succeeded to the presidency had President Johnson been convicted.[37] These historical precedents *denying* attempts to disqualify Senators certainly do not support the disqualification of Senators Menedez, Guttierrez or Johnson here.

C. There is no evidence that the challenged Senators will not impartially try Paxton.

The Texas Constitution requires Senators to "impartially . . . try" Paxton.[38] Here, there is no evidence that Senators Menedez, Gutierrez, and Johnson cannot and will not do so. None of the "evidence" Paxton cites reveals prejudgment of the impeachment charges. Indeed, some of the evidence Paxton cites, when viewed in full context, reveals those Senators' recognition of, adherence to, and support for the constitutionally mandated requirement of impartiality:

- "Now it's important to note that I'm going to be a jurist in the Senate so I have to be impartial as I look at the evidence."[39]

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[35] *See* https://www.govinfo.gov/content/pkg/CDOC-99sdoc33/html/CDOC-99sdoc33.htm.

[36] S. Journal, 1st Cong., Reg. Sess. at 382-83 (1804) (Pickering Impeachment).

[37] S. Journal, 40th Cong., Reg. Sess. 2 at 809-11 (1868) (Johnson Impeachment).

[38] *See* TEX. CONST. art. XV, § 3.

[39] *See* https://www.youtube.com/watch?v=D5EkDv29Jvw, at 0:19-0:27.

- "They've tried to color the jury [by delivering "a thick stack of documents to Senators' offices that included a defense of Paxton] in some way for sure. [Paxton] "will have plenty of time to offer his defense in that proceeding."[40]

- "This is obscene. If they're attempting to influence the carry out of our solemn constitutional duty to act impartially; shame on @DefendTXliberty."

Most of the evidence cited by Paxton involves typical political criticism aired years ago on subjects wholly unrelated to the impeachment charges preferred by the House. Some of the evidence consists of undisputed facts related to Paxton's legal troubles, *e.g.*, Paxton is under investigation by the FBI, under indictment, and has been accused of corruption and bribery by his own staff, some of which are related to impeachment charges, but without prejudgment of their validity. And some of the evidence is grossly mischaracterized—*e.g.*, Senator Gutierrez did not state as his opinion that the "evidence seen by the House 'could not be refuted,'" but instead commented on the reason he suspected that the House committee recommended impeachment: "I think that as that committee saw that evidence, they felt that there was enough matter-of-fact evidence—evidence that could not be refuted, to go forward."[41] In sum, none of this evidence reveals prejudgment of the impeachment charges by Senators Menedez, Gutierrez or Johnson.

Unable to identify a single historical precedent in which a Senator was disqualified for cause using a bias-or-prejudice standard, Paxton's request for this court of impeachment to boldly go where no other has gone before should be denied.

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[40] *See* Paxton's Motion Challenging Jurors for Cause at Ex. B.

[41] *See* https://www.youtube.com/watch?v=D5EkDv29Jvw, at 0:53-1:03.

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