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 EXCLUDE EVIDENCE BASED ON "PRIOR TERM" STATUTE OR THE SO-CALLED "FORGIVENESS DOCTRINE"

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

Warren Kenneth Paxton Jr. ("Paxton") has filed two motions[1] making the same claim, that the so-called "prior term" statute or "forgiveness doctrine" bars the Senate from trying 19 of the 20 Articles of Impeachment ("the Articles"). Regardless of the label, Paxton's motions seek to prevent the Senate from deciding whether the conduct set forth in Articles I-VII, IX-XX should result in his removal and disqualification from office. Both should be denied.

INTRODUCTION

Despite arguing in other motions that he does not know what the Articles of Impeachment claim he did wrong, Paxton's Forgiveness Motions argue that because the public knows what he did wrong but elected him anyway, the Senate is prohibited from discharging its constitutional duty to hold an impeachment trial. He claims the Senate must dismiss the Articles or otherwise prevent the House from presenting evidence at trial about his misconduct. Beyond the obvious conflict in Paxton's positions, the Forgiveness Motions are wrong on the law (addressed in this Response) and wrong on the facts (addressed in the House Managers' Response to the Motion to Dismiss).

First, the Texas House of Representatives ("the House") overwhelmingly voted to impeach Paxton 121 to 23. 75% of House Republicans and 93% of House Democrats voted to impeach, and these members represent approximately 23 million Texans. When the House members cast their vote to impeach, they were fulfilling their constitutional obligation to protect the citizens of this state from an official who abused his office.

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[1] Paxton's Motion to Dismiss based on the "prior term" statute and purported "forgiveness doctrine" and Motion to Exclude Evidence are based on these same theories (collectively "Forgiveness Motions").

The Constitution does not prevent the House from impeaching an official for misconduct that occurred before re-election or the Senate from trying an official on those grounds. Indeed, Article XV of the Texas Constitution mandates that the Senate try the articles of impeachment preferred by the House. If the Framers had intended to adopt a prior term or forgiveness limitation, they would have done so. Paxton's claim that either a statute or a judicially created doctrine can somehow "bar" the House and Senate from exercising their broad authority to impeach and try a person is so contrary to well-settled law that it is almost insulting.

Second, and equally as offensive, is Paxton's claim that the voters forgave him for his misconduct when they reelected him because they were allegedly fully aware of his misdeeds. Paxton not only repeatedly denied the allegations against him, but he also actively sought to hide his misconduct from the public. His denials loomed large and his deception worked. As detailed in the response to the Motion to Dismiss, the public was incapable of knowing the extent of Paxton's abuses of power and breaches of trust. However, the Senate deserves to know the truth, and only a full trial will permit this.

ARGUMENTS & AUTHORITIES

Paxton argues that the Senate is not allowed try the Articles of Impeachment because of a statute, Texas Government Code section 665.081 ("prior term statute"), and a judicially created rule, "forgiveness doctrine" This is wrong as a matter of law, fact, and common sense.

I. It is impossible to rely on the forgiveness doctrine when denying the allegations.

It flies in the face of common sense that Paxton can on one hand loudly and publicly deny the allegations against him, and even engage in a cover-up of his wrongdoing, but then on the other hand claim he cannot be impeached because the public forgave him for his bad conduct. For the public to forgive Paxton's bad acts, they must both know about them and be confident he committed them. Otherwise, in the face of such denials, it is impossible to know whether the voters

forgave the conduct or did not believe the allegations. The only true way for the public, and the Senate, to know what occurred is to have a public trial where his alleged misconduct will be fully presented.

II. Paxton's claim that the prior term statute and the forgiveness doctrine bar the Senate from proceeding to trial violates the Texas Constitution.

Paxton argues in his Forgiveness Motions that the "prior term" statute and the forgiveness doctrine "bars the Attorney General's removal." However, applying the statute and the forgiveness doctrine as Paxton suggests would violate the Texas Constitution.

Article XV, § 2 of the Texas Constitution governs the impeachment, removal, and disqualification of an attorney general. Neither Article XV nor any other constitutional provision prevents the House or the Senate from exercising its broad impeachment powers against an official for acts that occurred before the official's election to office.[2] And neither a statute nor a judicially created doctrine may mandate such a limitation.

In *Cramer v. Sheppard*, the Court rejected the attempt to apply an unexpressed limitation to the Constitution's affirmative grant of authority:

> [t]here is no language contained in such amendments which could be construed to limit their application to "wartime" or to "peacetime." If the people had intended the amendments to have such limitation, it would have been easy to express such intention therein. But to give these amendments such meaning, we would have to write into the Constitution language not contained therein.[3]

Indeed, had the Framers intended to limit the House or Senate's impeachment power to post-election misconduct, "it could have, and undoubtedly would have, so provided in plain unmistakable language."[4]

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[2] *See* TEX. Const. art. XV, §§ 1-2, 4.

[3] 167 S.W.2d 147, 154 (Tex. 1942).

[4] *Ferguson v. Wilcox*, 28 S.W.2d 526, 534 (Tex. 1930).

Consistent with this well-settled law, the Texas Supreme Court has concluded, repeatedly, that Texas Revised Civil Statute, art. 5986,[5] the predecessor to Texas Government Code section 665.081,[6] does not apply to impeachments of officials listed in Article XV, § 2 of the Texas Constitution. This includes the attorney general. In *In re Carrillo*, the Court held that the predecessor statute did not apply to the removal of a district judge pursuant to the Texas Constitution because Article XV, § 7 authorizes the Legislature to provide for the removal of officers whose methods of removal are *not* provided in the Constitution and "[t]his proceeding for removal *is authorized by the Constitution, and for that reason Article 5986 is not applicable.*"[7] The same is true for Paxton.

Next, Paxton argues that pursuant to *In re Laughlin*, the "spirit" of the prior term statute bars the Senate from proceeding to trial. This argument fails as well. As with a statute, a court created doctrine cannot restrict the Senate from exercising the authority it is granted under the constitution, including the authority to conduct an impeachment trial.[8] Moreover, the circumstances at issue in *In re Laughlin* are completely different from those at issue here. *In re Laughlin* involved an original proceeding before the Texas Supreme Court to remove a district

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[5] TEX. REV. CIV. STAT. art. 5986.

[6] Article 5986 was recodified as Texas Government Code section 665.081. When it was recodified, the Legislature added subpart (b), which states: that "(b) The prohibition against the removal from office for an act the officer commits before the officer's election is covered by: (1) Section 21.002, Local Government Code, for a mayor or alderman of a general law municipality; or (2) Chapter 87, Local Government Code, for a county or precinct officer." Thus, pursuant to subsection (b), section 665.081 is applicable only to the listed local office holders.

[7] *In re Carrillo*, 542 S.W.2d 105, 110 (Tex. 1976); *see also In re Bates*, 555 S.W.2d 420, 427 (Tex. 1977) (noting that art. 5986 was authorized pursuant to Texas Constitution Article XV, § 7); *In re Brown*, 512 S.W.2d 317, 321 (Tex. 1974).

[8] *Dickson v. Strickland*, 265 S.W. 1012, 1021 (1924). ("The Constitution is the supreme law of the state. It is elementary that a statute or principle of the common law in conflict with the Constitution is void.").

court judge.[9] The removal proceeding did not originate in the House and was not going to be tried by the Senate.[10] Under these facts, the Court decided to not remove a judge for misconduct that was known to the voters.[11] Thus, *In re Laughlin* does not and should not[12] apply here.

III. The forgiveness doctrine is at odds with the purpose of impeachment.

The forgiveness doctrine is fundamentally at odds with the primary purpose of impeachment. The Constitution gave the House and the Senate the ability to impeach and remove certain named state officials so as to "rid the government of an undesirable officer" and protect the public from an officer who "has done an official wrong."[13] The Framers of the Federal Constitution, which informed the drafting of the Texas Constitution,[14] understood that impeachment was at odds with democratic elections. There were heated debates at the Constitutional Convention over whether to include impeachment in the federal Constitution at all or whether to let the voters ultimately decide to remove an elected official in the next election cycle.[15] James Madison, who some refer to as the "father of the Constitution" explained that

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[9] TEX. CONST. art. XV, § 6.

[10] *Id*. art. XV, § 2.

[11] See *In re Laughlin*, 265 S.W.2d 805, 808 (Tex. 1954). *In re Laughlin* has only ever been applied to proceedings before the Texas Supreme Court seeking to remove a district judge under Article XV, § 6.

[12] The Senate's power to try, remove, and disqualify the state's highest officials is considerably different from the Texas Supreme Court's ability to remove a district judge from office. The Supreme Court cannot disqualify a judge from running for future office. While there may be some logic to declining to remove a judge for past known misconduct when he is eligible to run for re-election, the mandate that the Senate remove and disqualify a person from office shows that the Framers concluded that such misconduct cannot be forgiven. And, under article XV, § 6 a judge can be subject to removal upon a written complaint submitted to the Supreme Court "by not less than ten lawyers." This type of complaint is vastly different from a House majority deciding, after a months-long investigation, that there is sufficient evidence to support preferring an official to the Senate to be tried for committing impeachable offenses.

[13] *Ferguson v. Maddox*, 263 S.W. 888, 890 (Tex. 1924).

[14] *Id*. at 892.

[15] *See* John D. Feerick, *Impeaching Federal Judges: A study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 48 (1970); (noting that during the Constitutional Convention "[s]ome expressed the view that impeachment was unnecessary in the case of an officer serving a fixed term, since his electors would give their judgment about his

impeachment was a critical check on executive power: "The limitation of the period of his service was not a sufficient security. … He might pervert his administration into a scheme of peculation or oppression."[16] And George Mason opined: "Shall the man who has practised [sic] corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?[17] In other words, the risk that the official could use his power to hide his misdeeds or worse, prevent others from even investigating his misdeeds, was too great.

The Framers made sure that an official who commits an impeachable offense would not be in position to repeat it. An official convicted of impeachable offenses is immediately removed and should be disqualified from holding future office. The official cannot escape removal and disqualification by pardon. These provisions show that the Framers did not want an impeached person to be able to seek forgiveness from voters after they were found guilty of committing impeachable offenses.[18] It simply cannot be the case that the Framers intended to prevent a person from seeking forgiveness after an impeachment trial but would have permitted a person to seek "forgiveness" before trial so as to avoid being removed altogether.

Paxton complains about the political nature of the process and suggests the forgiveness doctrine is needed to protect democracy. But the Framers understood that impeachment is inherently Political—with a capital "P"—and could give rise to abuse.[19] Accordingly, they adopted

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conduct at election time. Others, however, were of the opinion that there were certain types of acts which might be committed by a public official, including the President, which would dictate his removal prior to that time.").

[16] Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 775 (March 1999).

[17] Madison Debates (July 20, 1787).

[18] *Id*.

[19] *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

various provisions to minimize any such potential. Under the Texas Constitution, impeachment of the attorney general requires action by both the House and the Senate, and judgment is limited to removal and disqualification. While the House can impeach based on a simple majority, Article XV, § 3 does not permit conviction without a two-thirds vote of the Senate.[20] Notably absent from these protections is anything prohibiting impeachment based on pre-election conduct. Recognizing that the impeachment process is likely to "agitate the passions of the whole community," the Framers of the federal Constitution determined that the need to remove an offender from office, regardless of when the misconduct occurred, was necessary to protect the state and its citizens.[21] This is no less true for the Texas Constitution.

Finally, then Texas Supreme Court Justice Don Willett likewise concluded that it is inconsistent with the Texas Constitution to allow an official to escape removal for misconduct before re-election:

> Our Constitution's concern for the integrity of public office allows no room for the notion that reelection operates to spare elected officials from the full effects of felonies committed during a prior term, whether or not they were known to the voting public.[22]

IV. The Senate has repeatedly rejected claims that the prior term statute and forgiveness doctrine bar the Senate from proceeding to trial.

Paxton invokes Senate "precedent" and alleges that in 1887, 1893, and 1931 the Senate dismissed impeachments based on the prior term statute and the forgiveness doctrine.[23]

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[20] TEX. CONST. art. XV, §§ 3-4.

[21] THE FEDERALIST NO. 65 (Alexander Hamilton).

[22] *In re Bazan*, 251 S.W.3d 39, 46 (Tex. 2008) (Willet, J., concurring).

[23] Paxton claims that "rulings" from impeachment trials are precedent or *stare decisis*. However, while Article XV, § 6 states original proceedings before the Supreme Court related to removing district judges from office "shall have precedence," Article XV, § 2 regarding trial before the Senate is silent.

He is wrong and indeed mischaracterizes the Senate's prior actions.

During the impeachment trial of W.L. McGaughey, the Senate sustained a demurrer based on McGaughey's prior term argument, but also denied several other demurrers based on the same argument.[24] As such, it proceeded to trial on these and other articles.[25] And, in the impeachment trial of J.B. Price, while the Senate dismissed a few of the articles, the Senate did not state which demurrer it was granting. Then, the Senate tried Price on articles that on their face alleged conduct that occurred prior to his election.[26]

Even though Paxton states that Judge O.P. Carrillo raised the issue of the prior term doctrine barring his impeachment trial, he fails to mention that the Senate refused to apply the doctrine and proceeded to try and remove Carrillo.[27] It is misleading at best for Paxton to claim that past Senate proceedings require the Senate to dismiss Articles of Impeachment against Paxton.[28] Far from it, prior Senate actions show that it should proceed to trial against Paxton as Article XV, §2 mandates.

V. Paxton cannot meet the elements necessary to invoke the forgiveness doctrine.

Even if the doctrine applied (which it does not), before an official may invoke the forgiveness doctrine, two key elements must be met. Paxton cannot do so.

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[24] *See* Record of the Court of Impeachment on the Trial of W.L. McGaughey, at 2, 3, 5, 8.

[25] *Id.* at 169-78.

[26] S.J. OF TEX., 42nd Leg., S.C.S. 295-431 (1931).

[27] Record of Proceedings of the High Court of Impeachment on the Trial of O.P. Carrillo, Judge, 229th District Court, at 160. Similarly, Governor Ferguson filed a demurrer seeking to dismiss certain articles which on their face complained about conduct that occurred prior to his 1917 election. The Senate overruled the demurrers and ultimately impeached him on several of these articles. *See* Record of Proceedings of the High Court of Impeachment on the Trial of James E. Ferguson, Governor, at 17, 767-69, 780.

[28] The attempt to remove Judge Willis from office was by "address" pursuant to Article XV, § 8 of the Texas Constitution. *See* S.J. OF TEX., 20th Leg. R.S. 684. The address process for removal is different from a trial before the Senate. *See id.* at 680-81.

First, the conduct at issue must not be "disqualifying."[29] In other words, the conduct must be of a kind that is relatively minor and, therefore, forgivable. Here, the Articles allege systemic, egregious willful acts of corruption that cast public discredit on the office of attorney general. Such conduct, if taken as true, is disqualifying as a matter of law.[30] Paxton has not had the audacity to claim that the conduct he is accused of, if proven true, is not disqualifying. This alone defeats his Forgiveness Motions.

Second, Paxton cannot show that the public had full knowledge of *all* relevant facts before his election. That *some* allegations were public is not enough. In *In re Carrillo*, while the Court noted that *In re Laughlin* allowed voters to potentially forgive a judge's misconduct before election, it was critical that the public's knowledge encompassed all relevant facts.[31] The Court made this same point in *In re Brown*.[32] The Court explained that the forgiveness doctrine could apply only when all of the official's acts of misconduct "*were a matter of public record or otherwise known to the electors."*[33] And in *McInnis*, the Court refused to apply the doctrine when the voters' knowledge was based on

> nothing more than allegations and charges [including in an indictment] that a crime had been committed. Hence, a question arises as to whether the voters were sufficiently aware of the commission of a crime by [the defendant] for the *Laughlin* "forgiveness" doctrine to be invoked. Consequently, *in the absence of any proof available to the voting public at the general election that [the defendant] had*

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[29] *In re Laughlin*, 265 S.W.2d at 808.

[30] 586 S.W.2d 890, 895 (Tex. App.—Corpus Christi 1979), *aff'd*, 603 S.W.2d 179 (Tex. 1980).

[31] 542 S.W.2d at 110.

[32] *In re Brown*, 512 S.W.2d at 321.

[33] 265 S.W.2d at 808 (emphasis added).

> *actually committed the acts constituting crimes, as alleged and charged, there was no crime or proven misconduct to forgive.*[34]

As detailed in response to the Motion to Dismiss (and the response to the No Evidence MSJ), only some of Paxton's wrongdoing was even alleged before his re-election, and Paxton stood firm on his denials. Thus, Paxton cannot establish that he was forgiven for his misdeeds.

VI. Paxton cannot seek to exclude relevant evidence based on the forgiveness doctrine.

Paxton has sought to exclude evidence based on the forgiveness doctrine, but it is not an evidentiary rule. Rather, it is a classic affirmative defense. Excluding evidence of pre-election wrongdoing would result in dismissal of several claims. Thus, the Motion to Exclude is nothing more than a stalking horse for dismissal.[35]

Finally, Paxton has not claimed forgiveness as to Article of Impeachment VIII relating to his settlement of the whistleblowers' lawsuit. At minimum, this means that the Senate should not dismiss or exclude evidence related to the other articles. Evidence of Paxton's misconduct that was allegedly forgiven is highly relevant to this Article and may not be excluded.

CONCLUSION

Paxton can run, but he cannot hide. The Senate trial is fast approaching, and both the Senate and the public are not yet fully aware of how bad Paxton's actions really were. By the end of the Senate trial, they will be. And there will be no reasonable doubt that Paxton does not deserve the honor and privilege of being the Attorney General of the great State of Texas.

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[34] *McInnis*, 586 S.W.2d at 896 (emphasis added).

[35] Because of this, Senate Rule 1(b) seems to indicate that the Motion should be put to the full Senate for determination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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