

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

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AUG 15 2023

IN THE MATTER OF
WARREN KENNETH
PAXTON, JR.

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CLERK OF THE COURT

**HOUSE MANAGERS' RESPONSE TO PAXTON'S MOTION TO EXCLUDE
EVIDENCE PURPORTEDLY GATHERED IN VIOLATION OF LAW**

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

Famed poet Carl Sandburg once said:

If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell.

Warren Kenneth Paxton Jr. (“Paxton”) is pounding the table. But his protests ring hollow. When more than 80% (121-23) of the Texas House of Representatives (“the House”) voted across party lines to impeach Paxton, it was fulfilling its constitutional obligations. And the House dutifully followed the Constitution and law when it investigated, drafted, and preferred the Articles of Impeachment to the Senate. Paxton’s Motion to Exclude Evidence (“the Motion”) is baseless, and it invites the Senate to violate the Constitution. It should be summarily denied.

THE HOUSE IMPEACHMENT PROCESS

House members’ eyebrows were raised in February 2023, when Paxton appeared before House Appropriations seeking over \$3 million dollars to settle a lawsuit filed against the Office of the Attorney General (“the OAG”). Four of Paxton’s most trusted hand-picked senior advisors had sued him after he fired them (“Senior Staff”). Almost three years earlier, the day before the Senior Staff was fired, seven members had reported him to the FBI. His Senior Staff had spent months witnessing and being asked by Paxton to do acts that were either illegal, unethical, ran counter to agency protocol, or for the sole benefit of Paxton and Nate Paul, a campaign donor and close friend of Paxton’s. Paxton was engaged in an extensive pattern and practice of using every tool available to him at the OAG to help Paul deal with his mounting legal troubles. This pattern included Paul’s efforts to harass and interfere with federal law enforcement officers who were investigating him. As the senior staff started to realize how widespread Paxton’s efforts to help Paul were, they became increasingly troubled. They pleaded with him to stop. But he only responded by demoting

them and isolating them from others. Left with no option and acting in the best interest of the state and its taxpayers, the Senior Staff reported him to law enforcement.¹

When Paxton arrived at the House asking for money to silence the fired Senior Staff, he was evasive. Particularly troubling was Paxton’s refusal to answer any specific questions about the settlement agreement or the litigation in general.² The House had virtually no information regarding the allegations in the lawsuit. Paxton had been careful to settle his lawsuit with Senior Staff before any discovery could shed light on his alleged wrongdoing. But it was the House’s job to scrutinize the settlement. And to do this, they needed to know why hard-earned taxpayer dollars should be used to pay the fired Senior Staff.

Soon thereafter, the House General Investigating Committee (“GIC”) sought the answers that Paxton refused to give. The GIC is charged by the House to investigate possible cases of abuse of office or misuse of government resources, and its ability to investigate these cases is firmly grounded in both statute³ and House Rules.⁴ These rules expressly permit GIC to:

- “initiate or conduct inquiries and hearings concerning,” among other things, both “the expenditure of public funds at any level of government within the state” and “any other matter the committee considers necessary for the information of the legislature or for the welfare and protection of state citizens”;
- investigate any “matter related to the misconduct, malfeasance, misfeasance, abuse of office, or incompetency of an individual or officer under Chapter 665, Government Code”;

¹ Exhibit 125.

² [Appropriations - S/C on Articles I, IV, & V - Feb 21st, 2023 \(granicus.com\)](#) (33:35 – 54:30).

³ TEX. GOV’T CODE § [301.020](#).

⁴ [88th Legislature House Rules Manual](#) (“House Rules”), Rule 3, Section 13. The House Rules are adopted by the House Members at the beginning of each regular session. In 2023, the Members chose to renew the authority they have conferred on the GIC since 2015.

- “employ and compensate assistants to assist in any investigation” if “necessary” and “for any reason”; and
- “propose articles of impeachment.”

The GIC opened its “Matter A” inquiry, which the public now knows related to Paxton and the proposed settlement. It retained five experienced former prosecutors (Erin Epley, as chief committee counsel, and Terese Buess, Mark Donnelly, Donna Cameron, and Brian Benken as deputy committee counsel), as well as Dan McNulty, a longtime Houston police officer (retired) and Harris County DA investigator, to assist in its investigation (“Investigators”) and act as legal counsel to the committee. These four former prosecutors have over 100 collective years of law enforcement experience at the state and federal level, including vast experience in matters of public integrity.

Over a two-month period, the GIC issued a number of subpoenas to both individuals and entities. The Investigators interviewed 15 individuals. Afraid that Paxton would find out and retaliate and attack them in the same way he had attacked his former Senior Staff, several witnesses only agreed to talk if the Investigators agreed not to record the interviews.⁵ The Investigators also reviewed thousands of pages of documents.⁶ They were shocked by what they discovered, including facts that were previously unknown to the public. Importantly, the Investigators found evidence showing that the complaints from Paxton’s most senior and trusted advisors were true: Paxton had been engaging in egregious abuses of power for the benefit of Nate Paul.⁷

⁵ Texas House of Representatives, General Investigating Committee, May 24, 2023 Transcript: In re Paxton Evidence Hearing (“[GIC Transcript](#)”) 15. The full video of the 4-hour hearing is available [here](#).

⁶ *Id.* at 13-15.

⁷ It is important to note that much of the information provided to House Investigators was supported by sworn testimony. For example, the Senior Staff—James Blake Brickman, David Maxwell, J. Mark Penley, and Ryan M. Vassar—all verified their pleadings with signed

Following the investigation, the GIC noticed a hearing to invite the House Investigators to publicly present the findings of their exhaustive investigation. The Investigators appeared and, over a four-hour period, presented the results of their investigation and answered detailed questions from the GIC members. What began as an effort to uncover facts needed to inform the Legislature’s decision to appropriate funding for the settlement agreement had revealed far more than the committee envisioned. Faced with the harsh truth and the extent of Paxton’s misconduct and mindful of their sworn oath to “preserve, protect, and defend the Constitution and laws of the United States and this State” – the GIC could not turn a blind eye.

The following day, the GIC met, adopted proposed Articles of Impeachment against Paxton, and authorized the filing of the Articles with the chief clerk.⁸ The proposed articles were filed as H.R. 2377 that same day, and were laid out in the House and debated on the floor on May 27, 2023. Over objections by members that mirror those raised in Paxton’s Motion,⁹ the impeachment resolution passed overwhelmingly on a vote of 121 to 23.¹⁰

ARGUMENTS & AUTHORITIES

Paxton’s Motion claims the House’s investigation was “illegal,” though it is hard to decipher precisely what he claims was illegal about it. His arguments are riddled with factual inaccuracies and misstatements of law. The Motion reflects a shocking and fundamental

declarations. [H.J. OF TEX., 88th Leg., R.S.](#) 5951. Likewise, included in the information the House Investigators reviewed was a sworn deposition of Nate Paul. [GIC Transcript](#) at 74.

⁸ Texas House of Representatives, General Investigating Committee (May 25, 2023).

⁹ See, e.g., [H.J. OF TEX., 88th Leg., R.S.](#) 5930, 5939-40, 5945, 5964.

¹⁰ See [88\(R\) H.R. 2377](#).

misunderstanding of constitutional law, particularly for someone who is the State’s former top lawyer.

I. Paxton asks the Senate to violate the Texas Constitution when he requests that the Senate review how the House conducts its proceedings.

The plain text of the Texas Constitution assigns separate impeachment functions and powers to the House and Senate.¹¹ The Constitution grants the House the sole power of impeachment.¹² The House “also holds investigative powers that are ancillary to its impeachment power. Only the House may decide whether to investigate, impeach, and prosecute public officials ... These powers are in the sole domain of the House and are not shared with or exercised by the Senate.”¹³ The Constitution vests each house with the authority to “determine the rules of its own proceedings.”¹⁴ Indeed, Paxton’s request that the Senate declare the House’s investigation illegal is constitutionally impermissible.

The House’s job is to investigate the facts 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.¹⁵

¹¹ See TEX. CONST. [art. XV, §§1-4](#).

¹² *Id.* art. [XV, § 1](#); [Kilbourn v. Thompson](#), 103 U.S. 168, 190 (U.S. 1880) (“The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them.”)

¹³ [In re Request for Access to Grand Jury Materials](#), 833 F.2d 1438, 1445-46 (11th Cir. 1987).

¹⁴ *Id.* art. [III, § 11](#).

¹⁵ [Report of the Texas House Select Committee on Impeachment](#) at 8 (July 23, 1975).

The power granted to the House to “impeach,” and the Senate to try “impeachment,” carries with it, by inevitable implication, *the power to the one to prefer and to the other to try charges*.¹⁶

“Each house is invested with independent responsibilities and duties, and *is the sole judge of its own rules of procedure*. . . .”¹⁷ During the full House’s debate on the Articles, the House heard the same misplaced objections to the GIC’s procedures that mirror those Paxton attempts to interject into these proceedings.¹⁸ The House overruled these objections and ratified the process by overwhelmingly adopting the Articles (121-23). As the sole judge of the House’s own process, this ended the inquiry.¹⁹

II. The House is similar to a grand jury and the rules of evidence do not apply.

Paxton’s complaints about the House procedures arise from his fundamental misunderstanding of the nature of impeachment proceedings. They are not criminal proceedings and the rights afforded criminal defendants in criminal proceedings are not applicable.²⁰ Paxton will not lose his life, liberty, or property if he is removed and disqualified from future office.

¹⁶ [Ferguson v. Maddox](#), 263 S.W. 888, 892 (Tex. 1924) (emphasis added).

¹⁷ [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, 229 (1993) (concluding that the Senate has the sole discretion to choose impeachment procedures); [Horton v. McLaughlin](#), 149 N.H. 141, 144 (N.H. 2003) (citations omitted) (“The legislature has full authority to establish all rules, regulations and laws necessary and proper to carry out its constitutional mandate. Thus, the legislature's exclusive power to conduct impeachment proceedings necessarily carries with it the full authority to make, implement and interpret rules pertaining to impeachment.”).

¹⁸ *See, e.g.*, [H.J. OF TEX., 88th Leg., R.S.](#) 5930, 5939-40, 5945, 5964.

¹⁹ [Terrell](#), 14 S.W.2d at 789.

²⁰ As detailed in the House Managers’ Response to Paxton’s Motion to Quash the Articles of Impeachment and, Alternatively, Request for a Bill of Particulars, impeachment is not a criminal proceeding.

Moreover, Paxton confuses the House’s impeachment process with a *trial* rather than its intended purpose, which is to act like a grand jury:

The House acts somewhat in the capacity of a grand jury. It investigates, hears witnesses, and determines whether or not there is sufficient ground to justify the presentment of charges, and, if so, it adopts appropriate articles and prefers them before the Senate. In doing these things, the House is not ‘legislating,’ nor is it conducting an investigation in order that it may be in better position to legislate. It is investigating facts in order that it may determine whether one of the people’s servants has done an official wrong worthy of impeachment under the principles and practices obtaining in such cases, and, if so, to present the matter for trial before the constituted tribunal.²¹

This is fatal to Paxton’s arguments in several ways.

First, the rules of evidence do not apply to grand jury proceedings.²² As such, grand juries may consider a wide range of evidence whether or not it is ultimately determined to be admissible at trial.²³ Grand juries may hear from the prosecutors²⁴ and consider statements from investigators, just as the House considered statements from its committee staff.²⁵ And despite Paxton’s table pounding, a defendant cannot object to proceeding to trial on the grounds that evidence before

²¹ [Ferguson v. Maddox](#), 263 S.W. at 890.

²² See [United States v. R. Enters., Inc.](#), 498 U.S. 292, 298 (1991) (“This Court has emphasized on numerous occasions that many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings. This is especially true of evidentiary restrictions.”); [K.W.M. v. State](#), 598 S.W.2d 660, 661 (Tex. Civ. App.—Houston [14th Dist.] 1980, no pet.); [TEX. R. EVID.](#) 101(e)(2).

²³ See [United States v. Calandra](#), 414 U.S. 338, 345 (1974) (concluding that a grand jury may consider incompetent and inadmissible evidence).

²⁴ See [U.S. v. Dionisio](#), 410 U.S. 1, 15 (1973) (noting that grand jurors “may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge.”).

²⁵ CHARLES L. BLACK, JR. & PHILLIP BOBBITT, *IMPEACHMENT: A HANDBOOK*, NEW EDITION 8 (2018) (noting that in the U.S. House, “no technical ‘rules of evidence’ apply Evidence may come from investigations by committee staff, from grand jury matter made available to the committee, or from any other source.”).

the grand jury was hearsay.²⁶ It is well-settled law that a trial court may not look back at the grand jury proceeding to critique the type or sufficiency of evidence presented.²⁷

Second, Paxton’s claim that the House “clearly violated the Texas and federal Confrontation Clauses” is wildly off base. To be sure, during a criminal *trial* a person has the right to confront and cross examine witnesses. A person being “investigated by a grand jury does not have the constitutional right to appear in person or by counsel”²⁸ The House’s impeachment proceeding was not a trial and was never intended to be a trial. That is the Senate’s role. And once the Senate impeachment trial starts, Senate Rule 5(c) gives Paxton the ability to confront and cross examine witnesses, including those witnesses Paxton’s Motion appears desperate to preclude.

Third, Paxton’s claim that the Investigators somehow violated the law by not swearing in witnesses before *interviewing* them could not be more wrong. Texas Government Code section 301.022 plainly states that it only applies when a person is giving testimony—which the witnesses were not doing. It is alarming, but perhaps not shocking, that Paxton is willing to take such an extreme position to benefit himself at the expense of his own agency. Such an unprecedented requirement would curtail the OAG and other investigative committees from being able to freely speak with witnesses. Without question, it would compromise future investigations.

Moreover, there was no practical need for the Investigators to administer formal oaths during the investigation. Texas Government Code section 305.021 prohibits individuals from misleading or lying to House Investigators:

²⁶ See [Franklin v. State](#), 606 S.W.2d 818, 827 (Tex. Crim. App. 1978); [Costello v. United States](#), 350 U.S. 359, 363 (1956).

²⁷ See [Dean v. State](#), 749 S.W.2d 80, 82 (Tex. Crim. App. 1988).

²⁸ See [Moczygamba v. State](#), 532 S.W.2d 636, 638 (Tex. Crim. App. 1976).

A person, for the purpose of influencing legislation²⁹ or administrative action, may not:

- (1) knowingly or willfully make a false statement or misrepresentation of the facts to a member of the legislative or executive branch; or
- (2) cause a copy of a document the person knows to contain a false statement to be received by a member of the legislative or executive branch without notifying the member in writing of the truth.

This includes communications made to committee staff, such as the House Investigators.³⁰ Thus, whether or not formally sworn, the witnesses the House Investigators interviewed were bound by law, under penalty of perjury, to offer only truthful and accurate information.

Fourth, Paxton’s counsel have publicly railed against the House allegedly violating the law by allowing the House Investigators to present the findings of the investigation without formally being sworn in. But once again, Paxton is wrong on the law, and he should know this. The GIC retained the Investigators as staff counsel. As such, they are exempt from having to provide witness affirmations, i.e., sworn statements.³¹ Committees can hear from a “resource witness,” that is, “a person who is employed by an agency of the legislative branch of government”

²⁹ “Legislation” includes both a “matter pending in either house of the legislature” and “any matter that is or may be the subject of action by either house or by a legislative committee, including the introduction, consideration, passage, defeat, approval, or veto of the matter...” TEX. GOV’T CODE § [305.002\(6\)\(A\)-\(B\)](#). The phrase “influencing legislation” includes any communication that “pertain[s] to legislative proceedings and [made] in connection with issues under consideration by the Legislature or were reasonably likely to encourage consideration by the Legislature.” *Sullivan v. Tex. Ethics Comm’n*, 660 S.W.3d 225, 244 (Tex. App.—Austin 2022, pet. filed).

³⁰ TEX. GOV’T CODE § [305.002\(7\)](#) (“‘member of the legislative branch’ means a member, member-elect, candidate for, or officer of the legislature or of a legislative committee, *or an employee of the legislature.*”).

³¹ Sworn statements (colloquially “witness affirmation forms”) are governed by [House Rule 4](#), section 20.

(including “the Texas House of Representatives”), at either a public hearing or a formal meeting.³² And a “resource witness . . . is not required to execute the sworn statement required under Section 20[.]”³³ This has been the House’s practice since at least 1991 (which includes the time when Paxton served in the House).³⁴

In sum, Paxton’s claim that the House “gathered evidence illegally” and that the “fruit of the poisonous tree” doctrine would somehow allow the Senate to exclude unspecified evidence from trial is preposterous. The House and its Investigators scrupulously fulfilled their constitutional duty to investigate and prefer the Articles to the Senate for trial, where Paxton will have the chance to confront the evidence and witnesses presented against him.³⁵ Any suggestion otherwise is false.

CONCLUSION

Not only are Paxton’s incessant accusations against the House’s process false, but they are irrelevant. The Senate will be deciding 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.”³⁶ Paxton’s unfounded and false attacks on the House have nothing to do with these questions. The Senate should deny the Motion to Exclude Evidence and Paxton’s transparent effort to deflect from the real issue of whether he abused his office and breached the public’s trust.

³² [Id.](#), Rule 4 Explanatory Note, at 55.

³³ [Id.](#)

³⁴ See [72nd Legislature House Rules Manual](#), Rule 33 (1991).

³⁵ [Report of the Texas House Select Committee on Impeachment](#) at 8 (July 23, 1975).

³⁶ [Senate Rule](#) 13(b).

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CERTIFICATE OF SERVICE

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