

Ratsy Daw

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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.**

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**HOUSE MANAGERS' RESPONSE TO PAXTON'S
MOTION TO QUASH THE ARTICLES OF IMPEACHMENT**

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

Warren Kenneth Paxton Jr. (“Paxton”) has filed two motions making the same claim that somehow the Articles of Impeachment (“the Articles”) are facially invalid. Paxton’s Motion to Quash the Articles (“the Motion”) seeks to either quash the Articles or, in the alternative, have the Senate force the Texas House of Representatives (“the House”) and the House’s Board of Managers (“House Managers”) to amend or alter them. Neither request is appropriate. The arguments herein apply equally to the Request for Bill of Particulars (“the Request”).

INTRODUCTION

In other motions, Paxton insists that the public was fully aware of the wrongdoing set out in the Articles but forgave him and elected him anyway, thus begging the Senate to stop the impeachment from going forward. Yet in this particular Motion, Paxton professes puzzlement over what he is alleged to have done wrong. Not only is it implausible for Paxton to claim he does not know what he is being charged with doing wrong,¹ but this Motion reflects a fundamental misunderstanding of the law regarding impeachments, the history of impeachment in Texas, and the principles of separation of powers as set forth in the Texas Constitution.

ARGUMENTS & AUTHORITIES

I. In direct conflict with the Texas Constitution, Paxton improperly asks the Senate to order the House to amend the Articles of Impeachment.

Paxton asks the Senate to order the House to amend the Articles to include more details than they already include. This request conflicts with Texas Constitution Article I, § 10, which states that a person can be tried for committing impeachable offenses without an “indictment.”²

¹ Paxton has access to full transcripts from the investigators’ report to the General Investigating Committee and the House impeachment proceedings.

² TEX. CONST. [Art. I, § 10](#); GEORGE BRADEN, ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS [35-36](#) (1977) (recognizing that under the Texas Constitution,

Instead of looking to this constitutional provision, Paxton incorrectly tells the Senate that the Articles are “unconstitutionally vague” because criminal law regarding “charging instruments” (i.e., an indictment) should apply and require the Articles to contain more details. But again, a person can be impeached without an indictment, therefore Paxton does not have any right to demand more details. Paxton’s Motion and Request should be dismissed outright.

II. Impeachment trials are neither criminal nor civil proceedings.

Paxton is also wrong in claiming that the Constitution “treats an impeachment as a criminal proceeding.” Impeachment is not a criminal or civil proceeding.³ It is a unique, if not mostly Political, with a capital “P”, proceeding—i.e., an action by the representatives of the people challenging official actions that are contrary to the public interest.⁴

In England, the earliest versions of impeachment could result not only in an official’s removal from office, but also in imprisonment and even a death sentence.⁵ The Framers of the U.S. Constitution “made a sharp departure from the English practice—they divorced impeachment and

a person subject to impeachment does not have “the right to demand the nature and cause of the accusation” against him).

³ See *Ferguson v. Maddox*, 263 S.W. 888, 889 (Tex. 1924) (“Said judgment and impeachment proceedings constituted a quasi-criminal action, . . .”); *Mechem 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.”).

⁴ *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.’”).

⁵ RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* xii (1974) (“In England impeachment was criminal in nature because removal from office and criminal punishment were united in one proceeding, so that a man could lose his office and his head in one blow.”).

removal from indictment and criminal trial.”⁶ Recognizing that impeachment was uniquely Political, with a capital “P”, they deliberately separated impeachment from the forum for criminal trials:

The subjects of [impeachment’s] jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused. In many cases, it will connect itself with the pre-existing factions, and will inlist [sic] all their animosities, partialities, influence and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.⁷

Even though the Senate sits as a court for purposes of impeachment, it is not acting as a judicial court. The official being tried has no right to a jury trial, a unanimous verdict, or a pardon.

A trial before the Senate is different from a trial in a court of law:

While the Senate in one sense acts as a court on the trial of an impeachment, it is essentially a political body and in its actions is influenced by the views of its members on the public welfare. The courts, on the other hand, are expected to render their decisions according to the law regardless of the consequences. This must have been realized by the members of the Constitutional Convention and in rejecting proposals to have impeachments tried by a court composed of regularly appointed judges we think it avoided the possibility of unseemly conflicts between a political body such as the Senate and the judicial tribunals which might determine the case on different principles.⁸

⁶ *Id.*

⁷ [THE FEDERALIST NO. 65](#) (emphasis in original); see also [People ex rel. Robin v. Hayes](#), 143 N.Y.S. 325, 328 (N.Y. Sup. Ct. 1913) (“This great power is political.”). Hamilton’s reference to the process as “Political” was based on a common understanding of the term as “relating to politicks; relating to the administration of publick affairs” and politcks was defined as “the science of government; the art or practice of administring publick affairs.” *Political* and *Poliitcks*, SAMUEL JOHNSON’S DICTIONARY at 1750.

⁸ [Ritter v. United States](#), 84 Ct. Cl. 293, 299 (U.S. 1936).

As such, courts⁹ and legal scholars¹⁰ repeatedly reject the idea that impeachment trials are criminal proceedings.

The same is true in Texas. Patterned after the United States Constitution,¹¹ the Texas Constitution requires the Senate to try impeachment cases,¹² and it limits the remedy for impeachment to removal and disqualification from office.¹³ It also expressly provides that a judgment of impeachment does not preclude other criminal or civil litigation regarding the same conduct.¹⁴ These clauses, standing alone, establish that an impeachment proceeding is not considered a criminal prosecution:

Th[e] limitation on the nature of the judgment following impeachment distinguishes it from the traditional criminal prosecution. The accused may be removed and disqualified from ever again holding government office but cannot otherwise be deprived of life, liberty, or property. Conversely, the judgment does

⁹ See *Mecham*, 751 P.2d at 961 (1988) (“trial in the Senate is *not* the equivalent of a criminal trial within the judicial system.”) (emphasis in original); *State ex rel. Hous. v. Dist. Court*, 202 P. 756, 760 (Mont. 1921) (“The rule followed in a majority of the jurisdictions is that a proceeding for the removal of a public officer is not a criminal proceeding; that the object of such a proceeding is to protect the public from corrupt officials, not to punish the offender.”); *Shields v. State*, 89 P.2d 756, 760 (Okla. 1939) (“A proceeding to remove an officer is not a criminal proceeding.”); *Stanley v. Jones*, 2 So. 2d 45, 48 (La. 1941) (“[A] suit to remove a state officer [is] ... not a criminal proceeding.”).

¹⁰ See John D. Feerick, *Impeaching Federal Judges: A study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 1, 53(1970); BERGER, *supra* at xii; Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers’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).

¹¹ See *Ferguson v. Maddox*, 263 S.W. at 892.

¹² TEX. CONST. [art. XV §§ 2-3](#).

¹³ *Id.* [art. XV §§ 3-4](#).

¹⁴ *Id.* (“Judgement in cases of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under this State. A party convicted on impeachment shall also be subject to indictment trial and punishment according to law.”).

not bar criminal prosecution or civil suit based on the conduct for which impeached.¹⁵

The Texas Supreme Court agrees, emphasizing that the purpose of impeachment proceedings in Texas is to protect the public and not to punish the office holder:

The Constitution, in relation to impeachment, has in mind the protection of the people from delinquencies or malfeasances.... *The primary purpose of an impeachment is to protect the state, not to punish the offender.* True, he suffers, as he may lose his office to be disqualified from holding another; but these are only incidents of a remedy necessary for the public protection.¹⁶

Just a few years later, the Court again stressed that impeachments are unique because “convictions under the criminal laws would be pardonable as other offenses after conviction, but impeachment with consequent removal from office and disqualification to hold office was specifically excepted from pardon. The purpose of impeachment was not primarily one of punishment, but a protection to the public—an established public policy fixed in the Constitution.”¹⁷ The Texas Constitution highlights this public-protection purpose by, unlike the U.S. Constitution, temporarily suspending the official who has been impeached by the House from office pending trial.¹⁸

Paxton’s claim that impeachments are “legally considered a criminal proceeding” ignores this precedent and mischaracterizes prior impeachment proceedings and the Texas Constitution. First, Paxton misrepresents prior Senate impeachment rulings. The Texas Senate has *never* held

¹⁵ BRADEN ET AL., *supra* at [711](#).

¹⁶ [Ferguson v. Maddox](#), 263 S.W. at 892 (emphasis added); see also [Hastings v. United States](#), [802 F. Supp. 490](#), 500 (U.S. 1992) (“Impeachment is a wholly separate proceeding from a criminal trial, and it has an entirely different purpose.”).

¹⁷ [Ferguson v. Wilcox](#), 28 S.W.2d 526, 536 (Tex. 1930); see also [Ferguson v. Maddox](#), 263 S.W. at 893 (“For their protection the people should have the right to remove from public office an unfaithful official.”).

¹⁸ TEX. CONST. [art. XV § 5](#).

that impeachment trials are criminal proceedings.¹⁹ Quite the opposite. During the Ferguson impeachment trial, his counsel argued that the Senate should exclude Ferguson’s testimony before a House committee because Texas Revised Civil Statute art. 5517 prevented the use of such testimony in a “criminal case” or “criminal proceeding,” which would preclude its use during the impeachment trial. The Senate rejected this argument. It admitted the testimony and refused to find that the impeachment trial was a criminal case or proceeding as contemplated by the statute.²⁰

Second, the Texas Constitution does not, as Paxton claims, treat impeachment as a criminal proceeding. In *Meyer v. Tunks*,²¹ the Texas Supreme Court rejected the argument that the rights set forth in Texas Constitution Article I, § 10 applied to an accused being tried for removal under Article XV, § 7. In particular, the Court found that a removal proceeding is not criminal and rejected the accused’s efforts to avoid being called to the stand to testify: “it is hardly logical to contend that in a removal action the defendant officer . . . cannot be called to the witness chair . . .”²²

Indeed, the Framers took care to treat impeachment differently. As pointed out, there are several provisions distinguishing impeachment proceedings from criminal proceedings. Specifically, impeachment trials are not held in traditional courts,²³ and so none of the rules and procedures adopted by the Judiciary for civil and criminal cases apply. The accused has no right

¹⁹ 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.

²⁰ See *id.* at 338-41.

²¹ [360 S.W.2d 518](#), 519-20 (Tex. 1962)

²² *Id.* at [521](#).

²³ See TEX. CONST. [art. XV, § 2](#).

to a jury trial but must be tried by the Senate.²⁴ A unanimous verdict is not required for impeachment as it is for criminal conviction.²⁵ A person subject to impeachment has no right to demand an indictment before the case proceeds.²⁶ An impeached party cannot be pardoned, whereas those convicted of a crime (other than treason) can.²⁷ A judgment of impeachment does not prevent criminal or civil prosecution for the same conduct.²⁸ And a party who commits an impeachable offense can only be removed and disqualified from office.²⁹ If Paxton is impeached, he will not be deprived of life, liberty, property, or the ability to secure employment. Paxton’s claim that impeachments are criminal proceedings is simply wrong.

III. The House is vested with the sole authority to charge and prefer articles of impeachment, and therefore, it is improper for Paxton to ask the Senate to order the House to amend or otherwise alter the Articles of Impeachment.

Paxton has not cited a single incident of an article of impeachment being quashed or a request for a bill of particulars being granted. This is because Texas Constitution Article XV, § 1 grants the House the sole authority to charge a person and then prefer articles of impeachment to

²⁴ Compare TEX. CONST. [art. I, § 10](#), with TEX. CONST. [art. XV, § 3](#).

²⁵ Compare TEX. CONST. art. [XV, § 3](#) (“no person shall be convicted without the concurrence of two-thirds of the Senators present.”), with; TEX. CONST. [art. V, § 13](#); *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005) (“Under [the Texas Constitution], jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases.”).

²⁶ Compare TEX. CONST. [art. I, § 10](#), with TEX. CONST. art. [XV, § 3](#).

²⁷ See TEX. CONST. [art. IV, § 11](#).

²⁸ See *id.* art. [XV, § 3](#). Courts have repeatedly held that it is only when a judgment serves to punish that it is criminal in nature. See *In re Reece*, 341 S.W.3d 360, 365 (Tex. 2011) (“In determining whether contempt is civil or criminal, it is necessary to examine the purpose behind the contempt order: civil contempt is “remedial and coercive in nature... while criminal contempt is punitive in nature....”); *Flemming v. Nestor*, 363 U.S. 603, 614 (1960) (“Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected.”).

²⁹ TEX. CONST. [art. XV, § 4](#).

the Senate.³⁰ Indeed, Paxton’s request that the Senate order the House or House Managers to replead, amend, or alter the Articles is plainly unconstitutional.

The Framers of the U.S. and Texas Constitutions designed the impeachment process in two independent steps. The House is granted the sole authority to impeach, that is, accuse and charge a state official with misconduct that could result in removal and disqualification from office.³¹ And the Senate is granted the sole authority to try, and remove and disqualify, an offender.³² Paxton confuses the two processes and thereby undermines the separate powers expressly conferred on the House and Senate by the Constitution itself.

It is the House’s role 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:³³

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*.³⁴

³⁰ 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, 229th District Court](#), at 239 (in arguing against Carrillo’s special exception, counsel for the House Managers explained that they did not have “the authority to change the charges as they have been made by the entire House of Representatives. So we are bound from the day that Bill reached the front door of this Chamber until the day we get through with this trial. We are bound by what’s on the four corners of that instrument. We cannot amend.”); *State v. Leese*, [55 N.W. 798](#), 799 (1893) (concluding that the house managers did not have the authority to independently amend the articles of impeachment because “such power can no more be delegated by the joint convention to a committee or managers of impeachment, appointed by it, than the legislature can confer authority upon a committee composed of members of that body to enact a law, or to change, alter, or amend one which has been duly passed.”).

³¹ TEX. CONST. art. [XV, § 1](#).

³² *Id.* art. XV [§§ 2-4](#).

³³ [Report of the Texas House Select Committee on Impeachment](#) at 8 (July 23, 1975).

³⁴ [Ferguson v. Maddox](#), 263 S.W. at 892 (emphasis added).

While the Constitution contains certain requirements for the Senate impeachment process,³⁵ it is silent as to the manner or means the House must employ when exercising its charging powers.³⁶

It is a principle of constitutional law that where there is a grant of power in the Constitution to a department of Government ... without defining the manner or form in or by which it is to be exercised and carried into effect, the Legislature may legitimately prescribe reasonable rules by which this may be done.³⁷

As the Senate has done for this trial, the House established its own rules for conducting the investigation and thereafter preferring articles of impeachment.³⁸ This includes a rule granting the General Investigating Committee (“GIC”) “all the powers and duties conferred by [Government Code Chapter 665] ..., including the authority to propose articles of impeachment.”³⁹

Paxton has not shown that the House’s Articles violate the Constitution or rules it adopted. Nor does he explain why the Senate should review the House’s method and manner of impeachment much less order the House to amend the Articles it preferred. He cannot. “Each house is invested with independent responsibilities and duties, and *is the sole judge of its own rules of procedure. . . .*”⁴⁰ There is no basis for the relief Paxton seeks in his Motion and Request. Indeed,

³⁵ TEX. CONST. [art. XV, § 3](#) (Senators take an oath of impartiality and conviction must be by a two-third vote of the present senators); § 4 (judgment only results in the removal from office and disqualification from holding future office).

³⁶ 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) (“[T]he Framers specifically mandated that the Senate hold a trial under specific conditions, while leaving the House to impeach in any fashion that it chooses.”).

³⁷ *Austin v. Gulf, Colorado, and Santa Fe Railroad Co.*, [45 Tex. 234](#), 265 (1876).

³⁸ See [88th Legislature House Rules Manual](#), Rule 3, section 13(c); Rule 4, section 12.

³⁹ See *id.* at Rule 3, section 13(c).

⁴⁰ *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

he is inviting the Senate to violate one of the most basic constitutional principles: the separation of powers.⁴¹

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. Paxton's requested relief is both meritless and unnecessary. As a court of impeachment, the Senate has resolved to "proceed to the consideration of [the enumerated] Articles."⁴²

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U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (the Senate has the sole discretion to choose impeachment procedures).

⁴¹ See TEX. CONST. [art. III, § 11](#) ("Each House may determine the rules of its own proceedings."); [art. II, § 1](#) ("no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.").

⁴² [Senate Rule 5](#).

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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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