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

Patsy Spaw

AUG 15 2023

CLERK OF THE COURT

IN THE MATTER OF	§
WARREN KENNETH	§
PAXTON, JR.	§

HOUSE MANAGERS' RESPONSE TO
PAXTON'S MOTION TO PRECLUDE
PAXTON FROM BEING COMPELLED TO TESTIFY

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

Warren Kenneth Paxton, Jr.'s ("Paxton") filed a motion to preclude Paxton from being compelled to testify and the Texas House of Representatives Board of Managers ("House Managers") files the following response:

INTRODUCTION

Paxton's motion to preclude Paxton from being compelled to testify is mislabeled. It is not about whether he can be compelled to *testify*. It is about whether he can invoke his right against self-incrimination before being questioned as a witness. Paxton claims that during an impeachment proceeding, which is designed to determine whether he should be removed and disqualified from office for abusing his power, he should be permitted to obtain the benefits of the Texas equivalent of the Fifth Amendment without actually having to invoke it. However, the Texas Supreme Court disagrees. In *Meyer v. Tunks*, the court unequivocally held that while a state official can assert the right against self-incrimination during a removal action, the proceeding is not criminal, and, therefore, the official can be questioned.[1] Only at that time, during such questioning, may the official invoke his right against self-incrimination.[2]

ARGUMENTS & AUTHORITIES

I. Paxton has not invoked his constitutional right against self-incrimination and seeks an improper advisory opinion regarding the effects of doing so.

The Fifth Amendment states that "[n]o person … shall be compelled in any criminal case to be a witness against himself … ."[3] The Texas Constitution's equivalent right against self-

[1] *Meyer v. Tunks*, 360 S.W.2d 518, 519-20 (Tex. 1962).

[2] *Id.*

[3] U.S. CONST. amend. V.

incrimination is found in Article I, § 10, which states, "In all criminal prosecutions the accused … shall not be compelled to give evidence against himself … ."[4]

Paxton has been charged in three felony indictments for securities fraud and is also the subject of an on-going federal criminal investigation.[5] Paxton's close friend, Nate Paul, has also been indicted for federal felonies. And Paxton's misdeeds with Paul are, in large part, the basis of this impeachment trial. Given these circumstances, it is understandable why Paxton may think *some* of his answers to questions in the impeachment trial "would in themselves support a conviction" or "furnish a link in the chain of evidence needed to prosecute," the standard necessary to invoke his right against self-incrimination.[6]

To invoke the constitutional right against self-incrimination, the party asserting the right must expressly invoke it.[7] The invocation of the right to remain silent must be unequivocal and unambiguous.[8]

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[4] TEX. CONST. art. I, § 10.

[5] *See* Exhibit 142, The State of Texas v. Warren Kenneth Paxton, Jr., Nos. 416-81913-2015, 416-81914-2015, 416-81915-2015, in the 416th District Court of Collin County, Texas; Exhibit 138.

[6] *Walters v. State*, 359 S.W.3d 212, 215 (Tex. Crim. App. 2011).

[7] *See Salinas v. Texas*, 570 U.S. 178, 183-84 (2013) (plural. op.) (the Fifth Amendment's express-invocation-requirement mandates that "a witness who desires the protection of the privilege must claim it at the time he relies on it") (cleaned up). An exception to the Fifth Amendment's express-invocation-requirement exists for a criminal defendant, who need not take the stand and assert the privilege at his own criminal trial. *See id.* at 184. This exception does not apply to Paxton because he is not a criminal defendant and, as explained further below in Section III, this impeachment trial is not a criminal trial.

[8] *See Berghuis v. Thompkins*, 560 U.S. 370, 380–82 (2010).

Here, Paxton's counsel has stated publicly and stridently that Paxton will not testify at his impeachment trial.[9] But Paxton's motion does not invoke his right against self-incrimination or otherwise state he will not testify before the Senate. Instead, Paxton expressly waffles on whether he will invoke his right to remain silent, *e.g.*, "if Attorney General Paxton chooses not to testify in his impeachment trial voluntarily" and "should Attorney General Paxton elect not to testify[.]"[10]

Why would Paxton state publicly he is not going to testify while not formally telling the Senate the same thing? Because Paxton wants to have it both ways. Paxton wants the benefits of a Fifth-Amendment invocation, *e.g.*, no adverse inference from or comment on an invocation, without actually invoking the Fifth Amendment, so he can avoid the detriments of invocation, *e.g.*, negative publicity and disdain—as Texas' top law enforcement officer—from refusing to publicly answer questions before the Senate in an effort to cling to the office he abused.

Paxton's vehicle to obtain what he wants is an improper request for an advisory opinion about the effects of a possible, future invocation of his right against self-incrimination. All of the relief Paxton seeks is premised on contingent facts, *e.g.*,:

(1) Paxton cannot be subpoenaed to testify *if the House Managers choose to do so*;

(2) *if Paxton elects not to testify*, the House Managers and counsel cannot raise or publicly comment on that decision before or during trial; and

(3) *if Paxton elects not to testify*, he is entitled to an instruction to the jurors *if he requests one* not to draw any negative inference from his refusal to testify.

These issues, dependent on contingent or hypothetical facts, are not ripe as they may never come to pass. Unless and until then, the Senate need not make a decision on them.

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[9] Patrick Svitek, *Ken Paxton Will Not Testify At Impeachment Trial, Defense Attorney Says*, TEX. TRIB. July 4, 2023 8:00 a.m.

[10] Motion to Preclude Attorney General Warren Kenneth Paxton Jr. from Being Compelled to Testify at 9-10.

In any event, as shown below, Paxton is not entitled to such relief.

II. The House Managers can subpoena Paxton to testify in this impeachment trial and he can invoke his constitutional right against self-incrimination on a question-by-question basis.

The Texas Constitution gives the Senate the sole power "to try the party impeached"[11] and states that "[e]ach House may determine the rules of its own proceedings . . . ."[12] Combined, these constitutional powers authorized the Senate to adopt the Rules of Impeachment ("Rules").[13]

Rule 22 states that "[t]he presiding officer is authorized on the request of one of the parties or their counsel to issue subpoenas compelling persons to attend … ."[14] Rule 23 provides a form for a subpoena which, in relevant part, summons an individual "to appear in person before the SENATE OF TEXAS sitting as a COURT OF IMPEACHMENT . . . then and there to testify and the truth to speak . . . in the cause which is before the Court . . . ."[15]

Neither Rule 22 nor Rule 23 limits the individuals who may be summoned to testify before the Senate.[16] Specifically, neither excludes Paxton from those persons who must appear and testify

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[11] TEX. CONST. art. XV, § 3.

[12] TEX. CONST. art. III, § 10.

[13] *See* *Nixon v. United States*, 938 F.2d 239, 243 (D.C. Cir. 1991) (the Senate's power to "determine the Rules of its Proceedings" gave "the Senate independent discretion to set procedural rules for impeachment trials . . . ."), *aff'd*, 506 U.S. 224 (1993); *Mecham v. Gordan*, 751 P.2d 957, 963 (Ariz. 1988) (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.").

[14] Tex. S. Rule 22, S. Res. 35, 88th Leg., 1st C.S. (2023) ("Senate Rules").

[15] *Id.* Rule 23.

[16] *Id*. Of course, the Senate always has the authority decide whether a witness's testimony is relevant. *See* Senate Rule 13(b).

if subpoenaed.[17] Because the Senate properly adopted rules that permit the issuance of a subpoena compelling anyone to testify, including Paxton, the House Managers can subpoena Paxton to testify in this impeachment trial.[18]

In *Meyer v. Tunks*, the Texas Supreme Court examined a similar issue. In that case, the State of Texas sought to remove from office the sheriff of Jefferson County pursuant to Texas Constitution Article XV, § 7, which states: "The Legislature shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution."[19] At the time the action was brought, the sheriff was under criminal indictment.[20] The state noticed the sheriff's deposition, without prejudice to the sheriff's ability to invoke his constitutional right against self-incrimination to any question that might incriminate him.[21] The sheriff moved to quash the deposition on the ground that the removal action was a criminal action, and requiring him to give testimony violated the right against self-incrimination in Article I, § 10 of the Texas Constitution.[22] The trial court denied the sheriff's motion to quash and he sought mandamus relief from the Texas Supreme Court.[23]

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[17] *See id.*

[18] Paxton effectively seeks to amend Rules 22 and 23 to exclude himself from their reach, which requires a two-thirds vote of the Senators present and eligible to serve as jurors. *Id.* Rule 7.

[19] *Meyer v. Tunks*, 360 S.W.2d at 519-20.

[20] *Id.* at 519.

[21] *Id.*

[22] *Id.*

[23] *Id.*

The Texas Supreme Court noted that the character of a removal action "is to be determined by the object sought to be accomplished and the nature of the judgment entered."[24] The court recognized that the object of the removal action was "not to punish the officer for derelictions or for the violation of a criminal statute but to protect the public in removing from office by speedy and adequate means those who have been faithless and corrupt and have violated their trust. The law imposes no other penalty."[25] The court found that the removal action was a civil action, but after noting that other states variously classified their analogous removal actions as civil, quasi-criminal or criminal, stated that the "terminology is not altogether important or controlling … ."[26]

The Texas Supreme Court then recognized that:

> The gist of Art. 1, § 10 of the State Constitution is the same as that of the Fifth Amendment to the United States Constitution, namely that the defendant in a criminal case shall not be compelled to give evidence against himself. The protection thus afforded is not against the propounding of the question but is the right to refuse to answer if he claims the privilege."[27]

Because the removal action was not a criminal case, the Texas Supreme Court found that "it is hardly logical to contend that in a removal action the defendant officer cannot be called to the witness chair … ."[28] The Texas Supreme Court held that the code of criminal procedure did not apply and Article I, § 10 of the Texas Constitution did not exempt the sheriff "from being examined

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[24] *Id.* at 520.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 521.

[28] *Id.*

as an adverse witness, though he may claim the protection afforded to him by this constitutional provision."[29]

Meyer is virtually on-point and should be followed by this court of impeachment. Like the removal action in *Meyer*, the foundational authority, which was Texas Constitution Article XV, is also the foundation for this impeachment trial.[30] And like the sheriff in *Meyer*, Paxton is currently under indictment and seeks to avoid being questioned in the action to remove him from office. [31] As the sheriff did in *Meyer*, Paxton asserts here that the action to remove him is a criminal proceeding and Texas Constitution Article I, Section 10 precludes him from having to testify in the action to remove him from office.[32] But like the removal action in *Meyer*, the object of this impeachment trial is not to punish Paxton for derelictions, but to protect the public from an official who has abused his office and violated its trust.[33] Consequently, as in *Meyer*, this impeachment trial is not a criminal proceeding,[34] and neither the Fifth Amendment nor Article I, Section 10 apply to protect Paxton from being called to the stand and questioned.[35] Of course, as *Meyer* made

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[29] *Id.* at 522.

[30] *See* TEX. CONST. art. XV, §§ 2, 3, 4.

[31] *See* Exhibit 142.

[32] *See* Motion to Preclude Attorney General Warren Kenneth Paton Jr. from Being Compelled to Testify at 1, 5.

[33] *See Ferguson v. Maddox* 263 S.W. 888, 892 (Tex. 1924) ("The primary purpose of an impeachment is to protect the state, not to punish the offender.").

[34] *See also* section III, *infra*.

[35] The Fifth Amendment and Article I, §10 apply only to criminal proceedings. *See* U.S. CONST. amend. V ("No person … shall be compelled in any *criminal case* to be a witness against himself … .") (emphasis added); TEX. CONST. art. I, § 10 ("In all *criminal prosecutions* the accused … shall not be compelled to give evidence against himself … .") (emphasis added).

clear, Paxton retains his right to refuse to answer specific questions based on his constitutional right against self-incrimination.[36]

III. Paxton's impeachment trial is not a criminal proceeding.

The entirety of Paxton's argument and the relief he seeks is premised on his argument that this impeachment trial is a criminal proceeding. It is not. The House Managers have thoroughly refuted Paxton's arguments in the House Managers' Response to Paxton's Motion to Quash the Articles of Impeachment. Rather than repeat those arguments here, the House Managers incorporate them by reference into this response.

Two historical notes deserve further discussion. First, the historical record strongly supports the conclusion that the Framers of the U.S. Constitution, from which the Texas Constitution adopted its impeachment proceedings,[37] did *not* consider an impeachment trial to be a criminal proceeding. In the debate concerning the impeachment of Senator William Blount—the first impeachment to take place under the new U.S. Constitution—the Senate "authoritatively

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[36] The only real distinction between *Meyer* and this case is that *Meyer* was deemed to be a civil action and this impeachment trial is *sui generis*—one of a kind—neither civil nor criminal. *See* Letter from James Madison to Thomas Jefferson (March 4, 1798), *in* 17 The Papers of James Madison 88 (David B. Mattern et al. eds., 1991) (Madison, the "Father of the Constitution," observing that the believed impeachments to be "sui generis"). However, this distinction makes no difference because *Meyer* itself teaches that, whether a removal action was deemed to be civil, quasi-criminal or criminal, the "terminology is not altogether important or controlling …." *Meyer*, 360 S.W.2d at 521. Under *Meyer*, the "object sought to be accomplished and the nature of the judgment to be entered" are controlling in determining the character of a removal action. *Id.* at 520.

[37] *See Ferguson v. Maddox*, 263 S.W. at 892 ("When the Constitution of Texas was adopted, it was done in the light of, and with a full knowledge and understanding of, the principles of impeachment as theretofore established in English and American parliamentary procedure. The Constitution in this matter of impeachment created nothing new. By it, something existing and well understood was simply adopted.")

decided" "whether impeachment is a criminal process[.]"[38] Involved in the debate were Senators and commentators who had served as members of the Constitutional Convention,[39] and Senators who had served in the First Congress, which approved the Bill of Rights in its final form.[40] Thus, the debate provides an accurate account of the Framer's original intent on the issue of whether an impeachment trial is a criminal proceeding.[41] The debate concerned a motion to apply the Sixth Amendment's requirement of a jury trial in all "criminal prosecutions" to the impeachment trial.[42] "[T]he entire issue rested on two questions," the first of which was—"was impeachment a criminal prosecution[?]"[43] After extensive debate, the Senate defeated the motion 26-3.[44] "Both the senators' comments, and their clearly expressed attitudes, indicate that the defeat of [the] motion constituted a decision that impeachment was not a criminal process."[45] "The debate and decision upon this issue—a full discussion followed by a lopsided, overwhelming vote against [the] motion—should destroy any intent-based argument that impeachment is a criminal process."[46]

Second, Paxton wholly misstates the ruling of the Presiding Officer in the 1917 impeachment trial of Governor Ferguson. Contrary to Paxton's assertion, the Presiding Officer did

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[38] Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framer's Intent*, 52 MD. L. REV. 437, 439-40 (1993).

[39] *Id.* at 440-41.

[40] *Id.* at 441.

[41] *Id.*

[42] U.S. CONST. amend. VI; Buckner F. Melton, Jr., *supra*, at 445.

[43] *Id.* at 447.

[44] *Id.* at 453-54.

[45] *Id.* at 455.

[46] *Id.* at 456.

not find that the impeachment trial was a criminal proceeding. The Presiding Officer rejected that argument and stated that "under the Texas Constitution the chair is of the opinion that it[, an impeachment trial,] is what would probably be termed a quasi-criminal action."[47] Governor Ferguson's counsel subsequently acknowledged that the Presiding Officer had ruled that the impeachment trial was a quasi-criminal proceeding.[48]

For all these reasons, Paxton's impeachment trial is not a criminal proceeding.

IV. If the House Managers subpoena Paxton to testify and he invokes his right against self-incrimination, the Senate may draw an adverse inference from—and the House Managers may comment on—such invocation.

Because the impeachment trial of Paxton is not a criminal proceeding, the Senate may draw an adverse inference from—and the House Managers may comment on—any invocation of the right against self-incrimination by Paxton if the House Managers subpoena him to testify. Doing so would not infringe Paxton's constitutional right against self-incrimination.[49]

CONCLUSION

For the reasons set out above, the Court of Impeachment should deny Paxton's Motion to Preclude Paxton from Being Compelled to Testify.

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[47] State of Tex. Senate, Rec. of Proc. Of the High Ct. of Impeachment on the Trial of Hon. James E. Ferguson, Governor, S. 35, 2nd & 3rd Sess. at 338 (1917).

[48] *Id.* at 671.

[49] *See Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 285-86 (1998) (a defendant's Fifth Amendment right against self-incrimination in a clemency proceeding, a nonjudicial postconviction process not part of the criminal case, is not infringed by allowing an adverse inference to be drawn from the defendant's silence); *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976) (a defendant's Fifth Amendment right against self-incrimination—in a prison disciplinary hearing resulting in "punitive placement" for 30 days—was not infringed by allowing an adverse inference to be drawn from his silence in a non-criminal proceeding).

Respectfully submitted,

Rusty Hardin
State Bar No. 08972800
Lara Hudgins Hollingsworth
State Bar No. 00796790
Jennifer Brevorka
State Bar No. 24082727
Joe Roden
State Bar No. 00794549
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
adennis@rustyhardin.com
alewis@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

Ross Garber
[bar number]
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