THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

Patsy Spaw

AUG 05 2023

CLERK OF THE COURT

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

ATTORNEY GENERAL WARREN KENNETH PAXTON JR.'S MOTION TO DISMISS ARTICLE VI

Article VI charges the Attorney General with violating the Texas Whistleblower Act by "terminating and taking adverse personnel action against" several of his highest-level employees. H.R. 2377, 88th Sess. (2023). But, as the Honorable Kent Hance has urged, that Act does not govern the relationships between an elected official and "those inferior officers" who "provide competent policymaking advice in line with the policymaking goals as defined by the elected official."[1] Subjecting a principal even to civil liability due to the precipitous breakdown in a relationship between an elected official and his staff "would place in jeopardy the very foundations of our governmental system and require elected officials to rely on advice that is adverse and hostile to their own duly established policy goals as a statewide elected official."[2] To subject an elected official to impeachment because he could no longer trust or work with subordinates who clearly opposed him would be to hold that an elected official's power to choose his subordinates exists only at the Legislature's sufferance.

Whistleblower Act claims are ordinary employment disputes. They belong in civil litigation—where the case underlying Article VI existed for multiple years, both before and after the Attorney General's most recent election. The appropriate remedy for all employment litigation, if any, is determined by a court or a settlement. Neither the Founders of the federal Constitution nor past Texas practice has ever indicated that pedestrian employment litigation pursued in the ordinary course of business gave rise to an impeachable offense. It still fails to do so. Article VI should be dismissed.

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[1] Letter of Amicus Curiae, Honorable Kent. R Hance, Cause No. 21-1027 (Tex. 2022), available at https://tinyurl.com/HanceAmicus.

[2] *Id.*

STANDARD

Impeachment is reserved only for the gravest of public wrongs as historically understood in English and early American practice "by an examination of the Constitution, legal treatises, the common law[,] and parliamentary precedents." *Ferguson v. Maddox*, 263 S.W. 888, 892 (Tex. 1924). As a Court of Impeachment, the Senate "must determine whether or not the articles presented by the House set forth impeachable offenses." *Id.* at 893. With respect to Article VI, the House has not. Impeachment is an extraordinary remedy used to protect the State from only the most serious offenses. It is "emphatically" *not* an "arbitrary and unrestrained" power to remove an elected official. *Id.* Rather, "[i]mpeachment is used only in extreme cases," *Ferguson v. Wilcox*, 28 S.W.2d 526, 533 (Tex. 1930), consistent with "such official delinquencies, wrongs, or malfeasances as justified impeachment according to" that historical practice. *Ferguson*, 263 S.W. at 892. This Court decides whether an Article as alleged rises to the historical level of an impeachable offense as a matter of law. *Id.* at 893. This Court may dismiss an Article outright—either for failing to rise to that level, or for any other legal defect. *Id.*; *see also* S. Journal, 88th Cong., 1st Sess. at 40–52 (2023).

ARGUMENT

I. Article VI Does Not Describe an Impeachable Offense.

The Supreme Court has "emphatically repudiate[d] the idea that any officer may be arbitrarily impeached." *Ferguson*, 263 S.W. at 892. Historical precedent illustrates that the sort of misdeeds alleged in this Article are insufficient to sustain an Article of Impeachment.

"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 [Texas] Constitution in this matter of

impeachment created nothing new. By it, something existing and well understood was simply adopted." *Id.* at 97. At the 1787 Constitutional Convention, the Framers expressly rejected "maladministration" as a ground for impeachment. Charles L. Black, Jr., *Impeachment: A Handbook*, *in* IMPEACHMENT: A HANDBOOK, NEW EDITION at 26–27 (Charles L. Black, Jr. & Philip Bobbit, 2018). James Madison noted that "[s]o vague a term w[ould] be equivalent to a tenure during pleasure of the Senate." *Id.* at 26. In its place, the Framers substituted "high Crimes and Misdemeanors," signaling that they believed impeachable offenses must "hav[e] about them some flavor of criminality." *Id.* at 27–28.

That the Executive does not serve at the pleasure of the Senate is a core separation of powers concern that has been a theme of American impeachment proceedings. The Framers were "insistent that balance between the executive and legislative branches be maintained so that the executive would not become the creature of the legislature." Impeachment of Richard M. Nixon, President of the United States, Final Rep. of the Comm. on the Judiciary, House Comm. on the Judiciary, 93d Cong. 2d Sess. at 11 (1975) ("Nixon Impeachment"). The Senate "is not a board of directors, and it does not appoint the [Attorney General]. If we know little about how the Framers and ratifiers of [the Constitution]" intended the impeachment power to operate, "we know this: they decisively rejected removal of the [executive] for simple maladministration, and they rejected also the subordination of the [executive] to the Congress that such a power would imply." Black at 80.

Impeachment is reserved for offenses so dangerous and immediate that they threaten the public order and cannot wait for ordinary electoral politics to provide an ordinary remedy. *See id.* at 35. Impeachable offenses are never private wrongs, which, according to Blackstone, are merely "an infringement or privation of the private or civil rights belonging to individuals considered as

individuals; and are thereupon frequently termed *civil injuries*." 3 William Blackstone, *Commentaries* *2. Accordingly, the conduct upon which an article of impeachment is based must be "seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties." Nixon Impeachment at 12–13. The question before this Court is whether the conduct alleged in Article VI could conceivably amount to a violation of this magnitude. It cannot.

The termination of political appointees, especially an official's seniormost advisors, falls squarely within the realm of "administration." Disagreement with the Attorney General's personnel decisions is decidedly not the type of offense the Framers had in mind when contemplating impeachment and removal from public office against the will of the voters. The Attorney General unquestionably possesses the constitutional and statutory power to appoint and remove his highest-ranking advisors. "[T]he power of appointing, overseeing, and controlling those who execute the laws" has long been considered at the heart of the executive power. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (citing 1 Annals of Cong. 463 (1789)). "That power, in turn generally includes the ability to remove executive officials." *Id.* The Government Code further empowers the Attorney General to appoint several high-level assistants to carry out his policies and act in his stead under certain circumstances. *See, e.g.*, Tex. Gov't Code § 402.001.

To allow this Article to proceed would be to allow the House of Representatives to superintend the staffing choices of a statewide elected official of a coordinate branch of government and to subvert the authority of the electorate's chosen officeholder to the management of the legislature. "[I]t is a cardinal principle of our constitutional life that governments are created to protect the rights of the governed—including the right to have their consent manifested in the

persons chosen to govern. That means protecting the electorate's choice of [officeholder], unless the very destruction of the protecting State and its constitutional norms is at stake." Black at 120.

Of course, the "very destruction of the . . . State" is undoubtedly not threatened here. The harm, if any, of the actions alleged in Article VI would be to a handful of former employees—not to the State. This is fatal. "[T]he critical element of injury in an impeachable offense [is] injury *to the state*." Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 82 (1989) (emphasis added).

Indeed, even if the allegations in Article VI were true (and they are not), this Court has recognized that not every violation of law constitutes an impeachable offense. Judge J.B. Price was impeached on twelve articles, one of which accused him of writing a literal blank check drawing on State funds for a witness fee. This Court recognized that the charges simply failed to qualify as "grave offenses" requiring the extraordinary remedy of impeachment. S. Journal, 42nd Cong., 2nd Sess. at 429-431 (1931). This Court dismissed six of the articles against Judge Price and acquitted him on the rest. *Id.* at 429-431, 684-691. The Court should follow suit and dismiss Article VI.

Article VI describes the type of private wrong that fails to rise to the level of an impeachable offense. The Whistleblower Act is unquestionably a statute that merely recognizes a "civil injury" (*cf.* 3 Blackstone, *Commentaries* *2) to an individual that is only redressable by a civil action in civil court for civil remedies, not a "high crime" remediable by the "high court" of impeachment (4 Blackstone, *Commentaries* *256). *See also* Tex. Gov't Code Chapter 554. Indeed, some of these individuals have filed suit, and their claims remain pending. That ongoing litigation counsels against adjudicating this claim in favor of abstention. *See, e.g.*, *Bice v. La. Pub. Defender Bd.*, 677 F.3d 712, 716 (5th Cir. 2012) (describing the *Younger* doctrine which requires federal

courts to abstain from exercising jurisdiction over an ongoing state judicial proceeding).

Moreover, not every legal error rises to the level of a "grave official wrong," *Ferguson*, 263 S.W. at 892, or that term lacks meaning. At most, Article VI alleges that the Attorney General "infringe[d]" on former employees' "private or civil rights." 3 William Blackstone, *Commentaries* *2. A civil action of this sort is not akin to high treason requiring immediate correction through impeachment. And by re-electing the Attorney General, Texas voters have determined that this allegation should not preclude him from holding office; this Court should do the same.

II. Article VI Fails as a Matter of Law.

Article VI must also be dismissed because the Whistleblower Act does not protect employees against adverse employment actions taken by an elected official. Fundamentally, a violation of the Whistleblower Act occurs only when a public employee "in good faith reports a violation of law *by the employing governmental entity* or another *public employee* to an appropriate law enforcement authority." Tex. Gov't Code § 554.002(a) (emphasis added); *State v. Lueck*, 290 S.W. 3d 876, 878 (Tex. 2009). The Act defines a "public employee" to include "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." Tex. Gov't Code § 554.001(4). It defines State entities in corporate terms, including "a board, commission, department, office or other agency in the executive branch of state government." *Id.* § 554.001(5)(a). While the Whistleblower Act creates a cause of action based on the misconduct of *appointed officers*, it does not create a cause of action against the five *elected* officers—such as the Attorney General—whose positions are created by the Texas Constitution, article IV, section 1.

The Whistleblower Act only recognizes violations of its terms by an "employing governmental entity" or a "public employee." A claim can only be brought against the employing

agency, not the elected officeholder. Tex. Gov't Code § 554.0035 ("A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter."). The Article's allegation that the Attorney General is guilty of conduct proscribed by the Whistleblower Act is a legal impossibility. Like the Governor, the Lieutenant Governor, and the jurors of this Court, the Attorney General is an *elected* officer, chosen by the people of Texas to exercise sovereign authority on their behalf. As an elected official, the Attorney General simply does not fall within the statute's ambit.

As a former member of this esteemed body, the Honorable Kent Hance, has urged, "words matter, and the members of the Legislature chose their words carefully when they drafted the Whistleblower Act." [3] And as Governor Abbott has noted, the application of the Whistleblower Act to the Attorney General would implicate "the governance powers of an officer of the Executive Department who was elected on a statewide basis." [4] It would disenfranchise voters—who elect officers to set policy, not staffers—and would vitiate the separation of powers.

III. Article VI Misstates Texas Employment Law.

Article VI charges that the Attorney General violated the law by failing to provide his former employees with "good cause" protections for termination, or "due process" prior to those terminations. Texas law imposes no such obligations on an at-will employer—so Article VI misstates Texas law and must be dismissed as a matter of law.

Texas has been an "at will" employment state since at least 1888. *See East Line & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888). Accordingly, "[a]bsent a specific agreement to the

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[3] Letter of Amicus Curiae, Honorable Kent. R Hance, Cause No. 21-1027 (Tex. 2022), available at https://tinyurl.com/HanceAmicus.

[4] Letter of Amicus Curiae, Governor Greg Abbott, Cause No. 21-1027 (Tex. 2022), available at https://tinyurl.com/AbbottAmicus.

contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Sawyer v. E.I. Du Pont De Nemours & Co.*, 430 S.W. 3d 396, 399 (Tex. 2014). Terminating an employee without good cause when no good cause is required cannot form the basis of an impeachable offense; it does not even form the basis of a tort.

Similarly, Article VI suggests that state employees are entitled to due process prior to dismissal. Not so. It is well-established that a person must have a protected liberty or property interest in their employment to be entitled to due process. At-will employees, like the individuals referenced in Article VI, have no constitutionally protected liberty or property interest in their employment that entitles them to due process. *E.g.*, *Cote v. Rivera*, 894 S.W.2d 536, 541 (Tex. App.—Austin 1995) (holding that an employee's claim for purported violation of her due process rights "lack[ed] merit" because she had no property interest in her at-will employment); *Renken v. Harris Cnty*., 808 S.W.2d 222, 225 (Tex. App.—Houston [14th Dist.] 1991) (same). Impeaching an official for failing to provide due process in a context where black-letter law establishes that no due process is required is nonsensical—though that is what Article VI does.

Furthermore, neither good cause nor due process is necessary for an employing state or local governmental entity to succeed against a Whistleblower Act claim. It is a complete defense to a cause of action under the Whistleblower Act that the "employing state or local governmental entity would have" terminated the employee "based on information, observation, or evidence that is not related to the fact that the employee made a report" to law enforcement. Tex. Gov't Code § 554.004(b). This defense does not require the "employing state or local governmental entity" to establish "good cause" justifying the termination. Nor does it require the "employing state or local governmental entity" to provide the employee with due process. For these additional reasons, Article VI fails as a matter of law.

IV. Article VI's Remaining Allegations are Baseless.

The Attorney General does not even know which individuals the House contends he allegedly terminated in violation of the Whistleblower Act, because the House has not identified them. This flaw is fatal and requires that Article VI be dismissed. The Texas Constitution requires every prosecutor to include in every charging instrument the "accusation . . . with sufficient clarity and detail to enable the defendant to anticipate the [prosecution's] evidence and prepare a defense to it." *Garcia v. State*, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998); *see* Tex. Const. art. I, § 10. The Managers may not rely on generalities. Nor may they assume that the Attorney General knows the nature of the charges against him. *Drumm v. State*, 560 S.W.2d 944, 946–47 (Tex. Crim. App. 1977). "[T]o presume that an accused is guilty and therefore knows already the details of his offense, and thus can adequately prepare his defense, despite a vague indictment, is contrary to all proper principles of justice." *Slayton v. State*, 633 S.W.2d 934, 936 (Tex. App.—Fort Worth 1982, no pet.). The Article must, standing alone, provide effective notice of the allegations the prosecution intends to prove in order to convict. *See State v. Gollihar*, No. PD-1086-08, 2010 WL 3700790, at *2 (Tex. Crim. App. Sept. 22, 2010). Article VI fails to do so.

Nor has the Attorney General been apprised of the purported facts that form the basis for Article VI's remaining accusation: that he "engaged in a public and private campaign to impugn the employee's professional reputation or prejudice their future employment." Without knowing what statements or evidence the House believes support such an austere allegation, the Attorney General cannot fairly or adequately prepare a defense. Even so, Supreme Court Justice Harriet O'Neill recognized in a unanimous Texas Supreme Court decision that even when an employer triggers law enforcement action against a former employee by both "federal and state enforcement agencies" and "attempt[s] to have [the employee's] [professional] license revoked" as part of "a

personal vendetta designed to punish [a former employee]," Texas does not recognize an employee's tort claim. *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 612 (Tex. 2002).

The House had a constitutional duty to specifically delineate how the Attorney General committed an impeachable offense. Tex. Const. art. XV, § 1. It cannot delegate this authority to the House Managers at trial, permitting them to decide what the House of Representatives meant when it preferred Article VI. This Court's jurisdiction in turn is limited to the allegations set forth in the House's Articles. Tex. Const. art XV, § 2. This Article should be dismissed for failing to adhere to constitutional minimums of due process and adequate notice, which apply with full force in impeachments. *See Maddox*, 263 S.W. at 892; *Walters v. State*, 715 S.W.2d 63 (Tex. App.—Dallas 1986, no writ).

Even if the Court were to look beyond the allegations in Article VI, the House investigators themselves struggled to describe what this portion of Article VI meant, and they referred to what they sensed some unnamed witnesses were feeling. *See* Transcript at 142:10-11. They conceded: "we didn't spend -- we didn't spend a great deal of time on this area because it's their personal lives." *Id.* at 142:24–143:1. Respectfully, if the House cannot "spend a great deal of time" identifying any purported wrongdoing at issue here, this Court should not let Article VI see the light of day at trial. It is well-settled that prosecutors must provide "a *substantial* statement of the offence upon which the prosecution is founded" and cannot allude to "general reference[s]"—even "general reference[s] to the provisions of a statute" do not suffice. *The Hoppet*, 11 U.S. 389, 394 (1813) (emphasis added). Article VI falls well below this standard and must be dismissed.

CONCLUSION AND RELIEF REQUESTED

The Attorney General respectfully requests the Court dismiss Article VI.

Respectfully submitted.

/s/ Judd E. Stone II
Judd E. Stone II
Christopher D. Hilton
Allison M. Collins
Amy S. Hilton
Kateland R. Jackson
Joseph N. Mazzara

STONE|HILTON PLLC
1115 W. Slaughter Ln.
Austin, TX 78748
(737) 465-7248
judd.e.stone@proton.me
christopher.d.hilton@proton.me
allison.collins23@proton.me
amy.s.hilton@proton.me
kateland.jackson@proton.me
joseph.mazzara86@proton.me

Tony Buzbee
The Buzbee Law Firm
JP Morgan Chase Tower
600 Travis Street, Suite 7500
Houston, Texas 77002
Tbuzbee@txattorneys.com

Dan Cogdell
Cogdell Law Firm
1000 Main St., Suite 2300
Houston, TX 77002
dan@cogdell-law.com

Counsel for the Attorney General

CERTIFICATE OF SERVICE

This motion was served via email on the Senate, the Lieutenant Governor, and the House Board of Managers through their counsel, Rusty Hardin, Dick DeGuerin, and Harriet O'Neill on August 5, 2023.

/s/ Judd E. Stone II
Judd E. Stone II