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 OR HOLD IN ABEYANCE ARTICLES XVI THROUGH XX

The House Managers have said no one is above the law. They should begin with themselves. Fair constitutional procedures—such as the requirement that the House charge the Attorney General through clear, particularized Articles—are the foundation of the rule of law. Articles XVI through XX violate these bedrock obligations at every turn.

Neither the Texas nor the United States Constitution permits the House to prefer, or the Managers to prosecute, Articles that are vague and that make it impossible for this Court to vote on a specific act that might stand as an element of the charged offense. An Article that charges the Attorney General "acted with others to conspire, or attempt to conspire, to commit acts," Art. XVI, fails to provide the Attorney General with the constitutionally required notice of *what* he is charged with so as to prepare a fully informed defense. As does one that accuses the Attorney General of "misus[ing] his official powers" to "perform services for his benefit and the benefit of others." Art. XVII. Accusations so vague amount to little more than a charge of doing something wrong, in some way, for someone's benefit. That is not enough. *Russell v. United States*, 369 U.S. 749, 765 (1962) (quotation omitted); *State v. Ross*, 573 S.W.3d 817, 820 (Tex. Crim. App. 2019).

Nor may the House end-run this obligation by preferring Articles with countless possible factual predicates left to the Managers' and this Court's imaginations. Innumerable possible acts fall under the capacious scope of each of Articles XVI to XX. But this Court's rules do not allow any Article to be divided. S. Journal, 88th Cong., 1st Sess. at 40-52 (2023), Rule 28. The House may not cobble together a two-thirds majority by saying that an Article could really refer to one of fifteen bad acts, so each Senator should vote to sustain based on whatever he or she thinks is the best possible case. This unconstitutional aggregation condemns Articles XVI through XX. Each should be dismissed, or at a minimum held in abeyance, due to these egregious constitutional problems.

STANDARD

The prohibition against vague laws in the criminal context is so fundamental that a statute that "flouts it 'violates the first essential of due process.'" *Johnson v. United States*, 576 U.S. 591, 595 (2015) (Scalia, J.). The same is true of charging instruments, with the "Texas and United States Constitutions granting" a respondent "the right to fair notice of the specific charged offense." *State v. Ross*, 573 S.W.3d 817, 820 (Tex. Crim. App. 2019). For example, "if the prohibited conduct is . . . defined to include more than one manner or means of commission," then the prosecution must "allege the particular manner or means it seeks to establish." *Id*. When a charging instrument fails to provide fair and effective notice, the instrument should be dismissed. *DeVaughn v. State*, 749 S.W.2d 62, 67 (Tex. Crim. App. 1988). Whether to do so is a question of law for the Court. *Smith v. State*, 309 S.W.3d 10, 13-14 (Tex. Crim. App. 2010).

An Article is not divisible, S. Journal, 88th Cong., 1st Sess. at 40-52 (2023), Rule 28, and the Managers must prove every fact necessary to an Article beyond a reasonable doubt. *Id.* at Rule 25. Our Constitution prohibits conviction absent concurrence by two-thirds of Senators that the Managers have proven all necessary facts. Tex. Const. Art. XV, § 3.

An offense is only impeachable if it rises to the level of a "grave official wrong[]" as historically understood in English and early American practice. *Ferguson v. Maddox*, 263 S.W. 888, 892 (Tex. 1924). This Court has the power to dismiss an Article for failing to rise to that level or for any other legal defect. *Id*.; S. Journal, 88th Cong., 1st Sess. at 40-52 (2023), Rule 15.

ARGUMENT

I. Articles XVI Through XX are Unconstitutionally Vague.

The Texas and United States Constitutions entitle one facing criminal proceedings to know what specific charges and claims he faces so that he may prepare an informed defense. *State v. Moff*, 154 S.W.3d 599, 603 (Tex. Crim. App. 2004); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (citation omitted). Texas courts have long held that the charging instrument itself must state facts that, if proven, would constitute an offense. *Posey v. State*, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977). Indeed, a charging instrument must clearly state the factual basis of the offense in plain and intelligible words. Tex. Code Crim. Proc. arts. 21.02(7), 21.03, 21.11; *State v. Barbernell*, 257 S.W.3d 248, 251 (Tex. Crim. App. 2008). "[I]t is fundamental that the [charging instrument] must state facts which, if true, amount to a violation of law." *Ex parte Vasquez*, 56 S.W.2d 190, 191 (Tex. Crim. App. 1933). Texas courts have emphatically rejected charging instruments with nebulous language, holding for well over 160 years that charging instruments "must state the elements of the offense, leaving nothing to inference or intendment." *Green v. State*, 951 S.W.2d 3, 4 (Tex. Crim. App. 1997); *see also State v. Hutchinson*, 26 Tex. 111, 111 (Tex. 1861).

As this Court has previously held, an impeachment proceeding is a criminal matter. 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 337, 340 (1917) (Ferguson Impeachment Proceedings). This understanding derives in large part through previous English, American, and Texas practice. *Ferguson,* 263 S.W. at 893. Articles of impeachment are "a kind of bill[] of indictment." 4 William Blackstone, *Commentaries* *260. "The weight of authority in the United States and elsewhere . . . is that an impeachment proceeding is a criminal proceeding," Ferguson Impeachment Proceedings at 340. Because articles of impeachment are a kind of bill of indictment, the rules and principles of notice and fair play apply equally to them as to a modern charging instrument. *See, e.g.*, *id.; see also Maddox*, 263 S.W. at 892.

None of Articles XVI through XX state a charge against the Attorney General with the precision required to satisfy constitutional and statutory standards. Article XVI references a conspiracy but does not address any of the elements of that purported conspiracy: (1) a person; (2) with intent that a felony be committed; (3) agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and (4) he or one or more of them performs an overt act in pursuance of the agreement. Tex. Penal Code § 15.02(a); *Brown v. State,* 576 S.W.2d 36, 43 (Tex. Crim. App. 1978) (requiring dismissal for failure to identify the alleged agreement to commit a crime). And what it says—that the Attorney General "acted with others to conspire, or attempt to conspire, to commit acts described in one or more articles"—identifies neither a co-conspirator, the predicate act, why it is a felony, nor any relevant agreement, let alone how and when it was made. Article XVI is grossly deficient.

None of the other Articles fare better. Article XVII faults the Attorney General for misusing "his official powers" (no mention of which one) by "causing employees of his office" (no identification as to who or how) to "perform services" (no mention as to what) for "his benefit and the benefit of others" (without identifying the benefit or recipient). No reasonable person could ascertain what specific act this Article purports to charge. Article XVIII is the same: it does not identify what part of the Constitution, which part of the Attorney General's oath, or which statute was violated, let alone how it was violated. It must likewise be dismissed because "any element that must be proved should be stated in" the Article plainly. *Green*, 951 S.W.2d at 4. Similarly, Articles XIX and XX claim that the Attorney General is unfit for office through some "misconduct, private or public," and that the Attorney General abused the public trust when he "used, misused, or failed to use his official powers" in some utterly nebulous way.

These are not plain and intelligible words that identify a recognizable offense. They are hardly more than gestures indicating displeasure with the Attorney General. The House had a constitutional duty to state with the requisite specificity how it believed the Attorney General committed an impeachable offense. Neither the Attorney General nor this Court can identify what these Articles allege prior to the Managers' no doubt forthcoming effort to fill in the blanks—an effort they are not permitted. *Geick v. State*, 349 S.W.3d 542, 547 (Tex. Crim. App. 2011). Articles XVI through XX must therefore be dismissed.

II. Articles XVI Through XX are Unconstitutionally Aggregate.

Our Constitution and this Court's rules impose several interlocking procedural requirements on the charges that the Managers must prove. First, each Article is indivisible—so each Member of this Court must vote to either acquit or convict the Attorney General on each Article as a unified whole as written. S. Journal, 88th Cong., 1st Sess. at 40-52 (2023), Rule 28. Second, a Member may only vote to convict the Attorney General on an Article if the Member believes the Article sufficiently articulates, and the Managers have proven, every element required and identified in an Article beyond a reasonable doubt. *Id.* at Rule 25; *Green*, 951 S.W.2d at 4. Third, the Constitution requires the concurrence of two-thirds of Members present to convict the Attorney General on any charge—so two-thirds of the Members of this Court must agree that a given Article articulates, and the Managers have proven beyond a reasonable doubt, all of the same elements and facts. Tex. Const. Art. XV, § 3. As drafted, Articles XVI through XX make this impossible, because they invite each Court Member to conclude that the Attorney General committed *different* acts while voting to convict on the same Article. This violates the Constitution's requirement of a two-thirds concurrence to convict the Attorney General of a given Article, and it requires Articles XVI through XX to be dismissed.

In the typical criminal matter, a jury must unanimously convict a defendant. *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005); *Ramos v. Louisiana*, —— U.S. ——, 140 S. Ct. 1390, 1397 (2020). An impeachment clearly requires only a two-thirds supermajority. Tex. Const. Art. XV, § 3. But the underlying principles that the requisite number of jurors reach an agreement to convict remain the same. The requirement in both cases exists to demand that jurors reach a consensus "on the same act for a conviction." *Pizzo v. State*, 235 S.W.3d 711, 714 (Tex. Crim. App. 2007). Consensus is required on every essential element of an offense—from the occasion of the offense to the mental state required to commit it. *Id*. at 714-15 (citations omitted). And even where the means of how a defendant committed an offense is not an essential element of a crime, unanimity on the "brute facts of the offense is nevertheless required as a matter of due process [when] the alternate means are so disparate as to become two separate offenses." *O'Brien v. State*, 544 S.W.3d 376, 383 (Tex. Crim. App. 2018).

This due process requirement prohibits what Justice Scalia dubbed "novel umbrella crimes," that conjoin offenses not included with one another at common law, such as "a felony consisting of either robbery or failure to file a tax return." *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (concurring). If the jury unanimously convicted the defendant, but half the jurors believed the defendant had committed a robbery while the other half thought he failed to file a tax return, ""permitting a 6-to-6 verdict" to stand as a unanimous conviction "would seem contrary to due process." *Id*. Such a composite, pick-your-own-predicate crime scenario would violate due process for an offense that could be established by proving one of two unrelated bad acts.

How much worse for due process, then, that the House's Articles XVI to XX attempt to establish an offense through fifteen or more predicates. The menu of potential acts available to establish the offense outlined in each of these Articles virtually guarantees that two-thirds of this

Court will not concur on the "brute facts of the offense." *O'Brien*, 544 S.W.3d at 383. And this Court's rule that each Article must be voted on indivisibly prevents Members from resolving whether they concur in each Article based on the same brute facts through a series of alternative votes. S. Journal, 88th Cong., 1st Sess. at 40-52 (2023), Rule 28. The Articles as currently drafted present an impermissible possibility that the Court could convict the Attorney General without the constitutionally required concurrence—with some Members voting that one Article served as the predicate offense, others voting that a second Article served as the predicate, and so on. Neither the Texas nor the U.S. Constitution would allow this in any other criminal context; this Court should not permit it here. *O'Brien*, 544 S.W.3d at 383; *Schad*, 501 U.S. at 650.

Each Article makes this flaw plain. Take Article XVI, regarding conspiracy. Texas law requires a jury to unanimously agree on the critical element of an agreement to commit a criminal offense to support a conspiracy conviction. *Garcia v. State,* 46 S.W.3d 323, 327 (Tex. App.—Austin 2001, pet. ref'd). But Article XVI does not identify the agreement or the criminal offense at the crux of the alleged conspiracy. This ambiguity gives rise to a very real risk that the Attorney General could be convicted of conspiracy based on an impermissible—and unconstitutional—aggregation of votes, without twenty-one Senators all concurring that the Attorney General had formed a given specific agreement to commit a given specific criminal offense.

Articles XVII through XX fare no better. As written, none of them set forth their respective essential elements in a way that would permit, let alone ensure, factual concurrence by two-thirds of Senators. Since these Articles rely on "the acts described in one or more articles," each fails to set forth the specific occasion of the alleged offense, and instead invites the Members to vote to convict the Attorney General based on any one of a menu of allegations. The actions underlying each Article occurred at a different time, in a different context, for different reasons, subject to

different defenses. But through their unconstitutionally aggregate drafting, the Attorney General could be acquitted of all the underlying Articles that serve as potential predicate offenses for Articles XVII through XX, and yet nonetheless be convicted of one of these aggregate articles.

This is constitutionally intolerable. As eloquently noted during Judge Nixon's impeachment on a similar omnibus article "[t]he House is telling us it's O.K. to convict . . . even if we have different visions of what he did wrong, but that's not fair to Judge Nixon, to the Senate or to the American people." Proceedings of the U.S. Senate in the Impeachment Trial of Walter L. Nixon, Jr., a Judge of the U.S. District Court for the Southern District of Mississippi, 101st Cong., 1st Sess. at 449 (1989).

The two-thirds supermajority requirement is a core constitutional protection in impeachment proceedings afforded to the Attorney General and to Texas's electorate, who chose the Attorney General to serve a third term. Neither the House nor the Managers should be permitted to erode these protections. Articles XVI through XX make it impossible for the Senate to comply with the two-thirds concurrence constitutionally mandated. They must therefore be dismissed.

III. Articles XVIII through XX are Not Impeachable Offenses.

Articles XVIII through XX fail to rise to the level of impeachable offenses. Here, the Legislature has textually identified the proposed charges—"dereliction of duty," (Article XVIII), "unfitness for office," (Article XIX), and "breach of public trust," (Article XX)—as insufficient. Texas law identifies a variety of bases that are sufficient for removal from office by address, namely "willful neglect of duty," "incompetency," (statutorily defined in part as "gross carelessness in the discharge of official duties"), "oppression in office," "breach of trust," or "any other reasonable cause that is not a sufficient ground for impeachment." Tex. Gov't Code § 665.052.

This residual clause, however, clearly indicates that the previous five grounds are not sufficient bases for impeachment. Removal by address is allowed for "any *other* reasonable cause *that is not* a sufficient basis for impeachment." *Id*. (emphasis added). The implication is clear: "willful neglect of duty," "unfitness to discharge . . . official duties," and "breach of trust," are *not* sufficient bases for impeachment. And that is what Articles XVII through XX charge: dereliction of duty ("willful neglect of duty"), unfitness for office, and breach of public trust. These three Articles must therefore be dismissed.

IV. At a Minimum, the Articles Should Be Held in Abeyance to Determine if a Predicate Offense Even Exists.

Articles XVI through XX each rely on the Managers proving some other Article beyond a reasonable doubt. By necessity, Articles XVI through XX cannot rely on another Article as a predicate act without that other Article being an impeachable offense; so each fails.[1]

That result proceeds straightforwardly from Texas criminal law. The Court of Criminal Appeals has not hesitated to reverse or reform a conviction when a jury finds a defendant guilty of an offense that relied upon an unproven—or improper—predicate offense. *Walker v State*, 594 S.W.3d 330, 338-39 (Tex. Crim. App. 2020); *Hughitt v State,* 583 S.W.3d 623, 631 (Tex. Crim. App. 2019). An improper predicate offense renders the greater offense relying on that predicate "non-existent." *Walker v. State*, 594 S.W.3d at 338-339. This includes instances where the prosecution has alleged an invalid predicate offense, such as a predicate offense not specifically enumerated within the statutory governing the greater offense. *Hughitt,* 583 S.W.3d at 631. Consequently, a lack of a valid predicate offense in a charging instrument is a substantive defect that can require dismissal. *Walker,* 594 S.W.3d at 340.

[1] See the Attorney General's other pending motions to dismiss.

These principles apply with even greater force here, where the Attorney General has no recourse to an appellate court to reverse an improperly relied-upon predicate. By the Articles' own terms, the Managers must prove beyond a reasonable doubt the actual commission of a separately enumerated Article as well as the existence of a conspiracy (or misappropriation of public resources, dereliction of duty, unfitness for office, or abuse of public trust) to secure a conviction on Articles XVI through XX, respectively. And the other enumerated Article relied upon must be a valid, impeachable offense to constitute a proper predicate offense. Without an underlying valid, impeachable offense—and none exists here—Articles XVI through XX must be dismissed as a matter of law.

But at a minimum, this court should hold Articles XVI through XX in abeyance until it (1) determines that one or more of the other enumerated articles is a valid, impeachable offense; (2) determines that Articles XVI through XX, as written, articulate valid, impeachable offenses; and (3) determines that Articles XVI through XX can be considered in a way that will comply with the Texas Constitution's two-thirds concurrence requirement. Twenty-one jurors must be able to all agree on the same operative facts to convict on any of Articles XVI through XX. These determinations cannot be made unless or until Articles XVI through XX have been revised and the trial on any predicate Articles that are deemed to be valid, impeachable offenses in their own right is completed.

CONCLUSION

Attorney General Paxton respectfully requests that the Court grant this Motion to Dismiss Articles XVI through XX, or alternatively hold Articles XVI through XX in abeyance.

Respectfully submitted.

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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 and Dick DeGuerin, on August 5, 2023.

/s/ Allison M. Collins

Allison M. Collins