Patsy Spaw
JUL 07 2023
CLERK OF THE COURT

THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

IN THE MATTER OF WARREN
KENNETH PAXTON, JR.

MOTION TO PRECLUDE ATTORNEY GENERAL WARREN KENNETH PAXTON JR. FROM BEING COMPELLED TO TESTIFY

/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

Counsel for the Attorney General

In Texas, an impeachment trial is legally considered a criminal proceeding. Although it may proceed in part on allegations broader than those recognized under Texas's criminal laws, our Constitution recognizes that an impeachment does not seek civil redress on behalf of a plaintiff; it is an action by the State to punish an alleged wrongdoer. Hence why Article I, section 10 of our Constitution's Bill of Rights—entitled "Rights of Accused in Criminal Prosecutions"—dispenses with the requirement of an indictment before criminal charges may move forward in cases of impeachment, while preserving all other criminal procedural rights in that context. Tex. Const. art. I, § 10. And why the Constitution provides that "[i]n all criminal cases, except treason and impeachment, the Governor shall have power, after conviction . . . to grant reprieves and commutations of punishment and pardons." *Id.* art. IV, § 11. And why the Constitution speaks of impeachments in terms of conviction and acquittal. *Id.* art. XV, § 3 ("convicted"); art. IV, § 16(c) ("acquitted").

This Court has acknowledged as much before—and protected previous respondents to impeachment articles accordingly. As the Presiding Officer in the 1917 trial of Governor Ferguson summarized, "[t]he weight of authority in the United States and elsewhere . . . is that an impeachment proceeding is a criminal proceeding," during which an impeached official has the right "to refrain from taking the stand." 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 Court has repeatedly recognized similar basic rights. *See, e.g.*, State of Tex. Senate, Rec. of Proc. of the High Ct. of Impeachment on the Trial of O.P. Carrillo, Judge, S. 64, Reg. Sess. (1975) ("Carrillo Impeachment Proceedings") (among other rights, not compelled to testify); S. Journal, 42nd Cong., 2nd Sess. (1931) ("Price Impeachment Proceedings") (same). And Texas's adherence to precedent under the doctrine of

stare decisis reinforces that this Court should stand by those decisions. *See Mitschke v. Borromeo*, 645 S.W.3d 251, 263 (Tex. 2022).

Because these are criminal proceedings, the Attorney General's right to protection from being compelled to testify "is so well understood that it requires no citation of authority to support it." *Brumfield v. State*, 445 S.W.2d 732, 735 (Tex. Crim. App. 1969). The Attorney General therefore moves the Presiding Officer, pursuant to his authority under Senate Rules 6, 13, and 15(b), to enforce that right in these proceedings—as the Texas Constitution requires—through an order that: (1) prohibits the House Managers from seeking a subpoena requiring Attorney General Paxton to testify before the Senate; (2) prohibits the House Managers from raising whether Attorney General Paxton chooses to testify before the Senate at any point during trial; and (3) provides that, should Attorney General Paxton elect not to testify, a limiting instruction to the jury shall be issued, admonishing the jury that no negative inference may be drawn from his decision not to do so.

I. ATTORNEY GENERAL PAXTON CANNOT BE COMPELLED TO TESTIFY.

A criminal defendant's right not to testify against his will—that his "fault was not to be wrung out of himself"—was well-established when Blackstone articulated it. 4 Blackstone 293. Indeed, this right has existed in some form since at least the 1640s, and perhaps earlier. *See, e.g.*, R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. Rev. 962 (1990). Texas law and practice recognize that an impeachment trial is a criminal proceeding. That ancient right therefore applies, and the House Managers may not violate it through subpoena or otherwise.

A. This impeachment trial is a criminal proceeding.

This Court has long recognized that an impeachment trial is a criminal proceeding. The question was put directly before *both* the House and Senate during Governor Ferguson's 1917 impeachment—the only other impeachment of a statewide elected official in Texas history. During the House's investigation of allegations against Governor Ferguson, a prosecutor for the House attempted to compel the Governor to testify before the House. *See* H. Journal, 35th Cong., 2nd Sess. at 160-61, 777-78 (1917); *see also* Ferguson Impeachment Proceedings at 121. The Governor's lawyer objected, explaining the Governor had a right to decline taking the stand because of the criminal nature of the proceedings. H. Journal, 35th Cong., 2nd Sess. at 160. The judge appointed to rule on the admissibility of evidence and testimony agreed with the Governor, sustaining the objection and ruling that the Governor could not be compelled to provide testimony and expressly declining to adopt the House prosecutor's view that the impeachment proceedings were "not necessarily criminal." *Id.* at 160-61. In so ruling, the judge determined "it is a constitutional privilege that no one can be compelled to testify against himself." *Id.* at 160.

Governor Ferguson ultimately testified before the House voluntarily, and counsel for the House managers sought to introduce his *voluntary* statements into evidence. Ferguson's counsel objected based on then-applicable Article 5517, which provided that when a witness testified before the investigating committee, "[t]he testimony given by a witness before such investigating committee shall not be used against him in any criminal action or proceeding." In support of admitting the voluntary House statements, counsel for the House Managers argued that in Texas, an impeachment was not a criminal proceeding, even though he "admitt[ed] frankly . . . that most of the authorities [he had] been able to find outside of Texas classify impeachment as a criminal case—[a] criminal proceeding." Ferguson Impeachment Proceedings at 312-13.

The Senate's Presiding Officer admitted the statements into evidence because, in his view, Article 5517's immunity attached only to someone subject to compulsory process, *id.* at 339-40, and the Committee of the Whole before which Ferguson testified was not a "committee" for purposes of Article 5517's immunity. *Id.* at 340. But in explaining his holding, the Presiding Officer emphasized the criminal nature of an impeachment proceeding repeatedly. "The weight of authority in the United States and elsewhere," the Presiding Officer remarked, "is that an impeachment proceeding is a criminal proceeding." *Id.* at 337. That conclusion "evidently was the conviction upon which the Senate of the United States" acted in a previous impeachment. *Id.* And "under the Texas Constitution," the Presiding Officer was "of the opinion that it is what would probably be termed a quasi-criminal action." *Id.* at 338. That was in part because "[t]here is language in several sections of the [Texas] Constitution which would indicate that the framers of the Constitution had in mind that an impeachment case was a criminal case." *Id.* And while Governor Ferguson was not entitled to Article 5517's protections, that was in relevant part because the Governor "claimed the right, which in the opinion of the presiding officer of [the House]," "and in the opinion of this Presiding Officer [of the Senate], he had a right to claim, to refrain from taking the stand in that proceeding." *Id.* at 340.

This Court has since reaffirmed its holdings in the Ferguson impeachment that an impeachment trial is a criminal proceeding. Senate impeachment rules routinely provide the robust procedural protections afforded to criminal defendants consistent with that holding, including a right to fulsome evidentiary disclosures, the distinctive burden of proof beyond a reasonable doubt, and the obligation of the House Managers, as prosecutors, to bear that burden. *See, e.g.*, Carrillo Impeachment Proceedings at 10-17; Price Impeachment Proceedings at 18-21; S. Journal, 35th Cong., 2nd Sess. at 71-73 (1917) (Senate rules for Ferguson impeachment). The Court's rules for

this proceeding largely continue in that tradition. *See* S. Journal, 88th Cong., 1st Sess. at 40-52 (2023) ("Senate Rules"). And even the House Managers here apparently agree: when debating the Articles of Impeachment in the House, the House Managers repeatedly referred to the House's role as that akin to a grand jury, and to the Articles as the equivalent of an indictment. *See* H. Journal, 88th Cong., Reg. Sess. at 5923, 5952, 5963, 5967 (2023). Grand juries and indictments exist solely in criminal proceedings.

The Constitution confirms this Court's longstanding holding, speaking of impeachments as criminal matters repeatedly. Article I, section 10—entitled "Rights of Accused in Criminal Prosecutions"—delineates a variety of rights afforded every Texan. Out of those many rights, it declares that one, the right not to "be held to answer for a criminal offense unless on indictment of a grand jury," shall apply, as relevant here, "except . . . in cases of impeachment." The only permissible textual inference is that Article I, section 10 views an impeachment as a criminal matter—and that all of Article I, section 10's other protections, including that an accused "shall not be compelled to give evidence against himself," otherwise apply.

Other provisions confirm this conclusion. Article IV, section 11(b), vests the pardon power in the Governor "[i]n all criminal cases, except treason and impeachment." And the Constitution speaks of impeachments using distinctly criminal terminology: Article XV, section 3 states that "no person shall be *convicted*" but by a supermajority of the Senate; Article IV, section 16, authorizes the Lieutenant Governor to act as Governor if the Governor is impeached—but only until the Governor "is acquitted." Civil matters do not conclude in either a "conviction" or "acquittal."

Were there any remaining doubt, *stare decisis* requires this Court to stand by its previous decisions. *See* Black's Law Dictionary 1696 (11th ed. 2019). "During [an impeachment] trial[,]

the Senate sits 'as a court of impeachment,' and at its conclusion renders a 'judgment.'" *Ferguson v. Maddox*, 114 Tex. 85, 94 (1924). "The Senate sitting in an impeachment trial is just as truly a court as is this court." *Id.* And every other Court in Texas, perhaps every other court in the United States, adheres to some version of the *stare decisis* doctrine. *See Mitschke v. Borromeo*, 645 S.W.3d 251, 263 (Tex. 2022); Michael J. Gerhardt, The Power of Precedent 147–48 (2008) ("[I]t is practically impossible to find any modern Court decision that fails to cite at least some precedents in support."). After all, "[*s*]*tare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015). It has long been "an established rule to abide by former precedents, where the same points come again in litigation," 1 W. Blackstone, Commentaries on the Laws of England 69 (1765), so to "avoid an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). That is why in Texas "[a]dherence to precedent remains the touchstone of a neutral legal system that provides stability and reliability," and "[d]epartures from precedent must be carefully considered and should be rare." *Mitschke*, 645 S.W.3d at 263. Time-worn principles of judicial administration recommend that this Court stand by its earlier decisions. It should do so.

B. Because this trial is a criminal proceeding, Attorney General Paxton cannot be compelled to testify in it.

Given that an impeachment trial is legally considered to be a criminal proceeding, there can only be one conclusion: the Attorney General may, but cannot be forced to, testify. As the Court of Criminal Appeals put it, "[t]he proposition that a criminal defendant cannot be compelled to take the stand and give evidence against himself is so well understood that it requires no citation of authority to support it." *Brumfield v. State*, 445 S.W.2d 732, 735 (Tex. Crim. App. 1969). Joseph Story identified the right "from being compelled, in any criminal case, to be a witness against

[one]self" as well-rooted in a "common law privilege" as of his 1833 *Commentaries*. 3 J. Story, Commentaries on the Constitution of the United States § 1782 (1833). Even Blackstone thought it well-established. 4 Blackstone 293; *see also* Helmholz, *supra*, at 1. And our Constitution's Article I, section 10 enshrines this guarantee as a matter of Texas law. Tex. Const. art. I, § 10.

Both the House and this Court have also concluded that a respondent in an impeachment proceeding specifically enjoys the right not to testify if he does not wish to do so. During the House investigation that eventually led to Governor Ferguson's impeachment, counsel for the House prosecutors attempted to compel Governor Ferguson to testify. *See* H. Journal, 35th Cong., 2nd Sess. at 160. Governor Ferguson's counsel objected; the judge appointed by the House to resolve these questions ruled that "it is a constitutional privilege that no one can be compelled to testify against himself," and he sustained the objection. *Id.* Counsel for the House asked leave to raise several additional arguments in favor of compelling Governor Ferguson to testify, including that the right not to testify "is a privilege [the Governor] can have on the witness stand if any question asked him" tended to incriminate him; that the House's investigation "is an investigation by the State Legislature . . . as to whether or not certain things have been done, not necessarily criminal, but yet as such ought to preclude his longer being Governor;" and that the rule against self-incrimination "ought not to be applied as if [the Governor] were indicted . . . and on trial in the district court." *Id.* at 160-61. The judge dismissed these arguments out of hand and again ruled that Governor Ferguson could not be compelled to testify. *Id.* at 161. During Ferguson's trial, the Presiding Officer of this Court expressly referred to that objection approvingly: "[Ferguson] claimed the right, which in the opinion of the presiding officer of that body, and in the opinion of this Presiding Officer, he had a right to claim, to refrain from taking the stand in that proceeding." Ferguson Impeachment Proceedings at 340.

Federal impeachment practice confirms this right—as the Senate's Presiding Officer also acknowledged during the Ferguson trial. *Id.* at 337. In the history of impeachments before the United States Senate, no House prosecutor has ever so much as *attempted* to compel a respondent to testify before the Senate until 2010. *See* U.S. Senate, Impeachment Trial Comm. on the Articles Against Judge G. Thomas Porteous, Jr., S. 111, 2nd Sess., 489-95 (2010). In seeking to compel Judge Porteous to testify, House Managers admitted they were "not aware of an instance in which a judge was compelled to be a witness in a Senate impeachment trial," *id.* at 490, and the Senate denied the House's attempts. That is not because federal respondents historically attended their proceedings and voluntarily testified; indeed, for the eight impeachments between the Founding and 1904, four respondents—Senator William Blount (1799), Judge John Pickering (1804), Judge West Humphreys (1862), and President Andrew Johnson (1868)—did not attend their trials at all, and none of the eight testified. (Three were acquitted.) In 1905, Judge Charles Swayne refused to answer his impeachment charges in person and appeared at the Senate trial only during the cross-examination of witnesses. No federal impeachment respondent has taken the stand since Judge Alcee Hastings, in 1989, and each did so voluntarily. And the United States House did not so much as attempt to compel President Trump to testify in either of his impeachments. *See, e.g.*, "Trump Will Not Participate in Impeachment Hearing," Dec. 2, 2019, BBC News, https://www.bbc.com/news/ world-us-canada-50625550 (last visited July 5, 2023).

Governor Ferguson's assertion of a right not to testify against his will required virtually no debate because it was so well settled. But contrary to what the prosecutor in Governor Ferguson's impeachment argued—and what the House Managers may well assert—the right not to testify is not merely a right to refuse to answer a question that might incriminate the speaker. It includes "the right . . . to elect not to testify," and it also "prohibit[s] the State from exacting a price for

exercising that right." *Durham v. State*, 153 S.W.3d 289, 292 (Tex. App.—Beaumont 2004). Not only may "no adverse inference . . . be drawn from" an individual's exercise of the right, but "comment on that" exercise "is forbidden." *Brumfield*, 445 S.W.2d at 735. Individuals exercising the right are even constitutionally entitled to a jury instruction that no adverse inference may be drawn from a refusal to testify. *Durham*, 153 S.W.3d at 293. In other contexts, the refusal to provide that instruction when it is requested is a "constitutional error . . . that directly offends the United States or Texas Constitution[s]." *Id.* at 292; *see also Ulloa v. State*, 901 S.W.2d 507, 511-13 (Tex. App.—El Paso 1995, pet. ref'd). Texas courts recognize the federal principle that limiting instructions are "perhaps nowhere more important" than in the context of the right not to testify. *Durham*, 153 S.W.3d at 293 (quoting *Carter v. Kentucky*, 450 U.S. 288, 301 (1981)); *Ulloa*, 901 S.W.2d at 511. Simply put, if Attorney General Paxton chooses not to testify in his impeachment trial voluntarily, the House Managers may not comment on that decision, their counsel may not comment on it, and if requested, this Court should provide an instruction that no adverse inference should be drawn from that decision.

II. THIS COURT SHOULD ENTER AN APPROPRIATE ORDER PROTECTING ATTORNEY GENERAL PAXTON'S RIGHT NOT TO TESTIFY.

This Court has the power to enter an appropriate order protecting Attorney General Paxton's right not to testify should he choose not to do so. This Court's rules empower the Presiding Officer to, at his discretion, rule on pre-trial motions and to make and enforce rules and regulations that are conducive to a just trial. *See* Senate Rules 5(b), 6, 13(a). The Presiding Officer has the authority to make all evidentiary rulings, observing the Texas Rules of Evidence as nearly as practicable. *See* Senate Rules 13(b), 15(b). Just as in the Ferguson impeachment, the application of Attorney General Paxton's right not to testify is such a ruling. *See* H. Journal, 35th Cong., 2nd Sess. at 160-61.

And this Court should exercise that power expeditiously. No doubt both sides' presentations to this Court will be significantly affected depending on whether the House attempts to compel Attorney General Paxton to testify. These proceedings will proceed both more fairly and more efficiently if this Court confirms Attorney General Paxton's rights regarding testimony long before the eve of trial. *See* Senate Rule 13(b).

To those ends, Attorney General Paxton respectfully requests an order that fully protects his well-established right not to testify in these proceedings. That order should have three components. *First*, it should directly prohibit the House Managers from seeking a subpoena, through this Court or otherwise, that would require Attorney General Paxton to testify before the Senate. *Second*, it should prohibit the House Managers and their counsel from publicly raising or commenting on the Attorney General's decision whether to testify either before or during trial. And *finally*, it should provide that, should Attorney General Paxton elect not to testify, a limiting instruction to the jury shall be issued (upon request) that directs the jury not to draw any negative inference from his refusal to do so. Each of these requests follows straightforwardly from both Texas and federal constitutional law, and each is essential.

III. CONCLUSION

This Court should expeditiously enter an appropriate order prohibiting the House Managers from attempting to compel Attorney General Paxton to testify in his impeachment trial, forbidding them or their counsel from commenting on any decision not to do so, and providing for a limiting instruction, if necessary, at trial.

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

Counsel for the Attorney General

CERTIFICATE OF SERVICE

This motion was served via email on the House Board of Managers' counsel, to wit: Rusty Hardin, rhardin@rustyhardin.com, and Dick DeGuerin, ddeguerin@aol.com, on July 7, 2023.

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