

June 10, 2023

Atty. Gen.

JUN 10 2023

CLERK OF THE COURT

Lieutenant Governor Dan Patrick

*via email***Re: Texas House of Representatives' Improper Subpoenas and Witness Contact
Concerning the Impeachment Proceedings for Attorney General Ken Paxton**

Dear Lieutenant Governor Patrick:

On behalf of Attorney General Ken Paxton, we respectfully submit this correspondence to bring your attention to the efforts of the House of Representatives to continue its investigation, which we believe unlawfully usurps the Senate's sole authority to determine how the Attorney General's pending impeachment shall be tried.

The House and its agents are issuing subpoenas and contacting potential witnesses without notice to the Attorney General or an opportunity to participate in their apparently ongoing fact discovery. At least one such subpoena issued by the House requested document production within only five business days. Our understanding is that the House has not put any witnesses under oath to testify during its investigation; it certainly has not invited the Attorney General to question them as he could at a deposition or during any other impeachment proceeding in Texas history. Meanwhile, the Attorney General and his counsel have no ability to issue subpoenas or obtain relevant discovery unless and until the Senate provides for such fact discovery with its rules. As a result, trial preparation is currently entirely one sided—with the House continuing its investigation unimpeded, and with the Attorney General deprived of any recourse or process of his own.

The Texas Constitution prohibits the House's actions. "The power of impeachment" is "vested in the House of Representatives." Tex. Const. art. XV, § 1. But once the House exercises that power, the Constitution vests sole power to try that impeachment—from the rules surrounding discovery prior to the trial to the conduct and outcome of the trial itself—in the Senate. Tex. Const. art. XV, § 2; Tex. Gov't Code § 665.024. The moment the House impeached the Attorney General, all jurisdiction over this matter was transferred to the Texas Senate.

Once the House voted to impeach, it became a mere litigant on one side of the trial before the Senate. The House lost any investigative powers that have been conferred upon it by statute. *See* Tex. Gov't Code § 665.005 (providing for broad investigative powers by House only "[w]hen conducting an impeaching proceeding"); *id.* § 665.001 (defining "impeachment proceedings" to exclude any activity that is not in accordance with Senate rules once articles have been voted out of the House). The House therefore has no authority to do *anything* regarding the impeachment proceedings until the Senate establishes the rules. *See* Tex. Gov't Code § 665.024. Accordingly, the House's continued actions subvert the careful separation of authority over the awesome power of impeachment enshrined in the Texas Constitution.

The House cannot rely on the statutory powers of its General Investigating Committee to justify its actions. Although Texas Government Code § 301.020 grants broad investigative powers, the specific impeachment-related statutes control over that more general grant of authority. *See, e.g., City of Dallas v. Mitchell*, 870 S.W.2d 21, 23 (Tex. 1994) ("When two statutes conflict, the specific controls over the general."); Tex. Gov't Code § 311.026 (Special or Local Provision Prevails Over General). None of the other grants of authority contained within Section 301.020 are applicable here, as the House has been explicit that its continued investigation is

related to the articles of impeachment it has already passed—jurisdiction over which is now vested exclusively in the Senate.

The only reasonable conclusion is that Attorney General Ken Paxton is being afforded the least degree of due process for an impeached officer in the history of our great State. Every past impeachment in Texas was based on public evidence and witness testimony, including an opportunity for cross-examination by counsel for the respondent, all of which occurred in the House before any vote on impeachment. And in each of the three impeachments that have resulted in removal during the past 150 years (Ferguson, Carrillo, and McGaughey), the respondent was permitted to participate fully in all phases of the House’s factual development and investigation. For a more recent example, in the 2014 impeachment investigation against University of Texas Regent Wallace Hall, none other than Rusty Hardin—who is current counsel for the House—conducted a nearly year-long investigation with multiple invitations for the accused to appear and testify, offer evidence, and participate in the fact development in the House. Mr. Hardin then produced a nearly 200-page investigative report for the House *before* it considered any proposed articles of impeachment.

Simply put, by any legal or historical measure, Attorney General Ken Paxton is not being afforded an adequate opportunity to participate in the investigation or prepare his defense. We humbly submit that you and the Senate can and should assert your constitutional control over these proceedings now, while the rules committee deliberates and conducts its important business. Because an outstanding document subpoena requires production no later than Monday, June 12, we respectfully urge you to consider and take the following actions by Monday morning.

First, you and the Senate should make clear that the House and its impeachment managers, attorneys, committees, and agents may not issue subpoenas or contact witnesses prior to the Senate adopting rules for the conduct of the trial and related pre-trial proceedings. Second, you and the Senate should make clear that any previously issued subpoenas are stayed, and that no recipient of a subpoena should respond until the Senate has adopted rules for the impeachment trial. Third, to the extent that any documents have been produced or witness statements provided to the House in response to previously issued subpoenas or improper contact by the House and its agents, you and the Senate should make clear that copies of such documents and statements shall immediately be provided to the Attorney General’s defense counsel and that all such documents should be held segregated by the House until the Senate determines how they will be handled.

This request is meant solely to ensure the Senate and its President retain their rightful control over this process. We eagerly await the Senate’s decision regarding the rules for these proceedings, and we trust that you and the Senate will provide a fair and transparent process to adjudicate this historic matter. We would also welcome the opportunity to answer any questions or provide the Attorney General’s position on the appropriate rules for these proceedings, if desired.

We sincerely thank you for your consideration.

Very truly yours,

/s/ Christopher D. Hilton

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