Patsy Spaw
JUL 19 2023
CLERK OF THE COURT

THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

RESPONSE TO HOUSE MANAGERS' REQUEST TO CLARIFY AND MOTION FOR PROTECTIVE ORDER

Six days have passed since the Court issued its Discovery Order, and the House Managers continue to defy it. Their latest gambit—to withhold producing *any* further materials on the speculation that *some* of those materials may be confidential—is internally incoherent and inconsistent with recent positions the Managers themselves espoused. The delay is emblematic of the Managers' ongoing strategy: to obstruct the Attorney General's ability to mount a defense by delaying his gathering of relevant information by any means possible. This Court should put an emphatic end to that strategy.

This Court's order was clear: effective "immediately," it obligated the House Managers to produce *all* documents relevant to any Article of Impeachment "as soon as practicable." Other than documents protected by the work-product doctrine or communications between the Managers and their agents, the Order provides no exceptions—and certainly none justifying the expansive protective order the Managers now demand under Texas Code of Criminal Procedure Article 39.14. To be clear, the Attorney General neither intends to disclose any irrelevant confidential information, nor does he object to Article 39.14's application in principle. As the Attorney General has argued previously, Texas law identifies an impeachment proceeding as a criminal proceeding to which, at a minimum, *all* criminal-procedure rights and obligations attach. If the Managers

straightforwardly agreed with that conclusion, the Attorney General would gladly consent to abide by Article 39.14's confidentiality provisions.

But the Managers cannot have it both ways. They cannot demand Article 39.14's confidentiality provisions and refuse its obligations, as they have so far. Nor can they publicly tout compliance with this Court's order while defying it at every turn. Nor can they justify such defiance through a unilateral and dubious promise to complete their production at the end of this week. Trial begins in six weeks. The parties have roughly two weeks remaining to file motions. Every single day is material to the Attorney General's defense. The Court should act swiftly to compel the House Managers' compliance with the Discovery Order and require that their production be completed immediately, and in no event later than July 19, 2023.

I. The House Managers Are Violating The Court's Order.

The Court's Discovery Order is unconditional. There are no prerequisites to the Attorney General's right to receive a copy of the materials that are relevant to the Articles of Impeachment against him. By the terms of the Court's Order, the House Managers' refusal to comply subjects them to sanctions. Discovery Order at 3.

The sincerity of the House Managers' newfound demand that the Court impose a confidentiality contingency on the Attorney General is belied by every position the House Managers have taken in this case. The House has consistently maintained thus far that Article 39.14 does not apply to this impeachment in any form. *See* Exhibit A at 1 (July 11 Letter) ("[N]either the [Texas Code of Criminal Procedure] nor the Michael Morton Act apply."). Indeed, after the Court's Discovery Order, when the parties conferred on July 13, 2023, the House Managers refused to agree to the application of subsection (j) of Article 39.14, which requires prosecutors to provide an itemized list of all documents, items, and information provided to the respondent. The House

Managers retorted that the Discovery Order makes no mention of the application of that subsection. Yet, days later, the House Managers invoked *other* subsections of Article 39.14 as a basis to grind their document production to a complete halt. They offered no theory as to how Article 39.14 might apply to these proceedings partially, nor did they attempt to reconcile their new concerns with their previous (incorrect) position that Article 39.14 did not apply at all. Mtn. at 4 n.2; *see also* Exhibit A at 1.

But while they insist that Article 39.14 expansively applies exclusively to their favor—that is, to benefit the House and to burden the Attorney General—the Managers have simultaneously argued that *their* obligations under the Discovery Order should be limited to only the Order's express dictates. *See* Exhibit B at 1 (July 17 Letter). When the Attorney General requested that the House produce a log for any documents withheld on the basis of privilege, the House Managers called it "absurd" and flatly refused to compile this routine discovery instrument in part because the Court's Order does not explicitly require it. *Id.* at 2. Yet, the House Managers are holding documents hostage because the Attorney General will not agree to the one-sided application of Article 39.14. The Attorney General repeatedly attempted to confer with the House Managers concerning the application of Article 39.14 to these proceedings before they filed their Motion, but the House Managers have refused to say whether they agree to the application of the entirety of Article 39.14. Instead, they filed their Motion with the Court requesting *only* that the confidentiality subsections apply.

The House Managers' contention that the Attorney General must agree to be bound by the confidentiality provisions contained in subsections (e) and (f) of Article 39.14 *before* the House Managers comply with the Court's Order is intractable. Mtn. at 1–2. There is no mention of these provisions in the Discovery Order and the House Managers did not raise this issue in a timely

manner. The House Managers' refusal to produce documents until the Court "clarifies" whether a section of Article 39.14 applies should result in the exclusion of any documents whose production has been delayed by the House Managers' baseless and dilatory motion. *See* Discovery Order at 3.

II. The House Managers' Motion Is Dilatory.

The House Managers fail even to gesture to a reason why their production cannot proceed as the Court considers their Motion. This omission is especially galling because the House Managers filed their Motion *after* the Attorney General committed that he would not disclose sensitive personal information (as the House Managers acknowledge) and four hours *after* the Court issued a Gag Order prohibiting parties and counsel from making statements about "information received pursuant to the Discovery Order, a subpoena, or other order of the court." Mtn. at 6; Gag Order at 3. The House Managers emphasize that any application of subsection (e) or (f) would extend only to pre-trial disclosures and does not affect the introduction of evidence at trial. Mtn. at 6. By the House Managers' own terms, then, even if their Motion were made with earnest concern about pre-trial disclosure of sensitive personal information—a concern to which they do not even vaguely allude in their Motion—that has been addressed and resolved by both the Attorney General's commitment and the Court's Gag Order. Allowing the House Managers to mark documents as confidential will only delay their compliance with the Court's Order, delay their productions, and lead to protracted motions practice challenging the confidentiality designations.

Moreover, the Court's Order required the parties to confer about production, and the House Managers did not raise any purported concerns about confidentiality in this meeting. The House Managers subsequently made an initial production without raising this issue. Only now, weeks before the parties' deadline to file motions, have the House Managers identified this new roadblock

of their own making and they are using this roadblock to authorize themselves to defy this Court's Order. The Court should consider this issue waived and deny the House Managers' Motion as untimely.

There can only be one conclusion: the purpose of the House Managers' Motion is to withhold documents, obstruct the Senate procedures, interfere with due process, and put as many roadblocks as possible in the way of the Attorney General presenting a fulsome defense.

III. The Court Should Require The House Managers To Complete Their Production Immediately And Produce A Privilege Log.

The Court has emphasized the critical importance of the Attorney General's "right to a fair trial" and "to the fair administration of justice." Gag Order at 2. This can only be accomplished by full and fair disclosure of the evidence, and the House Managers' compliance with the Court's Discovery Order. To ensure full compliance, it is critical that the House Managers produce a privilege log so that the Attorney General can assess whether the House Managers have properly exercised their prosecutorial obligations to disclose all exculpatory, impeachment, and mitigating evidence in accordance with this Court's Discovery Order and Texas Code of Criminal Procedure article 39.14(h).

The House Managers' paltry initial production omits evidence of the House having met with witnesses or documents reflecting witness testimony to the House. To the extent that the House Managers consider these files to be protected by work product privilege, they are wrong. The Texas Court of Criminal Appeals recently considered whether certain documents in prosecutors' possession were protected from the mandatory disclosure requirements of Texas Code of Criminal Procedure 39.14(h). In *In re State of Texas ex rel. Kim Ogg*, the State sought mandamus relief from a trial court's order requiring disclosure of certain documents made by investigators within the Harris County District Attorney's office. In a brief order, the Court of Criminal Appeals

denied the State's request for mandamus relief. The concurring opinions elucidate the judgment of the Court: "[E]xculpatory, impeachment, and mitigating evidence must be disclosed even if it constitutes 'work product' . . . . This is because the work-product privilege is not absolute, and the duty to reveal exculpatory evidence as dictated by *Brady* overrides any privilege under the work-product doctrine." *In re State of Texas ex rel. Kim Ogg*, 630 S.W.3d 67, 71 (Tex. Crim. App. 2021) (Newell, J., concurring) (citing Tex. Code Crim. Proc. art. 39.14(h)). The requirements of Article 39.14(h) require that "work product privilege gives way" to compliance with the "prosecutorial duty to disclose any exculpatory, impeachment or mitigating evidence." *Id.* at 72 (citing J. Hervey Concurring Opinion at 2 (citing Tex. Code Crim. Proc. art. 39.14(h)). Indeed, "[d]escriptions of potential witnesses and statements that would reveal whether the party had spoken to potential witnesses are not work product and are discoverable." *Id.*

The House has made clear it intends to fight any and every obligation conferred on them by this Court and by the law. The House's dilatory gamesmanship and failure to disclose evidence is sanctionable. To ensure the House fully complies with its obligations, the Attorney General requests that this Court require them to serve privilege logs with detail sufficient to assess the credibility of every assertion of privilege for every document they withhold.

CONCLUSION

The House Managers are currently violating an Order from this Court to produce all documents as soon as practicable. The House Managers are continuing their strategy of obstructing due process, and this Court should deny their Motion for Clarification or for Protective Order. To ensure full compliance with the Discovery Order, the Court should require that:

1. All "written or recorded witness statements in the possession of the Managers or their agents of the Committee or its agents" shall immediately be provided to the Attorney General, regardless of any claim of work product or any other privilege;

2. The House shall immediately notify the Court and the Attorney General whenever they receive supplemental evidence, shall disclose this evidence to the Attorney General within 48 hours, and shall notify the Court of its compliance with this deadline;

3. The House shall provide a fulsome and complete privilege log that comports with Texas law no later than Thursday, July 20th, for all documents withheld from its production under a claim of work product or any other privilege;

4. The House shall provide custodian information for all documents produced to the Attorney General indicating the original source of the document;

5. The House shall construe any ambiguity in the Discovery Order in favor of disclosure.

Respectfully submitted.

/s/ Amy S. Hilton
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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 18, 2023.

/s/ Amy S. Hilton
Amy S. Hilton

EXHIBIT A

July 11, 2023

Via Email: christopher.d.hilton@proton.me and judd.e.stone@proton.me
Judd E. Stone II, Esq.
Christopher D. Hilton, Esq.
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Re: Discovery Demand and Motion for Pretrial Scheduling Order or Conference

Dear Messrs. Stone and Hilton:

We write in response to your discovery demand e-mailed to us on July 6, 2023, at 5:54 P.M., and your motion for pre-trial scheduling matters, filed 25-hours later (despite stating in the July 6, 2023 letter that you requested a response within 7 days of the letter). While we will timely respond to your motion as required by the Senate Rules, we address below the issues raised in the letter and further propose an agreement that may moot aspects of the motion.

We disagree with your summary conclusion that select portions of the Texas Code of Criminal Procedure apply to the Senate's impeachment trial. You fail to provide any legal support for your proposition, and you also ignore that Texas Government Code section 665.024 expressly states that "[t]he senate shall adopt rules of procedure when it resolves into a court of impeachment." This is precisely what the Senate did here after careful thought.

Importantly, in detailing the procedural rules that apply both before and during the impeachment trial, the Senate did *not* incorporate the procedures you now claim should apply. Indeed, when the Senate wanted to adopt certain Texas rules, such as the Texas Rules of Evidence, it expressly stated as much.

Similarly, neither the Code nor the Michael Morton Act apply merely because portions of this statutorily created process[1] parallel aspects of criminal prosecutions. To the contrary, the Texas Constitution expressly notes that cases of impeachment "shall only extend to removal from office, and disqualification from holding any" future office in the state. TEX. CONST. Art. XV, § 4. And the Constitution further states that a party "convicted on impeachment shall also be subject to indictment trial and punishment according to law." TEX. CONST. Art. XV, § 4. Thus, the Constitution confirms that a judgment of impeachment is separate and distinct from a criminal prosecution.

[1] Tex. Gov. Code. §§ 665.001– .081.

A trial of impeachment articles in the Senate is not a criminal prosecution, a fact that courts in Texas and elsewhere have routinely recognized. *See e.g.*, *Ferguson v. Maddox*, 263 S.W. 888, 889-90 (Tex. 1924); *Mecham v. Gordon*, 156 Ariz. 297, 303 (Ariz. 1988); *Hastings v. United States Senate*, 716 F. Supp. 38, 41 (D.D.C. 1989), *aff'd mem. on other grounds*, 887 F.2d 332 (D.C. Cir. 1989).

There exist other examples demonstrating how impeachment differs from criminal prosecution. In one proceeding, judgment involves removal from a duly elected office—a privilege—or prohibition of an individual serving in public office. TEX. CONST. Art. XV, § 4. In the other, a criminal prosecution, a judgment may infringe upon an individual's life and liberty. Double jeopardy prohibits prosecution twice for the same crime, but that legal principle does not apply to impeachments. *Compare* TEX. CONST. Art. 1, § 14 *with* TEX. CONST. Art. XV. Criminal trials, but not impeachment trials, allow for *voir dire* of jurors, with the State and defendant afforded the right to strike potential jurors. *See e.g.*, TEX. CODE CRIM. PROC. ARTS. 35.01 – 35.29.

Here, the rules the Senate adopted provide Mr. Paxton with ample opportunity to investigate the claims brought against him. Both parties are treated equally and provided the opportunity to compel documents prior to trial and further compel the testimony of witnesses at trial. *See* Senate Rule 6. Moreover, the Senate Rules expressly recognize that both sides are free to speak with potential witnesses. *See* Senate Rule 21(g).

Regardless of our disagreement about what the Senate Rules do or should require, and consistent with our continued commitment to transparency, we agree to voluntarily supply you with copies of all relevant documents in our possession, in exchange for Mr. Paxton agreeing to provide us with the same. If agreement is reached, we can commence a rolling production of materials this week.

Please let us know whether Mr. Paxton will accept this agreement by signing below. We can then work with you to establish the details of exchanging documents.

Sincerely,

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cc: Tony Buzbee
Dan Cogdell
Allison C. Collins
Amy S. Hilton
Kateland R. Jackson
Joseph N. Mazarra

AGREED:

____
Christopher Hilton on behalf of Warren Kenneth Paxton

____
Judd Stone on behalf of Warren Kenneth Paxton

EXHIBIT B

July 17, 2022

The Honorable Dan Patrick **_Via Electronic Mail_**

Re: Mr. Paxton's July 16, 2023 Discovery Dispute Letter/Motion

Dear Lieutenant Governor Patrick:

In a midnight missive, Mr. Paxton's counsel requested that this Court impose five additional discovery obligations upon the Texas House of Representatives Board of Managers ("House Managers"). With the exception of the request for a privilege log, Mr. Paxton never raised any of these issues with the House Managers' counsel. Regardless, the Senate should deny the requests because they are contrary to the existing discovery order and existing law and are unworkable.

First, Mr. Paxton asks that the Senate order the House to "immediately" produce "all written and recorded witness statements" in the possession of House Managers, the Committee, and their agents, "**regardless of any claim of work product or any other privilege**." (emphasis added). The request is unprecedented. To begin with, the Senate's July 12 Discovery Order is clear. It requires production "as soon as practicable." As the House Managers have stated, they will comply with this Order and provide any responsive documents they presently possess by July 21, 2023.

Contrary to the law, counsel demands that the House Managers be forced to produce work product or attorney-client privileged material. This request is outrageous, and antithetical to the most basic privileges afforded by the law. Indeed, the Texas Code of Criminal Procedure evidences how Mr. Paxton's request is out of bounds. Article 39.14(a) states unequivocally that discovery does NOT include:

> the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things **not otherwise privileged** that constitute or contain evidence material to any matter involved in the action ....

TEX. CODE OF CRIM. P. art. 39.14(a) (emphasis added).

Despite making such an unprecedented request, Mr. Paxton does not provide any legal or factual basis for it. He does not claim waiver of the privilege or that there is some type of exigent circumstances meriting such an uncalled-for suggestion. Nor can he. And undoubtedly, Mr. Paxton's request would involve an unparalleled exercise of governmental power wherein the Senate would compel the House to waive fundamental

and well-recognized legal privileges. Thus, we ask that the Senate decline Mr. Paxton's invitation to take such drastic and unsupportable action.

Second, Mr. Paxton's request requiring the House to "immediately" provide notice of the receipt of "supplemental evidence", and then produce this material within 48 hours, is similarly unheard of, impractical, and unnecessary. As a threshold issue, Mr. Paxton's use of the broad and undefined term "supplemental evidence" does not provide either party with guidance as to what this phrase means. Regardless, the request is unworkable. The efforts necessary to electronically produce materials to Mr. Paxton require a multistep process. This will in most instances take more than 48 hours. Our productions must preserve necessary electronic information (i.e., metadata). We must also apply bates numbers to files so that the production can be properly documented and format the documents so they can be provided as part of a load file. Similarly, requiring the House to notify the Court about receipt of such material, and their production, could result in an endless litany of e-mails to the Senate. Instead, the House Managers will follow the Discovery Order and supplement the production with responsive documents as soon as practicable. The House Managers will continue to produce the documents to Mr. Paxton as requested.

Third, Mr. Paxton's request for a privilege log that "comports with Texas law" is absurd. What he requests is actually contrary to the law. As lawyers who have represented the State or the accused in more than 100 criminal trials (both state and federal), we have never produced, requested, or even heard of a court ordering a prosecutor to produce a privilege log. Simply put, privilege logs are a discovery concept adopted for civil proceedings, not criminal ones. But even under civil law, there is no basis for requiring a privilege log. Texas Rules of Civil Procedure do not require the logging of attorney-client or core work product communications made during the course of litigation. *See* TEX. R. CIV. P. 193.3(c); TEX. R. CIV. P. 192.5(b).

Thus, whether one practices in the civil or criminal realm, attorney-client communications and work product created during litigation is neither discoverable nor required to be included in a privilege log. *See* TEX. R. CIV. P. 192.5(b) and 193.3(c); TEX. CODE CRIM. PROC. art. 39.14(a). These are the only types of privileges that exist here.

Fourth, Mr. Paxton requests that the House Managers' lawyers provide "custodian information for all documents produced to the Attorney General indicating the original source of the document." Once again, what Mr. Paxton wants is simply wrong. We are unable to investigate and discover the original source of documents provided to the House Managers. We can only tell Mr. Paxton what entity provided them, such as the Office of the Attorney General.

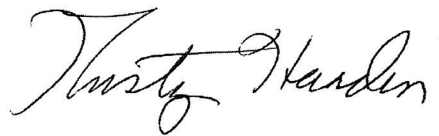
Fifth, Mr. Paxton's last request is that "The House shall construe any ambiguity in the Discovery Order in favor of disclosure." That makes no sense and is totally contrary to the Discovery Order. The Discovery Order is not ambiguous, and this is not a contract

dispute. Simply because Mr. Paxton does not understand a rule does not mean it should be construed against the House Managers.

This request also contradicts the Order itself, which unequivocally states that "[a]ny dispute between the Managers and counsel to Warren Kenneth Paxton, Jr., relating to compliance with this order should be brought to the Court's attention as soon as possible through written communications or motions." Consistent with this dictate, the House Managers will seek guidance from the Senate regarding the implementation of the July 12 Discovery Order whenever it is called for.

Mr. Paxton's letter/motion is without merit as it seeks to impose additional confusing, and unheard of, discovery obligations upon the House Managers. We ask that the Senate deny Mr. Paxton's requests out of hand.

Sincerely,



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