# STONE | HILTON



June 16, 2023

Lieutenant Governor Dan Patrick
Sen. Brian Birdwell
Sen. Brandon Creighton
Sen. Pete Flores
Sen. Juan "Chuy" Hinojosa
Sen. Joan Huffman
Sen. Phil King
Sen. Royce West

***via email***

**RE: Response to House Board of Managers' Memorandum Regarding Senate Procedures**

Dear Lieutenant Governor and Senators of the Rules Committee:

Attorney General Ken Paxton's upcoming impeachment trial is an historic event that deserves rules and procedures based on historical precedent. We have every confidence that the Senate will provide the parties and the public with fair and transparent proceedings that both reflect the seriousness of the impeachment process and satisfy the due process requirements our Constitution imposes.

We are surprised to discover the House Managers' newfound reliance on historical practice, given that they have abandoned Texas practice at every turn to date. Unlike every other impeachment in Texas history, the House conducted its business prior to *this* impeachment in secret; it ignored express legal requirements imposed by statute, such as putting testifying witnesses under oath; it refused to afford the Attorney General the opportunity to provide a defense or response; and it then voted to impeach solely on the basis of summarized hearsay that would be inadmissible in any Texas court. Moreover, as we have previously written to the Lieutenant Governor, the House Managers have continued their lawless investigation even after impeaching the Attorney General. Here, too, the House violated both Texas practice and the Texas Constitution. They violated practice by issuing unlawful subpoenas, attempting to intimidate witnesses, and refusing to provide the Attorney General with the basic disclosures that would be provided in every single criminal case in the State. They violated the Constitution by attempting to exercise jurisdiction over this matter after they delivered articles of impeachment to the Senate—the point at which our Constitution transfers sole and exclusive authority over an impeachment to the Senate.

We are confident that unlike the House, the Senate will act with the appropriate regard for its solemn duties and the Texas Constitution. To aid the Senate and the rules committee in its work, we respectfully submit the following response to the House Board of Managers' memorandum. We would also welcome the opportunity to provide more detailed input for the Senate as it deliberates on the appropriate rules for these proceedings, if desired.

## I. Three Features of the Senate Rules are Essential for Conducting the Impeachment Trial.

Without knowing or presuming the current status of the committee's efforts to craft rules for these proceedings, we respectfully submit that there are three fundamental components of any rules package that the Senate should include.

1. *The House's burden of proof must be "beyond a reasonable doubt."* The Senate has always required the House to prove every allegation of each of its articles beyond a reasonable doubt. This consistent standard for Texas impeachments is particularly important where, as here, many of the articles are premised on criminal law theories. *See* Carrillo Rule 16. Moreover, only the highest burden of proof ensures that Texas voters—who overwhelmingly reelected Ken Paxton only 7 months ago—are respected. Removing a democratically elected official is anathema to our system of government, and it should only be done on the highest showing under the strictest standard.

2. *Neither side should have the power to subpoena witnesses.* If the House desired to subpoena witnesses for public testimony, the House had ample opportunity to do so during its own investigation. Instead, the House apparently suggests that it be allowed to compel anyone to provide documents or testimony using the *Senate's* subpoena power after it declined to use its *own* subpoena power before issuing the Articles. In order to keep these proceedings manageable and to enforce the historical precedent that the House must conduct a fulsome and public investigation prior to referring Articles of Impeachment, the House should be limited to the alleged facts and witnesses that it has already gathered. This practice is consistent with President Trump's recent impeachment proceedings, where neither side was permitted compulsory process for the attendance of witnesses; it should be adopted here as well.

3. *Witnesses should be presented via deposition rather than live testimony.* Presenting live witness testimony on the floor of the Senate introduces a needless piece of showmanship that will do nothing to aid the Senate in its decision making or advance the ends of justice—but which could easily lead to counsel for the House transforming these solemn proceedings into little more than extended political theater. As in President Trump's recent impeachment proceedings, the Senate will receive a more focused and helpful presentation of evidence if the parties take recorded depositions of witnesses prior to trial and then present only the most relevant portions to the body as a whole. On the other hand, live testimony will involve tedious and irrelevant foundational and background testimony, repeated objections and the need to rule on them, and undue pressure and public scrutiny for fact witnesses who may be nothing more than innocent bystanders to these events. Whatever may have been done in prior impeachments in Texas,[1] modern impeachment proceedings have demonstrated that presenting deposition testimony is the best way to communicate information to the Senate and to the public.

There are of course many other concepts that a fair and just set of rules should embrace—fulsome and prompt disclosures of evidence by the prosecution, robust written motions practice to resolve legal issues and define the scope of the trial well in advance of the trial date, and the full application of evidentiary rules and procedural protections that apply in any trial in Texas—but the committee is well equipped to advise the Senate on these matters. However, we respectfully submit that without each of these three crucial elements, the Senate trial will devolve into unmanageable political theater instead of a solemn and robust legal process.

## II. Many of the House Board of Managers' Proposals Are Unjust and Unworkable.

Although the House Board of Managers has purported to look to historical examples for how the Senate should conduct this trial—a refreshing change from their ahistorical conduct in the investigatory phase—many of

[1] The historic examples have typically involved a combination of written submission of testimony and live witnesses, but all of those examples predated the modern rules of evidence, contemporary rules of trial procedure, and the technological advances in both the presentation of deposition testimony and the media's ability to report on the evidence being presented at trial.

their proposals misunderstand the historical examples, introduce crucial deviations that materially affect the proceedings, and misapply the law.

We respectfully submit the following responses to some of the House Board of Managers' Proposals. (The House Board of Managers' proposals appear with the numbering from their memorandum, and their proposals appear in italic text, with our response following in regular text.) Although we do not comment on each rule proposed by the House in the interest of brevity, we do not necessarily agree with the rest of their proposals, and we would welcome an invitation to provide more detailed feedback regarding the proposed rules package.

(8) *Pleas and motions are heard and decided prior to the presentation of evidence.* There is little doubt that some pre-trial motions must be heard in this matter, including motions to dismiss, motions in limine, and the inevitable procedural motions around things like fact discovery and requested alterations to any schedule. But the House's proposal is problematic for at least three reasons.

First, they apparently contend that *all* pleas and motions should be resolved prior to the presentation of evidence. That concept is inconsistent with trial practice, wherein the basis for an objection or a motion may not occur until a question is asked or a witness speaks. *See* Carrillo Rule 5-c; Ferguson Rules 15, 16. The "demurrers and exceptions" referred to in the Ferguson rules are analogous to modern motions to dismiss and should not be read to encompass *all* motions. *See, e.g.*, *In re Shire PLC*, 633 S.W.3d 1, 11-13 (Tex. App.—Texarkana 2021, mandamus denied) (explaining the "Evolution of Dismissal and Challenges to Pleadings in Texas"). To the extent that the House is suggesting that *all* pleas and motions *must* be heard prior to trial, that suggestion is unworkable.

Second, the House Board of Managers takes issue with any sort of motion which might summarily dismiss one or more articles pending before the Senate. That objection is utterly baseless. Not only are motions to dismiss a common feature of litigation of all kinds across Texas and across the country, but recent precedent such as the second Trump impeachment demonstrates that such devices can be relied on to narrow the impeachment to try only certain articles, or to enable the Senate to reject the articles altogether. Without such a device, the Senate will be subjected to a full trial on the merits of claims that may be legally and factually without merit—a process that would no doubt provide the House Managers and their counsel with the press coverage they so earnestly crave, but which would benefit neither the public nor the Senate in any way.

Third, the House has suggested a "no reconsideration" rule, purporting to rely on Rule 9 of the Ferguson impeachment, with no Carrillo impeachment rule equivalent. But the House ignores Ferguson Rules 15 and 16, which expressly provide for motions during the course of the trial with no exceptions. This proposed "no reconsideration" rule also appears to be premised on a misunderstanding of the terms "demurrers and exceptions" in this context. *Cf. In re Shire*, 633 S.W.3d at 11-13. In all courts in Texas, it is the prerogative of the adjudicative body whether to reconsider a prior ruling or hold open a decision on a motion pending further developments in the litigation. *See, e.g.*, Tex. R. Civ. P. 329b; Tex. R. App. P. 49.1, 49.5; *see also* Fed. R. Civ. P. 59, 60. In any event, it is commonplace in ordinary litigation for a party to urge a basis for dismissal multiple times across a case as the evidence develops and the standard for such a motion changes—such as, for example, a motion to dismiss a criminal charge at the outset, followed by a motion for a directed verdict at the close of the prosecution's case, followed by a similar motion at the close of all the evidence. The Senate should not and need not deviate from sound trial procedure by adopting the House's novel and utterly ahistorical limit to motions practice.

(9) *Parties and their counsel are permitted to object to the admission of evidence and the Texas Rules of Evidence should be applied where practicable.* The House Board of Managers' qualification of "where practicable" is a dangerous standard that is not reflected in any of the precedents on which they rely. "Where practicable" suggests that the evidentiary rules can be disregarded based on mere impracticality; in other words, based on convenience. But the vital constitutional due process interests protected by the Texas Rules of Evidence

cannot and should not be lightly brushed aside. It is for that reason that Ferguson Rule 14 and Carrillo Rule 5(c) required the presiding officer to apply evidentiary rules "as near as applicable"—a workable limitation that requires strict adherence to evidentiary rules except where the differences between a Senate trial and regular trial court proceedings are directly implicated. Because the Texas Rules of Evidence are instrumental to the concept of fair justice, they must apply with full force.

(11) *Parties or counsel are allowed to request from the presiding officer the issuance of subpoenas compelling persons to attend trial and/or produce documents prior to trial.* As discussed above, the House Board of Managers should not now be heard to complain that it cannot present its case without subpoena power. The House had, and squandered, that opportunity to preserve live witness testimony and obtain documents in its own investigation. The House should not now be permitted to exercise the Senate's power to fix its prior mistakes.

(14) *The Senate will vote on the articles of impeachment separately but at the conclusion of the presentation of evidence as to all of the articles.* There is no constitutional or statutory limitation on the Senate's authority to vote whenever and however it deems appropriate. *See* Tex. Const. art. XV; Tex. Gov't Code ch. 665. To the extent that the House Board of Managers suggests that historical precedent requires the Senate to hold its votes until the end of the trial, they are wrong. The Ferguson rules specifically contemplated pretrial motions to dismiss ("demurrers and exceptions") and provided that a trial would only occur at all "[i]f, after decision upon demurrers and exceptions presented, there shall remain any issues to be tried." Ferguson Rule 10. Similarly, the Senate in the Carrillo impeachment provided for pretrial "dilatory pleas and motions" and voting thereon prior to the introduction of evidence. Carrillo Rule 15; *see also Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("The purpose of a dilatory plea is . . . to establish a reason why the merits of the plaintiffs' claims should never be reached."). Accordingly, this rule merely represents a restatement of the House's opposition to any pretrial dispositive motions, which is a position without any legal or historical basis.

(16) *The House is permitted to present additional articles of impeachment prior to trial.* Regardless of whether this rule made sense in the context of the Ferguson impeachment, it was not replicated during subsequent impeachment proceedings in Texas, and it is manifestly unjust and unnecessary here. In light of the House's secretive and closed process, the House cannot be permitted to expand its articles on the eve of trial without severe and insurmountable prejudice to the Attorney General. A contrary rule would prove unworkable: if the House introduced a new article based on new evidence and new legal theories, it would stand to reason that the Attorney General would be entitled to some reasonable period of time to investigate those theories and prepare a defense. The House's proposal amounts to a unilateral license to extend impeachment proceedings to whatever extent and whatever length that might convenience the House Managers, without regard to the value of the Senate's time. The Senate should not give the House such license. The House conducted a secret impeachment on matters extending back to before the Attorney General's first election; if it now discovers that unprecedented procedure did not extend far enough, that is its problem, not the Senate's.

(17) *The Senate meeting as a court of impeachment must be composed of impartial members.* This is a truism on its face: the problem is how the House attempts to apply this standard. The Constitution requires each Senator to, without exception, take an oath to "impartially try the party impeached, and no person shall be convicted without the concurrence of two-thirds of the Senators present." Tex. Const. art. XV, § 3. The attendance of each Senator is mandatory. Tex. Gov't Code § 665.026. The Attorney General has great confidence that each Senator will take and honor this oath. Full attendance and participation by every Senator—whether each ultimately votes aye, nay, or present on any question—is consistent with both the Carrillo and Ferguson proceedings. Indeed, there is no constitutional or statutory authority even permitting a Senator to recuse for any reason; participation in an impeachment trial is mandatory. The House's facile analogy, proposing that Senators should recuse themselves for reasons that might excuse a juror from an ordinary trial, misses a critical distinction: every Senator represents nearly a million Texans in this historic proceeding—Texans who overwhelmingly voted

for Attorney General Paxton's reelection only seven months ago. No Senator is free to disregard that solemn obligation and thereby disenfranchise Texans by the million from their participation in this process.

Nonetheless, in an attempt to exclude Senators that they perceive as unfavorable to their case, the House Board of Managers suggests that the Senate should adopt rules to exclude Senators via recusal or disqualification. But the rules must do more than isolate a single Senator or two, as the House suggests. Instead, the Senate should provide both sides with a process to explore whether each Senator's impartiality could reasonably be questioned—either on the basis of public statements, personal views, or other circumstances, such as being a percipient witness. Many members of the Senate have previously commented on the merits of the claims brought against the Attorney General in the matters pending against him; those matters have formed the basis of virtually all of the articles passed by the House. At a minimum, the Attorney General would be equally entitled to inquire as to whether one or more Senators' statements reflect on their impartiality—which is to say, both sides would require a voir dire process as regards every member of the Senate. That unthinkable possibility only reveals how impossible, unconstitutional, and inappropriate the House's proposal for disqualifying Senators really is.

That is not to say that any Senator should (or would) act in a biased manner or based on their own self-interest. Indeed, the Constitution requires that each Senator set aside personal or partisan interest and take an oath to act impartially, and the Attorney General trusts and expects that the Senate will do so, listening to the evidence and setting aside everything other than their legal duty. The Senate should be trusted to follow the Constitution.

## III. The Senate Is Not Responsible for Correcting the House's Mistakes.

It is clear from the House Board of Managers' memorandum that they realized too late their mistakes in conducting their impeachment investigation behind closed doors, and they now seek to have the Senate fix their failures of process on the backend. But the gall of the House Board of Managers in this regard is particularly shocking given the unjust and at times unlawful process used by the General Investigating Committee. Here are three examples.

**"No witnesses were placed under oath . . . ."** 88th Leg., R.S., Journal of the Texas House 5636 (statement of Rep. Murr). Every accused enjoys the fundamental right to confront the witnesses against him; that core right of confrontation "requires that the witness be placed under oath." *Rivera v. State*, 381 S.W.3d 710, 712 (Tex. App.—Beaumont 2012, pet. stricken) (citing *Maryland v. Craig*, 497 U.S. 836, 845 (1990)). And more directly, Texas state law requires that "[a]ll legislative committees shall require witnesses to give testimony under oath." Tex. Gov't Code § 301.022(a). The General Investigating Committee is the *only* committee that cannot waive this requirement. *Id.* § 301.022(b).[2]

Nonetheless, and in transparent violation of this statutory requirement, the General Investigating Committee recommended impeachment on the basis of unsworn testimony, summarized in hearsay provided by its investigators, without ever making the recordings of those interviews available to the House. 88th Leg., R.S., Journal of the Texas House 5637 ("SCHAEFER: Were those recordings made available to the membership of this body? MURR: No."). To date they have not been provided to Attorney General Paxton either, depriving him of the basic right of knowing the evidence and accusations against him beyond the vague, conclusory articles made public and transmitted to the Senate.

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[2] The House may contend that this requirement does not apply to the witnesses who spoke to its investigators. There is no textual support for this argument within the statute, which refers to all "witnesses," Tex. Gov't Code § 301.022, and the House's refusal to take fact witness testimony under oath is repugnant to the concept of due process as enshrined in the Texas and U.S. Constitutions.

The House Managers suggest that their decision in this regard was correct because "[t]ypically, you do not see law enforcement or investigators place a victim or a witness under oath. That occurrence occurs at a trial." 88th Leg., R.S., Journal of the Texas House 5636 (statement of Rep. Murr). This statement is partially true, because it is already a crime to knowingly make false statements to law enforcement in Texas; invoking the threat of perjury is therefore redundant. *See* Tex. Penal Code § 37.08. But the House's view of its role is that it acted analogously to a "grand jury." *E.g.*, 88th Leg., R.S., Journal of the Texas House 5643. Taking this position at its face (and leaving aside the obvious historical and factual inaccuracies that are fatal to the analogy), the House *still* failed to follow the law. Texas law requires that all witness testimony provided to a grand jury must be *under oath*. Tex. Code Crim. Pro. art. 20A.256 (Witness Oath). Any evidence obtained in violation of this requirement is inadmissible. *See id.* art. 28.23.

**The Attorney General—and the public—were excluded from the process.** The General Investigating Committee did not even make public that it was conducting an investigation related to the Office of the Attorney General until May 23, 2023. *See* Minutes, House Committee on General Investigating, 88th Leg., R.S. (May 23, 2012), *available at* https://capitol.texas.gov/tlodocs/88R/ minutes/html/C2802023052315001.htm. Impeachment of the Attorney General was discussed publicly for the first time on May 25, 2023. *See* Minutes, House Committee on General Investigating, 88th Leg., R.S. (May 25, 2012), *available at* https://capitol.texas.gov/tlodocs/88R/minutes/html/C2802023052515451.htm. The General Investigating Committee refused to hear from the Office of the Attorney General at this meeting.[3] *E.g.*, 88th Leg., R.S., Journal of the Texas House 5649. And the House was forced to vote on this weighty and important matter less than 48 hours later, on a holiday weekend. *See, e.g.*, 88th Leg., R.S., Journal of the Texas House 5644 ("We should be doing this in the open daylight. We should be doing it not with 48 hours notice.") (statement of Rep. Smithee). In less than a week, the House impeached a third-term Attorney General without the presentation or consideration of any admissible evidence.

The decision to exclude the accused and to conduct all proceedings in secret, then foist them upon the House with less than two days' notice, is an inexcusable affront to our open and adversarial system of justice. Rather than hew to precedent and conduct their investigation in public, the General Investigating Committee conducted a secret and one-sided inquisition away from public scrutiny, hiding behind technical formalities of the House rules to justify their anti-democratic effort to surreptitiously overturn the will of the voters. *See, e.g.*, 88th Leg., R.S., Journal of the Texas House 5641-42 (colloquy between Rep. Murr and Rep. Tinderholt). This is the first time in Texas history that an impeachment has been conducted in secret, and hopefully the last.

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[3] The House has claimed that because the Attorney General appeared at an appropriations subcommittee hearing to testify regarding the settlement of the lawsuit with the so-called whistleblowers, he was invited to participate. *E.g.*, 88th Leg., R.S., Journal of the Texas House 5640. Such a claim is anemic and unserious. This is an obvious mischaracterization of the Appropriations subcommittee hearing, which had nothing to do with impeachment or any investigation. Representative Murr also claimed that "Mr. Paxton and members of his staff appeared before the Appropriations subcommittee and requested $3.3 million to fund a settlement, but declined to provide any additional information." 88th Leg., R.S., Journal of the Texas House 5640. Like so much else in the House Board of Managers' memorandum, this statement is provably false. The Attorney General personally appeared before the Appropriations subcommittee and answered questions along with his staff for nearly 45 minutes, committing in response to several questions that he would provide follow-up information. *See* Video, Appropriations Subcommittee on Articles I, IV, & V, 88th Leg., R.S. (Feb. 21, 2023), available at https://tlchouse.granicus.com/MediaPlayer.php?view_id=78&clip_id=23823. Most importantly, however, the General Investigating Committee never requested documents, witnesses, or testimony from Attorney General Ken Paxton or his Office at any time prior to impeachment.

**The House's rushed impeachment defied historical precedent.** In *every* past impeachment in Texas, the House acted based on public evidence and witness testimony, including an opportunity for cross-examination by counsel for the respondent. In the Ferguson impeachment, the public process before the entire House lasted 3 weeks, and that was after extensive public investigation by a House select committee. In the Carrillo impeachment, the process lasted 4 months. By contrast, the public process afforded Attorney General Ken Paxton lasted approximately 48 hours.

For a more recent example, in the 2014 impeachment investigation against University of Texas Regent Wallace Hall, Rusty Hardin—currently an attorney assisting 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. Then, after many more months of effort, Mr. Hardin produced a nearly 200-page report reflecting the testimony of approximately two dozen sworn witnesses from four public committee hearings, the review of over 150,000 documents and over 200 exhibits, and extensive communication with the accused's counsel. The current proceedings pale in comparison.

The House's explanations for their deviations from historical process are unsatisfying. *See, e.g.*, 88th Leg., R.S., Journal of the Texas House 5641 (colloquy between Rep. Murr and Rep. Tinderholt). But it is not the upper chamber's responsibility to correct the mistakes of the lower chamber. The House would have the Senate waste its valuable time—time that could be better spent pursuing legislative priorities—holding a wide-ranging inquisition so that the House can present the evidence that it neglected to develop on its *own* time. If the House Board of Managers was truly serious about presenting their so-called evidence to the public, they would have done so during the investigatory phase prior to impeachment, just like every House that has come before. The House Board of Managers' statement that they are committed to a process based on "transparency, fairness, and unquestioned impartiality" would be laudable if the House had not so clearly demonstrated its commitment to secrecy, injustice, and a predetermined outcome.

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Thank you for considering this response. To the extent that the Senate desires additional input to set the rules for these proceedings, we hope that you will invite both sides to discuss these and other matters, and we remain ready to provide any input that would be helpful.

Very truly yours,

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