

## MEMORANDUM

TO: **Members of the Texas Senate Special Committee on Rules of Procedure for Impeachment Trial**

FROM: **House Board of Managers**

DATE: **June 15, 2023**

SUBJECT: **Information Regarding Senate Procedures for an Impeachment Trial**

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As the Texas Supreme Court said in speaking of the impeachment of Governor James E. Ferguson, when the Senate exercises the power of impeachment, “its powers are so clearly judicial as to make argument on the point almost superfluous. . . . Obviously, a body authorized to sit as a ‘court’ to ‘try’ [articles of impeachment] preferred before it, that is, to hear the evidence and declare the law and to render ‘judgment,’ possesses judicial power, and in its exercise acts as a court. The Senate sitting in an impeachment trial is just as truly a court as is this court.” See *Ferguson v. Maddox*, 114 Tex. 85, 94, 263 S.W. 888, 890-91 (1924). “Acting as a court, the senators are sworn impartially to ascertain the facts, the applicable law, and apply the law to the facts.” 2 George D. Braden, et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 710 (1977). Consistent with this, past procedural rules for the Senate impeachment trials of Governor James E. Ferguson (1917) and District Judge O.P. Carrillo (1975-76) included provisions that mirror proceedings in Texas courts of law.

The House Board of Managers is aware of recent media statements made by Mr. Paxton’s counsel requesting the Senate adopt rules that would allow for a “summary procedure” whereby the Senate would be permitted to consider only the articles of impeachment preferred by the House and previously disclosed information of the House General Investigating Committee but none of the underlying facts and evidence, including witnesses, before rendering a judgement. The House Managers and their counsel have embraced the commitment to participating in an impeachment trial process that meets the traditional goals of trials in courts of law: transparency, fairness, and unquestioned impartiality. To this end, the House Managers would welcome the certainty that tried-and-true rules of Texas trial procedure and evidence could provide to the impeachment process. We understand the Special Committee will be presenting rules of procedure for consideration by a caucus of the Senate in less than a week’s time. We fully appreciate that progress on the proposed rules is at or nearing completion; however, given Mr. Paxton’s counsel’s alarming public request for a sham trial, we wish to share with the committee the findings of our research of the rules that were used in the impeachment trials of Carrillo and Ferguson.

We respectfully offer this memo as a resource to the committee as it concludes its important work, and we hope that its guidance is helpful to your work.

The impeachment trials of Carrillo and Ferguson provided numerous rules. If the Senate follows the rules that applied in these prior impeachment proceedings, as we respectfully request you do, the following rules and procedures would apply here:

- (1) **Mr. Paxton and the House Managers are entitled to be represented by counsel.** *See* Ferguson Rule 2, 4; Carrillo Rule 3.
- (2) **The Senate appoints a general legal counsel to advise the presiding officer and Senate members on legal issues:** In Carrillo, the Senate appointed well-known lawyer Leon Jaworski to advise the presiding officer and Senate members and provide counsel on questions of law that arose during impeachment trial. *See* Carrillo Rule 2.
- (3) **Parties' counsel are permitted to present argument, evidence, and witnesses, including the right to cross-examine the opposing parties' witnesses.** *See* Ferguson Rule 2, 4, 12, 15; Carrillo Rules 3, 13, 14, 15, 17(d).
- (4) **The House Managers and their counsel are entitled to open and conclude the presentation of evidence and argument:** The House Managers carry the burden of proof and thus are entitled to open and conclude the presentation of evidence and argument in the case. *See* Ferguson Rule 10; Carrillo Rule 16.
- (5) **The proceedings are recorded, transcribed, and frequently published:** In the Ferguson and Carrillo proceedings, a daily transcript of the court proceedings were published each night in the Senate Daily Journal and copies were provided to each party and their counsel. *See* Ferguson Rule 25; Carrillo Rule 10.
- (6) **The Senators, as members of the Court, and witnesses are required to be under oath:** The Texas Constitution requires that all Senate members participating in the trial swear an oath to deliberate impartially. Tex. Const. art. XV, § 3. The witnesses should be required to provide testimony under oath and subject to penalties of perjury. *See* Ferguson Rule 24, 27; Carrillo Rule 11(a), 17.
- (7) **Senators are prohibited from publicly commenting about the merits of the proceedings until after they have reached a judgment.** *See* Carrillo Rule 12. Nearly all Senators have already issued public statements explaining that public comment, as jurors, is not considered appropriate during the pendency of a trial.
- (8) **Pleas and motions are heard and decided prior to the presentation of evidence.** *See* Ferguson Rule 7; Carrillo Rule 15. The court should rule separately on each plea and motion. *See* Ferguson 9; Carrillo Rule 15. The Ferguson Rules also stated that once questions and objections were decided, they would not be reconsidered during trial. *See* Ferguson Rule 9.

- (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.** *See* Ferguson Rule 14; Carrillo Rule 5(c).
- (10) **The Senate has the power to compel witnesses and documents and the power to preserve order and punish for contempt the same as district courts.** *See* Ferguson Rule 11, 12; Carrillo Rule 4, 5.
- (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.** *See* Ferguson Rule 12; Carrillo Rule 24.
- (12) **The parties may invoke the Rule as to witnesses.** The witnesses should be prohibited from hearing or discussing other witness testimony. *See* Ferguson Rule 28; Carrillo Rule 18. In Carrillo, the rules excepted members of the court, parties, and their counsel from the Rule. *See* Carrillo Rule 18(b).
- (13) **The Senate members are required to deliberate in open session.** *See* Carrillo Rule 7, 19. In Carrillo, the rule stated that no action could be taken in a closed session and only members of the court, the presiding officer, general legal counsel, the clerk and bailiff were permitted in the closed session, unless the court voted in open session to invite others. If another person is invited, the parties and their counsel were required to be invited. *See* Carrillo Rule 7. Importantly, deliberating in open session ensures that the conduct and final judgment of Senators as members of the court of impeachment—and by extension, the Senate itself—cannot be discredited and thus impair public confidence in the integrity of the impeachment trial.
- (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.** *See* Ferguson Rule 21; Carrillo Rule 20.
- (15) **The Senate will permit cameras at the trial.** *See* Carrillo Rule 23. For the reasons expressed in Point No. 13, above, broadcasting the trial promotes public confidence in both the Senate and the Senators.
- (16) **The House is permitted to present additional articles of impeachment prior to trial.** *See* Ferguson Rule 26.
- (17) **The Senate meeting as a court of impeachment must be composed of impartial members.** The Texas Constitution clearly mandates that the Senate members, who will act as the triers of both fact and law, “shall be on oath, or affirmation impartially to try the party impeached.” Tex. Const. Art. XV, § 3. It has already been publicly disclosed that at least one Senator, Angela Paxton, presents an issue regarding the Court’s impartiality because she is Mr. Paxton’s spouse. There is no law, statute, or rule within the impeachment trial context regarding when or how a Senator is disqualified or may be recused. However, Texas law is clear that in a court of law a person is disqualified or unfit to be a

trier of fact, i.e., a juror if: “the juror has a bias or prejudice in favor of or against the defendant” or if the juror “is related within the third degree of consanguinity or affinity,<sup>1</sup> as determined under Chapter 573, Government Code, to the defendant.” TEX. CODE CRIM. PRO. art. 35.16; *see also* TEX. GOV'T CODE § 62.105 (recognizing the same basis for disqualification from serving as a juror). Thus, to avoid even the appearance of impropriety, the House Managers request that the Senate rules address the issue of when a Senate member is disqualified or subject to recusal.

Again, thank you for taking the time to review our research as you engage in the solemn and serious task of preparing recommended rules for the Senate, sitting as a Court of Impeachment.

cc: Hon. Dan Patrick, Lt. Governor  
Patsy Spaw, Secretary of the Senate  
Karina Davis, Senate Parliamentarian  
Dick DeGuerin and Rusty Hardin, Attorneys for the Board of Managers  
Tony Buzbee, Dan Cogdell, Christopher Hilton and Judd Stone, Attorneys for Mr. Paxton

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<sup>1</sup> Persons are related “to each other by affinity if: (1) they are married to each other.” TEX. GOV'T CODE § 573.024.