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WHY THE INDICTMENT OF GOVERNOR PERRY IS DOOMED TO FAIL

During the aftermath of the announcement that Governor Perry had been indicted by a Travis County grand jury for abuse of official capacity and coercion of a public servant, many observers, Republican and Democratic alike, have staked out positions regarding the validity of the indictment and what, if any, action Governor Perry should take in response to it. Most Democrats who have weighed in on these issues have taken the position that Governor Perry clearly violated the law when he exercised his line-item veto authority to eliminate $7.5 million in funding that Senate Bill 1 passed by the 83rd Texas Legislature would have authorized for the Public Integrity Unit of the Travis County District Attorney's Office. Most of those same Democrats have indignantly called upon Governor Perry to resign in the wake of that indictment.

Not surprisingly, most Republicans have taken the opposite position: that Governor Perry did nothing wrong when he vetoed the funding of the Public Integrity Unit, and that he should be lauded, rather than prosecuted, for his decision to eliminate the funding after District Attorney Rosemary Lehmberg rejected his entreaties that she resign her office in the face of her April 2013 arrest for driving while intoxicated. Unfortunately, what has been lost in the cacophony of partisan commentary is a clear, objective, legal analysis of the indictment itself and the criminal statutes upon which it will either survive or succumb. To clarify what the indictment actually alleges, I offer the following analysis.

CORRECT CLASSIFICATION OF OFFENSES PURPORTEDLY ALLEGED

Numerous media outlets have reported that the indictment charges Governor Perry with *two* felony offenses, namely, abuse of official capacity and coercion of a public servant. That is incorrect, and anyone who believes otherwise has not carefully examined the precise language set forth in the indictment and compared it with the elements of the penal statutes upon which it is ostensibly based. Although the two-count indictment does indeed purport to charge Governor Perry with both of those offenses, only the first count even purports to charge him with a felony offense, albeit a felony of the first degree. The second count, if it charges him with any offense at all, charges him with a Class A misdemeanor.

COUNT II: COERCION OF A PUBLIC SERVANT

Count II of the indictment is based upon the provisions of section 36.03 of the Texas Penal Code, entitled "Coercion of Public Servant or Voter," subsection (a)(1) of which provides as follows:

> A person commits an offense if by means of coercion he [. .] influences or attempts to influence a public servant in a specific exercise of his official power or a specific

> performance of his official duty or influences or attempts to influence a public servant to violate the public servant's known legal duty[.]

Subsection (b) of section 36.03, however, provides that such an offense "is a Class A misdemeanor *unless the coercion is a threat to commit a felony*, in which event it is a felony of the third degree."

It is apparent from most news coverage of this event that the prevailing assumption is that Count II alleges that Governor Perry threatened to commit a felony when he allegedly attempted to influence Ms. Lehmberg to resign her office. However, the indictment itself contains no such allegation. Instead, it simply alleges that Governor Perry "threaten[ed] to veto legislation that had been approved and authorized by the Legislature of the State of Texas to provide funding for the continued operation of the Public Integrity Unity." Consequently, to determine whether Count II alleges a felony of the third degree, one must determine whether vetoing "legislation that had been approved and authorized by the Legislature of the State of Texas to provide funding for the continued operation of the Public Integrity Unity" constitutes a felony. Unless it does, Count II only alleges a Class A misdemeanor.

It is axiomatic that vetoing such legislation—or for that matter any legislation—does not constitute a criminal offense, much less a felony. Article IV, section 14 of the Texas Constitution expressly authorizes the Governor of Texas to exercise a line-item veto over one or more items of an appropriation bill:

> If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect.

It is an elementary principle of Texas criminal procedure that an indictment must be judged upon its face, not upon evidence that the prosecution believes it possesses to prove it. An indictment either alleges a criminal offense or it does not. If the statute that defines an offense provides that it is ordinarily a misdemeanor but under certain circumstances it is a felony, the indictment itself must allege the specific circumstances that make the offense a felony. Otherwise, it alleges a misdemeanor. That is exactly the case with Count II of Governor Perry's indictment. Unless we are willing to say that a Governor commits a felony if he or she exercises his or her constitutional power to veto an item of an appropriation bill, Count II alleges at most a Class A misdemeanor.

Does Count II even allege the commission of a Class A misdemeanor? The special prosecutor obviously believes that it does. Presumably, he would point to the fact that Count II alleges the elements of section 36.03(a)(1) of the Penal Code, *i.e.*, that by means of coercion Governor Perry influenced or attempted to influence Rosemary Lehmberg, a public servant, in a specific performance of her official duty. Were it not for the specific language in Count II that explains what Governor Perry allegedly did to constitute such an offense, the special prosecutor would prevail on this issue.

The problem for the special prosecutor is that the language that he uses to explain the allegation that Governor Perry attempted to influence Ms. Lehmberg in a specific performance of her official duty not only undermines that allegation, it expressly negates it. Count II alleges that the specific performance of official duty that Governor Perry attempted to influence was her "duty to continue to carry out her responsibilities as the elected District Attorney for the County of Travis," *i.e.*, her duty to occupy and "faithfully execute the duties of the office of District Attorney of Travis County." One does not need a law degree to distinguish between *specific* performance of an official duty and *general* performance of such a duty. What Count II actually alleges is that Governor Perry, by means of coercion, influenced or attempted to influence Rosemary Lehmberg in a general performance of her official duty. Because the statute specifies that the defendant's objective must be to influence a public servant in a *specific* performance of her official duty,

merely alleging that the defendant attempted to influence a public servant in the *general* performance of her official duty does not constitute an offense. Regardless of what evidence might be available to the special prosecutor to prove the allegations in Count II of the indictment, the outcome of such a prosecution—either dismissal in the face of a motion to quash or acquittal at the conclusion of a jury trial—is a foregone conclusion because it expressly negates the commission of the offense defined by section 36.03(a)(1) of the Penal Code.

COUNT I: ABUSE OF OFFICIAL CAPACITY

A careful examination of the allegations set forth in Count I indicates that it fares no better than its successor. Indeed, it actually fares much worse. Count I is based upon section 39.02 of the Penal Code, entitled, "Abuse of Official Capacity," subsection (a)(2) of which provides as follows:

> A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly [. . .] misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.

Subsection (c) of section 39.02 provides that such an offense is "a felony of the first degree if the value of the use of the thing misused is $200,000 or more."

Although Count I purports to charge Governor Perry with such an offense, like Count II, the specific allegations set forth therein not only undermine one of the elements of the offense defined by section 39.02, they expressly negate it. To see that this is so, one needs only to examine the language used in Count I to describe the government property that Governor Perry allegedly misused. Count I describes that property as "monies having a value of in excess of $200,000 which were approved and authorized by the Legislature of the State of Texas to fund the continued operation of the Public Integrity Unit of the Travis County District Attorney's Office, and which had come into defendant's custody or possession by virtue of the defendant's office as a public servant, namely, Governor of the State of Texas."

What government property does Count I allege Governor Perry misused? Money that then belonged to the taxpayers of the State of Texas, money that never came into Governor Perry's custody or possession because he exercised his constitutional power of eliminating such funding with a line-item veto. The second problem with Count I relates to the term "misuse." Like many statutes in the Penal Code, section 39.02 employs certain terms that are specifically defined by the Penal Code. Section 39.01 provides that within the context of section 39.02, the term "misuse" means to deal with property contrary to:

> (A) an agreement under which the public servant holds the property;
>
> (B) a contract of employment or oath of office of a public servant;
>
> (C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or
>
> (D) a limited purpose for which the property is delivered or received.

Count I alleges that Governor Perry dealt with the non-existent government property "by dealing with such property contrary to an agreement under which defendant held such property or contrary to the oath of office he took as a public servant." Assuming for the sake of argument that Governor Perry actually had custody of funds of the value of "$200,000 or more," and assuming further that he "misused" those funds as that term is defined by statute, under what agreement did he hold such property? What were the terms of that agreement? How did he deal with such property "contrary to the oath of office" that he took

as Governor? The indictment fails to answer any of these questions, and it fails to do so for two obvious reasons. First, no such agreement ever existed. Second, the oath of office prescribed for the Governor of Texas does not require a governor to sign every bill that lands on his or her desk. In fact, as pointed out above, article IV, section 14 of the Texas Constitution expressly authorizes the Governor of Texas to exercise a line-item veto over one or more items of an appropriation bill.

Finally, Count I fails for one other reason: it requires that the special prosecutor convince twelve fair and impartial jurors *beyond a reasonable doubt* that Governor Perry exercised his constitutional power to veto the funding that Senate Bill 1 would have authorized for the Public Integrity Unit "with intent to harm another, to-wit: Rosemary Lehmberg and the Public Integrity Unit."

After listening to hours of eyewitness testimony regarding how Ms. Lehmberg acted after she was detained, and later arrested, by Travis County Sheriff's deputies, transported to jail, arraigned, and booked for driving while intoxicated, how she repeatedly lied to deputies about her consumption of alcoholic beverages prior to her arrest, how she lied to the magistrate who arraigned her, and how she attempted to bully and threaten the deputies that were attempting to restrain her, and after watching audiovisual recordings depicting many of these same events, will any fair and impartial juror be convinced beyond a reasonable doubt that Governor Perry exercised his line-item veto to *harm* Ms. Lehmberg or the Public Integrity Unit? Or, will jurors be convinced instead that he did so because Ms. Lehmberg had squandered the trust that had been placed in her by the voters of Travis County by repeatedly attempting to coerce Travis County Sheriff's deputies and even a City of Austin Magistrate into releasing her so that she could escape the inevitable consequences of her decision to endanger the lives of innocent citizens by driving her Lexus while grossly intoxicated?

Whether this indictment will die a quick death from a judicial ruling granting a motion to quash or one prolonged by a jury trial ending in acquittal, only time will tell. One thing, however, is certain: it cannot survive both judicial and juror scrutiny.

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