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[Gov. Rick Perry Indictment Timeline](#)

Lawyers: Perry's Dismissal Arguments Strong, But Unlikely to Succeed

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As the prosecutor and judge in Gov. Rick Perry's case mull over the governor's recent request to dismiss his indictment, analysis by three longtime criminal law attorneys reveals the most legal merit in one of Perry's arguments to dismiss his coercion of a public servant charge.

Texas Lawyer asked three attorneys with longtime criminal law experience to analyze Perry's application for pretrial writ of habeas corpus and predict what the special prosecutor and judge might do next. All of the lawyers are former federal prosecutors who now represent white-collar criminal defendants and people or companies facing investigations.

The first count of the [indictment](#) in *Texas v. Perry* alleges that the governor committed abuse of official capacity under Texas Penal Code §39.02 in June 2013 by misusing government property, contrary to his oath of office as a public servant, while intending to harm Travis County District Attorney Rosemary Lehmborg and her office's public integrity unit. The second count in the indictment alleges that Perry committed coercion of a public servant under penal code §36.03 by threatening to veto funding for the public integrity unit unless Lehmborg resigned.

The governor has pleaded not guilty. In his [writ application](#), Perry argued that the statutes involved are unconstitutional, that the prosecution violates the separation of powers doctrine and that it violates his free speech rights, among other things.

Here are the legal analysts' answers, edited for style and length.

Texas Lawyer: After analyzing Perry's filing, which argument has the most merit?

[Philip Hilder](#), principal, [Hilder & Associates](#), Houston: Gov. Perry may be entitled to relief on a pretrial writ only if he shows that the trial court lacks jurisdiction, meaning that it does not have the power or authority to proceed. To do that, Gov. Perry must show the statutes under which he has been indicted are facially unconstitutional. ... The strongest argument offered by the defense in this very preliminary proceeding is against count two of the indictment on the ground that the statute is overbroad. ... [The veto] was an exercise of a constitutionally authorized political power. ... Count



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one, while it will likely survive the writ action Gov. Perry filed, is also vulnerable to a motion to dismiss for failure to allege criminal conduct. ... The strongest argument to dismiss count one attacks the drafting of the abuse allegation and whether the indictment sufficiently puts the defendant on notice as to the criminal violation.

John Kinchen, partner, Hughes Arrell Kinchen, Houston: From a strictly legal standpoint, the argument that §36.03(a)(1) of the Texas Penal Code (count two of indictment) is unconstitutionally overbroad on its face is stronger. ... Of course, being broad and vague does not, in and of itself, make a statute unconstitutional. Courts use sort of a sliding scale on this issue, and the real question is whether the statute is overly broad to the point where it prohibits a "substantial amount" of constitutionally protected activity. ... I think Gov. Perry makes a compelling argument that this statute is far enough on the sliding scale to criminalize protected political speech.



BILL MATEJA

Bill Mateja, principal, Fish & Richardson, Dallas: My prediction is that the trial court will dismiss count two of the indictment (coercion of a public servant) based on their argument that count two, on its face, is overbroad and vague. They make a persuasive argument that it's impossible to know what is legal versus illegal conduct. Given the definition of "coercion" in the statute, it may well be a crime for any governor to negotiate with a legislator for changes in a pending bill by informing the legislator that, as drafted, the governor would veto the bill.

Texas Lawyer: If you were the prosecutor in this case, how would you respond to this filing?

Hilder: If I were the special prosecutor and believed that any of the defense arguments were meritorious, I would consider filing a superseding indictment correcting the shortcomings. I anticipate that the prosecutor is comfortable with the constitutionality of the statutes and will stand firm in defending the writ challenge. Defending a motion to dismiss may be more challenging.

Kinchen: I need to change the discussion. I am not trying to "scrutinize a gubernatorial vote" or criminalize innocent conduct. The veto is, of course, a lawful act. But that is not the issue—lawful acts can be criminalized depending on the underlying circumstances. The Texas Legislature dictates those circumstances, and it has determined that taking or withholding "action as a public servant" in order to improperly "influence a public servant" is a crime. Also, I would concede that the statute is broad, but not to the point where it criminalizes a "substantial amount" of constitutionally protected free speech. Finally, I would emphasize two important points about §36.03 to the judge. First, the Texas Legislature already has addressed the constitutional challenges being made by Gov. Perry with subsection (c) of the statute—which essentially creates an exception for "official actions taken by [a] member of the governing body." Gov. Perry will have an opportunity at trial to argue that his actions meet that exception. ... Second, the court of appeals in Fort Worth looked at the constitutionality of this statute in 1994 and determined that it passed muster. *Tobias v. State*, 884 S.W.2d 571 (Tex.App.—Fort Worth 1994, pet. ref'd). If I were the prosecutor, I would cite *Tobias* early and often.

Mateja: I believe the special prosecutor possesses many more facts that he's not told us about

(because, if he doesn't, the indictment should be dismissed). So the special prosecutor will want a hearing to flesh out those facts to challenge any "as applied" challenge. If, for some reason, the judge doesn't mandate a hearing, get ready to read about what all these additional facts might be that the special prosecutor possesses.

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