In the Office of the Attorney General of Texas

Re: A.G. Opinion Request 0589-GA

SUPPLEMENTAL BRIEF OF SPEAKER TOM CRADDICK

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Speaker of the Texas House of Representatives Tom Craddick requests that the Attorney General accept and consider this supplemental brief responding to assertions made in briefs filed after the original July 20 deadline.

INTRODUCTION

The Attorney General should decline the invitation to act as Monday morning quarterback. As submissions by House members on all sides of the issues make clear, at the core of the opinion request is an internal House political dispute that has spilled over from the concluded 2007 session and now threatens to spill over into a separate branch of government. The Attorney General should not ensnare himself in this internal dispute between members of the House over the interpretation and application of internal procedural rules that the House members themselves voted on, had the opportunity to amend during the 2007 session, and will be required to revisit afresh at the beginning of the 2009 session. The Texas Constitution exclusively and explicitly delegates to each house of the legislative branch, not the executive branch, the responsibility and right to draft, enforce, and interpret its rules. Acting under that exclusive delegation, the House—at the beginning of the 80th Legislature and as it has done for decades—adopted rules that explicitly exempt the speaker's recognition decisions from appeal. The Attorney General may not provide requestors an end-run around the rules they agreed to play by; requestors must petition their peers in the House to receive the relief they seek through an amendment to the House rules.

The political nature of the opinion that requestors and the handful of other House members supporting them ask the Attorney General to render is obvious given that the results they seek could, if they had any broad-based support, be achieved through the democratic process. Those members could, in the next session, push through changes in the rules regarding a speaker's power of recognition, if they had the votes to do it. They could amend the rules to

provide for appeal of a speaker's recognition decisions, if they had the votes. They could elect one of themselves speaker, if they had the votes. They could expel a speaker from House membership, if they had the votes. They could amend the statute providing that the Senate conduct the constitutionally required trial in proceedings brought to remove a speaker, if they had the votes. They could even amend the Texas Constitution, if they had the votes in the House and Senate and among the people of Texas. The attempt to have the Attorney General reinterpret House rules by fiat is improper and should be rebuffed.

The current House rules do not permit a motion to vacate the speaker's office by means of a simple majority vote, nor do they grant any type of motion a "privileged" status that overrides the speaker's recognition power. Thus, the constitutional question whether the House can permissibly remove its speaker by a majority vote is a purely academic one. Even if it were appropriate for the Attorney General ever to engage in interpreting House rules, the questions here would remain purely theoretical unless and until (1) amendments to the House rules permitting a motion to vacate are proposed and debated in a future session, (2) those amendments are adopted, and (3) an attempt is made to vacate the speakership by such a motion. When the House itself has never gotten as far as considering a proposed amendment to its own rules, the Attorney General certainly has no occasion to address the constitutionality of such a hypothetical amendment.

The answers to the requestors' questions are, in any event, clear under the text of both the current rules and the Texas Constitution. The 80th Legislature's House rules, in the interest of moving the House's legislative business along, endowed the speaker with broad and unappealable discretion to recognize, or not recognize, members of the House. Neither parliamentary tradition nor the Texas House rules recognize a form of "privilege" that overrides

the speaker's recognition power or transforms nonappealable decisions into appealable ones. There is no mechanism for filibuster in the Texas House.

The Constitution and House rules also make clear that the speaker serves a fixed term of office and may only be elected once per term. Moreover, the speaker's role is not limited to wielding the gavel on the House floor. That officer exercises numerous sovereign duties for the public good. Thus, the Texas speaker is removable only in the manner authorized for removing officers under the Texas Constitution, and no resort to inapposite practices by legislative bodies operating under different constitutional arrangements can alter that conclusion.

I. THE ATTORNEY GENERAL SHOULD REFRAIN FROM OPINING ON MATTERS THAT THE CONSTITUTION EXCLUSIVELY CONSIGNS TO THE TEXAS HOUSE.

Numerous House members, including some who disagree with Speaker Craddick's position on the merits of the issues, agree that it is not the business of the Attorney General to interfere with internal House matters. *E.g.*, Brief of Reps. Berman, B. Brown, F. Brown, Callegari, Corte, Davis, Eissler, Flynn, Harper-Brown, Howard, Isett, Jackson, Murphy, Woolley, and Zedler; Letter of Rep. Dunnam; Brief of Rep. Callegari; Brief of Rep. Chisum. The Attorney General should decline requestor's invitation to pass judgment on the application and interpretation of the House's internal rules, which the Constitution authorizes the members of the House alone to create, implement, and interpret. And the Attorney General should refuse to take part in an attempt to undermine the House's internal rules through an appeal of a parliamentary decision that those rules do not allow House members appeal.

A. The Attorney General Has No Constitutional Authority to Intervene in the Internal Affairs of the House.

The Texas Constitution expressly separates the branches of government and vests each chamber of the Legislature with power over its own internal procedures. TEX. CONST. art. II, §1 ("The powers of the Government of the State of Texas shall be divided into three distinct

departments."); TEX. CONST. art. III, §11 ("Each House may determine the rules of its own proceedings."). The rules the House members have adopted themselves contemplate no interference from a coordinate branch in matters regarding their interpretation. Instead, the rules entrust their interpretation, application, and enforcement to the presiding officer of the House. Tex. H.R. Rule 1 §1, 80th Leg., R.S. (2007) ("The speaker shall enforce, apply, and interpret the rules of the house in all deliberations of the house.").

Accordingly, the Attorney General has previously recognized that it is inappropriate for the Attorney General "to attempt to tell the House of Representatives what its rules mean." Op. Tex. Att'y Gen. No. H-55 (1973); *see also* Op. Tex. Att'y Gen. No. JC-501 (2002) ("Given the authority of each house to establish its own rules of procedure and to determine the authority of its own committees, and in light of the absence of any applicable constitutional or statutory requirements, the determination whether proposed or contemplated legislation falls within the jurisdiction of a particular House committee is within the sole province of the House of Representatives."). Attorneys general in other states have reached the same conclusion when asked to address similar issues. *E.g.*, Op. Va. Att'y Gen. 31, WL 27404 (1977-78) (explaining that "[i]t is the responsibility of the legislative branch to both establish and enforce it own rules" and that "[i]t would not be proper for the executive or judicial branch of government to inquire as to the legislature's observance of its own rules or procedure"); *cf.* Op. S.C. Att'y Gen., WL 632964 (1991) (emphasizing that "any interpretation of House Rules is solely within the province or authority of the House of Representatives" and declining to go further than stating that the rules' terms reasonably supported a given interpretation).

Indeed, it would particularly inappropriate for the Attorney General to opine on the issues raised in requestors' letter because those issues are not properly framed for review. To the extent

requestors seek review of Speaker Craddick's parliamentary decision not to recognize an improper motion, that internal House dispute, which arose during a session that is over, is moot. *See* Brief of Rep. Berman *et al.* (describing the politics behind the opinion request); Brief of Rep. Callegari (same); Brief of Rep. Chisum (same); Brief of Rep. Flynn (same); Brief of Rep. Laubenberg (same). And to the extent requestors seek a preemptive opinion on what House rules should be put into effect next session, that issue is not ripe for consideration because next session's rules will not be adopted, or their content established, until the House acts at the start of the next session to adopt the rules governing that session. *See* TEX. CONST. art. III, §11. Because the rules for next session are not yet in effect, an Attorney General opinion concerning those rules would be particularly intrusive on the legislative branch. The House has the authority and opportunity to address any alleged deficiencies in its rules when its members vote to adopt those rules at the commencement of the next legislative session. The Attorney General should not usurp that legislative prerogative by opining on the content and meaning of those, as yet unadopted, rules. *See* Brief of Rep. Chisum ("The chairmen now asking for your opinion may have recently decided that they now disagree with the rules regarding a speaker's authority in regard to recognition, but they should face their colleagues regarding proposals to change this long-standing principle, not ask the attorney general to interpret it.").

B. The House's Rules Grant the Speaker a Discretionary, Nonappealable Power of Recognition.

Even if the Attorney General could permissibly review a speaker's application of House rules, he must find that those rules grant the speaker broad, unqualified authority with respect to recognizing matters before the House. Rule 5, §24, gives the speaker the discretion to determine both *when* and *whether* to recognize matters during House proceedings:

> Sec. 24. RECOGNITION—There shall be no appeal from the speaker's recognition, but the speaker shall be governed by rules

> and usage in priority of entertaining motions from the floor. When a member seeks recognition, the speaker may ask, "For what purpose does the member rise?" or "For what purpose does the member seek recognition?" and may then decide if recognition is to be granted.

Tex. H.R. Rule 5 §24, 80th Leg., R.S. (2007).

Under rule 5, the speaker may determine *when* a motion will be entertained, and the speaker may also determine *whether* to recognize a member seeking to place an item before the House. The speaker alone is authorized to "decide *if* recognition is to be granted." *Id.* (emphasis added). The House's rules are clear: "There shall be no appeal from the speaker's recognition." Tex. H.R. Rule 5 §24, 80th Leg., R.S. (2007); Tex. H.R. Rule 1 §9(b), 80th Leg., R.S. (2007) ("Responses to parliamentary inquiries and decisions of recognition made by the chair may not be appealed.").

II. A SPEAKER CAN BE REMOVED ONLY AS PROVIDED BY TEX. CONST. ART. XV, §7.

Pruned of rhetoric, requestors' question 1 asks whether a speaker may properly be removed from office at the pleasure of the House. The only constitutional answer is no. Should the Attorney General proceed to address the political questions posed by this request, he must conclude that the Constitution provides for a definite two-year term of office for the speaker. Accordingly, the speaker can be removed from the speakership only as provided by law enacted under TEX. CONST. art. XV, §7.

A. The Constitution Mandates That a Speaker Election Occur Only Once Per Session.

The plain language of TEX. CONST. art. III, §9(b) provides that "[t]he House of Representatives shall, *when it first assembles*, organize temporarily, and thereupon proceed to the election of a Speaker from its own members." (emphasis added). That language—which is unique to the Texas Constitution of 1876 and uniquely refers to the position of speaker of the

Texas House—very specifically limits when and how often speaker elections may occur. Those respondents who assert otherwise can do so only by disregarding that plain language as well as the contrasts between the current provision for electing a speaker and the current provision for electing a Senate president pro tempore or the pre-1876 constitutional provision for electing both officers.

Representatives Geren, Smith, Krusee, Haggerty, McCall, and England (collectively, the Geren respondents) assert that art. III, §9(b) "gives no date or deadline" by which a speaker's election must occur. Brief of Rep. Geren *et al.* 13. That is simply not true. "[W]hen it first assembles" has a definite meaning, even if it does not provide a date certain. No one could seriously read a requirement that the House do something "when it first assembles" to mean that the House could constitutionally wait until, say, 70 days into a 140-day session to elect a speaker.

"It is axiomatic that constitutional provisions are interpreted in such a manner as to give effect to every phrase of the document." *In re McLean*, 725 S.W.2d 696, 698 (Tex. 1987). "[T]he language used is presumed to have been carefully selected." *Id.*; *accord Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 395 (Tex.1989) (same). Every word of art. III, §9(b), including the word "first," "must be presumed to have been used for a purpose." *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981)); *cf. Rooms With A View, Inc. v. Private Nat'l Mortgage Ass'n*, 7 S.W.3d 840, 844 (Tex. App.—Austin 1999, pet. denied) (noting that "the same guidelines" are used "in interpreting constitutional provisions as . . . in interpreting statutes"). Similarly, every word excluded—for example, words that might permit deferred or

multiple speaker elections—"must also be presumed to have been excluded for a purpose." *Laidlaw Waste Sys.*, 904 S.W.2d at 659.

Art. III, §9(b) means what it says. To find any support for the idea of a speaker election occurring later than the beginning of a regular session, the Geren respondents must reach outside the Constitution to TEX. GOV'T CODE §302.001. Echoing the constitutional provision, §302.001 recognizes that "the house shall elect a speaker" when it "first convenes in regular session" but also purports to permit deferral of a speaker election upon a majority vote. Of course, the Constitution trumps any conflicting statute. If there is a conflict between art. III, §9(b) and §302.001's deferral provision, §302.001 must give way. But the constitutionality of §302.001 is a question for another day. More relevant to the questions at issue, even §302.001 does not purport to permit *multiple* elections for speaker to occur during a session. There is simply no authority in statute, case law, House rules, House precedent—or anywhere—suggesting that art. III, §9(b) of the Texas Constitution of 1876 has ever been interpreted to permit a speaker's election more than once per session.

If there could be any doubt about what art. III, §9(b) means, it would be erased by two comparisons. First, comparing art. III, §9(b)'s provision that the House elect its speaker "when it first assembles" with the immediately preceding provision for the Senate to elect its president pro tempore absolutely confirms that multiple elections for speaker are not permitted. TEX. CONST. art. III, §9(a) provides that "[t]he Senate shall, *at the beginning and close of each session, and at such other times as may be necessary*, elect one of its members President pro tempore." (emphasis added). Art. III, §9(a) thus not only requires at least two elections per session for president pro tempore but explicitly authorizes the Senate to elect a new president pro tempore whenever it "may be necessary." Speaker-specific art. III, §9(b) simply does not provide for new

speaker elections "at such other times as may be necessary." *Cf., e.g., Bouldin v. Bexar County Sheriff's Civil Serv. Comm'n*, 12 S.W.3d 527, 529 (Tex. App.—San Antonio 1999, no pet.) (noting that it is inappropriate to "insert additional words into a statute unless it is necessary to give effect to clear legislative intent"); *Jones v. Houston Gen. Ins. Co.*, 736 S.W.2d 860, 863 (Tex. App.—Waco 1987, writ denied) ("The existence or non-existence of legislative intent may be inferred from the fact that a certain provision is missing from a statute.").

The other comparison that drives home that the current Constitution provides for speaker elections only once per session is the comparison between the 1876 document and Texas's four earlier state constitutions. All four state constitutions preceding the 1876 Constitution provided that "[t]he House of Representatives, when assembled, shall elect a speaker and its other officers; and the Senate shall choose a President for the time being, and its other officers." TEX. CONST. of 1845, art. III, §12; TEX. CONST. of 1861, art. III, §12; TEX. CONST. of 1866, art. III, §11; TEX. CONST. of 1869 art. III, §15. Unmistakably, by separating the provision for electing a speaker from that for electing a president pro tempore and by replacing "when assembled" by "when [the House] first assembles," the framers of the 1876 Constitution both limited speaker elections to once per session and distinguished them from the more frequent elections for Senate president pro tempore. There would be no other reason for that change in the 1876 Constitution and no reason for the Constitution to single out the speaker for different treatment. And the fact that the framers of the 1876 Constitution could have said things differently does not change the clarity of what they did say. The Geren respondents assert that the 1876 adoption of the 1869 Constitution's language regarding removal means that language gets the same construction under both documents; they must concede the corollary that changed language gets a different

construction.[1] The changed language of 1876, which was quite probably inspired by the events of 1871, also means that the departure of Speaker Evans is no precedent for removal of a speaker under the current Constitution.

House rules and precedent confirm that the House has never believed it had authority under the 1876 Constitution to remove a speaker at will. No speaker has ever been removed under the 1876 Constitution, and no respondent has identified any record of a "motion to vacate the chair" ever being entertained on the House floor under that document. Representative McCall points to the 1909 and 1972 episodes in which Speakers Kennedy and Mutscher eventually acceded to calls for their resignations. Brief of Rep. McCall 4. But the very fact that House members resorted to requests that a speaker *resign* demonstrates that they knew that the Constitution did not provide for them to summarily *remove* an unpopular speaker. Indeed, according to Representative McCall, Speaker Kennedy did not even resign until the session after the one in which members passed a resolution calling for his resignation. *Id.*

As respondents like former Speaker Rayford Price agree, Brief of Rayford Price, the House rules do not permit a motion to remove a speaker. The rules go further: they expressly forbid campaigning for the speakership during a session, which would be both absurd and impossible to enforce if speaker elections could occur at any time. Tex. H.R. Rule 1, §18, 80th Leg., R.S. (2007) ("*During a regular session of the legislature* a member may not solicit written pledges from other members for their support of or promise to vote for any person for the office

[1] In fact, the 1876 Constitution did not "adopt[] the same language regarding removal of all other state officers," Brief of Rep. Geren *et al.* 9, that was in the 1869 Constitution. *Compare* TEX. CONST. of 1869 art. VIII, §6 ("The Legislature shall provide for the trial, punishment, and removal from office, of all other officers of the State, by indictment or otherwise."), *with* TEX. CONST. of 1876 art. XV, §7 ("The Legislature shall provide *by law* for the trial and removal from office of all officers of this State, *the modes for which have not been provided in this Constitution.*" (emphasis added).

of speaker." (emphasis added)). Representatives Geren, Smith, Krusee, Haggerty, McCall, and England flatly mischaracterize rule 1, §18. The rule says nothing about "an election occurring during the regular session." Brief of Rep. Geren *et al.* 23. It says that solicitation of pledges to vote for a person for speaker may not occur during the regular session. Tex. H.R. Rule 1, §18, 80th Leg., R.S. (2007). If mid-session elections could occur routinely, it is highly unlikely the House would adopt such a prohibition. Instead, the rule confirms the House's own traditional recognition that a speaker is elected to a two-year term at the beginning of each regular session.

B. A Speaker Could Only Be Removed From Office by Law Enacted Pursuant to the Constitution.

As detailed in Speaker Craddick's initial brief, the speaker of the Texas House is not merely that chamber's parliamentary presiding officer but also the official charged with numerous statewide sovereign functions for the benefit of the public. Brief of Speaker Craddick 10-13. Thus, the speakership is a public office of the state of Texas. *See Green v. Stewart*, 516 S.W.2d 133, 135 (Tex. 1974) (identifying the predominant determining factor for whether an official is a public officer of the state as "whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.").[2] Because no other constitutional provision governs removal of a speaker, a speaker who is not otherwise lawfully removed from membership in the House could only be removed from the office of speaker through a method authorized by the catch-all removal provision found in TEX. CONST. art. XV, §7: "The Legislature shall provide by

[2] *Accord Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955); *Kimbrough v. Barnett*, 55 S.W.120 (Tex. 1900); *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740 (Tex. Civ. App.—Galveston 1949, writ ref'd); *Walton v. Brownsville Navigation Dist.*, 181 S.W.2d 967 (Tex. Civ. App.—San Antonio 1944, writ ref'd); Op. Tex. Att'y Gen. No. 93-027 (1993); *see also In re Texas Senate*, 36 S.W.3d 119, 120 (Tex. 2000) (confirming that an official can be both a legislative officer and a state officer)

law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution."

Neither Speaker Craddick nor anyone else has ever suggested that the speaker is among the list of officers in TEX. CONST. art. XV, §2, the provision specifying that impeachment of certain officers "shall be tried by the Senate." Thus, arguments by some respondents making the obvious point that the speaker is not listed in art. XV, §2 are directed at a straw man. The only relevance of art. XV, §2 is that, by excluding the speaker, it leaves that officer in the category of "all officers of this State, the modes for which have not been provided in this Constitution." TEX. CONST. art. XV, §7.

Representatives Geren, Smith, Krusee, Haggerty, McCall, and England join liberal advocacy group Common Cause Texas in confusing the question of impeachment of a House member or senator with the impeachment of a speaker. No one has suggested that the Texas Constitution provides for impeachment of a House member *as a House member* or a senator *as a senator*. And any such suggestion would clearly be at odds with TEX. CONST. art. III, §11's provision that each chamber is entitled to expel its own members. Impeachment would make little sense in the context of removing a legislator from either chamber. Why would the House or the Senate ever resort to a method of removing a member that requires the assent of the other chamber if it could accomplish the same end by unilateral action? Expulsion of a sitting speaker from the House would necessarily also remove that individual from the speakership. *See* TEX. CONST. art. III, §9(b) (stating that the speaker must be elected from among the House members).[3]

[3] Texas Progressive Alliance's belief that an expelled member could remain speaker is simply wrong. Expulsion of a member who happens to be speaker is, quite obviously, one lawful way in which a vacancy could arise.

The issue here is not removal of a representative or a senator from either chamber; it is removal of an individual from the office of speaker.

To the extent some respondents suggest that the exclusion of the speaker from the list of officers whose impeachments must be tried by the Senate under TEX. CONST. art. XV, §2 or the speaker's dual status as a member of the House removes the office of speaker from the coverage of TEX. CONST. art. XV, §7, their argument proves too much. For example, under that logic, there would be no way to remove a sitting senator from the office of acting lieutenant governor, even if that officer had committed impeachable offenses.

Another inapposite argument conflates the mandate of the Constitution with the dictates of TEX. GOV'T CODE ch. 665. Speaker Price, for example, appears to concede that it is at least possible that removal of a speaker comes within TEX. CONST. art. XV, §7 but, incongruously, asserts that conclusion is absurd because it permits the Senate to override the House's desire to remove its own speaker. But nothing in the Constitution requires an impeached speaker to be tried by the Senate. *See* TEX. CONST. art. XV, §2 (listing officials, not including the speaker, for whom the Senate must try impeachments). Similarly, the Geren respondents contend that if the speaker is subject to art. XV, §7 "the Legislature would have to pass a statute providing for his removal by trial in front of some other body [*i.e.*, other than the House]." Brief of Rep. Geren *et al.* 7. But it is only Chapter 665, the *statute*, not the Constitution that provides that state officers, which include a speaker, must be removed by impeachment, with trial in the Senate. TEX. GOV'T CODE ch. 665.002, 665.021. The Constitution merely requires that the removal process involve a "trial" and be provided for "by law." TEX. CONST. art. XV, §7; *see Dorenfield v. Allred*, 73 S.W.2d 83, 86 (Tex. 1934); *Knox v. Johnson*, 141 S.W.2d 698, 701 (Tex. Civ. App.—Austin 1940, writ ref'd).

Because nothing in the Constitution prevents the Legislature from providing for removal of a speaker by some method other than impeachment with trial in the Senate, problems, if any, with the current mechanism for impeaching a speaker must be addressed by amending the statute, not by ignoring the Constitution. Moreover, as a practical matter, the House is unlikely ever to find itself saddled with a speaker that it has impeached but the Senate declined to convict. If a substantial majority of the House membership believed a speaker had committed offenses serious enough to warrant impeachment, that majority would likely find the offenses sufficient to warrant expulsion from the House.

C. Inapposite Practices in Other Legislative Bodies Cannot Change the Conclusions Required by the Texas Constitution and Rules.

Lacking any support for their positions in the Texas Constitution, the Texas House rules, or Texas House precedent, some respondents have resorted to the purported practices in a handful of other legislative bodies. But, compared to the constitutions under which those bodies choose speakers, the Texas Constitution is like a whole other constitution. Those outside sources cannot change the effect of Texas's unique constitutional requirement that speaker elections only occur when the Texas House "first assembles." Nor can congressional practice trump the Texas House rules that grant nonappealable recognition power to the speaker and do not permit a purported "motion to vacate the chair."

1. Unlike Some Other Constitutions, the Texas Constitution of 1876 Cannot Be Construed to Permit Replacement of a Speaker Mid-Session.

Although the United States House "has never removed a Speaker," JEFFERSON'S MANUAL §315, some respondents rely on authorities concluding that, at least theoretically, the speaker of that House may be removed at the will of the House. *See, e.g., id.*; MASON'S MANUAL OF LEGISLATIVE PROCEDURE §581(1) (2000). But, unlike the Texas Constitution, which limits the

Texas House to electing a speaker "when it first assembles," TEX. CONST. art. III, §9(b), the federal Constitution says simply "The House of Representatives shall chuse their Speaker and other Officers." U.S. CONST. art. I, §2, cl. 5. Thus, unlike the Texas speaker, the speaker of the U.S. House is not granted a constitutionally fixed term; and that lack of a fixed term is the source of any power the U.S. House retains to replace its speaker at will. *See* MASON'S MANUAL OF LEGISLATIVE PROCEDURE §581(1) (2000) ("*When there is no fixed term of office*, an officer holds office at the pleasure of the body." (emphasis added)); *In re Speakership*, 25 P. 707, 711 (Colo. 1891) (noting that the purported "common parliamentary law" prerogative of a legislative body to remove its speaker at will is retained only if "such law" has not "been *repealed or superseded by any constitutional or statutory enactment*" (emphasis added)).

No one submitting briefs has identified a single instance in which a speaker was removed mid-session by a legislative body operating under a constitution saying anything remotely similar to "[t]he House of Representatives shall, when it first assembles, . . . proceed to the election of a Speaker." TEX. CONST. art. III, §9(b). In contrast to Texas's "when it first assembles" language, Alaska's Constitution says simply "Each house may choose its officers and employees." ALASKA CONST. art. II, §12. Similarly, Iowa's says merely "Each house shall choose its own officers." IOWA CONST. art. III, §7. Maine's Constitution likewise says only "The House of Representatives shall choose their speaker." ME. CONST. art. IV, pt. 1, §7. And the Colorado Constitution of 1876, which the Colorado Supreme Court was applying in *In re Speakership*, provided merely that "[t]he house of representatives shall elect one of its members as speaker," not specifying when or how often. COLO. CONST. of 1876, art. 5, §10. Indeed, today's Colorado Constitution specifies that a Colorado speaker may be elected "[a]t the beginning of the first

regular session after a general election, *and at such other times as may be necessary.*" COLO. CONST. art. V, §10 (emphasis added).

2. The Texas House Rules Do Not and Cannot Permit a "Motion to Vacate the Chair" or a "Privileged" Right to Filibuster in Support of Such a Motion.

Because TEX. CONST. art. III, §9(b) permits a speaker election only at the beginning of each session and because TEX. CONST. art. XV, §7 requires that the removal of officers like the speaker be provided for "by law" and involve a trial, whatever the practice might be in other bodies under other constitutions, the Texas House could not constitutionally make a rule that permits removal of a speaker by a "motion to vacate the chair." *See Childress County v. Sachse*, 310 S.W.2d 414, 419 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.) ("Where the State Constitution prescribes the manner of removing a public official, neither the Legislature, Executive officers nor the Judiciary can act beyond the limitations of the Constitution."); *accord Dorenfield*, 73 S.W.2d at 86; *Knox*, 141 S.W.2d at 701. In any event, as respondents like Speaker Price acknowledge, the existing House rules certainly do not provide for such a motion. House rule 7, throughout its 46 subsections, lists dozens of specific motions that may be brought up on the House floor. A motion to vacate the chair is not among them.

Because no motion to vacate exists under the Texas House rules and because no such motion is even permitted under the Texas Constitution, Speaker Craddick was well within his rights to decline to recognize members to speak on such a motion as the clock ran out on the 2007 session. But, regardless of the correctness of the speaker's underlying rationale, his parliamentary decisions under the recognition power are not appealable. Tex. H.R. Rule 5 §24, 80th Leg., R.S. (2007) ("There shall be no appeal from the speaker's recognition."); Tex. H.R. Rule 1 §9(b), 80th Leg., R.S. (2007) ("Responses to parliamentary inquiries and decisions of recognition made by the chair may not be appealed."). Further, because the Texas House rules

are quite clear on both the speaker's power of recognition and the lack of any provision for a motion to vacate the chair, it is inappropriate to use congressional precedents or *Mason's Manual of Legislative Procedure* to provide further interpretation on the present questions. Under House rule 14, those outside sources may be considered only when Texas rules "are silent or inexplicit." Tex. H.R. Rule 14 §1, 80th Leg., R.S. (2007) In this case, the Texas House rules speak directly to the speaker's recognition power and explicitly identify motions that may be brought on the House floor, which—in accordance with the Texas Constitution—do not include a motion to vacate the chair.

Nor could a motion to vacate the chair, if it were constitutionally permitted to and did exist under the Texas House rules, be afforded any sort of "privilege" that could override the speaker's recognition power. "Privilege," under Texas House rules and in general parliamentary usage, simply does not mean an absolute right to be heard. A privileged motion is simply one that may be taken up, if at all, outside the normal order of business. BLACK'S LAW DICTIONARY 1197 (6th ed. 1990), explains that "privilege" in the context of parliamentary law is merely "[t]he right of a particular question, motion, or statement to take precedence over all other business before the house."[4] Accordingly, the Texas House rules on privilege provide the order of *priority* among motions, stating that "[q]uestions of privilege shall have precedence over all other questions except motions to adjourn." Tex. H.R. Rule 5 §36, 80th Leg., R.S. (2007). That is, the privilege rules govern *when* certain motions may be heard *if* they are heard at all; they contain nothing to abrogate the speaker's broad decision to decide *whether* to recognize a particular item to come before the House.

[4] The same source defines "precedence" as "[t]he act or state of going *before*; adjustment of *place*. The right of being *first placed in a certain order*." BLACK'S LAW DICTIONARY 1176 (6th ed. 1990) (emphasis added).

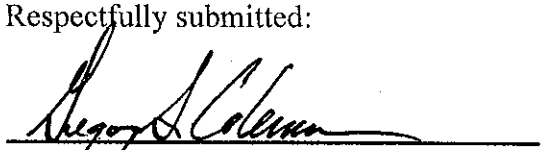
Thus, if a motion to vacate existed and if it were "privileged," it still would not override the speaker's discretionary and nonappealable recognition power. None of the respondents have explained how adopting requestors' view of "privilege" as an absolute right to be heard could avoid introducing session-stopping filibusters into the Texas House.

CONCLUSION

The Attorney General should respect the separation of powers and refrain from interfering with internal disputes about the House's procedural rules as requestors have asked him to do. Should the Attorney General nevertheless decide to opine on those internal disputes over House rules and procedure, the answers to requestor's questions are clear. The rules that the House adopted impart broad, unequivocal discretion to the speaker on questions of recognition, and decisions made under that authority are not appealable. The House could change its rules if a majority so desired, but it has not yet done so. And, regardless of provisions in the House rules, the speaker may not be removed from office in any mode that is contrary to the Constitution.

DATED: August 8, 2007

Respectfully submitted:



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