

Texas Progressive Alliance

August 1, 2007

The Honorable Greg Abbott
Office of the Attorney General
Opinion Committee
P.O. Box 12548
Austin, TX 78711

RE: Attorney General Opinion Request No. RQ-859-GA

Dear General Abbott:

On June 18, 2007, State Representatives Jim Keffer and Byron Cook submitted to your office a Request for Opinion concerning the scope of authority of the Speaker of the Texas House of Representatives.

Specifically, Representatives Keffer and Cook posed to you four questions relating to the nature of the office of Speaker of the Texas House of Representatives, the authority of the House of Representatives to elect a new speaker, and the Speaker's authority to recognize related to his own removal.

The Texas Progressive Alliance, a confederation of more than 50 Internet-based writers and bloggers, followed the attempts to remove House Speaker Tom Craddick extensively during the 80th Regular Session of the Texas Legislature. Our members have, on their various weblogs, closely examined the applicable House rules, statutes, and case law concerning the questions posed by Representatives Keffer and Cook and respectfully submit to you our collective opinion on the above referenced request.

We would like to make three points: (1) Craddick, as Speaker of the House of Representatives, is not a "statewide" officer; (2) as Speaker, he serves at the pleasure of the members of that body; and (3) the submission by Terry Keel as House Parliamentarian raises disturbing ethical and governmental concerns.

As for the first point, we incorporate and rely on the authorities and arguments already submitted, *See* KEFFER OPINION REQUEST RQ-859-GA [hereinafter KEFFER REQUEST] at 5 concerning the omission of the Speaker of the House from the list of officers subject to removal by impeachment under the Texas Constitution, which is consistent with the

precedent and practice that the Speaker is, in fact, not a state officer, but a legislative one. *See* TEX. CONST. Art. XV § 7.

Speaker Craddick's brief [hereinafter, CRADDICK BRIEF], however, takes a skewed approach to the interpretation of both the Texas Constitution and precedents upon which Rep. Keffer and others rely:

But, contrary to requestors' premise, the fact that the speaker is a legislative officer means neither that the speaker serves at the pleasure of the House membership nor that the speaker is not also a public officer of the state. The speaker is in fact a state officer, as confirmed by the Constitution, opinions of the Attorney General, and Texas Case Law—including the very authorities on which requestors rely.

[...]

Because, under these precedents, the speaker must be classified as a public officer of the state, the potential removal of an individual from that office is governed by constitutional mandate. *See* CRADDICK BRIEF at 9, 10.

It appears as though Speaker Craddick interprets the omission of the position of Speaker of the House of Representatives as creating some ambiguity with regard to the status of the position which does not exist. *See* TEX. CONST. art 15 §§ 2 and 7; TEX. ATTNY. GEN. OP. 0-898 (1939, G. MANN); and *In re Texas Senate* 36 S.W.3d at 120-1 as cited in notes 11, 12 of the KEFFER REQUEST.

Should you find, however, in light of these precedents, that there remains such an ambiguity, other precedents address manners of appropriate interpretation. When construing an ambiguous statute, a court should avoid adopting an interpretation that would lead to absurd results. *Boykin v. State*, 818 S.W.2d 782, 785-86 (TEX. CRIM. APP. 1991). In such a case, a court may presume that the Legislature did not intend for its efforts to lead to illogical consequences. *Id.* Although the present matter presents questions of constitutional rather than statutory interpretation and concerns an Attorney General's Opinion as opposed to a court ruling, the same principle applies.

Craddick asserts that under the Texas Constitution, the Speaker of the House is a "statewide" officer who can be removed from office only by impeachment. If accepted, Craddick's interpretation of the relevant provisions would create the possibility of an absurd result.

Under the Texas Constitution, the House can expel a representative with the consent of two-thirds of House members. *See* TEX. CONST. art III, § 11. Thus, the House of Representatives alone could expel the member who happens to be serving as Speaker.

That person would no longer be a member of the House, but if one follows the reasoning set forth in the *Craddick Brief*, that person would still be the Speaker. Thus, the presiding officer of the House would be a person who is no longer a member of the House.

This would be an absurd result, and the possibility of this absurd result demonstrates that the drafters of our Constitution did not hold Craddick's view.

History paints a clear picture of the intent of the framers of both the Texas Constitution and the House Rules when it comes to the removal of a sitting speaker. On May 10, 1871, Speaker Ira Hobart Evans was removed as a result of a simple majority vote as a result of a motion to vacate the chair. *See* 12 TEX. HOUSE JOURN'L, p. 1474-1483.

Likewise the second point has already been superbly briefed here. But we would like to reiterate that the strength of this position goes back to Thomas Jefferson and his *Manual Of Parliamentary Practice for the United States Senate*. In addition, on matters of privilege, the Speaker does not have the right to deny recognition; such is an abuse of discretion and flies in the face of the tradition and practice of the House.

Moreover, there is nothing in the Texas Constitution or in Congressional precedents to support the idea that the Speaker may only be removed from his position as Speaker of the House by impeachment.

On the third point we would like to elaborate. Terry Keel has submitted a brief under his title as Parliamentarian, a House office. But, it is unclear who Keel is representing here, and even if it is clear, it is impossible for him to do so without violating the Texas Disciplinary Rules of Professional Conduct. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G App. A (TEX. STATE BAR R., art. X § 9) [hereinafter "Rule 1.06"]. "A lawyer shall not represent opposing parties to the same litigation." Rule 1.06(a). Without the adversely affected client's consent, a lawyer may not undertake representation that is "materially and directly adverse to the interests of another client of the lawyer." *See* RULE 1.06(b), (c). In addition:

A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute. *See* RULE 1.06(d).

Finally, if a lawyer undertakes or finds himself in such a conflict situation, the lawyer "shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules." *See* RULE 1.06(e). As Parliamentarian, Mr. Keel should be representing all 150 members of the House. If so, by advocating a position in favor of Speaker Craddick that is adverse to that of other members (nay, a majority) of that body, Keel is in violation of the ethics rules governing lawyers. If Mr. Keel is only representing Speaker Craddick, he is acting in conflict with his role as Parliamentarian and is denying the House proper legal representation.

There is also a question regarding whether Mr. Keel is only the Parliamentarian or also Special Counsel to the House. His predecessors, Ms. Denise Davis and Mr. Chris Griesel, served two jobs—parliamentarians and special counsel—because with the shift of supervision of the Legislative Council away from the House the House was without independent representation. Mr. Keel has stated that he is not Special Counsel to the House, yet he is taking the full salary of \$145,000 granted to Ms. Davis meant to compensate her for performing both jobs *See* “CRADDICK APPOINTS ALLY AS CHIEF PARLIAMENTARIAN,” *The Dallas Morning News*, Saturday, June 30, 2007.

If Mr. Keel is in fact Special Counsel to the House, then again, he has performed his duties in violation of the conflict rules governing lawyers. If he is not, then the House is without legal representation. As Mr. Keel is operating in conflict to his other current clients, he should under Rule 1.06(e), immediately withdraw from any and all representations contributing to that conflict.

Other documents revealed in recent days also more fully illustrate the type of conflict of interest in which Mr. Keel may be involved regardless of whether he is serving dually as special counsel or merely as Parliamentarian.

Following the resignation of Denise Davis as Parliamentarian, Speaker Craddick sent Ms. Davis a letter [hereinafter CRADDICK-DAVIS LETTER] in which he noted:

During your time with the Speaker’s Office you provided legal and parliamentary advice to me. The depth and breadth of your representation of me means that you must be particularly careful to ensure you do not divulge legal confidences. As your former client, I am putting you on notice that I expect you to keep confidential all privileged matters that transpired during the time you worked for me.

In addition, as you are aware, you are ethically obligated to decline to provide advice or services or make statements that are substantially related to or would challenge the validity of your work here. I therefore respectfully request that you endeavor to avoid putting yourself in positions where your ethical obligations could come into conflict with any future discussions or legal activities you may pursue. *See* CRADDICK-DAVIS LETTER, Attached, Exhibit A.

Here, Speaker Craddick attempts to assert attorney-client privilege as a blanket to cover advice Ms. Davis gave to Speaker Craddick in her position as Parliamentarian of the Texas House of Representatives. However, any attempt to claim that Ms. Davis’ work as Parliamentarian would be subject to confidentiality required by the lawyer-client relationship and mandated by the Texas Disciplinary Rules of Professional Conduct is tenuous, at best:

Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of

Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G App. A (TEX. STATE BAR R.. art. X § 9) [hereinafter "Rule 1.05"].

While a clear difference exists between the duties of a parliamentarian and a special counselor, Speaker Craddick blurs the lines between the two. The Parliamentarian of the Texas House of Representatives does not solely serve the Speaker, but the House itself.

As a result, Speaker Craddick attempts to assert a privilege with regard to Ms. Davis' parliamentary duties which he cannot assert because neither is the information privileged nor is Speaker Craddick Ms. Davis' client (in her capacity as Parliamentarian) by virtue of the nature of the position of Parliamentarian and by virtue of Rule 1.05.

Regardless of whether Mr. Keel now serves as a special counselor, it is clear that Speaker Craddick has now tailored the position of Parliamentarian and instructed the Parliamentarian to act such that the parliamentarian speaks for the Speaker and is his representative. This places Mr. Keel in direct conflict with his other clients, the remaining 149 members of the Texas House of Representatives.

Obviously, Mr. Keel is placed in this unique position of conflict because of his status as a lawyer, which is not a requirement for serving as Parliamentarian in either chamber of the Texas Legislature, though it has become a custom in recent years. However, it does not overshadow the fact that the Parliamentarian has, by longstanding custom and past practice, represented the House of Representatives and not the Speaker:

In recent decades, the parliamentarian and his assistant have served at the pleasure of the speaker, said Bob Kelly, who worked for 12 years as deputy parliamentarian to the late Robert Johnson and then from 1980 to 2000 as chief parliamentarian:

Mr. Kelly said he believes that the parliamentarian used to work "for the House and not at the pleasure of the speaker."

Anyone in the job should try to serve all members, he said.

"You would hope that everybody would respect you and feel comfortable coming and talking to you and helping them through their problems, whatever their legislative hurdles might be," said Mr. Kelly, now a lobbyist. *See* "CRADDICK TAPS HOUSE ALUMNI FOR SUPPORT," *The Dallas Morning News*, Sunday, May 27, 2007.

As has always been the custom, though appointed by the Speaker, the Parliamentarian clearly serves the interests of all members of the body.

In conclusion, we respectfully request that your office, in issuing its final opinion, carefully consider the facts and precedents stated hereinabove. We believe that such careful consideration will result in an opinion which reaffirms that the Speaker of the Texas House of Representatives is not a “statewide” officer and that the Speaker serves at the pleasure of the members of the House of Representatives and may be removed as past practice has dictated.

Further, we would respectfully request you weigh the potential impact of the brief submitted by Mr. Keel very carefully upon all 150 members of the House. In light of the conflicts illustrated hereinabove, you may, in fact, determine it is most appropriate to ignore the brief altogether in order to protect the interests of all elected members of the Texas House of Representatives.

Respectfully submitted,

Vince Leibowitz
Chair, Texas Progressive Alliance
Board Member, Region IV, Texas Progressive Alliance
& CAPITOL ANNEX, (CapitolAnnex.com)

On behalf of the Texas Progressive Alliance and its members as follows:

Charles Kuffner, Vice Chair, Texas Progressive Alliance
Texas Progressive Alliance Board Member, Region VII
& OFF THE KUFF, (offhtekuff.com/mt/)

Bradley Bowen, Texas Progressive Alliance Board Member, Region IV
& NORTH TEXAS LIBERAL (northtexasliberal.com)

Martha Griffin, Texas Progressive Alliance Board Member, Region VII
& MUSINGS (muse-musings.blogspot.com)

A.S. Medellin, MS, Texas Progressive Alliance Board Member, At-Large/Diversity
& DOS CENTAVOS (DosCentavos.net)

Machelle Ashbaugh, NORTH TEXAS LIBERAL (northtexasliberal.com)

John Cobarruvias, BAY AREA HOUSTON BLOG, (bayareahouston.blogspot.com)

Perry Dorrell, BRAINS AND EGGS, (brainsandeggs.blogspot.com)

Marc Gault, MARC'S MISCELLANY, (marcsmiscellany.blogspot.com)

Hal Heitman, HALF EMPTY (halfempth.blogspot.com)

Nathan Nance, COMMON SENSE, (commonsensetx.com)

Steve Southwell, WHO'S PLAYIN'?, (WhosPlayin.com)

Jaye Ramsey Sutter, JD, WINDING ROAD IN URBAN AREA, (windingroad.typepad.com)

Fernando Villarreal, TRUTH SERUM BLOG, (truthserumblog.com)

Lyn Wall, FEET TO THE FIRE, (feettofire.com)

Nate Wilcox, MYDD, (mydd.com)

Sharon Wilson, WISE COUNTY ACTIVE DEMOCRATS, (wisedems.org)

And, the following TEXAS PROGRESSIVE ALLIANCE member blogs as a whole:

BURNT ORANGE REPORT, (burntorangereport.com)

TEXAS KAOS, (texaskaos.com)

MCBLOGGER, (McBlogger.com)

EYE ON WILLIAMSON, (eyeonwilliamson.org)

SOUTH TEXAS CHISME, (stxc.blogspot.com)

enc: LETTER OF TOM CRADDICK TO DENISE DAVIS dated May 29, 2007 (EXHIBIT A)

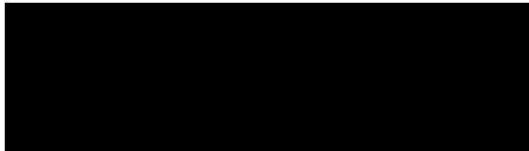
EXHIBIT A



TEXAS HOUSE OF REPRESENTATIVES

TOM CRADDICK
SPEAKER

May 29, 2007




Dear Ms. Davis:

It has been brought to my attention that your resignation from the Speaker's Office will become effective today, May 29, 2007. It is therefore incumbent upon me to bring to your attention certain issues regarding your employment here.

During your time with the Speaker's Office you provided legal and parliamentary advice to me. The depth and breadth of your representation of me means that you must be particularly careful to ensure you do not divulge legal confidences. As your former client, I am putting you on notice that I expect you to keep confidential all privileged matters that transpired during the time you worked for me.

In addition, as you are aware, you are ethically obligated to decline to provide advice or services or make statements that are substantially related to or would challenge the validity of your work here. I therefore respectfully request that you endeavor to avoid putting yourself in positions where your ethical obligations could come into conflict with any future discussions or legal activities you may pursue.

Sincerely,


TOM CRADDICK
Speaker

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