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COMMITTEES:
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PENSIONS & INVESTMENTS

June 18, 2007

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

Re: Legal and Constitutional Scope and Limitation of Claimed "Absolute Authority" and Other Powers of the Speaker of the Texas House of Representatives.

Dear Attorney General Abbott:

The integrity of our state government requires that those individuals who are entrusted with governmental responsibility use their positions legally under Texas state law and our State Constitution.

With this in mind, "Advisory Opinions" from the Texas Attorney General's office help clarify and protect the legal and constitutional limitations of power that are fundamental to our state government.

As you recall, earlier this year, as Chairman of the Texas House Ways and Means Committee, I jointly sought an informal "Advisory Opinion" on the scope and limitation of the Texas Governor's use of an "executive order" for mandating vaccinations.

Today, I am respectfully seeking by certified registered mail to your office a formal "Advisory Opinion" on the legal and constitutional scope and limitation of claimed "Absolute Authority" and other powers by the current Speaker of the Texas House of Representatives.

Specifically, I am requesting a formal "Advisory Opinion" to each of the four questions that I have attached to this letter. Additionally, I have provided a background discussion of the legal and constitutional concerns surrounding each question.

Clearly, the integrity of the Texas House of Representatives is at a critical crossroads as to whether the use of "Absolute Authority" by the post of Texas House Speaker contradicts the State Constitution (in particular: Article 3, Section 9; Article 3 Section 11; and Article 15, Section 7).

I also feel an "Advisory Opinion" will shed some light on the contradiction of legally and constitutionally allowing congressional redistricting whenever the Texas House deems appropriate but refusing to recognize this same legal and constitutional right for selection of a Speaker.

Finally, I want to note that in submission of Question #4, I am not seeking an Attorney General "Advisory Opinion" of interpretation of House rules (specifically, Rule 5, Section 24). Instead I am requesting an "Advisory Opinion" as to whether its current interpretation is in violation of the Texas State Constitution and if so, to expose that most properly, Rule 5, Section 24 should be interpreted for what it is–a rule that allows the Speaker to govern the *order* in which members are to be recognized, but not *whether* they will be recognized which seems to be in direct violation of the State Constitution.

Joining with me in seeking your "Advisory Opinion" on this matter is also Byron Cook, Chairman of the Civil Practices Committee in the Texas House of Representatives.

Respectfully submitted,

Jim Keffer, Chair
House Committee on Ways and Means

Attachment

6.18.07 Request for Advisory Opinion from Texas Attorney General Gregg Abbott
From: Texas House Ways and Means Committee Chairman Jim Keffer
Texas House Civil Practices Committee Chairman Byron Cook

Question 1: Are the Speaker of the Texas House of Representatives and the President Pro Tempore of the Texas Senate "legislative officers" as recently held by the Texas Supreme Court, officers who serve at the pleasure of the membership, according to rules adopted under the authority granted by Article 3, §11 of the Texas Constitution, or are they "state officers" subject to removal only as provided in Article 15, Section 7 of the Texas Constitution?

Question 2: If you conclude that, contrary to the holdings of the Texas Supreme Court and this Office, the Speaker of the Texas House of Representatives and the President Pro Tempore of the Texas Senate are subject to removal only by impeachment or other trial and removal proceeding under Article 15, Section 7 of the Texas Constitution, what is the effect of the impeachment of either of these officers? That is, does impeachment only remove them from the legislative office of Speaker or President Pro Tempore, or does it expel them from membership in the House/Senate in a manner different from, and inconsistent with, Article 3, Section 11 of the Texas Constitution?

Question 3: If, after the regular legislative session has commenced, a Speaker chosen by the members of the House is removed from that office by any legal means, does the House then have the power to select a new Speaker, or is it required to continue its operations in the absence of a Speaker, in apparent conflict with Article 3, Section 9 of the Texas Constitution?

Question 4: If the rules adopted by the Texas House of Representatives give the Speaker of the House unlimited discretion to refuse to recognize members for purposes of presenting any motion whatsoever–be it a motion to impeach the Speaker, a motion to vacate the chair, or any other sort of motion–do those rules effectively give the Speaker unlimited ability to prevent his removal (by simply refusing to recognize members for the required motions)?

BACKGROUND

The Texas Constitution, Article 3, §9 mandates that the House of Representatives "shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a Speaker from its own members,"[1] and that the Senate shall similarly elect a President Pro Tempore from amongst its membership.[2] Under the Constitution, the rules and

[1] Tex. Const. art. 3, §9(b).

[2] Tex. Const. art. 3, §9(a).

proceedings governing these elections are to be adopted by each respective house,[3] though the Constitution specifically authorizes that the election of officers may occur by use of a secret ballot.[4] While constitutionally-mandated, then, the House Speaker and the President Pro Tempore of the Senate are legislative officers, elected by the memberships of each respective house according to rules each house adopts, and not by the election of voters or by executive appointment.[5]

While the Constitution directs the House and Senate to choose the Speaker/President Pro Tempore by direct election of the membership, it does not expressly state how these legislative officers are to be removed though again, it is clear that the election of these legislative officers is to be determined by the rules adopted by each respective house.[6] The Constitution does specify that a member may be *expelled* from the Legislature itself–an act that would clearly divest the expelled member of the office of Speaker/President Pro Tempore-- by a vote of 2/3 of the membership of the relevant body.[7] Given the grant of authority provided in Article 3, §11, removal of a legislator from a legislative office has, as a matter of precedent, been decided by resort to the rules and proceedings of each house.[8] Applicable precedent, for example, holds that the Speaker may be removed in the same manner by which he was selected–by a simple majority vote of the members of the House.[9]

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[3] Tex. Const. art. 3, §11; Senate Rules 1.02, 1.04, 1.05. 15.04; 80 Tex. House Journal 10-14 (Jan. 9, 2007)(art. 3, §11 gives the House the authority to set its own rules and proceedings, including specifically the election of the Speaker, following *In re Texas Senate*, 36 S.W.3d 119, 120-1 (Tex. 2000)); discussed at House Rule 5, §51a, "House Precedents."

[4] Tex. Const. art. 3, §11 and §41; *In re Texas Senate*, 36 S.W.3d 119, 120-1 (Tex. 2000)(legislative officers may be selected by secret ballot under Article 3, §41);

[5] *In re Texas Senate*, 36 S.W.3d at 120-1(Article 3, §9 of the Constitution mandates the selection of Speaker and President Pro Tempore, who are "legislative officers" and therefore, may be elected by secret ballot under Article 3, §41); *Diffie v. Cowan*, 56 S.W.2d 1097, 1101 (Tex. Civ. App. 1932, no writ)(It has long been held that the speaker of a legislative body is not a "state officer"); Tex. Const. art. 3 § 11 (each House to adopt its own rules); art. 3, §41 (House and Senate officers need not be elected *viva voce*); Senate Rule 1.05, Editorial Note (President Pro Tempore is an officer of the Senate).

[6] *See* note 3.

[7] Tex. Const. art. 3, §11.

[8] *See, e.g.*, Senate Rule 15.04; 12 Tex. House Journal, p. 1474-1483, May 10, 1871, attached herein as Exhibit A (removal of Speaker Ira Hobart Evans by simple majority vote on a motion to vacate the chair).

[9] *See, e.g.*, 12 Tex. House Journal, p. 1474-1483, May 10, 1871, attached herein as Exhibit A (removal of Speaker Ira Hobart Evans by simple majority vote on a motion to vacate the chair).

Though removal of a legislative officer like the Speaker or President Pro Tempore has traditionally required only a simple majority vote of the respective house, with *complete expulsion* of a member requiring only a 2/3 vote of the membership of that house,[10] the current Speaker of the Texas House of Representatives now contends that the process of removing a member from his legislative office as Speaker is far more onerous than that required even for expulsion. Despite the fact that the Speaker of the House was clearly omitted from the list of officers subject to removal by impeachment under Article 15, §7 of the Texas Constitution,[11] an omission which is consistent with the long-held view that the Speaker is not a "state officer" but a legislative one,[12] Speaker Tom Craddick now takes the position that Article 15, §7 actually mandates that the Speaker may only be removed by impeachment or its "trial and removal" equivalent, and that a motion to vacate the chair like the one used to remove Speaker Evans in 1871 in fact conflicts with the Texas Constitution. This position appears unsupported by the text of Article 15, §7, and irreconcilable with earlier opinions of this office, and of the Texas Supreme Court.[13] This interpretation also means that it is easier to expel a member from the legislature altogether–an act that has voting rights implications-- than it is to remove him from a legislative office, an absurd interpretation that is inconsistent with established canons of statutory construction.[14]

Speaker Craddick also takes the position that under Article 3, §9 of the Constitution, the House can only elect a speaker at the beginning of each regular session. He relies on the language in Section 9 which directs the House to choose a speaker "when it first assembles," arguing that this provides a time and durational limit on the House's power to elect a speaker, and that providing for more frequent elections at, say, the beginning of a called session, would effect an amendment to the Constitution. Article 3, §11, of course, provides no such limitation on the House's power to govern its proceedings or elect its speaker, nor does Article 3, §9 itself provide that the direction to choose a

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[10] Tex. Const. art. 3, §11.

[11] Tex. Const. art 15, §§2 and 7; Tex.Attny. Gen Op 0-898 (1939, G. Mann)(only those officers named in Article 15, §2 of the Constitution are subject to impeachment). *See also Harris County v. Crooker*, 248 S.W. 652(Tex. 1923)(under *expressio unius maxim* doctrine of statutory construction, inclusion of specific set of limitations excludes those not expressly included); *Royer v. Ritter*, 531 S.W.2d 448, 449 (Tex. Civ. App. – Beaumont 1976, writ ref'd n.r.e.)(same).
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[12] *See In re Texas Senate*, 36 S.W.3d at 120-1 (speaker and president pro tempore are officers of their respective houses); *Diffie v. Cowan*, 56 S.W.2d 1097, 1101 (Tex. Civ. App. 1932, no writ)(It has long been held that the speaker of a legislative body is not a "state officer").

[13] *In re Texas Senate*, 36 S.W.3d at 120-1 (speaker and president pro tempore are officers of their respective houses); Tex.Attny. Gen Op 0-898 (1939, G. Mann)(only those officers named in Article 15, §2 of the Constitution are subject to impeachment); Tex. Attny. Gen. Op. JC-0418 (2001, J. Cornyn)(Railroad Commissioner not subject to impeachment under Art. 15, §2).

[14] Compare art. 3, §11 with art. 15, §7. *See Utts v. Short*, 81 S.W.3d 822, 832 (Tex. 2002)(statutory provisions should not be construed so as to lead to absurd results); *Cramer v. Sheppard*, 167 S.W.2d 147, 156 (Tex. 1943)(constitutional and statutory provisions should not be interpreted to lead to absurd results).

speaker upon "first assembling" is a term of limitation rather than direction. Moreover, the Speaker's argument again appears irreconcilable with applicable precedent, precedent handed down very recently in the congressional redistricting litigation. Taking a position directly analogous to that espoused by Speaker Craddick, the plaintiffs challenging the mid-decade redistricting contended that the Census Clause of the U.S. Constitution limited the authority of the legislature to conduct congressional redistricting mid-decade because it contained the following language:

> Representatives.....shall be apportioned among the several States....according to their respective numbers. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent term of ten Years.[15]

The plaintiffs argued that the Census Clause not only *required* that redistricting occur every ten years, after the release of new census data, it *limited* the states' ability to redistrict to once per decade, an argument that mirrors the Speaker's current contention that the Texas Constitution's directive to choose a Speaker upon "first assembly" limits the House's ability to elect a speaker to that time period. The plaintiffs' contention was, however, flatly rejected by the Panel, which held that while the Census Clause required that redistricting occur at least every ten years, after the release of the new census figures, it did not limit the states' ability to redistrict more frequently.[16] As with his contentions about removal, the Speaker's current contentions appear inconsistent with applicable precedent.

Once the appropriate method for removing the Speaker has been identified, it must be determined whether the method can actually be *implemented*, given the Speaker's interpretation of the power granted to him by the House rules. Whether the Speaker is to be removed by a motion to vacate, as indicated by applicable precedent, or through impeachment or its "trial and removal" equivalent, as Speaker Craddick contends, a member must first be recognized to present the relevant motion for consideration by the House. [17] Speaker Craddick, however, has taken the position that Rule 5, Section 24

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[15] U.S. Const., art. I, §2, cl. 3, quoted in *Session v. Perry*, 298 F.Supp.2d 451, 461 (E.D. Tex. 2004).

[16] *Session v. Perry*, 298 F.Supp.2d at 462. It is also worth noting that because the House and Senate do not exercise "legislative" functions when participating in impeachment proceedings, the Governor's failure to include impeachment in the call of any special session acts as no limitation on the power of the legislature to exercise this quasi-judicial function. See, e.g., *Ferguson v. Maddox*, 263 S.W.888, 890-1 (Tex. 1924)(impeachment a quasi-judicial function which cannot be circumscribed by the Governor's authority to determine the legislative matters to be considered in a special session called under Texas Constitution, Article 3, §40); Tex. Attny. Gen. Op. H-1023 (1977)(J. Hill)(same). Similarly, because the House's authority to enact rules, including rules relating to the election of the Speaker, is both constitutionally-based and not "legislative," that rulemaking authority is not limited by, and does not conflict with, the Governor's exercise of authority under Article 3, §40. *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 867 (Tex. 2005)(in construing statues, one must harmonize the entire Act, reading each part of it so that one part does not conflict with another); Tex. Gov't Code §311.021 (in construing statutes, one must attempt to give effect to all parts of the statute).

[17] *See* 12 Tex. House Journal, p. 1474-1483, May 10, 1871(removal of Speaker Ira Hobart Evans after presentation of a motion to vacate the chair); Tex. Attny. Gen. Op. 0-898 (1939)(G.

of the House Rules relieves him of any obligation to recognize members, and that this rule instead gives him absolute authority to recognize–or decline to recognize–members for any purpose, even privileged motions.

The Speaker's novel interpretation of the rule not only appears to be inconsistent with Texas constitutional law, but more fundamentally, it is inconsistent with the text of the rule itself. Far from providing unlimited power, the express language of Rule 5, Section 24 states that the speaker "shall be guided by rules and usage in priority of entertaining motions on the floor."[18] To give but one example, under Rule 7, Section 15, if a privileged motion has been postponed to a particular time, when that time arrives, the privileged matter "*shall be taken up* even though another motion is pending," a rule that clearly circumscribes the Speaker's power of recognition under Rule 5, Section 24.[19] The conclusion that Rule 5, Section 24 provides limitless power appears clearly erroneous.

Worse, if Rule 5, Section 24 gives the Speaker unlimited power to decline to recognize members, it gives him the power to systematically refuse to recognize members for any number of constitutionally impermissible reasons–because they are members of an opposing viewpoint on a rural versus urban issue, because they are women, because they are minorities, because they practice a different religion, because they are from East Texas, because they seek to present bills that originated in the Senate, or because he just doesn't like them. If Speaker Craddick is correct, Rule 5, Section 24 would also allow him to refuse to recognize members seeking to introduce legislation included in the Governor's special session call, thereby frustrating the exercise of the Governor's power under Article 3, §40 of the Constitution. Despite the fact that conduct like this could run afoul of equal protection and separation of powers guarantees, among other constitutional concerns, under Speaker Craddick's interpretation of the House rules, the House cannot put a stop to such behavior until it "first assembles" in the next regularly scheduled legislative session, when it is free to elect a new speaker. While this opinion request does not suggest that conduct of this nature is occurring, the point is that if the Speaker is correct about the grant of authority provided by Rule 5, Section 24, it certainly *could* occur, and the membership would be powerless to put a stop to it.

Finally, and more directly relevant to this opinion request, if Rule 5, Section 24 gives the Speaker unlimited power to decline to recognize members, it is clear that any removal power that exists in the Constitution, House rules, or statute is purely illusory. Because a member must first be recognized in order to present a motion to vacate the chair, or a motion to impeach or its equivalent,[20] if Speaker Craddick is correct about the reach of

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Mann)(describing proper procedure for impeachment, which *must* be initiated in the House, and which should commence with the introduction of a resolution by a House member); Art. 15, §1 (House has power of impeachment).

[18] Tex. House Rule 5, Paragraph 24.

[19] Tex. House Rule 7, Section 15, emphasis added.

[20] *See* 12 Tex. House Journal, p. 1474-1483, May 10, 1871(removal of Speaker Ira Hobart Evans after presentation of a motion to vacate the chair); Tex. Attny. Gen. Op. 0-898 (1939)(G. Mann)(describing proper procedure for impeachment, which *must* be initiated in the House, and which

Rule 5, Section 24, he can easily avoid any removal effort by simply declining to recognize a member seeking to present an otherwise proper removal motion or resolution. That being the case, all of the deliberation about the proper legal procedure to use in removing a speaker is meaningless, because no matter what method is determined to be the correct one, the Speaker can avoid it under the broad scope of Rule 5, Section 24.

While this Office is understandably reluctant to interpret House rules, the question posed is actually whether there is *any* limit to the Speaker's power in the face of House Rule 5, Section 24. The answer to that question must be "yes." At a minimum, the reach of the House rules must be limited by the Constitution. This would mean that the House Rules would not be construed to permit the Speaker to act in a manner that violates equal protection guarantees by allowing him to refuse to recognize all minority members of the House, for example. It would mean that the Speaker could not decline to recognize members seeking to introduce otherwise-proper legislation included in the Governor's call for a special session of the legislature. And it means that the House Rules would not be interpreted to frustrate the House membership's constitutional power to adopt rules, to choose or replace officers, or to expel members by permitting the Speaker to refuse to recognize members seeking to present such motions.[21] Most properly, Rule 5, Section 24 would be interpreted for what it is–a rule that allows the Speaker to govern the *order* in which members are to be recognized, but not *whether* they will be recognized.

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should commence with the introduction of a resolution by a House member); Art. 15, §1 (House has power of impeachment).

[21] Tex. Const., art. 3, §§9(c) and 11.