In the Office of the Attorney General of Texas

Re: A.G. Opinion Request 0589-GA

BRIEF OF
SPEAKER TOM CRADDICK

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INTRODUCTION

Tom Craddick, Speaker of the Texas House of Representatives, submits this brief regarding questions raised by Attorney General Opinion Request 0589-GA received by the Attorney General on June 18, 2007. In filing their request, requestors effectively ask the Attorney General to act as an appellate body, second-guessing decisions made by Speaker Craddick while presiding over the House during a legislative session that has already concluded. Requestors' appeal is prohibited by the Texas Constitution and House rules. The request is thus improper, and the Attorney General should refrain from opining on the political questions it raises out of respect for constitutional separation of powers.

One coordinate branch of government should not be—and is not constitutionally permitted to be—in the business of arbitrating internal disputes within and governed by the rules of another coordinate branch. The Texas Constitution commits the adoption, interpretation, and application of the House of Representative's rules to that body. The Attorney General has never played, and should not begin playing, the role of referee between the duly elected presiding officer of the House and momentarily disgruntled individual members.

The issues raised by requestors have no present urgency. Even if it were proper for the Attorney General to intervene in the operations of the House, internal House disputes arising in a session that has ended are now moot. They will remain moot unless and until similar questions arise in future sessions, or at the very least until the next legislature is sworn in and has adopted its new rules. These questions have not tended to arise with any frequency in the history of the state. The timing of this opinion request, unconnected to any pending business of the Legislature, suggests that requestors seek to use an Attorney General opinion for some personal agenda, perhaps as support for their position in anticipated litigation. The Attorney General should avoid becoming embroiled in requestors' political game.

If, however, the Attorney General does undertake review of the political questions raised by the request, he will find that the answers to the questions raised are clear. House rules give the speaker unqualified authority to decide whether members will be recognized. And the rules are equally clear that the legislative business of the House cannot be bogged down by endless appeals of those decisions.

The Constitution plainly delineates the time and frequency of elections for speaker, requiring such elections to occur once during a session at its outset. The significant constitutional and statutory responsibilities entrusted to the speaker demand the stability of a defined term of office for that official if they are to be executed faithfully and in a way that serves the public interest. Those same broad-ranging sovereign responsibilities contribute to the necessary conclusion that the speaker is both a legislative officer and a public officer of the state, who cannot be removed from office except in the mode specifically authorized by the Constitution. The modern Texas speaker is far more than a parliamentary figurehead and, to further the people's business, must be permitted to perform that office's important governmental and legislative functions unencumbered by threats of summary removal or interference from constitutionally separate departments of government.

I. THE ATTORNEY GENERAL SHOULD REFRAIN FROM INTERFERING WITH THE INTERNAL OPERATIONS OF THE HOUSE OR OPINING ON RELATED POLITICAL QUESTIONS RAISED BY THE REQUEST.

Requestors' fourth question is where the Attorney General's inquiry should begin and end. That question demonstrates that requestors' real intent is to invite this department of the executive branch to cross the constitutional boundaries of state government to interfere with the internal operations of the House of Representatives, an arm of the legislative branch. Specifically, contravening constitutional separation of powers and the House's own rules, requestors ask the Attorney General to overrule the parliamentary decision taken by Speaker

Craddick in the recently ended legislative session to refuse to recognize a member for the purpose of making a constitutionally invalid motion. As part of their attempted appeal to the executive branch of a nonappealable legislative branch parliamentary ruling, requestors further seek the Attorney General's interpretation of the House's internal rules enacted under that body's constitutional authority to organize its own affairs within the confines of constitutional requirements. The Attorney General should decline the invitation to embroil itself in the internal affairs of a separate, coordinate department of government.

Requestors' question 4 asks:

> 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)?

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

The request that the Attorney General opine on the interpretation and application of House rules effectively asks the Attorney General to step into the simultaneous roles of speaker, House parliamentarian, and a body that can hear appeals of rulings made on the House floor. Acceding to that request would do violence to the constitutional separation of powers and set a dangerous and disruptive precedent for second-guessing by the executive branch of any parliamentary ruling by a presiding officer in the legislative branch with which any member happens to disagree. That type of entanglement between the branches of government is neither desirable as a policy matter nor countenanced by the Texas Constitution.

The Attorney General should not rule on any matter that is delegated by the Constitution exclusively to the legislative branch. Those matters include any internal questions involving the

House rules, which under TEX. CONST. art. III, §11 are left to the House. The House rules themselves entrust their interpretation, application, and enforcement to the presiding officer of that body. 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."). As the Attorney General has previously recognized, construction of the House rules is primarily a responsibility of the speaker (and secondarily of the House parliamentarian), and 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.").

For the Attorney General (or a court) to interpret House rules following a ruling of the presiding officer and to judge the correctness of that ruling would violate the separation of powers doctrine contained in TEX. CONST. art. II, §1, which provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

If a question by its nature is committed to a political branch of state government, a court may not substitute its judgment for the political body. *E.g.*, *Larkins v. City of Denison*, 683 S.W.2d 754, 756 (Tex. Civ. App.—Dallas 1984, no writ); *see also, e.g.*, *Neeley v. West Orange-*

Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 776-80 (Tex. 2005) (applying the U.S. Supreme Court's *Baker v. Carr* analysis to find that school finance issues were not a nonjusticiable political question). Much less should an arm of the executive branch set a precedent of intervening in the internal workings of the Legislature.

The establishment of House rules of procedure under TEX. CONST. art. III, §11—which provides that "[e]ach House may determine the rules of its own proceedings"—is the most obvious commitment of a power to the Legislature that the Constitution can make. No standards are supplied in that grant of power, so a coordinate department is particularly ill-equipped to review a decision of the presiding officer. *See Larkins*, 683 S.W.2d at 756; *Neeley*, 176 S.W.3d at 776-80. Moreover, no provision of the Texas Constitution either expressly or impliedly guarantees the right of a member of the House of Representatives to be recognized by the presiding officer of that body for the purpose of bringing a motion to vacate the chair, even if such a motion were constitutionally valid. An opinion by the Attorney General on that procedural question would necessarily be an attempt to substitute the Attorney General's judgment for that of the presiding officer of the House—something the Attorney General cannot do and should not attempt to.

B. In Any Event, the House Rules Permit No Other Interpretation Than That Supporting the Speaker's Unqualified Power of Recognition.

If the Attorney General could permissibly review a speaker's application of House rules he would, in any event, find that the House rules themselves make clear that the power of recognition by the speaker is unqualified. Rule 5, Section 24, gives the speaker the power to determine when to recognize the members of the House during House proceedings. The rule provides:

> 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).

Emphasizing that the speaker's power of recognition may not be appealed, Rule 1, Section 9(b), which provides generally for the appeal of other rulings by the speaker, specifically provides that "[r]esponses to parliamentary inquiries and decisions of recognition made by the chair may not be appealed." Tex. H.R. Rule 1 §9(b), 80th Leg., R.S. (2007). Rule 4, Section 23A, provides a similar unqualified power of recognition to committee chairmen in the operation of their committees and also provides that, in some circumstances, "[r]ecognition is solely within the discretion of the chair and is not subject to appeal by that member." Tex. H.R. Rule 4 §24A, 80th Leg., R.S. (2007). Requestors ask the Attorney General to serve as an appellate body for recognition decisions made by the speaker, decisions that House rules do not permit members to appeal.

Chairman Keffer, although asserting that he is not requesting the Attorney General to interpret House rules, in the same breath asks the Attorney General to support his own interpretation that "Rule 5, Section 4 . . . allows the Speaker to govern the *order* in which members are to be recognized, but not *whether* they will be recognized." Letter from Jim Keffer to Attorney General Greg Abbott (June 18, 2007). That interpretation of rule 5 is wrong, as is its underlying premise that certain motions are somehow privileged, providing members bringing those motions an absolute right to be recognized and have those motions entertained. Questions of order are not governed by rule 5, §4 at all but by rule 1, §9. Tex. H.R. Rules 1, §9, 80th Leg., R.S. (2007) ("The speaker shall decide on all questions of order; however such decisions are subject to an appeal to the house made by any 10 members."). The same rule that governs

questions of order also stresses that "[r]esponses to parliamentary inquiries and *decisions of recognition made by the chair may not be appealed.*" *Id.* (emphasis added).

Nowhere do the House rules provide that certain motions, even a purported "motion to vacate the chair," are privileged exceptions to the speaker's unqualified power of recognition. Questions of privilege under House rules merely involve the order in which motions may be taken up. Tex. H.R. Rule 5 §§35-37, 80th Leg., R.S. (2007). There is no "privilege" that overrides the speaker's power to recognize or not recognize. Indeed, if such a privilege existed, overriding the plain language of rule 1, §9 and rule 5, §4, the effect would be a tectonic shift in House procedure—the introduction of filibuster. If certain privileged matters require mandatory recognition by the chair, any member could kill a calendar—or even an entire session as Sine Die approaches—by rising on such a matter and beginning a "privileged" debate that displaces all other business awaiting House action. Indeed, such a House filibuster would be even more powerful than the device traditionally employed in the Senate, which relies on the lieutenant governor's sufferance in recognizing the filibustering member to speak. The class of privileged motions posited by requestors would effectively create 150 House member "speakers," each with the power to bring business to a halt. Filibuster has never been known to exist in the Texas House, and it is telling that none of the master procedural tacticians who have served in that body in the 161 years since statehood has ever discovered the filibuster tool that requestors now posit has always lurked in the House rules.

Faced with the unequivocal language of the House rules regarding the speaker's power of recognition, requestors attempt to bolster their preferred—and erroneous—interpretation by positing a series of alarming hypotheticals involving possible unwise or unconstitutional exercises of discretion by a speaker. Requestors' speculation that a speaker might

"systematically refuse to recognize members for any number of constitutionally impermissible reasons," AG Op. Request 0589-GA, is fanciful conjecture, and requestors can point to no evidence that such abuses of the recognition power have ever been a problem or are likely to become so. There are no historical indicators to overcome the presumption that a speaker duly elected by the House membership will exercise parliamentary powers including the recognition power in good faith. More fundamentally, requestors' ethereal concerns are, at the very most, policy considerations that might be relevant to whether the House should amend its rules—as it is constitutionally empowered to do with each new legislative session. But those imagined potential quandaries are irrelevant to interpreting the clear rules to which the members of the House, including requestors, chose to bind themselves for the most recent session.

Simply put, the present rules duly adopted by the House empower the speaker to make nonappealable decisions regarding recognition of members. And the speaker's exercise of that power to put the people's legislative business first rather than squandering the House's limited time entertaining a constitutionally invalid motion is not subject to review by the Attorney General. Because the speaker's exercise of his recognition power to decline to entertain an invalid motion is not appealable within the House, let alone by resort to an external arbiter in another branch of government, there is *a fortiori* no justification for the Attorney General to opine on the remaining political questions underlying the speaker's parliamentary decision from the chair.

II. THE SPEAKER IS BOTH A LEGISLATIVE OFFICER AND A PUBLIC OFFICER OF THE STATE WHO CAN BE REMOVED ONLY AS PROVIDED BY TEX. CONST. ART. XV, §7.

Should the Attorney General proceed to address the political questions posed by the request he will, in any event, discover that the only legally sound answers with respect to the speaker's office support the decisions made by Speaker Craddick from the House chair. The

short answer to the question requestors attempt to pose as Question 1 is that the speaker is both a legislative and a state officer and can be removed from the speakership only as provided by the Texas Constitution, that is, by law enacted under TEX. CONST. art. XV §7.

Question 1 asks:

> 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, Section 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?

As an initial matter, the phrasing of this question is politically charged and legally flawed. Specifically, (1) it misrepresents *In re Texas Senate*, 36 S.W.3d 119 (Tex. 2000), which did not hold anything about the speaker or the president pro tempore of the Senate being legislative officers who serve at the pleasure of the membership; (2) it falsely assumes both that "state officer" and "legislative officer" are mutually exclusive categories and that categorization as a "legislative officer" necessarily means that the officer serves at the pleasure of the membership; and (3) it ignores the material differences in the constitutional provisions for choosing a president pro tempore and a speaker. The application of art. XV, §7 to the office of speaker is in fact clear under the Texas Constitution; confirmed by Texas case law, including *In re Texas Senate*; and consistent with the House rules.

C. The Speaker Is Both a Legislative Officer and a Public Officer of the State.

It cannot be seriously doubted, and requestors do not dispute, that the speaker is a legislative officer. The speaker is elected by one chamber of the Legislature from among its own members and, in that office, has significant powers and responsibilities regarding the legislative process and the organization and operation of the House. *See* TEX. CONST. art. III, §9(b); Tex. H.R. Rules 1, 5, §24, Tex. H.R. 3, 80th Leg., R.S. (2007). 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 by the Attorney General, and Texas case law—including the very authorities on which requestors rely.

The Texas Constitution contains numerous provisions relating to the conduct, authority, and removal of public officers of the state. For example, TEX. CONST. art. XVI, §40(a)'s prohibition on holding dual offices applies only when each position is a "civil office of emolument." TEX. CONST. art. IV, §12(a) requires appointments to vacancies in "State or district offices" to be made by the Governor and subject to Senate confirmation. TEX. CONST. art. XVI, §17 requires "[a]ll officers within this State" to hold over in office until a successor is qualified.

Given the importance, under the Constitution and other Texas laws, of determining what qualifies as a public office, many reported cases and Attorney General opinions discuss how a public office may be distinguished from other forms of public service, such as public employment or service on an advisory board. 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.

Texas case law and Attorney General opinions have set clear parameters for identifying officers of the state. The predominant determining factor distinguishing those officials who are public officers from those who are not "is 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." *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955) (quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740 (Tex. Civ. App.—Galveston 1949, writ ref'd)); *see also Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974); *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). As discussed further below, several sovereign functions of government for the benefit of the public are conferred on the speaker.

Kimbrough v. Barnett, 55 S.W.120 (Tex. 1900), cited by Op. Tex. Att'y Gen. No. JM-395 (1985), explains that

> Public office is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.

55 S.W. at 122 (quoting *Mechem on Public Officers*, Sec. 1); *see also* Op. Tex. Att'y Gen. Nos. MW-415 (1981), MW-418 (1981).

Other factors are also relevant, including the facts that the Constitution provides that the speaker be elected to a definite term of office and that the speaker-elect takes the constitutional oath of office separately from the oath that individual takes as a House member. The important government functions assigned to the speaker and the statewide nature of those functions—especially when combined with other indicia of public officer status—clearly compel the conclusion that the speaker must be considered a "state officer."

1. The Speaker Exercises Numerous Sovereign Functions for the Benefit of the Public.

The position of speaker of the Texas House of Representatives is not simply the position of presiding officer of the House. The Constitution and statutes bestow numerous other functions on the speaker, any of which clearly constitutes a part of the sovereign functions of the state. For example, as has long been recognized, the speaker may be authorized by law to appoint *other* state officers, who themselves are not subject to removal at the speaker's pleasure. *Dorenfield v. Allred*, 73 S.W.2d 83, 84-85 (Tex. 1934). Among numerous other important functions performed by the speaker are the following:

- The speaker is designated as a successor, under certain circumstances, to the office of the Governor (TEX. GOV'T CODE §401.023).
- The speaker is a member of the Legislative Redistricting Board responsible in part for redistricting of the Legislature and judicial districts (TEX. CONST. art. III, §28 and TEX. CONST. art V, §7(a)).
- The speaker appoints two members of the Texas Ethics Commission (TEX. CONST. art. III, §24).
- The speaker is a member of the committee that may set the constitutional limit on the rate of growth of appropriations in a biennium from state tax revenues not dedicated by the Constitution (TEX. GOV'T CODE §316.005).
- The speaker as a member of the Legislative Budget Board participates in budget execution under TEX. GOV'T CODE ch. 317.
- The speaker is a member of, and appoints one other member of, the State Preservation Board (TEX. GOV'T CODE §443.003).
- The speaker makes appointments to a number of statutory agencies outside the legislative branch, including the Texas Judicial Council (TEX. GOV'T CODE §71.012), the Pension Review Board (TEX. GOV'T CODE §801.104), and the Employees Retirement System of Texas (TEX. GOV'T CODE §815.002).
- The speaker participates in the approval of grants from the Texas Enterprise Fund (TEX. GOV'T CODE §481.078(e)) and the Texas Emerging Technology Fund (TEX. GOV'T CODE §490.101).

As that partial list of powers and responsibilities demonstrates, the Texas speaker, particularly in the office's modern incarnation, is not merely a parliamentary official. The duties that have been assigned to the speaker extend far beyond the limited role of presiding officer of the House, and reflect a long and growing tradition of treatment of the position of speaker as a state office on a par with the office of lieutenant governor. The lieutenant governor, although an officer of the Senate while serving as President of the Senate, *see In re Texas Senate*, 36 S.W.3d at 120, is clearly also a state officer. In fact, the powers of the speaker and lieutenant governor are largely the same. In nearly all of the statutes and constitutional provisions cited in the list above, the powers or duties assigned to the speaker are substantially the same as those provided to the lieutenant governor in the same law. The one exception gives the speaker an appointment authority not even the lieutenant governor has. TEX. GOV'T. CODE §815.002 (providing for the

speaker, the governor, and the chief justice each to appoint one trustee of the Employees Retirement System of Texas).

There is little to distinguish the powers and duties of the lieutenant governor under the original 1876 Constitution or under current law from those of the speaker of the House, other than the lieutenant governor's duty to fill in for the governor in the governor's absence from the state. To treat one as a public office and the other as something less than a public office is to ignore the strong similarity between the two positions and how they function in state government.

2. The Constitution Provides for the Speaker's Election to a Term of Office.

a. The Speaker Is Elected to a Two-Year Term.

The Texas Constitution very specifically provides for a speaker to be elected only once every two years—at the beginning of each regular legislative session. TEX. CONST. art. III, §9(b) provides: "The 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 could not be clearer. It establishes a two-year term for the speakership, commencing upon the speaker's election at the beginning of a session and ending when the next session begins. The Constitution makes no provision for the House to change speakers during that two-year term.

That understanding of art. 3, §9(b) is confirmed by contrasting the once-per-session provision for electing the speaker with the Constitution's provision for the Senate to elect a president pro tempore at least twice during each session and as many other times during a session "as may be necessary." TEX. CONST. art. III, §9(a) ("The 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, who shall perform the duties of the lieutenant governor in any case of absence or temporary disability of that officer."). The framers thus established different treatment for the election of the president pro tempore and the speaker.

"A primary rule of statutory construction is that legislative enactments involving the same general subject matter and also possessing the same general purpose or purposes are considered to be and are construed to be in pari materia (like subject matter)." Op. Tex. Att'y Gen. No. JC-342 (2001) at 3 (citing *Garrett v. Mercantile Nat'l Bank*, 168 S.W.2d 636, 637 (Tex. 1943), and *Calvert v. Fort Worth Nat'l Bank*, 356 S.W.2d 918, 921 (Tex. 1962)); *see 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"). Every word of art. III, §9 "must be presumed to have been used for a purpose" and every word excluded "must also be presumed to have been excluded 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)); *see also 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."). Only one meaning can be ascribed to art. III, §9(b)'s use of "when it first assembles" to designate the one and only occasion per session on which the House may elect its speaker and its exclusion of language like "and at such other times as may be necessary," which would be the source of any power the Senate has to replace its president pro tempore at will. If the framers had intended for the speaker to be elected at times other than at the beginning of the regular legislative session, they would have expressly provided the House membership with that authority, just as they did for the Senate membership in its

election of the president pro tempore. *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").

Requestors assert that interpreting the plain language of TEX. CONST. art. III, §9(b) to mean what it says—*i.e.*, that the speaker may and must be elected by the House only when that body "first assembles"—is akin to reading a limitation on redistricting into the Census Clause of the United States Constitution. That argument is nonsensical. The Census Clause says only that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers" and then, in a separate sentence, requires that "[t]he actual Enumeration" be made every ten years. U.S. CONST., art. I, §2, cl. 3. It contains no language mandating that apportionment, let alone redistricting within individual states, occur only after each decennial census. Within the language of the Census Clause there is simply no grammatical connection between the timing of the enumeration and the timing of apportionments, which is not even specified. TEX. CONST. art. III, §9, by contrast, provides a single, specific time for the precise action of electing a speaker—once per session, at the beginning of that session.

Texas law contains only one possible exception to the regular procedure required by TEX. CONST. art. III, §9(b) of electing a speaker at the very beginning of the legislative session. That possible exception is TEX. GOV'T CODE §302.001, which purports to allow a majority of the members present when the House first convenes to defer the election of the speaker to a later time. If §302.001's provision that the House may defer the speaker election is itself constitutional, a question that requestors have not put before the Attorney General, it is nothing more than a recognition that, although the election of the speaker normally and by constitutional

mandate occurs at the beginning of a session, circumstances may arise that require the election to be delayed. Section 302.001 cannot override the constitutional imperative that an election for speaker occur once—and only once—in the two years between the start of one regular session and the next. And §302.001 itself mirrors the constitutional provision, specifying that, absent a deferral, the election is to occur "[w]hen the house of representatives *first convenes in regular session* and a quorum is present." (emphasis added).

The House rules also expressly recognize that speaker elections are not to occur mid-session. Nowhere do they make any provision for a procedure to remove an incumbent speaker (which, as discussed further below, would be unconstitutional in any event). And rule 1, §18, which has been included in the rules since 1997, prohibits solicitation of pledges or promises "to vote for any person for the office of speaker" during a regular session. Tex. H.R. Rule 1, §18, 80th Leg., R.S. (2007). That 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. The Two-Year Term for Speaker Is Consistent with the Existence of Terms for Other Public Offices.

The intent of art. III, §9, taken as a whole, was for the election of a Senate president pro tempore at various times and for the election of a speaker only when the House first organizes for each regular session. The Constitution's establishment of a two-year term for the office of speaker is consistent with provisions in that document establishing or recognizing that other public officers, including appointed officers, serve fixed terms during which they are subject to removal only in specified circumstances or under specific procedures. TEX. CONST. art. XVI, §§30 and 30a provide rules governing the duration of the terms of statewide and local public offices for which terms are not otherwise prescribed. TEX. CONST. art. V, §24 and TEX. CONST. art. XVI provide that state, district, and county officers may generally be removed only for

cause, usually some form of misconduct or dereliction of duty, and only pursuant to a trial or similar proceeding. Other constitutional provisions set the terms of office for specific state, district, or local offices and provide for removal in specific circumstances. For example, TEX. CONST. art. XVI, §5 provides for disqualification from office on conviction of bribery or similar offenses, and TEX. CONST. art. XVI, §14 provides that an officer may vacate office by ceasing to reside in the state or applicable district. The provision by which the speaker—an official with functions and responsibilities extending far beyond the parliamentary operations of the House—is elected to a two-year term fits easily within this regime in which public officers in Texas, once elected or appointed, are vested with the powers of the office for a designated term unless removed for specific causes.

The Constitution's provision of a two-year term for the speaker makes sense as a policy matter. Like other public officers, a speaker must be free to exercise judgment in performing duties undertaken for the benefit of the public. In carrying out substantial sovereign functions like making appointments to important bodies, including the Texas Ethics Commission and the Employees Retirement System of Texas, participating in reapportionment of the House and Senate as a member of the Legislative Redistricting Board, approving economic development grants from the Texas Enterprise Fund, or transferring funds through budget execution as a member of the Legislative Budget Board, the speaker must be able to make decisions without worrying about whether an unpopular decision might trigger a removal effort. And if the speakership—and its myriad attendant public functions—could change hands with every shifting political wind, there would be severe costs to stability and continuity in state government.

c. The Constitution Does Not Leave the Duration of the Speaker's Term to Tradition, Inherent Powers, or the Discretion of the House Membership.

Article III of the Texas Constitution does not leave the powers of the Legislature regarding its organization and operation to tradition and the inherent or generally assumed authority of legislative bodies. Many details regarding the operation of the houses of the Legislature that might otherwise be assumed to be inherent to each chamber are expressly provided for in Article III, such as the order of business during a legislative session, TEX. CONST. art. III, §5, the authority of each house to adopt rules of procedure TEX. CONST. art. III, §11, the right of each house to judge the qualifications of its members, TEX. CONST. art. III, §8, the right of each house to expel a member, TEX. CONST. art. III, §11, and the right of each house to punish a person for obstructing legislative proceedings, TEX. CONST. art. III, §15. If the framers of art. III intended to provide the House with the power to remove the speaker at will, they would have specified that power, and would have been required to do so in light of the clear mandate that a speaker be elected only at the beginning of each legislature.

d. The Term of Office Provided for the Speaker Mirrors That Provided for an Acting Lieutenant Governor.

TEX. CONST. art. III, §9(a), which—in contrast to the provision for electing a speaker once per session—authorizes the Senate to elect a president pro tempore two or more times per session, also provides that, in the event of a vacancy in the office of lieutenant governor, the Senate elects a senator to perform the duties of that office until the next general election. Like the House once it elects its speaker, the Senate is not empowered to replace an acting lieutenant governor at its discretion but rather elects that officer as the Senate's permanent presiding officer with a fixed term of office. Presumably, although the Constitution does not speak expressly to the question, if it were necessary to remove the interim lieutenant governor before the end of that

term *for cause*—for example, blatant corruption or other misconduct—the Senate would have to look to impeachment or another method of removal provided by law under TEX. CONST. art. XV, §7 or to the expulsion of the member from the Senate under TEX. CONST. art. III, §11.

The term of office provided for an acting lieutenant governor thus parallels that provided for the speaker. In each case, the relevant officer is elected from and by the membership of one chamber of the Legislature both to preside over that body and to carry out numerous (and virtually identical) sovereign public functions for a specified duration of time. In either case, the officeholder is entitled to serve for the period to which that individual was elected by the members of the relevant chamber under TEX. CONST. art. III, §9, unless the member is appropriately expelled by the relevant chamber or removed by impeachment or by another method that may be enacted under TEX. CONST. art. XV, §7.

3. The Speaker Takes the Constitutional Oath for the Office of Speaker.

Texas courts have stated that whether the constitutional oath of office is required is another indication that a position constitutes a public office. *See Knox v. Johnson*, 141 S.W.2d 698, 700 (Tex. Civ. App.—Austin 1940, writ ref'd); *Aldine Ind. Sch. Dist.*, 280 S.W.2d at 578. A survey of the House Journals in the decades immediately following the adoption of the 1876 Constitution indicates that the speaker-elect generally took the constitutional oath of office prescribed by TEX. CONST. art. XVI, §1 immediately after being elected speaker. *See* H.J. of Tex., 19th Leg., R.S. 4 (1885); H.J. of Tex., 20th Leg., R.S. 5 (1887); H.J. of Tex., 22nd Leg., R.S. 2 (1891); H.J. of Tex., 26th Leg., R.S. 3 (1899); H.J. of Tex., 27th Leg., R.S. 4 (1901). The now fully established practice of administering the oath of office to the member elected as speaker of the House, *see, e.g.*, H.J. of Tex., 79th Leg., R.S. 16 (2005); H.J. of Tex., 80th Leg.,

R.S. 23 (2007), further confirms that the House itself considers the position of speaker to be a separate constitutional office.

4. *In re Texas Senate* Confirms That the Speaker Is Both a Legislative and a State Officer.

Contrary to requestors' premises, the Texas Supreme Court in *In re Texas Senate* did not hold that the speaker is only a legislative officer—or hold anything at all relating to the office of speaker—and in fact confirms that an officeholder like the speaker can be both a legislative officer and a state officer. *In re Texas Senate* explains that an acting lieutenant governor is "*in part* a Senate officer." 36 S.W.3d at 120 (emphasis added). If an acting lieutenant governor, who is elected from the Senate's membership and remains a senator, is a Senate officer only "in part," that individual must also be in part a public officer of the state. *See id.* (noting that "[t]he person to be elected will be the presiding officer of the Senate, but he will also be performing the duties of a State official in the Executive Department of the government with duties beyond those as a Senate officer"). The lieutenant governor's office itself is a dual office, occupied by an individual who is simultaneously a public state official and "a Senate officer." *Id.*; *see also* TEX. CONST. art. IV, §1 (identifying the lieutenant governor as an officer of the executive branch).

As detailed above, the speaker has statewide powers and responsibilities extending beyond the role of presiding over the legislative and parliamentary operations of the House and paralleling the virtually identical roles of the lieutenant governor. Thus, the Supreme Court's recognition that the lieutenant governor or an acting lieutenant governor is in part a state officer and in part a legislative officer applies equally to the speaker. By the same token, *In re Texas Senate* makes clear that classification as a legislative office does not transmute a constitutionally delineated term of office into service at the pleasure of a chamber's membership. The lieutenant

governor is popularly elected to a term of office, and an acting lieutenant governor is chosen—once—to fill out the remainder of a departed lieutenant governor's term. TEX. CONST. art. III, §9(a). Neither, even in the capacity of presiding officer of the Senate, serves merely at the pleasure of the Senate's membership. Similarly, the speaker is elected at the beginning of a regular legislative session, TEX. CONST. art. 3, §9(b), both to serve in the legislative role of presiding officer over the House and the public role of performing numerous other statewide functions, and serves until a new session begins.

Nor is requestors' position that the speaker of the Texas House is removable mid-session at the will of the House supported by the only other Texas case they cite for the proposition that the speaker is not a state officer. *Diffie v. Cowan*, 56 S.W.2d 1097 (Tex. Civ. App.—Texarkana 1932, no writ), did not involve any statewide office, let alone the office of speaker. *Diffie* concerned the attempted removal of a city alderman and questions regarding the city charter. *Id.* at 1097, 1101. Requestors grasp at dicta in *Diffie* citing an 1891 Colorado case for the proposition that "the speaker of a legislative assembly is not a 'state officer.'" *Id.* at 1101 (citing *In re Speakership*, 25 P. 707, 709 (Colo. 1891)). The 19th century Colorado case is even less instructive on questions relating to the modern Texas speakership than dicta in a 1932 Texarkana case concerning an alderman.

In *In re Speakership*, the Colorado Supreme Court—although unable to discover any judicial precedent or historical account indicating that any legislature in the history of the United States had ever replaced its speaker, 25 P. at 711—drew on what it perceived to be the "common parliamentary law" prerogative of a legislative body to remove its speaker at will as long as "such law" had not "been *repealed or superseded by any constitutional or statutory enactment.*" *Id.* (emphasis added). In Texas, any such "common parliamentary law" prerogative that might

have ever been inherited by the Texas House has been long since superseded by the requirement in the 1876 Constitution—along with that document's numerous other detailed constraints on what might otherwise have been left to a legislative body's traditionally inherent powers—that elections for speaker take place only when the House "first assembles" for each regular session. By contrast, 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, the amended Colorado Constitution, in force today, specifies that, like the Colorado Senate president and the Texas Senate's president pro tempore, 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*." (Emphasis added) COLO. CONST. art. V, §10. Thus, unlike the Texas Constitution that has been in force since 1876, Colorado's constitution never circumscribed whatever inherent power its House of Representatives may derive from common parliamentary law to change speakers at will and now explicitly enshrines that power. *In re Speakership* simply adds nothing to determining whether the fact that the Texas speaker is a legislative officer as well as a state officer makes that official removable mid-session at the will of the Texas House membership. *See Knox*, 141 S.W.2d at 700 (explaining that "since the rights, duties and status of [an officer of the state] are determined by, and dependent upon, the Constitution and statutes of this State, decisions from other states predicated upon their own Constitutions and upon statutes different from ours are of little value on" questions regarding removal of an officer under Texas law).

Moreover, the concept of a legislative speakership that animated the 19th century Colorado Supreme Court's conclusion that a speaker is not a state officer is far removed from the

reality of the role played by the Texas speaker in today's Texas government. As discussed above, the scope of the Texas speaker's statutory authorities and responsibilies ranges far beyond the podium of the House Chamber. To deny that the official who holds that office is more than a parliamentary officer of the legislature is to deny that the individual entrusted with those broad duties must exercise them for the benefit of the public at large. Indeed, other states also recognize, like Texas, that a modern speaker's role in state government and the resulting need for stability in the speaker's office warrant electing a speaker for a defined term of office. For example, New York's State Assembly elects its speaker "for a term of two years," and its rules do not permit midterm elections for a new speaker. N.Y. Assembly Rule VI, §2(f); *see also Brennan Explains Role in Assembly Coup*, http://www.lidbrooklyn.org/bp61200.htm. Simply put, whatever might be said about the role of a Colorado speaker in 1891 as limited to that of a parliamentary officer bears no relation to what must be said of a 21st century Texas speaker.

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

Because the speaker is a public officer of the state and because, unlike the provision regarding the selection of the president pro tempore of the Senate, the provision regarding election of the speaker does not contemplate or authorize election of a speaker more often than once per session, 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 TEX. CONST. art. XV, §7. That section is a catch-all provision, stating that "[t]he 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." TEX. CONST. art. XV, §7.

None of the other removal provisions in the Constitution provide a mode for removing a sitting speaker. TEX. CONST. art. III, §8 provides that "[e]ach House shall be the judge of the

qualifications and election of its own members." "Member" is equivalent to "representative" or "senator" and does not include other separate offices of either chamber, like the office of speaker. Strictly speaking, §8 is not a removal provision but authorizes the exclusion of a member-elect from becoming a fully qualified member. TEX. CONST. art. III, §11 provides that "[e]ach House may . . . , with the consent of two-thirds, expel a member." Although expulsion of a member from the House would necessarily divest that individual of any legislative offices held, including the dual legislative and state office of speaker, §11 provides no mode for removing a nonexpelled member from the speakership. TEX. CONST. art. XVI, §5 is a narrow provision relating to removal of officers convicted of bribery or attempted bribery. Because none of those provisions even arguably apply to removal of an individual from the office of speaker (other than, perhaps, for bribery), art. XV, §7 is the only possible constitutional source of authority to effect such a removal.

"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." *Childress County v. Sachse*, 310 S.W.2d 414, 419 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.); *accord Dorenfield*, 73 S.W.2d at 86; *Knox*, 141 S.W.2d at 701. Thus, aside from the possibility of an incumbent speaker's being lawfully expelled from membership in the House or disqualified for bribery, which would necessarily also divest that individual of the speakership, the exclusive mode of removal is prescribed by art. XV, §7, which requires both that any procedure for removal be enacted as law and that it involve a trial. *Dorenfield*, 73 S.W.2d at 86 (explaining that "the Constitution made it the mandatory duty of respondent to continue in his state office until August 26, 1935, ... until he was removed after trial under the provisions of some valid law" and that "a trial was an indispensable part of the constitutional

mode for his removal as an officer of this state"); *Knox*, 141 S.W.2d at 701 ("Since the Constitution has prescribed a 'trial' as a necessary prerequisite for the removal from office of 'all officers of this State,' neither the Legislature can authorize, nor the Board of Control effect, the removal of any such officer of the State except in compliance with its mandate."). TEX. GOV'T CODE ch. 665 is the statute implementing art. XV, §7. Chapter 665 provides for removal of state officers through the process of impeachment.

Any attempt to remove an incumbent speaker by a method of removal that is not established by the Legislature acting under art. XV, §7 would conflict with that constitutional provision and the statute that implements that provision and, therefore, would be invalid. In particular, if a method of removal were established under the rules of the House of Representatives, that procedure would not constitute a valid method under art. XV, §7, because such a procedure would fail to meet several requirements of the provision. Section 7 requires that any removal method be established by the "Legislature." Adoption of rules by a single house of the Legislature is not the act of the Legislature. *See* TEX. CONST. art. III, §1 ("The Legislative power of this State shall be vested in a Senate *and* House of Representatives, which *together* shall be styled 'The Legislature of the State of Texas.'" (emphasis added)). Section 7, further specifies that any method of removal must be established "by law" and provide for a "trial." House rules can never constitute "law" as that term is used in §7.

A rule adopted by a single chamber of the Legislature meets none of the requirements for enactment as law. *See, e.g.*, TEX. CONST. art. III, §29 (all laws must contain a specific enacting clause referring to enactment by the "Legislature"), §30 ("No law shall be passed, except by bill."), §32 (three readings required for each bill to have the force of law), §37 (each bill must be referred to and reported from a committee). Moreover, any suggestion that removal could occur

through a procedure such as a motion to vacate the speakership ignores art. XV, §7's requirement that any removal law enacted by the Legislature provide for a "trial" to be conducted. "Trial" is used in §7 "in its ordinary accepted meaning in law, which . . . is 'the judicial investigation and determination of the issues between parties.'" *Dorenfield*, 73 S.W.2d at 87. Were the Attorney General to conclude that an incumbent speaker may be removed through a simple motion on the House floor, that conclusion would violate not only the constitutional separation of powers but the constitutional mandate regarding the mode of removing public officers of the state and the statute implementing that mandate.

E. There Is No Precedent for Removal of an Incumbent Speaker by the House Membership Under the 1876 Constitution.

Research has indicated no instance under the present Texas Constitution, adopted in 1876, in which an incumbent speaker was removed. There is certainly no precedent suggesting that, despite the clear constitutional provisions to the contrary, individuals serving in the office of speaker as presently constituted are subject to removal at the pleasure of the House membership. The 1871 departure of Speaker Ira Evans is not, as requestors suggest, precedent for removing a present-day speaker by a simple "motion to vacate the chair." AG Op. Request 0589-GA. That is so for several reasons, most importantly because (1) the 1871 event took place under the *Texas Constitution of 1869*, which differs in dispositive ways from the present Constitution, and (2) it is not clear from the historical record exactly what transpired in 1871.

Speaker Evans, a Republican in the Reconstruction-era Texas House, took a principled stand against an unconstitutional 1870 measure to postpone the next election that was supported by a majority of the Republican caucus in the House. *The Handbook of Texas Online:* http://www.tsha.utexas.edu/handbook/online/articles/EE/fev4.html. During the 1871 session, a party caucus voted in favor of removing Evans from the speakership. *Id.* The next morning, a

resolution was offered on the House floor "[t]hat the office of Speaker of this House be now declared vacant." H.J. of Tex., 12th Leg., R.S. 1474 (1871); *see also The Handbook of Texas Online:* http://www.tsha.utexas.edu/handbook/online/articles/ EE/fev4.html. It is, at the very least, far from clear that a resolution to "declare[]" the chair vacant was equivalent to a *motion* to *cause* that vacancy by removal. More likely the indirect and declaratory wording of the resolution reflected that Evans—having been informed unequivocally that his allegiance to constitutional principles had cost him the support of all but a handful of his party caucus—had agreed to resign. Indeed, the record reflects that Evans did not challenge the declaration of a vacancy and declined a renomination to the speakership. H.J. of Tex., 12th Leg., R.S. 1474, 1482 (1885). Simply put, the events of 1871 are no evidence that a "motion to vacate the chair" has ever been accepted as a constitutionally valid mode of removing a speaker of the Texas House.

More fundamentally, whatever transpired in 1871 took place under the Texas Constitution of 1869, *not* the 1876 Constitution under which the House currently operates. That fact is especially significant because the 1869 provision for electing speakers differed materially from the current provision. Instead of specifying that a speaker is to be elected by the House only "when it *first* assembles" at the start of a regular legislative session as the current Constitution does, TEX. CONST. art. III, §9(b) (emphasis added), the 1869 Constitution provided merely that "[t]he House of Representatives, *when assembled*, shall elect a Speaker." TEX. CONST. of 1869 art. III, §15 (emphasis added). In other words, by its omission of the word "first," which occurs in the present Constitution, the 1869 provision could be (and perhaps, in 1871, was) understood to mean that the House was empowered to hold an election for speaker whenever it was assembled. *Cf. Laidlaw Waste Sys.*, 904 S.W.2d at 659 (noting the canon that

every word in a statute must be presumed to have meaning). Nor did TEX. CONST. of 1869 art. III, §29, the provision requiring that the "President . . . of the Senate, and Speaker of the House of Representatives, shall be elected from their respective bodies," specify a time for election of a speaker like that specified in the present constitution.

Comparison of the rest of the TEX. CONST. of 1869 art. III, §15 with the relevant provisions of the 1876 Constitution confirms that the 1876 document effected a specific change regarding the House's election of its speaker. The 1876 Constitution singles out the speaker to be *elected* when the House *first assembles*, TEX. CONST. art. III, §9(b), but provides, with respect to other House officers, only that "[e]ach House shall choose its other officers," *id.* at §9(c), that is, specifying neither the time, frequency, or method of choosing officers other than the speaker. The 1876 Constitution also, as discussed above, specifies—in contrast to the "when it first assembles" provision for electing the speaker—that the Senate has the power to elect a president pro tempore whenever it "may be necessary." *Id.* at §9(a). The 1869 Constitution made no such express distinctions between the time, method, and frequency for choosing a speaker and those for choosing other officers, including the Senate president pro tempore, providing only 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 1869 art. III, §15. In other words, the 1869 Constitution—on its face—left much regarding the election of officers to the interpretation and discretion of each house, while the 1876 Constitution imposed more detailed constraints, particularly the limitation on the time and frequency of speaker elections.

The 1869 Constitution also contained removal provisions that differed materially from those in the current Constitution. TEX. CONST. of 1869 art. VIII, §6 provided that "[t]he

Legislature shall provide for the trial, punishment, and removal from office, of all other officers of the State, by indictment or otherwise." The section did not specify, as does TEX. CONST. art. XV, §7, that the trial and removal requirement applies only if the modes of removal for officers "have not been provided in this Constitution" or that the mode of removal be provided "by law." TEX. CONST. of 1869 art. XII, §41 established a procedure by which "[a]ll civil officers of this State shall be removable by an address of two-thirds of the members elect to each House of the Legislature, except those whose removal is otherwise provided for by this Constitution." The current constitution contains no similar broad removal procedure applicable to all civil officers.

It is not known whether or to what extent the House in 1871 considered the relevant legal issues surrounding the appropriate methods of removing a speaker. But, whatever actually took place on the House floor in 1871 and whether or not what took place was constitutional under the 1869 Constitution, those events provide no warrant for the Attorney General to opine that House rules should permit a removal procedure that would plainly violate the current Constitution.

Indeed, the very nature of the change in the 1876 Constitution specifying that a speaker is to be elected when the House "first assembles" suggests that it may have been made for the specific purpose of avoiding destabilizing situations like the 1871 replacement of a speaker precipitated by a principled but unpopular position taken by that officer. It may be impossible to say for certain if the Committee on Legislative Department reporting to the 1875 constitutional convention had this specific concern in mind when recrafting the mode of electing a speaker because the details of their deliberations do not appear in the published debates of the convention. *See* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 48, *available at* http://tarlton.law.utexas.edu/constitutions/pdf/pdf1875debates/13%2009-20-1875.pdf.

Importantly, however, the "when assembled" provision of the 1869 Constitution had been carried over from the three earlier constitutions of the State of Texas. That is, 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." 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. The sudden change in 1876 to "when it first assembles" was clearly no accident. The 1871 disruption was a recent one at the time, and one that had aroused heated, sometimes hyperbolic, indignation in some quarters of the state. For example, the *Galveston News* compared it to the excesses of the Paris Commune of 1871:

> The bare fact that a legislative body can so remove its Speaker is no justification in the eyes of God or in the eyes of men. Usurpation so flagrant, so inexcusable, so wicked, has not been heard of in the history of the American Government. The act is revolutionary, without excuse, and of the same character which is now devastating France with blood.

Editorial, *The Austin Legislature*, GALVESTON NEWS, May 12, 1871. Regardless whether the constitutional convention's deliberations on the new language focused on the issue, the effect of the language change is to remove any possible suggestion that the House has constitutional authority to change speakers at will during or between sessions. *Cf. The Handbook of Texas Online: Constitution of 1876*, http://www.tsha.utexas.edu/handbook/online/articles/CC/mhc7.html (noting that "[t]o assure that the government would be responsive to public will, the [1875 constitutional] convention precisely defined the rights, powers, and prerogatives of the various governmental departments and agencies, including many details generally left to the legislature").

III. REMOVAL OF THE SPEAKER UNDER TEX. CONST. ART. XV, §7 WOULD AFFECT ONLY THE OFFICE OF SPEAKER.

Question 2 asks:

> 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?

Again, the requestors' question is itself fundamentally flawed and misleading. Neither the Supreme Court nor the Attorney General has ever held that TEX. CONST. art. XV, §7 does not apply to removal of an incumbent speaker, and, as discussed above, the office of speaker is a state office as well as a legislative office. In any event, the answer with respect to the speaker is that removal under TEX. GOV'T CODE ch. 665, the statute implementing TEX. CONST. art. XV, §7, would be directed only at the office of speaker.

Any removal proceeding under chapter 665 would need to specify which office or offices are the subject of the removal proceeding. Because TEX. CONST. art. III, §11 provides a method of removal, expulsion, for members of the Legislature, removal under TEX. CONST. art. XV, §7 encompasses only the office of speaker. If the proceeding is directed only at the office of speaker, the removal would apply only to that office and would not affect the entitlement of a person removed as speaker to continue to serve in the person's office of state representative.

IV. IF THE SPEAKER'S OFFICE BECOMES VACANT BY ANY LAWFUL MEANS, THE HOUSE COULD FILL THE VACANCY.

Question 3 asks:

> 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?

Again requestors pose a loaded question that misrepresents applicable law, this time imagining an apparent conflict that does not exist. In this instance, House precedents—under earlier constitutions and the present one—provide the simple answer that the House retains inherent authority to fill a vacancy in the office of speaker. But the authority to fill a vacancy is not authority to create a vacancy through removal, which, as discussed above, can only lawfully occur in accord with the provisions of the Constitution of 1876.

Past precedents of the House include instances in which the speaker has resigned and the resulting vacancy was then filled by an election of a new speaker. This occurred several times in 1846, once in 1857, several times in the 1861-1863 period, once in 1909, and most recently in 1972 when Speaker Mutscher resigned. *See Selected Pages of the House Journal, archived at* http://www.lrl.state.tx.us/legis/members/speakerElection.cfm. In the most recent instance, Speaker Mutscher used his authority under House rule 1, §10 to designate a member to preside over the House in the speaker's absence, although the designation was limited to presiding over the House in an upcoming called session until a new speaker was elected. *See* H.J. of Tex., 62nd Leg., 2d C.S. 3 (1972).

That rule still exists in the current House Rules, and is also the source of the speaker's authority to name a speaker pro tempore. The rule provides, "[a] permanent speaker pro tempore shall, in the absence or inability of the speaker, call the house to order and perform all other

duties of the chair in presiding over the deliberations of the house and perform other duties and exercise other responsibilities as may be assigned by the speaker." Tex. H.R. Rule 1 §10, 80th Leg., R.S. (2007). Only if there is no permanent speaker pro tempore, or if the permanent speaker pro tempore is unable to serve, is the speaker authorized to designate in writing another member to serve as presiding officer in the speaker's absence when the House is in session.

Thus, if there is a vacancy in the office of speaker and if the House is in session, the House either may elect a new speaker or, if there is a permanent speaker pro tempore or a member designated to preside under Rule 1, Section 10, may proceed with the speaker pro tempore or designated member presiding. Following a vacancy in the office of speaker, only if the House failed to elect a new speaker and the previous speaker failed to name a speaker pro tempore or member designated to preside (or if both those officers were unable to serve) would the House be compelled to proceed without a presiding officer. The unlikely situation of having no presiding officer would have to be brought about by the conscious action of the House in not electing a new speaker rather than as the consequence of any interpretation of a constitutional provision limiting the House's ability to remove the speaker.

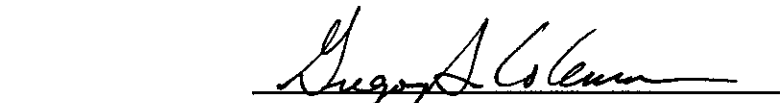
CONCLUSION

The Attorney General should refrain from injecting himself into the internal operations of a coordinate branch of government as requestors have asked him to do. The cost to constitutional separation of powers is too severe and the practical dangers of subjecting parliamentary decisions of a legislative body's presiding officer to unbounded collateral review too grave. If, however, the Attorney General wades into the political thicket of arbitrating internal disputes regarding House rules and procedure, he will find that the answers to the questions posed are clear. The rules to which the current House members have bound themselves give their speaker unequivocal and unappealable authority to exercise the power of

recognition. And the speaker, who holds a dual legislative and state office, may not be removed from office during a session in any mode that is contrary to constitutional mandate.

DATED: July 20, 2007

Respectfully submitted:



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