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**HOUSE OF REPRESENTATIVES**

August 3, 2007

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

**RECEIVED**

AUG 03 2007

Re: RQ-0589

**OPINION COMMITTEE**

FILE # RQ-0589-40  
I.D. # 45295

Dear General Abbott,

Thank you for requesting my input regarding the opinion request RQ- 0589. I am not, for better or worse, a lawyer. My purpose is to give you my impressions as both a long time House member and as an historian of the issues raised by Representatives Keffer and Cook and of the responses received by Speaker Craddick's lawyers, including his private consultant, Terry Keel. Because I will not cover all of the questions raised by Representatives Keffer and Cook, I adopt by reference their brief on those matters not addressed in this response. I would like to briefly discuss the following:

- (1) the origin of this question;
- (2) the request by the Speaker's former and current private lawyers (including the recently appointed House Parliamentarian) that the Office of the Attorney General not answer the Representative Keffer and Cooks request because of "separation of powers" concerns;
- (3) the historical origin of speakers of the house in anglo-american democracies; and
- (4) the Texas House of Representatives.

**Origin of This Dispute**

On May 26, 2007, The Speaker of the Texas House of Representatives made the following determinations:

- (1) "The office of Speaker of the Texas House of Representative is the only constitutionally-mandated officer of the Texas House by virtue of Article III, Section 9 of the Texas Constitution."
- (2) The Texas Constitution speaks to the exclusive grounds for the removal of officeholders."

- (3) “[A] unique provision of the Texas Constitution, Article XV, Section 7, mandates that the legislature can only provide for the trial and removal from office of any officer of this State by enactment of a law if a mode for a state officer’s removal has not otherwise been specifically provided for in the Texas Constitution.”
- (4) “This unambiguous provision of the Texas Constitution overrides any supposed merit to the suggestion that a process to remove an officer of this State can be created by one house of the legislature during a legislative session and used to remove that officer from office.”

Up until the time that the Speaker made these statements, no former speaker of the Texas House had ever claimed to be a constitutionally mandated office holder. In fact, no Texas court (or Attorney General) had ever determined the speaker of the house was a “state officer” subject to removal solely in the manner provided by Article 15, Section 7 of the Texas Constitution, and no authority existed for any of the four propositions stated above.

For some reason, and in spite of the fact that history and House precedent do not support these positions, these constitutional interpretations have been advanced only by this presiding officer and his lawyers, and without the support of a substantial number of house members who elected him as Speaker. But the most troubling aspect of all is that the Speaker and those acting on his behalf are making these legal misrepresentations on issues that are of very high importance to every citizen of the state.

Frankly, the questions before you today are not of Representative Keffer or Cook’s own making; but rather, are the “unique” and “unambiguous” interpretation of the Texas Constitution adopted by the Speaker and his lawyers. In my opinion, the proper question placed before you is simply “Are these interpretations correct?” I do not believe that they are.

### **Separation of Powers**

The Speaker has asked you not to answer the questions raised by Representatives Cook and Keffer because they are a “political game” and because they violate the separation of powers between the legislative and executive branches of government. The Speaker argues that he 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.”

These arguments are simply an attempt to create a distraction by rephrasing every question about the interpretation of existing laws into questions regarding the House Rules to insulate the Speaker's constitutional interpretations from review. Surely the Speaker, his staff, and his counsel are familiar enough with how the branches interact to know that Speakers of the House have recognized that the Attorney General could offer opinions on the correctness of their actions under existing laws and that the judiciary can properly review those actions.

For example, the Attorney General has issued opinions on issues specifically effecting the actions and selection of the Speaker of the Texas House. In Opinion H-55, the Attorney General, while declining to interpret House Rules, answered 16 separate questions regarding restrictions on financing and the expenditure of fund for a Speaker's race.

More recently, this office issued Opinion GA-213. In that case, Speaker Craddick's Chair of the Elections committee, Rep. Mary Denny, specifically asked the Attorney General's office to review the propriety of appointments to the Texas Ethics Commission by a former Speaker of the House. In that opinion, this office properly determined that while it could not resolve factual disputes regarding the appointment, it could address the constitutional requirements and limitations placed on the Speaker in making the appointments.

Further, the constitutionality of actions of the legislature and legislators are examined in Attorney General Opinions every day. For example, in Opinion JC-170, the Midland County Attorney asked this office whether an appropriation of general revenue funds to The University of Texas of the Permian Basin for the construction of a museum building was precluded by Article VII, Section 18(I) of the Texas Constitution. As you know, the opinion determined that the Odessa based university was stripped of the funding because the act appropriating general revenue funds for the construction of a museum building on the campus of The University of Texas of the Permian Basin did not express a need for the project, as required by the Texas Constitution.

The fact that constitutional questions arise from the utterance of the Speaker do not shield them from review, either by this office or by the courts. Your office has a long history of properly reviewing constitutional and statutory question arising from the operation of the legislature and the actions of its presiding officers, including the Speaker of the House. To do otherwise would allow the Speaker to place a cloak of invisibility around all of his pronouncements, rendering them immune from review.

### **A Short History on Speakers of the House**

As long as legislative parliaments have existed, so has the Office of Speaker. In the Anglo- American system of government, the first Speaker of a legislative house was

in 1258, when Peter de Montfort presided over the Parliament held in Oxford. These early presiding officers were known by the title *parlour* or *prolocutor*. The first designated "Speaker" of the house was Sir Thomas Hungerford, who took office in 1376. Initially, Speakers were often viewed as agents of the King. However, this quickly changed. Between 1400 and 1530, nine Speakers of the House of Commons were executed or met violent deaths, most for opposing the crown.

By 1642, the Speaker of the House of Commons was completely considered a servant of the body that chose him. The most famous example of a speaker's expression of his duty to his legislative house over all others (including himself) is by Speaker William Lenthall, when King Charles I entered the House of Commons to search for and arrest five members for high treason. When the King asked the Speaker if he knew of the member's location, the Speaker replied:

"May it please your Majesty, I have neither eyes to see nor tongue to speak in this place but as the House is pleased to direct me, whose servant I am here."

The fact that a Speaker is elected by the body and serves at the will of that body is undisputed by almost every parliamentary chamber. A brief history of the Speakership of the Texas House makes that clear. Beginning with the first legislature following statehood, it was obvious that the membership of the House, and the membership alone, had the right to remove and replace the office of speaker. In that first legislature in 1846, Speaker Crump desired to take a leave of absence. The House, after electing a speaker pro tem to rule in the Crump's absence, declared the office vacant and elected a new speaker, Edward Branch. All told five members held the office of speaker during the 1<sup>st</sup> legislative session.

In 1871, Speaker Ira Evans, a Medal of Honor winner and a defender of voting rights for newly freed Texans was told by members of his party that he would be removed as speaker if he did not support changes designed to keep his party in power. Unfortunately, the Speaker's lawyers have attempted to cloud the actions of Speaker Evans in order to distinguish their case. With Speaker Evans in the chair and presiding, Speaker Evans recognized "as a matter of privilege" a resolution that the office of speaker be declared vacant. The Speaker's lawyers claim that these events, which fact resulted in the removal of Speaker Evans from his title as Speaker, are not evidence that there has ever been accepted a constitutionally valid mode of removing a speaker of the Texas House. Their position simply defies logic.

In 1909, Speaker Kennedy, on the final day of the 31<sup>st</sup> Regular Session, recognized and allowed debate on a resolution that called for his resignation. The resolution passed and Speaker Kennedy resigned at the start of the next session.

During the 62<sup>nd</sup> Legislative Session, Speaker Mutscher was bedeviled by a number of resolutions and motions from members requesting his resignation or seeking to declare the office vacant. Speaker Mutscher eventually acceded to his member's wishes and resigned during that legislature's second called session.

Taken together, the Texas House and the Speakers elected by the House have come to the same conclusion. Speakers serve at the will of those who elect them. They are not transmuted into some other type of officer upon their election as presiding officer. In an at-will state, a speaker of the house serves at the members' leisure.

### **Conclusion**

The opinions process allows every designated state official to raise legitimate questions regarding interpretations of state constitutional law and to receive an interpretation. The process was open to the Speaker to seek a determination of his novel claim that he was elevated to the level of a state officer removable only under Article XV, Section 7 before he relied on it as the linchpin of his May 26<sup>th</sup> ruling. He chose, for whatever reason, not to seek such an interpretation. The Speaker now seeks to silence any "interference" (or interpretation) from constitutionally separate departments of government. This contempt for all voices but his own should neither bar the opinions process nor make his separation of powers arguments valid. Opinions from the Attorney General have always protected both the Texas Constitution and the right of the House to interpret the rules.

One final note, both of the Speaker's lawyers raise a parade of horrors that will occur if members of the house could remove a speaker (e.g., "If the speakership.... could change hands with every shifting political wind, there would be severe costs to stability and continuity in state government".) In my view, this raises a central question about what is more important about the Texas House. The Speaker posits it as a choice between stability for the sake of stability and the messy job of a governing in a democracy. I believe that the choice would have been an easy one for our forefathers who would have preferred to listen and participate in the loud cacophony of the 150. In the end, it is the Texas House of Representatives, not the Speaker's house.

Sincerely

A handwritten signature in black ink, appearing to read 'Brian', with a stylized flourish at the end.

Brian McCall