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House of Representatives

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AUG 03 2007 Representative Jim Pitts

OPINION COMMITTEE
August 3, 2007

FILE # RQ-0589-GA
I.D. # 45299

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas, 78711-2548

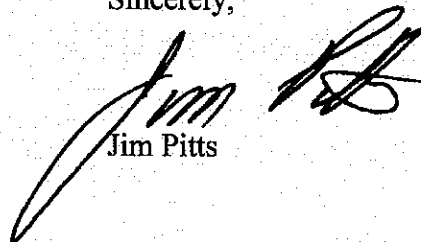
Re: Attorney General Opinion Request RQ-0589-GA

Dear General Abbott:

Enclosed is my brief in the matter of Opinion Request RQ-0589-GA. Thank you for the opportunity to comment on this matter.

Please contact myself or my office if you have any questions regarding this matter.

Sincerely,


Jim Pitts

In the Office of the Attorney General of Texas

Re: A.G. Opinion Request 0589-GA

Brief of Representative Jim Pitts

Questions Presented

- (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, Sec. 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?
- (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 proceedings 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?
- (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?
- (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 the 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)?

Overview

Under Article 4, Section 1, Texas Constitution, the office of lieutenant governor resides in the *executive department* of government.¹ The Speaker of the House, however, resides in the *legislative department* of government. (Article 3, Section 2 and Article 3, Section 9(b)). Because of the numerous inherent differences between the two offices, this brief addresses the inquiries raised by Representatives Keffer and Cook as they largely relate to the rights and powers of the presiding officer of the Texas House of Representatives.

Question One: Is the Speaker a “legislative officer” or a “state officer” for purposes of Article 15, Section 7, Texas Constitution?

Article 15, Section 7, Texas Constitution states: “The Legislature shall provide by law for the trial and removal from office of all officers of this State, and the modes for which have not been provided in this Constitution.” Impeachment is a preliminary prosecutorial step against an executive officer, followed by trial. Most state constitutions (and the United States Constitution) provide for such a mechanism, and it is normally used in instances where an executive officer has engaged in criminal or indictable conduct. Once an executive officer is impeached, tried, and judged guilty of

¹ “The *Lieutenant Governor* is a member of the executive branch but also plays the official role of President of the Senate. The Lieutenant Governor has some executive responsibilities, such as serving as acting governor when the Governor is out of the state, and is the first in the line of succession should the Governor be unable to perform his or her duties.” (Texas Politics. The Executive Branch. <http://texaspolitics.laits.utexas.edu>. The University of Texas at Austin, 2007.) A speaker pro tempore is elected at the beginning and close of each session and as needed to serve and perform the duties of lieutenant governor *in any case of absence or temporary disability of that officer*. (Article 3, Section 9(a)).

misconduct by an extraordinary vote requirement of two-thirds vote of the members present in the Texas Senate, the individual is removed from office.²

Neither the framers of the Texas Constitution or, by analogy, the framers of the United States Constitution, treat house members as "officers" for purposes of impeachment. See *Ferguson v. Maddox*, 114 Tex. 85, 97, 263 S.W. 888, 892 (1924). If the framers of the Texas Constitution - and subsequent legislatures - agreed with the position that Speaker Craddick espouses in his brief, specific reference would have been made to removing the Speaker by impeachment, as is the case with the Lieutenant Governor in Article 15, Section 2. To read these provisions otherwise would require the attorney general to engage in an "activist interpretation" of the law by substantially expanding the plain meaning of these provisions when there is no legal or historical basis for doing so.

There are no judicial, legislative, or other precedents that apply Article 15, Section 7 to any elected official other than an executive officer. The attorney general has adopted the view that impeachment is prescribed as a measure of removal only for those officers who are named as officers in the Texas Constitution:

"It is likewise to be observed that only those officers named in Article 15, Section 2 of the Constitution, are subject to impeachment. Impeachment is an unusual and expensive proceeding, and the Constitution does not contemplate that it may be used as a medium for removing from office any except the high and responsible officers of the state. The Legislature is commanded by Article 15, Section 7, to provide by law for

² "Judgment in cases of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under this State. A party convicted on impeachment shall also be subject to indictment, trial and punishment according to law." Article 15, Section 4, Texas Constitution.

the trial and removal from office of minor officials of the state, and this it has done." (Att'y General No. O-898 (1939)).

In his brief, Speaker Craddick argues that he is an officer of the state and thereby subject to removal under Article 15, Section 7 because "a sovereign function of the government" is conferred upon him and can be exercised by him "for the benefit of the public largely independent of the control of others." Sadly, this analysis muddies the waters with specious legal interpretations of constitutional provisions and parliamentary procedures that have served the state well since the earliest days of the Republic. Moreover, this view ignores a basic notion: that there are 150 members of the house elected by voters in their respective districts (Article 3, Section 2) and that *no member* -- including one who is selected as Speaker--can perform such a function:

"Under ordinary conditions, the authority of the presiding officer is derived wholly from the body itself. The presiding officer is the servant of the body to declare its will and obey its commands." (Mason's Sec. 578. Also see Cushing's Legislative Assemblies, Sec. 294).

Nor does a member who is elected by the house to preside as Speaker serve for a fixed term like the other state officers such as the Governor or the Lieutenant Governor³. In short, there is simply no legal authority to support the notion that person who is selected as Speaker by the House when it first assembles⁴ is entitled to *remain* in that position for two years. In fact, there are numerous authorities that stand for the opposite proposition:

³ Article 4, Sections 4 and 16, Texas Constitution.

⁴ Article 3, Section 9(b), Texas Constitution, requires the House, when it first assembles, to "proceed to the election of a Speaker from its own members."

"A speaker may be removed at the will of the house and a Speaker pro tempore appointed." (Jefferson's Manual, 2 Grey, 186. 5 Grey, 134).

"Complaint of the conduct of the presiding officer should be presented directly for action by the house, in which case the presiding officer should vacate the chair and call a member to preside until the matter is settled." (Mason's Manual, Section 126).

"A presiding officer who has been elected by the house may be removed by the house upon a majority vote of all the members elected, and a new presiding officer pro tempore elected and qualified." (Mason's Manual 581).

"When there is no fixed term of office, an officer holds office at the pleasure of the organization or until a successor is elected and qualified." (Mason's Manual 582).

"A proposition to elect a Speaker is in order at any time and presents a question of the highest privilege." (Canon's House Precedent VIII, 3383).

The qualifications and removal of members of the legislature, including a member who is elected by members to preside as Speaker, are governed by Article 3 of the Texas Constitution, and in particular, Article 3, Sections 8, 9, 11, 13, and 23. Article 3, Section 8 authorizes each house to judge the qualifications and election of its own members.⁵ Article 3, Section 9(b), requires the House, when it first assembles, to "proceed to the election of a Speaker from its own members." (See discussion, *supra*). Article 3, Section 11, places jurisdiction for determining the rules of its own proceedings and for the expulsion of a member in each respective house. This constitutional provision is not unique to Texas; it is consistent with both the U.S. Constitution and most state constitutions⁶. Article 3, Section 23, provides that a vacancy is created if a senator or representative moves his residency from the district or county from which he was elected. Article 3, Section 13 establishes the procedures for filling such vacancies.

⁵ Also see AG Opinion O-1702 (1939)

⁶ U.S. Constitution, Article 1, Section 5, Mason's Manual of Procedure, Section 3, and Cushing's Legislative Assemblies, Section 792

Under these provisions, a member who serves as Speaker and who is expelled would obviously be removed as Speaker of the house as well. A question relating to the title of members to their seats is likely a "privilege of the house" which may be raised under House Rule 5, Sections 35-39.⁷

These provisions confirm that Article 15, Section 7 does not apply to the legislature (e.g., members of the House and the Speaker that they duly elect). Therefore, the Speaker is not a "constitutional officer" or "state officer" for purposes of this provision.

Question Two: Effect of Impeachment on Membership in the House

As previously noted, Article 15, Section 7 does not apply to the office of Speaker because the Speaker is not a "state officer." In fact, such a construction of the Texas Constitution would conflict with Article 3, Section 11, which allows the House to prescribe its own rules for the expulsion of members, including members of the House. If, *arguendo*, there is such a conflict, the Texas Supreme Court has established a clear standard for resolving the conflicting constitutional provisions:

"In construing apparently conflicting constitutional provisions, a general provision must yield to a special provision."⁸

Rather, a Speaker may be expelled under the Texas Constitution from membership in the House like any other member. Article 3, Section 11 specifically addresses procedures for expulsion of members of the legislature by their respective houses and stands for the proposition that a member may be removed from the legislature by a process other than impeachment by the House and trial by the Senate. In addition,

⁷ Under congressional precedent, the "right of a member to his seat may come up at any time as a question of privilege, even though the subject may have been referred to committee." (3 Hind's Precedents 2584).

⁸ Carrollton-Farmers Branch I.S.D. v. Edgewood I.S.D. (Tex. 1992); San Antonio & A.R. Ry. Co. v. State (1936); County of Harris v. Shepperd (1956); and City of San Antonio v. Toepperwein (1911).

both the dicta of *In re Texas Senate*⁹ and House precedent¹⁰ underscore the fact that the House can prescribe its own procedures for removing a presiding officer and that those procedures are not limited by Article 15, Section 7.

Question Three: Power of the House to Select a New Speaker after the Session Has Commenced

There are several provisions that govern the selection of Speaker:

Article 3, Section 9(b), provides that "the house shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a speaker from the members;"

Article 3, Section 11, allows the house to determine the rules of its own procedures, including those for the election of a Speaker;¹¹

Article 3, Sections 12 and 41, govern how votes are taken in Speaker elections; and

Rule 1, Section 10, House Rules, authorizes the Speaker to appoint a Speaker pro tempore.

None of these provisions preclude the House from selecting a new presiding officer if the office of Speaker is declared vacant. Moreover, none of these provisions support the contention that the house may not *create* a vacancy in the office of Speaker by a simple majority vote.¹² In other words, inherent in the right to select a presiding officer is the right of the body to remove that presiding officer and the framers of the Texas Constitution and subsequent legislatures have declined to reject longstanding parliamentary law which prescribes the resolution of these issues by the membership:

⁹ 36 S.W.3d 120-121 (Tex. 2000).

¹⁰ 12 House Journal, Texas House of Representatives, 12th Legislature, 1474-83 (1871) in which the Speaker was removed by majority vote.

¹¹ Page 11 House Journal 80th Regular Session, January 9, 2007.

¹² 12 Texas House Journal, pp. 1474-1483.

"A speaker may be removed at the will of the house and a Speaker pro tempore appointed." (Jefferson's Manual, 2 Grey, 186. 5 Grey 134).

"A presiding officer who has been selected by the house may be removed by the house upon a majority vote of all the members elected, and a new presiding officer pro tempore elected and qualified." (Mason's Manual, Section 581).

"A proposition to elect a Speaker is in order at any time and presents a question of the highest privilege." (Canon's House Precedent VIII, 3383).

Question Four: Absolute Power

The question of whether the Speaker's power of recognition is absolute and without appeal has been discussed extensively by others who have submitted briefs. As many members of the House indicated during the final days of the 80th Regular Session, the view that such a power is inherent in the Speakership is extreme and not supported by law or precedent. Consequently, for purposes of Question 4, this brief adopts the arguments (and the legal authorities cited) by the other interested parties who have submitted briefs where those arguments underscore that neither the House Rules, House precedent, the Texas Constitution, nor parliamentary law were ever intended to create a divine Speakership that undermines the power of the members to remove their presiding officer. Any other view would subject the House that elected that Speaker to an outright abuse of discretion, create an entitlement to the office, and shield that presiding officer from the ultimate form of accountability.¹³

¹³ Our Speaker's position—that the chair's power of recognition is absolute and unappealable—is curious given the role that he played as one of the "insurgents" (or "Dirty Thirty") who challenged the abuse of power by Speaker Gus Mutscher during the Sharpstown scandal, and one wonders whether Speaker Craddick as a member back then would have considered the legal position that he so fervently articulates today as rational or reasonable.

Throughout the years, the members have consistently adopted rules that give the Speaker the power to control the order of business and other important functions of the House. The delegation of this power does not, however, bestow *absolute* authority upon the Speaker to determine whether a member will be recognized on *any matter*, including a question of privilege. I simply do not believe that the people of Texas sent their representatives to the Texas House to represent their districts and conduct the state's business while having their interests subjected to the "caprice or passion" of the Speaker.¹⁴

"A chairman does not sit here to expound rules according to his own arbitrary views. A just deference for the opinions of his fellows should constrain him to give precedent its proper influence; and until the House shall reverse them, to give them all the consideration which is due to cases heretofore settled by a solemn decision of the House."¹⁵

¹⁴ Preface, Jefferson's Manual of Parliamentary Practice, xlii.

¹⁵ Hinds Congressional Precedents, Volume II, 1317