STATE OF TEXAS

August 3, 2007

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

Re: Scope of the authority of the Office of Speaker of the Texas House of Representatives (RQ-0589-GA)

Dear Attorney General Abbott:

The undersigned members of the Texas House of Representatives hereby file the attached brief with respect to A.G. Opinion Request No. 0589-GA. In reviewing the queries submitted in the Request, we believe they can be distilled into the following four questions of law:

1. Is the member selected as Speaker of the House of Representatives subject to removal from the speakership by impeachment under Article XV of the Texas Constitution?

2. If the Speaker of the House of Representatives is not removable by impeachment under Article XV of the Texas Constitution, is the Speaker considered to be one of the "officers of this State" for which the Legislature must "provide by law for the trial and removal from office" under Article XV, section 7 of the Texas Constitution?

3. If the Speaker of the House of Representatives is not removable by either impeachment or trial pursuant to statute as prescribed in Article XV of the Texas Constitution, do the powers granted by Article III of the Texas Constitution to the House of Representatives carry with them the power to remove the Speaker by majority vote?

QUESTION ONE

> Is the member selected as Speaker of the House of Representatives subject to removal from the speakership by impeachment under Article XV of the Texas Constitution?

The Representatives contend that the member selected by the House to be its Speaker is not subject to impeachment under Article XV of the Texas Constitution. Section 1 of that article vests the power of impeachment in the House of Representatives. Section 2 provides that impeachment of certain enumerated executive and judicial officers shall be by trial in the Senate.[1] The Texas Constitution is different from the United States Constitution, and many other state constitutions, which often also include a class of officials subject to impeachment, rather than limiting impeachment to just certain officials. *See, e.g.*, U.S. CONST. art. II, § 4 ("President, Vice President and all civil Officers" may be impeached); *In re Speakership of the House of Representatives*, 25 P. 707, 709 (Colo. 1891) ("'[G]overnor and other state and judicial officers . . . shall be liable to impeachment'"); *State ex rel. Haviland v. Beadle*, 111 P. 720, 722 (Mont. 1910) (same); *Maben v. Rosser*, 103 P. 674, 675 (Okla. 1909) ("'Governor and other elective state officers, including the justices of the Supreme Court, shall be liable and subject to impeachment'"); *State ex rel. Zimmerman v. Dammann*, 228 N.W. 593, 595 (Wis. 1930) ("The house of representatives shall have the power of impeaching all civil officers of this state'"); Op. Me. Att'y Gen. 94-1 (1994) ("'Every person holding any civil office under this State may be removed by impeachment'").

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[1] These officials include "the Governor, Lieutenant Governor, Attorney General, Commissioner of the General Land Office, Comptroller and the Judges of the Supreme Court, Court of Appeals and District Court." TEX. CONST. art. XV, § 2.

"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." Op. Tex. Att'y Gen. No. O-898 (1939). Accordingly, based upon the language of our Constitution the Attorney General has opined that "only those officers named in the provisions of Article 15, Sec. 2 of the Constitution, are subject to impeachment." *Id.*; *accord* Op. Tex. Att'y Gen. No. JC-0418 (2001) ("A member of the Railroad Commission is not an officer subject to impeachment under article XV, section 2 of the Texas Constitution."). Although no Texas court case has ruled on this issue, the Supreme Court has noted generally that the "sections of Art. XV [provide] for the removal by impeachment or other prescribed modes, [of] named officers of the Executive Department and Appellate and District Judges in the Judicial Department." *Knox v. Johnson*, 141 S.W.2d 698, 701 (Tex. Civ. App.—Austin 1940, writ ref'd). This language clearly supports the opinion of the Attorney General that impeachment is limited to those officers listed in Article XV.

However, even if the Constitution gives the Legislature broader impeachment power, it would still not allow for removal of an officer of the House through impeachment. *See, e.g.*, 2 GEORGE D. BRADEN, ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 708 (1977) ("Arguably, therefore, the legislature has power to impeach and try any state officer except a member of the legislature."). In discussing whether aldermen of the City of Texarkana were "'officers of said city,'" and thus subject to removal by the city council under its charter, the Texarkana Court of Appeals noted that it "has long been held and accepted as settled law that a legislator is not a 'civil officer,' the speaker of a legislative assembly is not a

'state officer,' the members of state Legislatures are not 'officers of the state,' subject to impeachment, and this will hold true even though the State Constitution may fail to expressly give the legislative body control over its own members." *Diffie v. Cowan*, 56 S.W.2d 1097, 1101 (Tex. Civ. App.—Texarkana 1932, no writ). Indeed, the general rule from early on has been that legislators are not officers subject to impeachment. In 1797 the United States Senate determined that a Senator was not an officer of the United States subject to impeachment. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2294, at 644, § 2318, at 679 (1907); *accord* 17 Op. Att'y Gen. 419, 420 (1882) ("[A] member of Congress is not an officer of the United States in the constitutional meaning of the term.").

State constitutions have likewise been consistently interpreted as excluding members of the legislature from the definition of officers subject to impeachment. *See Hiss v. Bartlett*, 69 Mass. (3 Gray) 468, 473 (1855) ("It is suggested that the true remedy is by impeachment. But that form of proceeding has never been applied to members of the legislature."); *Beadle*, 111 P. at 722 ("Members of the legislative assembly are not liable to impeachment."); *Maben*, 103 P. at 675 (holding that construing constitution to allow impeachment of legislative members would conflict with constitutional authority of each house to discipline or expel its own members, and thus court would not adopt such an interpretation); *Dammann*, 228 N.W. at 595 ("[T]he framers of the Constitution did not intend . . . to authorize the impeachment by the Legislature of its own members.").

In a case directly on point, the Colorado Supreme Court has held that even though the speaker of its house was charged with the "duty of receiving, opening, and

publishing the election returns for state officers" and that "in a certain contingency the duties of the governor may devolve upon him," that did not make the speaker a "state officer" subject to impeachment. *In re Speakership*, 25 P. at 708-10. Likewise, in an opinion by the Attorney General of Maine, he concluded that the terms "'civil office'" and "'any office'" in the Maine Constitution as they related to removal by impeachment and address did not "include officers of the Legislature," specifically the speaker of the house. Op. Me. Att'y Gen. No. 94-1. As the opinion pointed out, "it would have been historically inconsistent for the framers of the Maine Constitution to have involved other constitutional institutions of the State, such as the Senate and the Governor, in the removal of the officers of the House." *Id.* This is because the form of government adopted by Maine in its constitution "derives from prior British practice," and in parliamentary history, "[i]mpeachment was not . . . a power exercised by one house against the other, or by one house and the King and Queen against the other." *Id.*

This reasoning is equally applicable to the scope of impeachment under the Texas Constitution. As the Supreme Court has noted, "[w]hen the Constitution of Texas was adopted, it was done in the light of, and with a full knowledge and understanding of, the principles of impeachment as theretofore established in English and American parliamentary procedure. The Constitution in this matter of impeachment created nothing new. By it, something existing and well understood was simply adopted." *Ferguson v. Maddox*, 114 Tex. 85, 97, 263 S.W. 888, 892 (1924). Accordingly, it should not be imputed to the framers of the Texas Constitution that they had any intention to require impeachment of legislative officers. Based upon the foregoing, the Representatives contend the Speaker of the House is not subject to

impeachment under Article XV and that the first question should be answered in the negative.

QUESTION TWO

> If the Speaker of the House of Representatives is not removable by impeachment under Article XV of the Texas Constitution, is the Speaker considered to be one of the "officers of this State" for which the Legislature must "provide by law for the trial and removal from office" under Article XV, section 7 of the Texas Constitution?

The Constitution has made it mandatory upon the Legislature to "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. Because legislative members and legislative officers are not "officers of this State" under this provision, it has no applicability to the removal of such officers, including the Speaker of the House.

The legal authorities previously cited in connection with the first question are equally applicable to this query. As the court in *Diffie* stated, the well-settled law in this country is that "a legislator is not a 'civil officer,' the speaker of a legislative assembly is not a 'state officer,' the members of state Legislatures are not 'officers of the state,'" as it relates to constitutional procedures for removing officers. *Diffie*, 56 S.W.2d at 1101. The Speaker of the House thus would not be an "officer of this State" under this constitutional provision. The Supreme Court of Colorado had before it a similar provision, which provided that "'all officers not liable to impeachment shall be subject to removal . . . in such manner as may be provided by law.'" *In re Speakership*, 25 P. at 710. In response to the argument that this provision embraced the speaker of the house and thus he could be removed only pursuant to a statute, the court stated that "it certainly cannot be maintained that the subordinate officers of the house, having once been chosen, and not being liable to impeachment, cannot be removed . . . simply

because no statute has been provided for their removal." *Id*. at 711. Because the speaker, as one of these officers of the house, "derives his office by election from the house to hold at the pleasure of the house; hence he may be removed by the house," even in the face of this constitutional provision. *Id.*

The argument against including the Speaker of the House within the class of officers subject to article XV, section 7 is even stronger under the Texas Constitution. First, that provision mandates a "trial," which the Supreme Court has determined requires "a hearing of evidence according to rules of law, and the rendition of a judgment by some legally constituted judicial tribunal of competent jurisdiction." *Knox*, 141 S.W.2d at 701. Because the Constitution has not granted the House of Representatives the power to sit as a judicial tribunal, if the Speaker were subject to this provision then the Legislature would have to pass a statute providing for his removal by trial in front of some other body that has the power to act as a judicial tribunal. As this mode of removing legislative officers was completely unknown in either English or American law, *see* Op. Me. Att'y Gen. No. 94-1, it would make no sense to impute such an intention to the framers of our Constitution. Rather, as with those constitutional provisions at the state and national level which deal with impeachment, the term "officers" should not be read to include those members selected to serve at the pleasure of their respective houses.

Second, article XV, section 7, and its predecessor sections in earlier Constitutions, have received a continuous and uninterrupted construction by all Legislatures that these provisions have no application to legislative officers. Since statehood, the Constitution has required the Legislature to enact a statutory means of removal for all

officers whose removal is not provided for by the Constitution. *See* TEX. CONST. OF 1845, art. IX, § 6 ("The legislature shall provide for the trial, punishment, and removal from office, of all other officers of the State, by indictment or otherwise."); TEX. CONST. OF 1861, art. IX, § 6 (same); TEX. CONST. OF 1866, art. IX, § 6 (same); TEX. CONST. OF 1869, art. VIII, § 6 (same); TEX. CONST. art. XV, § 7 ("The 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 for in this Constitution."). As the Attorney General has noted, the "Legislature is commanded by [the Constitution] to provide by law for the trial and removal from office of minor officials of the state, and this it has done." Op. Tex. Att'y Gen. No. 0-898, at 3. In fulfilling this mandate, however, no Legislature has apparently ever interpreted these constitutional references to "all officers" as including legislative officers, and thus there is no record that it has promulgated a removal statute for the Speaker. Instead, the only recorded instance we have of the removal of a Speaker was accomplished by a resolution to declare the office of Speaker vacant that was passed by a majority vote. *See* H.J. OF TEX., 12th Leg., R.S. 1474-83 (1871) (removal of Speaker Ira Hobart Evans).[2] In the matter of Speaker Evans, there is absolutely no record of any

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[2] Although those uninitiated in parliamentary procedure might view a resolution or motion to declare the speaker's office or chair vacant as nothing more than a recognition of something that has already occurred, it is the parliamentary procedure through which a sitting speaker is removed without his or her consent. *See, e.g.*, *In re Speakership*, 25 P. at 707 (noting that the membership of the Colorado house successfully "sought to depose [the] speaker" by a "motion . . . that the office of speaker of said house be declared vacant"); 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES: INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE § 35, at 24 (1935) (noting unsuccessful attempt to depose Speaker Joseph Cannon through resolution that "the office of Speaker of the House of Representatives is hereby declared to be vacant") [hereinafter CANNON'S PRECEDENTS]; Tom Raum, *Gingrich Won't Seek House Changes*, July 22, 1997, http://www.washingtonpost.com/wp-srv/national/longterm/gingrich/gingrich.htm (last visited July 27, 2007) (reporting on the role of

resignation and he was presiding as Speaker when the resolution to remove him was offered and approved.[3]

Under these circumstances, the Supreme Court has noted that the "'rule is that contemporaneous construction of a constitutional provision by the Legislature, continued and followed, is a safe guide as to its proper interpretation.'" *Walker v. Baker*, 145 Tex. 121, 126, 196 S.W.2d 324, 327 (1946) (orig. proceeding) (citation omitted). Additionally, "'while not conclusive, the construction given by the Legislature to those provisions of the Constitution dealing with legislative procedure is entitled to great weight.'" *Id*. (citation omitted). In this case, the Legislature has clearly determined that legislative officers are not considered "officers of the State" for the purposes of these constitutional provisions, and as such this construction is entitled to great weight and would be followed by the courts of this State.

Although the removal of Speaker Evans occurred under the 1869 Constitution, because the 1876 Constitution adopted the same language regarding removal of all other state officers, it would receive the same construction as the Legislature had previously given to the earlier provision. *See Trigg v. State*, 49 Tex. 645 (1878) (holding that where a new constitution adopted a prior constitution's provisions for removal of officers by the district court, the construction placed upon the prior provision would be placed upon the provision adopted in the new constitution). Under that 1869

Majority Whip Tom DeLay in a "failed plan to topple [Speaker] Gingrich" and stating that "DeLay had given them the go-ahead to offer a motion to 'vacate the chair'").

[3] In those instances in which a Speaker has resigned, that fact has been noted in the legislative journals and the members have either simply elected a new Speaker, H.J. OF TEX., 62nd Leg., 2d C.S. 3-33 (1972) (resignation of Speaker Gus F. Mustcher), or voted to accept the resignation before electing a new Speaker. *Id*., 31st Leg., 2d C.S. 6-7 (1909) (resignation of Speaker Austin Milton Kennedy).

Constitution, the Speaker had the duty of declaring the results of the gubernatorial election, TEX. CONST. OF 1869, art. IV, § 3, thus exercising a portion of the State's sovereignty. Despite that exercise of sovereignty, the Legislature clearly considered the Speaker not to be a state officer whose removal required a trial.[4] As the foregoing federal and state authorities show, where the removal of legislators and legislative officers are concerned, the constitutional definitions of the term "officer" have never received such a construction. Rather, as applied to legislative officers, such terms have received a practical interpretation, taking into account the intent of the framers, the separation of powers inherent in our constitutional systems, and the long history of plenary power exercised by legislative bodies over their members and officers, to conclude that legislative officers are not "officers" subject to impeachment or removal by any other authority than the legislative body that selected them. The established principles for construing the Texas Constitution are in accord with using such factors to interpret its provisions. *Tilton v. Marshall*, 925 S.W.2d 672, 677 n.6 (1996) ("The construction of any provision of the Texas Constitution depends upon factors such as the language of the constitutional provision itself, its purpose, the historical context in which it was written, the intention of the framers and ratifiers, the application in prior

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[4] Although the Texas Supreme Court has a long line of cases defining what constitutes a public officer under various provisions of the Constitution, these cases are of no real value in determining the present question. The definitions in those cases are intended to distinguish between an officer and an employee, and not to determine whether the framers intended the Speaker to be an officer such that his removal would require a judicial trial in a forum other than the House. *See, e.g., Green v. Stewart*, 516 S.W.2d 133, 135 (Tex. 1974) (setting out test for officer that courts use to distinguish "between an officer and an employee"); *Aldine Independent School Dist. v. Standley*, 154 Tex. 547, 555, 280 S.W.2d 578, 583 (1955) (same); *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740-41 (Tex. Civ. App.—Galveston 1949, writ ref'd) (same); *Walton v. Brownsville Nav. Dist.*, 181 S.W.2d 967, 969 (Tex. Civ. App.—San Antonio 1944, writ ref'd) (same).

judicial decisions, the relation of the provision to other parts of the Constitution and the law as a whole, the understanding of other branches of government, the law in other jurisdictions, state and federal, constitutional and legal theory, and fundamental values including justice and social policy."). While the current Speaker has been given certain appointive powers, and thus exercises more of the sovereign authority than did speakers under the 1869 Constitution, this is solely a difference of degree and not of character. There is no power that has been given the current Texas Speaker that would result in revising the definition of a state officer under our Constitution so as to now include the Speaker. *See Jones v. Ross*, 141 Tex. 415, 419, 173 S.W.2d 1022, 1024 (1943) ("It is the settled law of this State that the provisions of our State Constitution mean what they meant when they were promulgated and adopted, and their meaning is not different at any subsequent time.").

This has certainly been the case under the U.S. Constitution. After its adoption the Speaker of the U.S. House of Representative was given appointive powers. *See, e.g.*, Ch. 262, 15 Stat. 232 (1868) (providing that the U.S. Speaker will appoint two members to the board of a federally incorporated school for the disabled). Despite this granting of a portion of the sovereign power to the speaker, a movement to remove the U.S. Speaker did not resort to impeachment as would be required for a civil officer. Rather, the means of the proposed removal was a resolution that proposed to vacate the office of the Speaker. CANNON'S PRECEDENTS § 35, at 23-24. Currently, the U.S. Speaker enjoys not only this appointment power, but many others. *See, e.g.*, 16 U.S.C. § 715a (providing for the Speaker to appoint two members to the Migratory Bird Conservation Commission); 36 U.S.C. § 2302(b) (providing for the Speaker to appoint five members of

the United States Holocaust Memorial Council). In spite of this exercise of the sovereign powers of the federal government, the U.S. Speaker has not become a civil officer under the U.S. Constitution and is still subject to removal by a majority of the House. JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED NINTH CONGRESS, H.R. Doc. No. 108-241, at 150 (2005) ("A Speaker may be removed at the will of the House, and a Speaker pro tempore appointed.") [hereinafter HOUSE RULES MANUAL]. [5]

Based upon the foregoing, the Speaker of the House is not one of the "officers of this State" for which the Legislature must provide for removal by trial under article XV, section 7, and therefore the second question should be answered in the negative.

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[5] "The House rules manual reflects positions taken by prior Congresses" on the interpretation and application of their rules. *Powell v. McCormack*, 395 U.S. 486, 509 (1969).

QUESTION THREE

> If the Speaker of the House of Representatives is not removable by either impeachment or trial pursuant to statute as prescribed in Article XV of the Texas Constitution, do the powers granted by Article III of the Texas Constitution to the House of Representatives carry with them the power to remove the Speaker by majority vote?

If the Speaker of the House is not subject to removal by impeachment or by trial pursuant to statutory authority, then he is either not subject to removal or the authority for his removal lies elsewhere. The Representatives contend that pursuant to the plenary power given the House over its own affairs by sections 8, 9 and 11 of article III of the Texas Constitution, it may remove any of its officers, including the Speaker, by a majority vote.

Article III, section 9 provides that the "House of Representatives shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a Speaker from its own members." TEX. CONST. art III § 9(b). It also provides that each "House shall choose its other officers." *Id*. § 9(c). This provision mandates no required procedure for the selection of a Speaker, and thus a majority vote would be sufficient to select such officer, assuming a quorum is present. *Cf.* Op. Tex. Att'y Gen. No. V-226, at 1 (1947) (noting that a majority vote is sufficient to enact legislation). Moreover, although the Texas Constitution directs the House, after it first assembles, to temporarily organize and then proceed to select a Speaker, it gives no date or deadline by which this act must occur, does not state that the Speaker's election is for a certain period of time, and no where prohibits the House from choosing a Speaker at any other time. Accordingly, the Speaker of the House has no fixed tenure of office and the House is free to remove one Speaker and select another at any time.

The Legislature itself has recognized that the Constitution prescribes no date certain for the election of a Speaker and that a majority of the House may choose the date of such selection. TEX. GOV'T CODE § 302.001 ("When the house of representatives first convenes in regular session and a quorum is present and has been qualified, the house shall elect a speaker unless a majority of the members present decides to defer the election."). This statute comports with the absence of any such fixed date in article III, § 9(b). Moreover, "'while not conclusive, the construction given by the Legislature to those provisions of the Constitution dealing with legislative procedure is entitled to great weight.'" *Walker*, 145 Tex. at 126, 196 S.W.2d at 327 (1946) (citation omitted). Thus, there is no fixed date for electing the Speaker.

As with the date for electing the Speaker, the Legislature has also determined that the Constitution provides no fixed end date for the Speaker to serve in that office. The current Constitution contains no set term of office for the Speaker. The statutes relating to the organization of the House, however, provide that the Secretary State, or in his absence the Attorney General, will preside over the House until the election of the Speaker. TEX. GOV'T CODE §§ 301.003(a), (b); .006(a). These provisions reveal legislative recognition of the constitutional absence of any term of office for the Speaker. If the Speaker had a fixed term, then he would serve as the presiding officer of the House until the election of his successor. The Constitution provides that "[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." TEX. CONST. art. XVI, § 17. This provision applies to legislators generally. *See* Op. Tex. Att'y Gen. No. V-760 (1949) (opining that when the

representative elected in the 104th District for the 51st Legislature resigned before taking the oath of office, the representative elected in such district for the 50th Legislature continued to serve until his successor was elected and duly qualified). The position of Speaker is not embraced by the term "all officers" in this provision, in that no Speaker continues to preside until his successor is qualified.

This distinction is made clear when one looks at the presiding officer of the Senate, the Lieutenant Governor. This officer is elected for a four-year term and during that time has the primary responsibility of serving as the President, or presiding officer, of the Senate. TEX. CONST. art. IV, § 16(a), (b); *id.* interp. commentary (noting that the Lieutenant Governor "has only potential rather than actual executive powers," and that his "normal duties . . . are legislative for he is the president of the Senate [but as] the presiding officer of that body he has no vote except in case of a tie or when the senate sits as a whole"). As an officer with a fixed term of office, an outgoing Lieutenant Governor presides over the Senate until his successor is duly qualified. *See, e.g.*, S.J. OF TEX., 76th Leg., R.S. 1, 27 (1999) (outgoing Lieutenant Governor Bob Bullock presided over the Senate prior to the incoming Lieutenant Governor, Rick Perry, having taken the constitutional oath of office). A Speaker of the House, however, with no set term of office serves, as will be shown hereafter, at the will and pleasure of the body that elected him, and thus is not an "officer" that continues to occupy the position of Speaker until his successor is qualified.

Ordinarily, in the absence of a term for a particular office, the Constitution provides that the term shall not exceed two years. TEX. CONST. art. XVI, § 30(a).

However, it is clear that the position of Speaker is not an "office" under this provision. In reviewing the term of office for the presiding judge of an administrative judicial district, this office opined that this position did not constitute an "office" under article XVI, section 30. Op. Tex. Att'y Gen. No. M-305 (1968). Relying upon prior precedent which held that the office of presiding judge was not a "civil office of emolument" under article XVI, section 40(a), the opinion stated that "'the position of presiding judge of the administrative district [is not] an office that a regularly elected district judge is forbidden by the Constitution to hold and exercise. Its functions are judicial in nature, are not inconsistent with the constitutional duties of the district judge, and should, in our opinion, be regarded simply as superadded duties that the Legislature was authorized to require district judges to perform.'" *Id.* (quoting *Eucaline Medicine Co. v. Standard Inv. Co.*, 25 S.W.2d 259, 261 (Tex. Civ. App.—Dallas 1930, writ ref'd). Similarly, the office of Speaker is one which simply has superadded duties of a member of the House, which duties are not constitutionally inconsistent with the Speaker's legislative office, and thus does not come within the term of office set out in article XVI, section 30(a). As such, the office of Speaker carries with it no fixed term under the Constitution.

The general rule is that "[w]hen the tenure of office is not fixed by the constitution, nor by the law, and there is no provision for removal from office, its tenure is during pleasure" of the appointing authority. *Keenan v. Perry*, 24 Tex. 253 (1859); *accord Dorenfield v. State ex rel. Allred*, 123 Tex. 467, 474, 73 S.W.2d 83, 87 (1934) ("'Where, therefore, the tenure of the office is not fixed by law, and no other provision is made for

removals, either by the Constitution or by statute, it is said to be "a sound and necessary rule to consider the power of removal as incident to the power of appointment."'") (citation omitted). Thus, the power given to the House by the Constitution to elect a Speaker by majority vote carries with it by necessary implication the power to remove the Speaker by a majority vote at the pleasure of the House.

Those authorities that have considered this question have been unanimous in their adoption of this rule as it applies to legislative officers, including presiding officers. In *Cliff v. Parsons*, 57 N.W. 599, 600-01 (Iowa 1894), the secretary of the state senate was selected by a majority vote pursuant to a constitutional provision stating that "'[e]ach house shall choose its own officers'" and a statute providing that "'officers elected by either house shall hold their offices only during the session at which they were elected.'" Subsequently, the secretary of the senate was removed by a majority vote. *Id.* at 600. The Supreme Court of Iowa upheld the legality of the removal. It held that the statutory language above-quoted did not operate to create a tenure fixed by law for the senate secretary. *Id*. at 601. Accordingly, it applied the general rule that "'where the tenure is not fixed by law, and where the office is held at the pleasure of the appointing power, the power of removal is incident to the power of appointment; and it is well settled in such case that an officer may be removed without notice or hearing.'" *Id.* at 601 (citation omitted).

In *Malone v. Meekins*, 650 P.2d 351, 353-54 (Alaska 1982), a majority of the house desired to remove its speaker and elect a new presiding officer. When the speaker "learned that there was an ongoing movement to replace him as Speaker," he delayed calling the house to order past the 10:00 a.m. time for convening set out in the house

rules. *Id*. With the speaker and other members absent, the house majority leader convened the house and, by majority vote, removed the current speaker and elected a new speaker. *Id*. at 354. In a lawsuit filed by the deposed speaker, the Alaska Supreme Court upheld his removal. It specifically noted the Alaska Constitution "provides that '[e]ach house may choose its officers and employees.'" *Id*. at 355. It held that "[a]t least two concepts are implicit in this grant of authority: (1) each House has the exclusive power to remove as well as choose its own officers without any participation by the other House; (2) a majority vote of the members of the body is all that is required to either elect or remove an officer." *Id*. at 355-56. The court additionally held that no notice, hearing or debate prior to removal was required by due process or free speech and that even if the house's rules required such notice, a violation of those rules would not invalidate the acts of the majority in removing one speaker and selecting another. *Id*. 357-60.

The Attorney General of Maine, in answering the question of a representative, opined that because the Maine "Constitution does not fix the tenure of the Speaker's office, . . . the Speaker must be viewed as serving at the pleasure of the House of Representatives, and therefore may be removed and replaced at any time by a majority of the House of Representatives." Op. Me. Att'y Gen. No. 94-1. Additionally, although the rules of the Texas House of Representatives are silent on the matter of removing a speaker, they provide that if "the rules are silent or inexplicit on any question of order or parliamentary practice, the Rules of the House of Representatives of the United States Congress, and its practice as reflected in published precedents, and Mason's

Manual of Legislative Procedure shall be considered as authority." TEX. H.R. RULE 14, § 1, Tex. H.R. 3, 80th Leg., R.S., 2007 H.J. OF TEX. 63, 145 [hereinafter TEX. H.R. RULE]. The annotated and updated Jefferson's Manual, contained in the House Rules Manual for the U.S. House of Representatives notes that "[a] Speaker may be removed at the will of the House, and a Speaker pro tempore appointed." HOUSE RULES MANUAL, at 150 (2005). Likewise, Mason's manual states that a "presiding officer whose been elected by the house may be removed by the house upon a majority vote." NAT'L CONFERENCE OF STATE LEGISLATURES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 581, at 423 (2000); *see also* Op. Ind. Att'y Gen. No. 77-29 (1977) (relying upon Jefferson's Manual in advising that, if presiding officers refuse their constitutional duty to sign a bill that has been passed by the houses, the "members of the Houses could remove the presiding officers upon their refusal to perform their duties and appoint other persons to fulfill their duties").

In addition to its authority to choose its Speaker, the House has the exclusive authority to "be the judge of the qualifications and election of its own members" and to "punish members for disorderly conduct, and, with the consent of two-thirds, expel a member." TEX. CONST. art III, §§ 8, 11. The Colorado Supreme Court, in addition to the inherent power of removal that accompanies the power to select the speaker, relied upon identical powers enumerated in its constitution to hold that members of its house had the authority to remove a speaker. In that case, a majority of the members of the Colorado house proposed a motion to vacate the speaker's office, which the speaker refused to entertain. Following the speaker's refusal, a member of the house on his own called for a vote on the motion and it passed by a majority vote. After this motion, the

speaker declared upon a *viva voce* vote that the house was adjourned, following which a majority of the members elected a new speaker from among the membership. *In re Speakership*, 25 P. at 707.

In response to a request from the governor to declare who was actually speaker, the court held that "[u]pon investigation and reflection, we are satisfied that, as a purely legal proposition, the house of representatives has the power, by the vote of 'a majority of the whole number of members elected,' to remove its speaker from office, and to elect another in his stead, in the manner stated in the executive communication submitted." *Id*. at 711 (quoting COLO. CONST. art. V, § 22, which specifies the vote necessary to pass a bill). In support of its holding, the court initially concluded that:

> From the foundation of representative government in this country, the general rule, as announced by standard American authors on parliamentary law, has been that the legislative body of a state, having the power to choose its own speaker from its own members, has also the inherent power to remove such officer at its will or pleasure, unless inhibited from so doing by some constitutional or other controlling provisions of law. Such is the doctrine announced in the Manual of Parliamentary Practice prepared and published by President Jefferson during the early days of the republic, and republished by the authority of successive congresses of the United States since that period. It is unnecessary to speak of the pre-eminent merit of this work, or of the distinguished character and ability of its author. In Cushing's Law and Practice of Legislative Assemblies, a comprehensive work of great merit, the distinguished author, at paragraph 299, says: "The presiding officer, being freely elected by the members, by reason of the confidence which they have in him, is removable by them, at their pleasure, in the same manner, whenever he becomes permanently unable, by reason of sickness or otherwise, to discharge the duties of his place, and does not resign his office; or whenever he has, in any manner, or for any cause, forfeited or lost the confidence upon the strength of which he was elected." In Hatsell's Precedents of Proceedings in the House of Commons, a very old and valuable treatise, (volume 2, p. 230,) it is said: "The speaker, though he ought upon all occasions to be treated with the greatest respect and attention by the individual members of the house, is in fact, as was said on the 9th of March, 1620, but a servant to the house, and not their master;

> and it is therefore his first duty to obey implicitly the orders of the house, without attending to any other commands."

Id. at 708. The court then turned to its constitution to determine whether that document prohibited the house from removing a speaker. Not only did the court hold that its constitution did not inhibit the house's removal power, but found that other constitutional powers granted the house of representatives actually supported its exercise of that authority. Upon review of the Colorado Constitution's grant of power to the house to judge the qualifications of its own members, which power is similar to that granted the Texas House in article III, section 8, the court held that:

> "each house [is] the ultimate tribunal of the qualifications of its own members. The two houses, acting conjointly, do not decide. Each house acts for itself, and by itself; and from its decision there is no appeal, not even to the two houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each house is empowered to pass upon the present qualifications of its own members."[6]

Id. at 710 (quoting *State v. Gilmore*, 20 Kan. 551 (1878)). Moving on to the provision of its constitution giving the house the right to discipline its members, which provision is substantively identical to article III, section 11 of the Texas Constitution, the court held that:

> The power is granted to the house, not to the officers of the house, and is to be exercised by a majority of the members. . . . . Since the house of representatives is thus invested, for its own protection, with inherent power in the matter of disciplining its members, since it may deprive a member of his office as representative, an office to which he has been chosen by the electors of his

[6] This same analysis would apply to the power to select a Speaker. Even though the Texas Constitution provides that the power should be exercised when the House "first assembles," the fact that the House exercises its authority at that time would not exhaust such authority and it may used whenever the majority deems it necessary to remove a Speaker and elect another.

> district for a specified term, and thus deprive him of his emoluments, *a fortiori* may the house remove the speaker from an office given to him by the house itself, not for any definite term, and to which no emoluments are attached,—an office, too, as we have seen, which he is to hold, and the duties of which he is to exercise, at the will and pleasure of the house, according to immemorial usage. It is easy to conceive how the power to remove the speaker by the majority of the house may become necessary in order that legislation may be proceeded with in accordance with the will of such majority.

Id. Thus, in addition to the House's inherent constitutional power of removal that accompanies its power to select the speaker, the authority granted by the Texas Constitution for the House to judge the qualifications of and discipline its members provides additional authority the House to remove the Speaker by majority vote. Moreover, there is nothing in the Constitution that divests the House of the authority to remove its presiding officer.

The Legislature, in removing Speaker Evans, affirmatively exercised its removal power under the Constitution of 1869, and there is nothing in the present Constitution that purports to take that authority away. Under the Constitution of 1869, the House was commanded, "when assembled" to elect a Speaker. TEX. CONST. OF 1869, art. III, § 15. This provision is substantively identical to the present command to the House to, "when it first assembles, organize temporarily, and thereupon proceed to the election of a Speaker." TEX. CONST. art. III, § 9(b). It simply adds language reflecting the common practice of the House to first organize temporarily and then to elect a Speaker. If the framers of the current Constitution had it in mind to strip the House of its power to remove the Speaker, it borders on the absurd to conclude that they would have done so by simply adding the word "first." Rather, the most expedient method of removing this power from the House would have been to insert a provision stating words to just that

effect, rather than simply just inserting the word "first" into article III, section 9. *See Cox v. Robison*, 105 Tex. 426, 437-38, 150 S.W. 1149, 1155 (1912) (holding that had "the authors of this [constitutional] provision intended it to have a prospective operation and effect, they could, and it is fair to assume that they would, have used terms whose undoubted common use and meaning would have made that intention plain"). The fact that the constitutional convention of 1875 failed to include such a prohibition is decisive evidence that it did not intend to take from the House its power to remove its Speaker. *See, e.g.*, *Lyle v. State*, 80 Tex.Crim. 606, 612-13, 193 S.W. 680, 682 (1917) (holding that if framers of 1876 Constitution had intended to provide Legislature with general authority to pass local option laws, which authority was denied under former constitution, "the most expedient way to have given expression to this intention would have been to have included in the Constitution of 1876 a provision giving the general authority to pass such law," and framers inclusion of a limited authority instead "strongly indicate[d]" an intention to keep the general prohibition). Indeed, the House itself recognizes that there may be Speaker elections during a regular session and has seen fit to regulate such elections when they occur. TEX. H.R. RULE 1, § 18, at 67 (prohibiting solicitation of written pledges to vote for a certain individual for Speaker for an election occurring during the regular session).

Additionally, the different provisions for the election of the Speaker and the President pro tempore of the Senate evidence no intent by the framers to provide different powers of removal by those respective legislative bodies. Article III, section 9(a) provides that at the "Senate shall, at the beginning and close of each session, and at other such times as may be necessary, elect one of its member President pro tempore."

Unlike the Speaker, the Constitution gives the President pro tempore the duty of assuming the governorship in the absence or incapacity of both the Governor and Lieutenant Governor. TEX. CONST. art. IV, § 17(a). The framers thus simply recognized that because the President pro tempore may need to assume the duties of governor, there may be other times in which it is necessary to elect a replacement. The framer's acknowledgment that the Constitution's provisions for gubernatorial succession might require this eventuality can in no way be interpreted as a denial of any removal power that resides in the House based upon its plenary power over its members. Because of the significant constitutional difference between the Speaker and the President pro tempore, the provisions for their selection would not be interpreted together nor need any harmonizing, in that they are not "provisions affecting the same thing." *Duncan v. Gabler*, 147 Tex. 229, 234, 215 S.W.2d 155, 159 (1948).

Based upon the foregoing, the Texas House of Representatives has the constitutional power to remove its Speaker by majority vote. Thus, the third question should be answered in the affirmative.

QUESTION FOUR

> If the House of Representatives has the power to remove its Speaker by majority vote under Article III of the Texas Constitution, would a rule giving the Speaker the power to prevent a removal vote violate the Texas Constitution?

In the last legislative session, the Speaker of the House determined that under House rules he had the absolute power to disallow any motion, whether privileged or not, by refusing to grant recognition. Assuming this truly to be the import of the House rules, such a rule would violate the constitutional privilege of a majority of the House to exercise its authority to judge the qualifications of a member, discipline a member, or remove a House officer, including the Speaker.

The rules of the House of Representatives in the 80th legislative session, which were adopted by a vote of 142 to 0, provided that before granting recognition to a member to speak on a matter, the Speaker could inquire as to the purpose for which recognition is sought and "then decide if recognition is to be granted." TEX. H.R. RULE 5, § 24, at 105, 185. The rules further state that "[t]here 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." *Id.* at 105. This same rule has been part of the House rules since at least 1971. H.J. OF TEX., 80th Leg., R.S. 6441 (2007). The House rules also provide that "[q]uestions of privilege shall have precedence over all other questions except motions to adjourn," and that "[q]uestions of privilege shall be those affecting the rights of the house collectively, its safety and dignity, and the integrity of its proceedings." TEX. H.R. RULE 5, §§ 35(1), 36, at 106.

In this past legislative session the Speaker, for the first time that has been ascertained, interpreted these rules to mean that he can deny recognition for privileged motions so as to prevent their being heard, even though the rules give such motions precedence over all other House business except motions to adjourn. H.J. OF TEX., 80th Leg., R.S. 6438-41 (2007). Even assuming that the Speaker was correct in his interpretation of these rules,[7] such an interpretation would violate the Texas Constitution, and thus must give way to the rights and privileges accorded to the House by that document.

A legislative body's implementation of rules of procedure pursuant to constitutional authority is ordinarily within its sole discretion. *Terrell v. King*, 118 Tex. 237, 246-14, 14 S.W.2d 786, 789 (1929). However, a legislative body "'may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the

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[7] Although the Representatives assume that the Speaker is correct for purposes of this brief, it is apparent that his interpretation of the rules is in error. As Thomas Jefferson noted, the very purpose of legislative rules of procedure is to ensure "that there may be a uniformity of proceeding in business not subject to the caprice of the Speaker or captiousness of the members." HOUSE RULES MANUAL at 127. It is the very definition of absurdity to conclude that the members of the House voted unanimously to enact rules that make every piece of House business subject to the whim and caprice of the Speaker. Moreover, as previously noted, the House rules also provide that if they are "inexplicit on any question of order or parliamentary practice" the rules and practice of the U.S. House of Representatives "shall be considered as authority." TEX. H.R. RULE 14, § 1, at 145. Although the Speaker believed that the House rules were explicit on the question of whether a privileged motion may be blocked by a Speaker's non-recognition, a look at the U.S. House's rules and practice will show otherwise. Although not written into the U.S. House rules, by longstanding interpretation those rules provide, just like the Texas House rules, that the speaker may inquire as to what matter a member proposes to raise before conferring recognition and that as to recognition there is no appeal from the speaker's ruling. *See* LEWIS DESCHLER, DESCHLER'S PRECEDENTS, INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION AND LAWS, AND TO DECISIONS OF THE COURTS, ch. 29, §§ 8.12-.14, at 9611-13, §§ 9.5-.6, at 9635-37 (1976). Despite the U.S. House's rules and practice being exactly the same as the Texas House, it is clear that under the U.S. House rules the speaker is obliged to recognize a member on a privileged motion, when there is no motion of higher privilege offered or pending. *Id.* ch. 6, § 4.31, at 491.

rule and the result sought to be attained.'" *United States v. Smith*, 286 U.S. 6, 33 (1932) (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)). As this office has noted, the authority of each house of the Legislature to "'determine the rules of its own proceedings' . . . must be construed narrowly to apply only to matters of procedure" and "does not include action which goes beyond formality and substantially affects substantive rights." Op. Tex. Att'y Gen. No. JM-122 (1983).

A rule of either house, therefore, has no greater right to impinge upon the power of each house than would a statute passed by both houses. For example, in *In re Texas Senate*, 36 S.W.3d 119 (Tex. 2000), the Texas Supreme Court held that the Texas Open Meetings Act's prohibitions on secret meetings of the Legislature could not encroach upon the right of a majority of the Senate to select their officers by secret ballot as guaranteed by article III, section 41 of the Texas Constitution. Thus, an act of the Legislature outlawing secret legislative meetings could not take away from the Senate its constitutional right to elect its officers by secret ballot. *Id*. at 120. Likewise, in *Ferguson v. Maddox*, 114 Tex. 85, 98-99, 263 S.W. 888, 892-93 (1924), the Supreme Court considered the interplay between the Senate's power of impeachment and the State's criminal statutes. In that case, it was argued that a judgment of impeachment entered by the Senate disqualifying the governor from any future office was invalid as it was not a prescribed punishment for impeachment found in the State's criminal statutes. The Supreme Court noted that article XV, section 4 of the Constitution gave the Senate the power to impose such a punishment in an impeachment proceeding, and thus to the extent that the criminal statute sought to withhold this power, "it is plainly void." *Id*. at

99, 263 S.W. at 893. Thus, an act of the Legislature could not withhold from one house of the Legislature a power conferred upon it by the Constitution.

Likewise, a rule of the House may not withhold a power conferred upon it by the Constitution. For example, the Constitution gives each house of the Legislature the power to punish its members by a majority vote or expel any member by a two-thirds vote. TEX. CONST. art. III, § 11. If the Legislature passed a statute stating that the House could not punish or expel a member without the permission of the Speaker, such a statute would clearly be repugnant to the quoted constitutional provision and "plainly void." A House rule which purports to place the same limitation upon the House's power to punish or expel a member would also be void. The House as a body has the constitutional power to punish and expel members by the requisite number of votes, and neither it as a separate body nor the Legislature as a whole can withdraw that power and premise its exercise upon the concurrence of a single member.

Because the Constitution gives the majority of the House the power to remove a Speaker, its rules cannot give a veto to any single member over the use of that authority. As the cases previously cited reveal, the constitutional power to elect a speaker carries with it the constitutional authority to remove such officer. Likewise, the precedents of the U.S. House of Representatives show that it considers that a motion to remove a speaker "presents a question of constitutional privilege." HOUSE RULES MANUAL at 150-51. As such, any rule or statute that would purport to give a single member veto power over the use of this authority is repugnant to the Constitution and must give way to the authority of a majority of the House to exercise its constitutional perquisites and privileges. *Cf. Malone*, 650 P.2d at 355-56 (holding that where a joint rule provided that

the speaker served for a two year term, amendment or suspension of this rule by vote of 2/3 of each house was not necessary to remove the speaker, as enforcement of such a rule would "effectively frustrate the will of a majority of a legislative body and involve each House in the selection of officers of the other"). Based upon the foregoing, to the extent the Speaker is correct in his interpretation that the House rules give him the power to prevent the House from voting on the constitutionally privileged motion of removing the Speaker, such rules violate the Constitution. Accordingly, the fourth question should be answered in the affirmative.