

## SECRET BALLOTS-OVERRULED

Representative King raises a point of order against further consideration of Geren amendment in that the Geren Amendment would not immediately release the results of the members vote for speaker until “all committee assignments have been made for the 80th Legislature”. Representative King argues that the Geren Amendment constitutes a secret ballot and Article 3, Section 12, of the Texas Constitution, which requires the “yeas or nays of the members on any question shall, at the desire of any three members present be entered on the journals. as well as Rule 5, Section 51 of the Temporary Rules and other temporary rules of the House relating to the recording of votes and entry of the votes on the journal.

Specifically, Representative King states that the very nature of a secret ballot is such that the a member’s vote for speaker can not be ascertained or can not be ascertained for a set period of time and the purpose of Article 3, Section 12 , and Rule 5, Section 51, and other temporary rules, the entering of the “yeas and the nays” on the House Journal is thwarted. Strong policy arguments for and against a secret ballot have also been raised in the argument and in the accompanying debate to this amendment.

First, as a general rule and as noted in explanatory note 1 to Rule 1, Section 9 of the Rules of the 79th Legislature , the presiding officer of the House “though many sessions...have followed a plan of refusing to rule on constitutional points not related to legislative procedure...” The point of order in this case deals with such a legislative procedure and it is in order for the Presiding Officer to consider it.

Turning to the merits of the point of order, the resolution of which requires examining the Texas Constitutional provision relating to the election of a Speaker, the past practices of the

House, and recent decisions of the Texas Supreme Court in the case entitled, *In Re Texas Senate*.

Each of these points will be examined in turn:

#### A. Constitutional Provisions Relating to the Election of a Speaker

In addition to reviewing Article 3, Section 12, there are three provisions of the Texas Constitution that relate the ability of the House to select procedures to elect a Speaker. Article 3, Section 9 requires that the House “shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a speaker from its own members”. Article 3, Section 11, makes it clear that this House may determine the rules of its own procedures, which includes adopting rules for the procedure for electing a speaker. And finally, Article 3, Section 41, states that “in all elections by” the House, the vote “shall be given viva voce, except in the election of their officers.” All of these provisions, as well as Article 3, Section 12, were included in the 1876 Constitution.

Examination of these rules indicates some tension between the 4 constitutional provisions. Representative King and others argue that Article 3, Section 12, mandates the recording of the “Yeas and Nays” despite the Article 3, Section 41's language that appears to indicate that the House may use a method other than a viva voce method to elect a legislative officer. Opponents of the point of order argue the Article 3, Section 12 does not apply to a non-viva voce vote conducted under Article 3, Section 41, because either the selection of a candidate in a speaker election is not either a “yea” or a “nay” on a “question”. Finally, opponents argue that if Article 3, Section 12 were read to require all votes to be recorded at the request of three members, no election of officers could be done by nonrecord ballot, including a secret ballot, effectively writing out the provision of Article 3, Section 41. There appears to be no recorded Texas cases or Attorney General opinions examining the tension between these two provisions

and the issue has not been discussed and recorded in the House journals, and the members have offered no authority on this issue.

It is important to note that Texas Courts do have a well established standard in dealing with conflicting constitutional provisions. "In construing apparently conflicting constitutional provisions, a general provision must yield to a special provision." See *Carrollton-Farmers Branch I.S.D. v. Edgewood I.S.D.*, 826 S.W.2d 429 (Tex. 1992); *San Antonio & A.P. Ry. Co. v. State*, 128 Tex. 33, 95 S.W.2d 680, 686 (1936); *County of Harris v. Shepperd*, 156 Tex. 18, 291 S.W.2d 721, 726 (1956); *City of San Antonio v. Toepperwein*, 104 Tex. 43, 133 S.W. 416, 417 (1911). The only provisions of the four constitutional provision that specifically deals with the election of a speaker are the timing requirements of Article 3, Section 9, and the explicit recognition of non viva voce voting requirements for the election of legislative officers under Article 3, Section 41.

#### B. HOUSE PRACTICE REGARDING ELECTION OF SPEAKERS

The history of the House must also be considered. Beginning with the first regular session of the Texas Legislature in 1846 , secret ballots (or ballots in which the vote of each member can not be ascertained by recording in the Journal) have been used 50 times as a method for selecting the Speaker of the House. The last time that the secret ballot method of speaker selection was used was in 58th Legislature in 1955. In addition to election by secret ballot, the members of the House have also used a record vote using the voting machine or paper ballot, acclamation, and acclamation following the announcement of the results of a secret ballot to select a Speaker. It is clear that the history and practice of the House has allowed the members wide latitude to determine the method of election for Speaker.

But the fact that secret ballots have been allowed in the past is not determinative. The journals of the House for the years in which a secret ballot was used do not disclose whether there was any objection to the use of the secret ballot under any general objection or a specific Article 3, Section 12 objection.

In fact, to the best of our knowledge, only one public written opinion by a presiding officer or parliamentarian on the matter has ever been issued. In 1992, Representative John Hirschi requested the Parliamentarian to make a determination of whether a secret ballot was constitutional. A copy of the letter and the response of the parliamentarian is attached. The Parliamentarian, in responding to the letter, wrote that Article 3, Section 41 of the Texas Constitution, allowing other votes other than viva voce votes for the election of a Speaker, does not govern such an election. Rather, the parliamentarian determined that “a principle of constitutional interpretation requires that all applicable provisions be read together and, to the extent possible, each be given effect. The parliamentarian wrote “the house can adopt any procedure it chooses for electing a speaker, including a secret ballot, a voice vote, a record vote, or some other method, unless three members request a record vote. If a record vote is requested by three members, the only way to give effect to Section 12 is to conduct a record vote. “ The parliamentarian continued “The House has used secret ballots, I believe, because a majority of its members chose to do so and no three members requested a record vote”.

Because this is the only written document on the issue by a parliamentarian or a presiding officer and because it was distributed to all members of the 72nd Legislature, it is a useful barometer of the state of mind as to the parliamentarian’s thoughts in 1992 but the value of this written opinion is tempered by the fact that it was not raised by a member during a legislative proceeding, it was not considered by or debated by the body, or determined by the House’s

presiding officer. So, it is unclear whether the letter was anything more than an expression of the parliamentarian's opinion.

### C. In Re Texas Senate

In the years since the parliamentarian's written interpretation, a significant case was determined by the Texas Supreme Court, In re Texas Senate. In 2000, members of the Texas Senate determined that the chamber would vote for the replacement of the departing Lt. Governor by a secret ballot. Members of the news media sued the Texas Senate and the Senate's presiding officer contending that the Senate was prohibited by the Texas Open Meetings Act from electing one of its members to perform the duties of Lieutenant Governor by any method other than a viva voce vote in open session. In their initial petition to the trial court, the media plaintiffs, much like the 1992 Parliamentarian's letter, argued that Article 3, Section 12 required the Senate to hold a non-secret record vote if requested by three or more members.

In briefing the case before the Supreme Court, The Senate noted that Article 3, Section 41 of the Texas Constitution was recognition that "the framers did not intend all votes to be public...they expressly provided in the Constitution that voting for the election of officers in the House of Representatives and the Senate could be properly closed. In Footnote 4 of the Senate's brief, the Senate noted that an open vote is required by Article 3, Section 12 if requested by any three Senators "is not supported by the text of Section 12,[and...] is inconsistent with the constitution's express approval of closed votes in elections for officers..... The Senate argued that Section 12 requires that the "yeas and nays" of the members be recorded, "but it presupposes a viva voce vote; otherwise there are no "yeas and nays". Further the Senate argued, if Section 12 were read to require all votes to be recorded at the request of three members, no election of officers could be done by nonrecord ballot except on near unanimity. That would be inconsistent

with Section 41, which contemplates closed voting in any or all elections for officers.” See Brief of Petitioners, *The Texas Senate, In Re Texas Senate and the Honorable Rodney Ellis*, Cause Number 00-1321, at page 6, Footnote 4.

The Supreme Court determined that the Senate could proceed by secret ballot. See *In Re Texas Senate*, 36 S.W.3d 119 (Tex. 2000). While the Court’s opinion did not directly address the effect of Article 3, Section 12 on the ability to request a secret ballots, the unanimous Court made very clear several principles:

**First**, Article 3, Section 41 “clearly gives each House of the Legislature the authority to elect its officers by means other than a viva voce vote.” *Id.* at 120.;

**Second**, Article 3, section 41 authorizes each legislative chamber “to elect its officers by secret ballot, should it choose to do so”. *Id.*; and

**Third**, Arguments based on policy concerns for or against a secret ballot are not for the Court (or a presiding officer) to consider. [T]he Constitution, by allowing but not requiring a secret ballot, commits that choice to the this chamber. *Id.* at 121.

Examining the history of these Texas Constitutional provisions and the special specific provision regarding Article 3, Section 41, the practice of the House in actually conducting elections by secret ballot and other methods, and the unanimous Texas Supreme Court decision in *In re Texas Senate* which included that Court’s strong recognition that each legislative chamber’s authority under Article 3, Section 41 of the Texas Constitution to elect it officers by means the chamber determines is best, the Presiding Officer is of the opinion that the Texas Constitution leaves solely to the members of this House the authority to determine the manner of election of the Speaker of the House, including by a means other than a viva voce vote,

including by a secret ballot.

Additionally, the Texas Constitution is clear that arguments based on policy concerns for or against a secret ballot are not the presiding officer to consider but are rather properly and wisely entrusted to the members of the Texas House. In short, the members must make this determination themselves.

Accordingly, the point of order is respectfully overruled