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## SUPPLEMENT

FIRST DAY — TUESDAY, JANUARY 9, 2007

### **HR 35 - DEBATE**

REPRESENTATIVE CHISUM: If we adopt this resolution we're going to have some amendments offered that basically deal with whether or not we have a secret ballot. So the members of the house will have an opportunity to amend this document to have a secret ballot or to not have a secret ballot, whichever one they choose to do, and I just want to point out to the members that merely adopting this did not cut off any amendments to the resolution that is before us, is that correct?

CHAIR (secretary of state in the chair): That is correct, but anybody who has amendments needs to get them up here.

REPRESENTATIVE HILL: In the previous conversation I understood you to say that this resolution would be adopted and then amendments would be offered, but that is not the correct procedure, is it?

CHAIR: Let me clarify that. What we're going to do is to lay it out and then take amendments as they come to us. It has been laid out so now we're waiting on amendments. Like I said, if anyone has amendments we need them up here now. For what purpose, Mr. Eiland?

REPRESENTATIVE EILAND: Will Mr. Hartnett take the mic for a few questions?

CHAIR: Chair recognizes Mr. Hartnett.

EILAND: Mr. Hartnett, just so everybody understands the procedure that we're fixing to go through and what has basically been agreed on by the individuals who filed resolutions regarding this process. First, eventually the sergeant-at-arms will pass out to each member a blank ballot with a line to print the name of a speaker nominee who is going to be nominated from the floor and who receives seconds, correct?

REPRESENTATIVE HARTNETT: That's correct and that is essentially agreed to.

EILAND: Right, and then after they pass out the ballots each member will have, like mine will say, Craig Eiland, District 23. There will be a space to print the name of one of the speaker candidates. I can choose to print that speaker candidate's name at my desk if I choose or there will be a place beside the box

we're going to deposit the ballots to write it so that nobody else can see it, correct?

HARTNETT: That's correct.

EILAND: The members will have to print the name of their choice for nominee and then sign their name where indicated by their district.

HARTNETT: That's correct.

EILAND: We release the parties that worked on the resolution. There is no dispute as to that particular process.

HARTNETT: Correct. Basically the text in **HR 35** has been agreed to and worked out and now we're getting to the amendments which will be disputed.

EILAND: Right, and, so everybody knows, these amendments, at least that I know that are coming, there will be one amendment, yours, eventually, that says that the individual's vote—each members vote after it's counted and the speaker is nominated and takes office—their vote will be made public and entered into the journal as soon as possible and, it's assumed, sometime today.

HARTNETT: That's correct and it will be the paper ballot that you just described.

EILAND: There will be another amendment offered at some point that says that the votes cast by the individual members will not be made public until the day after committee assignments come, and then they will be made public and placed in the journal.

HARTNETT: Yes, I believe that will be Mr. Geren's amendment.

EILAND: There may or may not be another amendment that would keep the votes confidential forever. The ballots would be destroyed after the speaker takes the oath.

HARTNETT: Say that again. If this is another amendment, I'm not familiar with that.

EILAND: There may be another amendment that says the votes of the individuals for their candidates will be confidential forever and that the ballots will be destroyed after the speaker is sworn in. That's the three proposals that we know of that may be coming.

HARTNETT: I think Representative Merritt has filed something like that.

EILAND: That is basically the process that we are going to undergo.

HARTNETT: Yes. Hopefully, we will get to these amendments and decide our business fairly quickly at that point.

CHAIR: Members, now again if you have amendments please bring them up at this time. Let the presiding officer know if you have amendments to file.

REPRESENTATIVE DUTTON: As I understand, Mr. Secretary, we're still on **HR 35**. Is that correct?

CHAIR: Correct.

DUTTON: And that house resolution, there are three separate amendments to that resolution on the chair's desk at this point?

CHAIR: We have two amendments, one of which will be offered as an amendment to an amendment. Let me correct myself. We have three amendments, one of which will be offered as an amendment to an amendment.

DUTTON: My question is, what happens if **HR 35** fails and the amendments fail?

CHAIR: If that happens the chair will have to decide to take up another resolution.

DUTTON: Is there a default position? What I'm asking is, if a member were in favor of voting for speaker in the traditional method, which is where we vote from our desks and light up the board, is that in any of the amendments to **HR 35**?

CHAIR: It is not.

DUTTON: So that is not a default position?

CHAIR: That is right.

DUTTON: And so if all of these failed, we would have another resolution spelling out an additional procedure to elect the speaker.

CHAIR: That is correct.

DUTTON: Is it too late to offer a default position as an amendment to **HR 35**?

CHAIR: Representative, if you have an amendment and if you get it down here.

DUTTON: Okay.

CHAIR: That's what we're waiting on.

HARTNETT: Thank you, Mr. Secretary. Members, I would just like to comment, we did consider the board vote and one thing that we're a little concerned about is the issue of the verification and the mechanical malfunctions. So that's why we shied away from that. Definitely Chairman Dutton is correct, that's a viable alternative. We just figured that if we got enough clear-cut alternatives on the table that certainly if this resolution goes down we'll need to try the variations on the theme.

REPRESENTATIVE P. KING: I know that we're going to have some amendments today dealing with the voting process. Could I get a clarification from the parliamentarian on Article III, Section 12? I understand that it requires a record vote if requested by any three members on any issue before the house, and that also we've adopted the rules of the 79th as our temporary rules today and I believe that Rule 5, Section 51, allows for a single member to call for a public record vote on any issue before the house. Is that correct?

CHAIR: Let's let the parliamentarian look it up and we'll respond to your question. Thank you. Representative King, would you restate your question so we make sure that we give you the proper answer?

P. KING: I'm asking for clarification or interpretation of the Texas Constitution Article III, Section 12, which appears to require that on the request of any three members of the house that a record vote will be taken on any vote. And then along with that we have adopted today as our temporary rules the rules of the 79th and in those rules, Rule 5, Section 51 also seems to require a record vote if any member so moves.

CHAIR: That's correct. On these amendments being offered today you are entitled to a record vote.

P. KING: Now, if one of those amendments is to require a secret ballot is it possible for that amendment then to overrule the constitution if three members at the time of voting on the secret ballot request a public record vote?

CHAIR: Parliamentarian wants to have you restate the question.

P. KING: I'm sorry, I'm not being very clear. My question is that assuming we did pass a secret ballot, would it not be overruled by the Texas Constitution if three members move for a record vote? In other words, is it not correct that regardless of what we do today that Article 3, Section 12 supersedes any vote we take on an amendment to this resolution number 34? Mr. Secretary, my concern is that in addition to what we do here today we open a can of worms for future action beyond this vote today if we have violated the Texas Constitution. Because I'm very confident that if there was a secret ballot and the amendment passed at least three members would request a record vote when we vote for speaker.

CHAIR: Representative King, we're dealing here in a hypothetical.

P. KING: I'm trying to avoid a point of order after we go through a lot of work.

CHAIR: Raise that at the appropriate time, the chair can rule accordingly. This is asking the chair to decide a point of order before we raise it

P. KING: . Would that point of order be appropriate at the time that the amendment for a secret ballot is brought forward or would it be appropriate at the time we actually begin to vote on the speaker?

CHAIR: Are we assuming that a secret ballot has passed?

P. KING: No. Two steps. First, if an amendment for a secret ballot is brought forward or for any delay in a public vote and a record vote is brought forward, is that the proper time to raise that point of order?

CHAIR: That is correct.

P. KING: Thank you.

CHAIR: Members, has everyone submitted their amendments? Do we have all amendments? We have one more amendment that we are waiting for. It shouldn't be too much longer.

REPRESENTATIVE THOMPSON: Would you entertain a motion for the election of the speaker until Thursday of this week?

CHAIR: I will not.

THOMPSON: Thank you.

CHAIR: Members, right now you are receiving two amendments that deal with public versus private ballots. Please review these amendments.

REPRESENTATIVE GEREN: Mr. Secretary, did you just describe one of the amendments as a secret ballot?

CHAIR: I did and I was incorrect.

GEREN: Neither one calls for a secret ballot, the two that are being distributed, is that correct?

CHAIR: That is correct.

GEREN: Thank you very much, sir.

CHAIR: Does everyone have a copy of the two amendments? Raise your hand.

P. KING: This may be a point of information instead of a parliamentary inquiry. Am I correct that a couple of sessions back when the senate had an in-house voting process to elect a lieutenant governor that that was a secret ballot at that time. Am I correct?

CHAIR: That is correct.

P. KING: It has been suggested that the reason that that was later released was because the Texas Open Records Act required those votes to be made public. Does the parliamentarian know if that is correct? My concern is again that if it is correct, if that's what happened on the senate side of the Open Records Act, then it would obviously happen here and if we're going through all the time and trouble of voting today and even if there were amendments for secret ballots and even if those were approved, then ultimately the records would be released under the Open Records Act. Just trying to find out if that's a possibility.

CHAIR: Representative, those votes were released by the senators voluntarily.

P. KING: Was it not also the subject of an open records request?

CHAIR: The parliamentarian would have to research that to make that determination.

P. KING: I think that would be good for the house to know because as I recall they were released voluntarily only after an open records request was filed.

CHAIR: She will do that now.

REPRESENTATIVE SWINFORD: I would like some clarification. We are going to have two resolutions come to us. Let's just say for instance the one that we've already got, if it passed does that cut the other resolution off, the amendment to the resolution?

CHAIR: We have two competitive amendments and there is no definitive right for one to be offered over the other. We have agreed to a coin toss to determine which amendment will go first. Once that amendment is laid out—

SWINFORD: You are going to vote on both amendments, right?

CHAIR: You can offer it as an amendment to an amendment. And a motion to table.

SWINFORD: That's not my question. If you have two amendments, one of them provides for a record vote and one doesn't and one of them passes, does it cut the other one off?

CHAIR: Yes, it will.

EILAND: Based on some of the comments that have been made previously, I want to check and see—I think most of them left—but the case dealing with the senate electing Senator Ratliff as lieutenant governor went to the Third Court of Appeals and then eventually to the Texas Supreme Court, correct? So, therefore, I would think that it would be inappropriate—and I think they have all left—but if any member of the Third Court of Appeals or the Supreme Court is still here before we start discussing what their case says, we might want to ask them to leave. I don't know if they are still here. They were but I think they all got bored and left.

CHAIR: If the judges are still here you might come down and visit with the chair reference that. Representative King, could you approach the back mic?

P. KING: I'm here, Mr. Secretary.

CHAIR: You had asked a question earlier in regards to the Open Records Act. Chair's understanding is the request was made before the vote on the floor, and then the court held that the Open Records Act did not apply to that particular case. And the senators then voluntarily, some of them, decided to disclose their votes.

P. KING: So the correct statement would be that whatever action we'd take today would not be subject to the Open Records Act.

CHAIR: Based on that past, that is correct.

P. KING: Thank you.

GEREN: We have adopted as temporary rules the rules from the 79th Legislature. Is it not true that in those rules each member is required to vote from their desk if strict compliance is called, other than the two members who were debating the issue? And those two members' votes can be recorded in the front. Is that not correct?

CHAIR: That is correct.

GEREN: Thank you, Mr. Secretary.

[Amendment No. 1 by Hartnett was laid before the house.]

HARTNETT: Thank you, Mr. Secretary and members. Again, **HR 35**, the base amendment, is what everybody has agreed to—pretty much standard procedure. Now we're getting to the bone of contention which is what is going to happen to our ballots. Under either scenario we're going to cast paper ballots and the question is when will the public know how we have voted. My amendment is one page. It provides that each one of us will receive our paper ballot. We will be called in district order. We will come up, put our ballot into the box, then when everyone has deposited their ballot into the box, then the chief clerk will count the ballots, to be verified while he is counting by the secretary of state and the state auditor. Now the ballot, of course, must be signed and it will have the individual's name and our district number on the ballot. Upon the conclusion of the counting of the ballots, the secretary of state will release the tally and announce the tally of that particular vote. Then, as soon as possible, which is basically immediately, a tally sheet will be passed out to all the members on the floor showing how everyone voted on that particular vote, and at that point it becomes a record vote just like any other record vote that we cast. It will be recorded in the journal. The resolution that I filed initially had this roll call vote, but there was concern about everyone being in the same position and so this is a type of ballot where everyone will be in the same position.

Now the amendment that you will be presented with from Mr. Geren would have a similar procedure but would not release the signed ballots until after the committees are assigned. And I don't think we have ever done that in 160 years. My amendment is a typical record vote like we do all the time. It lets everyone know how we voted immediately. It provides transparency. It lets the public know how we have cast our vote on what is an extremely important decision for our state. I sent out an e-mail before coming here with an interesting quote from Paul Burka, who I don't always agree with, but I know many of us have been following his blog on this procedure. Mr. Burka basically endorsed what I am presenting to you, saying it's the fairest vote. It's the way to do it. It's the right way to do it. We don't need to hide. We don't need to play games. We don't need to dodge. We need to let everyone know how we voted and so my amendment is for a public vote which would be disclosed immediately rather than five weeks later.

HILL: Your definition of immediate would be that a list would be provided to all the members before any other action would be taken by this house?

HARTNETT: Absolutely. Before the next ballot, if there is another ballot, their results would be distributed.

HILL: So, we would stand at ease until that list was prepared and all members received it, so that we would all know, and the public would know, how this body had voted?

HARTNETT: Correct.

HILL: Thank you.

REPRESENTATIVE TALTON: Representative Hartnett, under your amendment, when would the ballots be released? Would they be today, or an hour from now, after the ballot?

HARTNETT: I believe it just provides that they would be tendered to the chief clerk. I think, technically, it would be for further disposition by this body, but my assumption would be they'd be a public record at that time.

TALTON: I understand, but under A, line 18, 19, and 20, it says: "shall release a copy of the tally indicating how each member voted as soon as possible after the Secretary of State announces the results."

HARTNETT: Yes.

TALTON: So we could probably assume today, is that correct, Under your amendment?

HARTNETT: Yes, the tallies would be released immediately.

TALTON: If a person was concerned about the members in this house and how they are treated, do you think the fairest way may be after committee assignments?

HARTNETT: We've never done that before, Robert.

TALTON: I understand, but we haven't had a speaker's race like this in over 40 years that I'm aware of.

HARTNETT: We've had lots of speaker's races.

TALTON: We have, but not like this. The last one I recall was after the Sharpstown Scandal, is that correct?

HARTNETT: 1975, I guess.

TALTON: I'm sorry, it's 31 years or thereabouts, would you agree with that?

HARTNETT: I think that's right.

TALTON: So I'll ask you again, do you think yours is a fair way, or do you think it's fair to the members to have it after committee assignments?

HARTNETT: I think mine is perfectly fair. I think I, as a member, have the right to know how my colleagues vote, and I think my constituents have a right to know how I vote.

TALTON: And I don't disagree with that, but I'm just saying I think that's where you and I may differ. Is that what it is, when you do it?

HARTNETT: I think that's what this is going to boil down to, is whether the individual votes are disclosed today or in several weeks.

TALTON: That's right. And it may be if you are concerned about protection of members and what occurs. Don't you think that it's better to wait until after committee assignments, and chairmen, and vice-chairmen?

HARTNETT: I think what the heart of this really is, is the people who've double-pledged and want to have their cake and eat it.

TALTON: Is protecting that member, regardless of what I think of, or you think of it, don't you think it's better to protect the members until after committee assignments, whether they're double or triple or whatever the case may be?

HARTNETT: I personally have no interest in protecting double-pledgers.

TALTON: So you do not want to protect members in general, is that what you're saying?

HARTNETT: My personal position is the right of the public to know how we vote today, and the right of the members to know how we vote today.

TALTON: The public will know, will they not, after committee assignments wouldn't they, Whether it's today or a month from now, which is probably about right for committee assignments?

HARTNETT: That's true, but I don't think that the needs of the few double-pledgers outweigh the needs of the citizens of Texas.

TALTON: Well, there's more than that I suspect, but don't you think what we really ought to be thinking about is protecting our body and integrity of this body? And what you're talking about is exposing people right now as they are and so forth as far as how they voted or how they pledged. Don't you think it would be better to do it after the committee assignments and the naming of chairmen and vice chairmen?

HARTNETT: I think that it's time that we show our cards today.

TALTON: So you want to show those people out, to show them for what they are, you really don't care about what happens to those folks, is that what you're telling us today?

HARTNETT: No, that's not true at all. I just don't think that that outweighs the needs of the citizens. Everything we do is a balancing test.

TALTON: But don't you care about the body? About protecting the body at least until after committee assignments?

HARTNETT: Again, it's a balancing test between the desires of openness and transparency and disclosure, versus the secrecy needs of a very small group of people.

TALTON: As you know, the supreme court has said we can do it any way we want to, isn't that correct, under Ellis?

HARTNETT: That's what we're about to vote on, yes.

TALTON: That's correct. Any way we decide to, and you don't agree with protecting members, and I appreciate your answer.

REPRESENTATIVE MARTINEZ FISCHER: Representative Hartnett, I'm curious, without your amendment, with the current rule that we have now, is there anything that would stop me from telling whoever who I voted for for speaker?

HARTNETT: Well, you can say whatever you want, of course.

MARTINEZ FISCHER: So, we don't need your amendment for me to go outside and tell my constituents or tell your constituents how I voted.

HARTNETT: Well, if it's not in the journal, it's not official.

MARTINEZ FISCHER: Well again, I think my word's official. Is your word official?

HARTNETT: Not under the law, I hate to say it.

MARTINEZ FISCHER: So when you swear and take an oath, your word's no good?

HARTNETT: It's good.

MARTINEZ FISCHER: I just want to be clear for these members, we have some new members. Nothing stops anybody from telling anyone how they vote for speaker, correct?

HARTNETT: Certainly you have that privilege if it's decided to be withheld until several weeks.

REPRESENTATIVE BRANCH: Representative, your approach seeks to have the names disclosed as soon as possible or promptly or immediately, is that correct?

HARTNETT: Immediately after each vote.

BRANCH: And the other approach that's been highlighted to us, or at least announced, would delay that at some point, is that correct?

HARTNETT: It would be delayed several weeks, correct.

BRANCH: I guess we could do that about a lot of votes in here, on taxes and these difficult issues. We could ask all these votes to be delayed so that we could have some time to deal with the consequences of our votes.

HARTNETT: It raises a lot of very interesting possibilities for politicians to delay the consequences of their votes.

BRANCH: So it seems to me this comes down to political courage. This is about the courage of your convictions and your votes, that you are ready to stand with your vote and let that be open and transparent. Isn't that what this is about?

HARTNETT: I think that's certainly an aspect to it.

BRANCH: Isn't that what people like us come down here and do, stand up and be counted?

HARTNETT: I can't argue with that.

REPRESENTATIVE MORENO: Mr. Hartnett, I can't see you but anyway, really this is a different election that we're having. You would agree with me, would you not, that this one of a kind? The only two people on this floor that have experienced this type of election is me and Representative Craddick. Nobody else on this floor has ever experienced elections like this in 42 years, so this is something different, would you agree with me?

REPRESENTATIVE HARTNETT: I'll take your word for it.

MORENO: Would you agree with me that neither side is attempting to hijack anybody else's vote, but what we're trying to do is make sure that the process and the member is protected for the same reason that we have this election? We feel that we were not treated equally in the past. That's the whole process, Mr. Hartnett.

REPRESENTATIVE HOCHBERG: Mr. Hartnett, this is unusual looking at the collected body here. You said in your conversation with Mr. Talton that the only purpose of delaying the release of names would be to protect, I believe you called them, double-pledgers or something like that. Why would it be limited to that? It seems to me that the fear of retribution, or the fear of unfair treatment, would not be limited to double-pledgers, but to anybody who found themselves on what became the wrong side, and I don't know what side that's going to be, and I don't know if you know which side that's going to be. You've said a number of times this is about protecting just a few members and there was a balancing act, and wouldn't you agree with me that it's really about a lot of members and a lot of districts, rather than just a few?

HARTNETT: I hear what you're saying Scott, but I think both sides have pretty solid lists and I think this is down to just a handful of people.

HOCHBERG: Well, I haven't seen any of those lists, and I don't know how many members in here have seen those lists, and I don't know whether you or I would believe those lists if we saw them, so I'm not real interested in seeing them. Is it then inherent in your proposal and in your logic that if you are on the side that loses, then you deserve to be a backbencher and do not deserve to participate fully in the proceedings of this body, and therefore we need to know who the people are right now before we make those committee assignments, to make sure those people are appropriately punished.

HARTNETT: Well, this quickly gets into some major political—

HOCHBERG: Please understand that I'm not attributing that to one side or the other, and I don't know that it matters in terms of what we're discussing here. What we're trying to get to is something where the house will work in its best possible way, regardless of which side wins.

HARTNETT: We can have all kinds of shades to these kinds of policy arguments, but we have to get back to reality, and that is first, what we're talking about on the opposing amendment has never been done before. Secondly, it would create all kinds of precedents for this body to try and hide its votes in other circumstances. I would love a lot of tough votes that I've cast to be able to delay them for a month, two months, three months. Of course, after an election, but that's probably too greedy, but just delay them a month or so so that the hoopla and the uproar fade and the attention fades and then the impact of that vote is dissipated as far as my personal career. I think the public is entitled to know right away how we vote.

HOCHBERG: Mr. Hartnett, wouldn't those scenarios that you're speculating about be in violation of the constitution, which limits our ability to have a secret vote strictly to the election of our officers? So those scenarios that you're worried about really wouldn't occur.

HARTNETT: I think that doesn't prohibit us from doing it, it just limits the ability to do so. If we want to do that as a body, we can do that. We have that power to defer the release of any vote we cast for as long as we want. We can do exactly what the Geren amendment will propose on anything we want to do, within the limits of the constitution.

REPRESENTATIVE JACKSON: Representative Hartnett, do you think the integrity of this house stands in the ballots?

HARTNETT: It's hard for me to really cast something that sweeping, Jim, because this is both an internal and external debate, and I don't want to cast aspersions on any of my colleagues.

JACKSON: Representative Hartnett, do you think that the integrity of this house is based on the word of its members?

HARTNETT: I think personal integrity is based on the word of a member, definitely.

JACKSON: Can this house have integrity without its members having integrity?

HARTNETT: No.

JACKSON: Then what in the world are people worried about somebody knowing how they voted, and whether they kept their word or not?

HARTNETT: I can't argue with that.

JACKSON: Thank you.

HARTNETT: I move adoption of the Hartnett amendment.

[Amendment No. 2 by Geren to Amendment No. 1 was laid before the house.]

GEREN: Members, thank you. I know it's been a long day for all of us, so I'll try to be quick with this. What this amendment does is allow—in my mind, it's a speaker protection amendment because there will be no perception of intimidation if the speaker doesn't know how every member of the house voted until after he lays out the committees. In other words, the press can't get on him, the members can't get on him, nobody can say "I was intimidated by my vote", and the speaker can say "I didn't know how he voted anyway." Just because he's on a committee that he may not be happy with, it doesn't mean that. . .I didn't know how he voted, therefore how was I intimidating? It protects both the members and the speaker, as well as providing the public with the knowledge of how each member voted. It just delays it a little bit. I disagree with Mr. Hartnett when he says that it's after the hoopla. Actually, I believe it creates two hooplas. One today and the articles in tomorrow's paper will not be about who Charlie Geren voted for or who Phil King voted for. It will be about who was elected speaker. When the names are released in two weeks or in three weeks, then there

will be additional hoopla. Then they will talk about who Mr. King or myself voted for. What this does is give the speaker as well as the members a cover until the committees and the chairmen and the vice chairmen are appointed. I think that's fair for all of us.

P. KING: I want to raise a point of order on this amendment, that it violates Article III, Section 12, of the Texas Constitution, as well as Rule 5, Section 51, of the temporary rules of the house.

CHAIR: Bring your point of order down front.

### HOUSE AT EASE

At 3:28 p.m., Secretary Williams announced that the house would stand at ease.

Secretary Williams called the house to order at 4:09 p.m.

Secretary Williams overruled the point of order and had read the following statement:

Representative P. King raises a point of order against further consideration of the Geren amendment in that the Geren amendment would not immediately release the results of the members' votes for speaker until "all committee assignments have been made for the 80th Legislature." Representative P. King argues that the Geren amendment constitutes a secret ballot and Article III, 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 P. King states that the very nature of a secret ballot is such that a member's vote for speaker cannot be ascertained or cannot be ascertained for a set period of time and the purpose of Article III, 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 the 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 III, 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 III, 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 III, 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 III, 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 III, Section 12, were included in the 1876 Constitution.

Examination of these rules indicates some tension between the four constitutional provisions. Representative P. King and others argue that Article III, Section 12, mandates the recording of the "yeas and nays" despite the Article III, 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 Article III, Section 12, does not apply to a non-viva voce vote conducted under Article III, 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 III, 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 III, Section 41. There appears to be no recorded Texas cases or attorney general opinions examining the tension between these two provisions, the issue has not been discussed and recorded in the House Journal, 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. (Tex. 1992); San Antonio & A.P. Ry. Co. v. State (1936); County of Harris v. Shepperd, (1956); City of San Antonio v. Toeppeurwein (1911)*]. The only provisions of the four constitutional provisions that specifically deal with the election of a speaker are the timing requirements of Article III, Section 9, and the explicit recognition of non-viva voce voting requirements for the election of legislative officers under Article III, 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 cannot 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 the 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 III, 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 III, 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, 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 lieutenant 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 III, 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 III, 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 III, 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 (Tex. 2000)*]. While the court's opinion did not directly address the effect of Article III, Section 12, on the ability to request a secret ballot, the unanimous court made very clear several principles:

First, Article III, 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 III, 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. The constitution, by allowing but not requiring a secret ballot, commits that choice to this chamber. *Id.* at 121.

Examining the history of these Texas constitutional provisions and the special specific provision regarding Article III, 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 the court's strong recognition of each legislative chamber's authority under Article III, Section 41, of the Texas Constitution to elect its 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 for 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.

HILL: Mr. Secretary, having listened to the explanation in the ruling on the point of order, I'm still a little confused, and I'm sure that most people are, but it seemed to me that I heard repeated throughout that explanation, that if three members objected and wanted a record vote then it would be a record vote, am I correct on that?

CHAIR: Yes, that it was to be read with other constitutional provisions.

HILL: So when an amendment is brought up for discussion, and it requires or requests a secret vote, if three members object and request a record vote, then a record vote will be granted?

CHAIR: A member is entitled to a record vote on this amendment.

HILL: That's not my question. My question is that this particular amendment calls for a secret ballot. If the members, assuming this amendment should pass, if the members themselves, three of them, should stand and say that they want a record vote rather than a secret vote, then it would be the position of the chair that they would be granted a record vote, am I correct in that?

CHAIR: Representative, are you asking that a request for a secret ballot would supersede this amendment? Is that the question?

HILL: Maybe I should restate my question. My question is, if an amendment such as this that we've had under discussion that requires a secret ballot in essence, were to be objected to by three members of this body who said they wanted a record vote and did not want a secret vote, that the record vote would be granted by the chair.

CHAIR: Let us confer here one second.

HILL: Certainly.

CHAIR: Representative?

HILL: Yes, Mr. Secretary?

CHAIR: If I understand your question, if the Geren amendment were to be approved, would it prohibit a record vote in this election?

HILL: That is correct, if three members of this body requested a record vote, even after the approval of Mr. Geren's amendment, would the chair grant a record vote?

CHAIR: The chair would not.

HILL: Then, Mr. Chairman, Mr. Secretary, we also have the rule that requires the members to be able to call for a verification of the vote, so how would you deal with that issue?

CHAIR: Are we on a secret ballot?

HILL: If we don't know how the members have voted, we don't really know how many votes have been cast, we don't know the verification of those votes. There is a history in this house that goes back a long time ago when a member was elected to speaker by secret ballot and more votes were cast for that member than members existed in the body.

CHAIR: Representative, there are methods in place for us to verify that the proper number of votes had been cast.

HILL: How does the body verify that?

CHAIR: The teller of the clerk will call the roll and match that against the number of ballots.

HILL: So who will call the roll? The clerk will call the roll?

CHAIR: Yes.

HILL: And the clerk will call the members name and state how they voted?

CHAIR: Yes.

HILL: Okay, I understand your position. Thank you very much.

REPRESENTATIVE OLIVEIRA: As Secretary of State, when you went around the great State of Texas asking people to vote, did they not cast a secret ballot? And each and every citizen of the State of Texas that went into vote, they cast a secret ballot did they not?

CHAIR: Correct

GEREN: Members, I'm going to be very brief. This amendment is not about a secret ballot. This amendment is about delaying notification of how each member voted until the committees and the chairs have been chosen by the speaker. This not only protects the members, but it protects the speaker. It takes away any accusations by members or the press that any member was punished in his committee assignment because of the way he voted, because the speaker can honestly say, "I have no idea how Representative Talton or Representative Geren voted," unless we choose to tell him. This is good for the members, it's good for the speaker. I move that we adopt the amendment to the amendment.

TALTON: Representative Geren, is this what is called a confidential ballot that will sometime in the future, as set out in your amendment, allow it to be public?

GEREN: That is correct, Mr. Talton.

TALTON: What is the reason for you to offer that amendment?

GEREN: The reason for me to offer that amendment is to make sure that there is a fair and unbiased process in the committee and chair assignments and also to protect the speaker from accusations of those.

TALTON: Now let me ask you this. So this really isn't a secret ballot as some folks are calling it. It's confidential and sometime in the future will be made public. Is that correct?

GEREN: That is correct, Mr. Talton.

TALTON: Thank you.

GEREN: Members, I move adoption of the amendment to the amendment.

HARTNETT: Members, I'll try to be brief. I think everyone knows how they're going to vote, but we just need to try to keep the perspective here that it may not be permanently secret, but it's definitely putting really important information in the freezer for several weeks. Is that a precedent that we want to do here? Just imagine how you'd feel if your city council cast a really important vote and then decided that for internal political reasons we don't want other people to know how we voted so we're just going to shelve it for a few weeks or a few months.

Once you open the door, where do you go? I think you'd be quite upset and you'd say, "What are those people doing?" What we're talking about here is interfering with the public's right to know, and as we well know their demands to know. We've all been bombarded by newspaper editorials, a huge number of groups and a huge number of constituents saying, "We want more information. This is the age of the Internet. We want access to information and we want it quick and don't get in our way." That's exactly what we're talking about doing, standing in the way of this huge public desire, for internal purposes, really relating to a handful of members. I urge you to oppose the Geren amendment and I respectfully move to table.

EILAND: Mr. Speaker, Members. So that the freshmen especially know what a motion to table does. Mr. Hartnett has moved to table the amendment. If you vote for the motion to table, if you vote green, if you vote yes, then you're voting to kill this amendment. If you are in support of this amendment, then you vote no on the motion to table. Mr. Geren and I will be saying, "vote no on the motion to table, so that we can pass this amendment." I think that one of the things Mr. Hartnett said earlier today when he was talking about this amendment, talking against it, talking for his amendment, he said, and I wrote the words down, "I don't think that we should delay the consequences of your vote for speaker." That is what this is about. The reason that we have brought this motion forward is because during this speaker's race, members have said, "I don't want to vote a certain way because I might lose my chairmanship. I might lose my vice-chairmanship. I might lose my committee assignments." For those of you who don't know, committee assignments in the Texas House, half roughly are made by seniority, the other half are made by speaker appointments. Everybody wants to be on the good side of the speaker. That's why this is a very rare occurrence. That's why some of the time there's been delay today, because there's no play book.

The last time this happened was somewhere around 1909, I am told, where there was an actual election of the speaker on the floor of the house. Usually, it's handled before we all get here, and that's because, really, this is our business. It's not your business, it's not our constituents' business. The governor of the State of Texas is elected by a confidential vote, and it is kept confidential on everyone's behalf forever. The lieutenant governor of this state is elected by confidential vote and it is held confidential forever. The speaker of the house is what we're deciding today. The proposal is not to keep the election of the speaker of the house confidential forever. There are those who would like that to occur. What this says, is at least keep my vote confidential so that Mr. Pitts or Mr. Craddick does not know how I voted prior to making committee assignments. That's what Mr. Hartnett said. He does not want us to delay the consequences of our vote. That's what this is all about. If we are free to vote how we want, or if we have to vote in consideration of how it might impact committee assignments.

So if you're for the amendment of Mr. Geren, vote no on the motion to table. If you don't like Mr. Geren's amendment and you want the votes to come out later this afternoon or this evening, or tomorrow, whatever, vote yes on the motion to table and you'll be able to vote on Mr. Hartnett's amendment later. We

would urge you, give us this opportunity. This is our election. That is why there is a speaker's statute that says it should be void of unfair, outside influences. This is, everybody should, I don't know why we are afraid to allow us to vote and delay the release of the names just a little while, while we get here and get going. So I would urge you all, members, vote no on the motion to table so that we can elect a speaker and that nobody knows how we voted until after committee assignments so there's no fear and there are no accusations that the speaker, whoever the speaker may be, appointed certain people because they voted certain ways. I close and I ask you to vote no on the motion to table.

REPRESENTATIVE ANDERSON: I appreciate your eloquence, but we're talking about fear, intimidation, and being afraid. Let's talk on the other side of the coin about courage. A willingness to step out and do what we said we'd do for our constituents. That we'd come up and take a stand on these votes. Let me ask you, you mentioned a very rare occurrence. It flashed into my mind a very rare occurrence. There are times when very ordinary people do extraordinary things. That rare occurrence, if you may recall, was the Alamo that started our entire history here. When Travis got up there and drew a line in the sand and said "step across," that was a vote. That was an immediate vote. It wasn't like, "well, maybe tell me in a couple weeks after we see how many people are injured or shot or something and then we can decide." So we have to start thinking about courage.

EILAND: And the question is?

ANDERSON: The question is that we have to be, or should not we be, up front with our folks at home, not come down here and say that we're special to protect ourselves for whatever reason, for whatever length of time? The question is, should not we come down here and vote and raise our hand and stand proudly, whichever way we decide to vote? Any uncertainty, would you agree, any risk, any question, any statement carries uncertainty of risk, including where we are here? Would you not agree that we should stand strong where our commitments are?

EILAND: I would not belittle the Alamo by comparing it to the election of the speaker of the house.

ANDERSON: It may be, and let me ask you this, often times as we decide these things it's good to have an example, a code of conduct, if you would, something that we'd refer to. And I think it'd be just the opposite. You're talking about fear, I'm talking about courage, you're talking about ridiculing the Alamo. I'm saying let's stand up for the Alamo. Let's stand up for the courage of our convictions. The question being, don't you think we should come down here and be willing to take a vote and stand up, tell the folks instantaneously? If you recall, last session was getting more instant recording of our votes to the general public to the point where we even heightened the constitution from calling for three members calling for a record vote to one member calling for a record vote. This flies in the face of what we did last session.

EILAND: I still don't understand what the question is, but the answer to all that must be that this is not about keeping anything secret. This is about delaying the release of the members and which way they voted until after committee assignments are made. Period. So that act does not factor into the appointment process.

ANDERSON: I appreciate your eloquence and ask you to vote yes on the motion to table.

HARTNETT: I close. Please vote yes, green.

[Amendment No. 2 was tabled by Record Vote No. 1, and Amendment No. 1 was adopted by Record Vote No. 2.]

[Amendment No. 3 by Merritt was laid before the house.]

MERRITT: Thank you, members, Mr. Secretary, guests, children of guests. I'm very happy to be here. I know this is the amendment that everyone's been waiting for. This is the amendment that forty-one elections have been held in Texas, by our forefathers, in secret. 41 elections from the very beginning of time of Texas, in early Texas. Our flag. The book of Genesis talks about the flag. It's a rainbow. The rainbow is when the Lord said he will keep his word. I will tell you that as we move through our founding fathers, vote after vote after vote was in secret. I rise before you today not to submit the names of members who might lead us to a brighter future. Voters speak of the qualities or flaws of any candidate for speaker of this great body. I'm here to speak on behalf of the rank and file, the voters.

Those of you in the gallery with my friend Terry, he was here. Terry was at the door at 7:15 this morning, first in line. I said "Terry, I'm going to speak about a secret ballot." He said, "that's why I'm here." I wish Terry, I guess he'd given up just waiting in the gallery. I'm here to advocate free and fair elections, the concept for which men and women in uniform are dying on the far away battlefields at this very moment. Members, does it make any sense to promote democracy abroad and then run away from it at home? You know what I'm talking about. I'm talking about the way we choose our leaders. Both in this chamber and in polling stations across this state and nation. In the days leading up to the election of our speaker, you have no doubt heard the opponents of the motion emphasize the word secret in secret ballot, as if there were something shadowy, sinister about insuring voter privacy in the electoral process. In fact, the very word ballot comes from the 14th century country called Italy where colored balls, ballatos, were placed in boxes to ensure the people who voted made their choices confidentially and without threat of retribution. Think about that for a second. Fourteenth century Italy. That was seven centuries ago.

The history of modern democracy is full of examples of brave men and women who fought for the right to cast their ballots in private. Not because they were shamed to announce it aloud, but rather to ensure that when all the ballots were counted, they could be proud of a choice made without intimidation or fear. The Geneva conference of 1954 upheld the right of the sealed ballot in elections conducted in Vietnam; it being one of the democratic principles for which thousands of Americans fought and died. Nearly ten years earlier Winston

Churchill said, in perhaps the most famous speech he ever gave, and I quote, "We must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the habeas corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence. All this means that the people of any country have the right, and should have the power by constitutional action, by free unfettered elections, with secret ballot, to choose or change the character or form of government under which they dwell."

Members, don't be fooled by those who say that sealed and confidential balloting would undermine the spirit of openness and transparency that Texans expect and deserve. This is not the same thing as a vote for the budget or for a tax bill. It is not by mistake that Article III, Section 41, of the Texas Constitution says votes in the house and senate shall be publicly declared except in the election of their officers. 41 secret ballot elections held in this body, in this Capitol. I support open voting and public records as much as any other member. How would you feel if instead of conducting deliberations in secret, our own grand jury discussed unsubstantiated allegations of criminal misconduct in the light of day? Then your opponents could just walk into the open session and convict you in the court of public opinion. No indictment, no trial, not fair. If you take away nothing else from this debate, if you take nothing else, remember this; a vote for a sealed ballot is the only way to give members the freedom to choose. Nothing in this motion denies your right to publicly declare your choice for speaker and even enter it into the House Journal. Just as members have done for decades when they wish to let their constituents know how they feel about an issue that had been decided by voice vote. You may record your vote in the journal. Members, we even require a sealed ballot when we choose our freshman of the year. Should we give our next speaker the same courtesy, a sealed, secret ballot?

Members, a friend of mine, a trooper, we have several troopers who have fought recently for democracy. A sealed ballot was used in Iraq. That's what this is, this is an Iraqi ballot that over 3,000 young men and women have fought for and made the ultimate sacrifice. On this chamber body, at this very moment in time, won't you allow me to vote my convictions in a sealed box and then be counted and destroyed, is what this amendment says. Counted and destroyed. Where I do not feel the wrath of not only the public, but the wrath of the lobbyists.

How many of you have ever been threatened by a lobbyist? How many of you have been told, "If you don't vote a certain way or give a pledge card we're coming after you"? Over \$750,000 was used against me because I stood up for my convictions. I have a right to stand for each and every member elected in this body not to be ridiculed, chastised, or talked about. Please give me, and the other members of the body, the right to vote in a box. To put my ballot in a box and those votes not ever be released. That is because I fear for Texas. I fear for Texas. The 21st Century must not have fear in this body for anyone. We must do our jobs as colleagues, not as Republicans or Democrats, but as colleagues, as brothers and sisters, as Texans. Thank you very much. I ask that you vote to table

Mr. Hartnett's motion. He may not make that motion to table, but I suspect he will. Mr. Hartnett and the rest of y'all, thank you for your time and God bless Texas.

HARTNETT: Mr. Secretary, members, I will try to be brief. I've been told one of our colleagues has lost a family member and we need to try to be as expeditious as possible for his sake. I would just remind us that we're not a private club. If we were a private club we could be secret, but we're a public club. We're a body in a fish bowl with 20 million spectators and constituents and they want to know how we elect what is perhaps the most powerful official in Texas. I respectfully move to table Representative Merritt's amendment.

MERRITT: Members, I remind you what we owe the constituents. We are our own constituents. No one in the gallery has this vote except you. I remind you that we are voting for our future and I ask you to vote no on Mr. Hartnett's motion to table and move Texas forward. Thank you.

[Amendment No. 3 was tabled by Record Vote No. 3, and **HR 35**, as amended, was adopted by Record Vote No. 4.]

