



TEXAS HOUSE of REPRESENTATIVES

RECEIVED

By Opinion Committee at 8:37 am, Jul 27, 2021

James White

House District 19
Jasper, Newton, Hardin, Polk, Tyler

HOMELAND SECURITY
& PUBLIC SAFETY, CHAIR

CORRECTIONS

REDISTRICTING

July 27, 2021

RQ-0418-KP

FILE# ML-48980-21

I.D.# 48980

Attorney General Ken Paxton
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548
opinion.committee@oag.texas.gov

General Paxton,

A few centuries ago, our Founders began a legacy constitutional republicanism that has persisted and served our country in exemplary fashion. Constitutional in the terms of limited government, defined government powers, the separation of powers, checks, balances, protection of fundamental liberties, and the respect for minority rights, while providing for the majority will of the people to prevail. As a republic, our system of government, federal, state or local aims for the representation of the people.¹ On the one hand, constitutional republicanism does not promote the brute imposition of the majority. On the other, it definitely does not enable the minority complete control of the majority.

Early in the development of our political culture, many North American colonial locales practiced a form of direct or pure democracy.² So therefore, we see the precedent set that those who govern do so physically in-person. As the North American colonies and then the United States became more cosmopolitan and grew in population, direct democracy became a less practical approach to popular governance and representative democracy or republicanism emerged as the mechanism for the popular will.

This brings us to the first subject of inquiry: **Does any legislator, federal or state, have a constitutional right to break quorum?** Many have asserted that legislators have a

¹ https://www.etymonline.com/search?q=republic&ref=searchbar_searchhint

² Direct or pure democracy is a form of popular government in which the governed, that is, the people convene in-person and decide, without an intermediary or representative, on public policy. I describe this as “a” form of direct or pure democracy because these colonial communities excluded significant portions of their populations, such as women, indentured servants, and the enslaved, of their communities from participating in these proceedings. Philosophically, the measure of full citizenship that merited political involvement was the exhibition of an independent will. Common forms of independent will included being a property taxpayer or taxpayer in some other form. Either through cultural construct or a phenomenon totally alien to free societies, slavery, e.g., women, the enslaved, and indentured servants could not exhibit their independent will. Lutz, Donald, *The Origins of American Constitutionalism*, Louisiana State University Press: Baton Rouge, 1988.



TEXAS HOUSE *of* REPRESENTATIVES

James White

*House District 19
Jasper, Newton, Hardin, Polk, Tyler*

HOMELAND SECURITY
& PUBLIC SAFETY, CHAIR

CORRECTIONS

REDISTRICTING

constitutional right to break quorum deliberately. We find that the Constitutional Convention of 1787 grappled with the topic of quorum. Some delegates argued for a quorum of less than a majority. Their concern dealt with the possibility of an indifferent majority of legislators undermining Congress' response to an emergency that impacts the constituencies of a minority of the legislators. Conversely, other delegates contended for a constitutional quorum provision of a super majority. The foundation of this position emanated from the idea that the issues facing the country required a more diverse body. Legislators that lived in states in proximity to the seat of government would have a distance and time advantage and not requiring a super majority would result in a minority of the total body making decisions for the whole. Eventually, the Convention of 1787 settled on at least half, plus one, of each chamber, House and Senate, as the constitutional quorum requirement. The Convention delegates saw the value of a majority of the chamber present in order to commence official business on behalf of their fellow citizens. Yet, the delegates did not want to foster the prospect of a minority frustrating the majority that is present and ready to begin work.³

So therefore, we have a provision devised by the Constitution to require a quorum of a majority in each chamber to conduct business. The Convention also adopted Delegate James Madison's language which gives both chambers the discretion "to compel attendance of absent members" and assess penalties.⁴ These convention motions eventually became Article 1, Section 5 of the Constitution.⁵ To accept the fact that any legislator, federal or state, has a constitutional right to break quorum purposefully, one would have to contend that the Constitution contradicts itself. Of course, the the First Amendment of the Constitution protects the rights of assembly, speech, and petition could relate to someone's participation in a legislative proceeding. However, Article VI of the Constitution requires U. S. Congressional members and even state legislators to take an oath to support the U. S. Constitution. This oath is prescribed in Title 5, Section 3331 of the United States Code. It reads:

"I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and

³ Madison, James, *Records of the Federal Convention*, p. 251-56: <https://memory.loc.gov/cgi-bin/ampage?collId=llfr&fileName=002/llfr002.db&recNum=256&itemLink=r%3Fammem%2Fhlaw%3A%40field%28DOCID%2B%40lit%28fr0022%29%29%230020004&linkText=1>

⁴ *Ibid*, p. 254.

⁵ "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide."



TEXAS HOUSE *of* REPRESENTATIVES

James White

*House District 19
Jasper, Newton, Hardin, Polk, Tyler*

HOMELAND SECURITY
& PUBLIC SAFETY, CHAIR

CORRECTIONS

REDISTRICTING

allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”⁶

This required constitutional oath includes “that I will well and faithfully discharge the duties of the office.” Many other public servants, such as our fighting men and women of the U.S. military, are bound to an oath. While their oath does not serve as a hard demarcation line that voids their constitutional rights, it definitely puts their service in context of the constitutional rights of the whole, whom they have sworn to protect.

Since 1824, eight constitutions have governed Texas. Interestingly, whether governed as an independent republic or a state within Mexico, the United States, or the Confederacy, each governing document contained a provision defining the constitutional requirement for a quorum and granting the legislative chambers the discretion to compel attendance in order to achieve the constitutional quorum and assess penalties.⁷ As with the U.S. Constitution, each of these governing documents had a corresponding oath of office.⁸ **Does any Texas legislator, have a constitutional right to break quorum?**

⁶ <https://history.house.gov/Institution/Origins-Development/Oath-of-Office/>

⁷ Federal Constitution of the United Mexican States (1824), Section IV Article 36: <https://tarlton.law.utexas.edu/c.php?g=813224&p=5802559#s-lg-box-18406991>; Constitution of the State of Coahuila and Texas (1827), Title 1, Section V, Article 101: <https://tarlton.law.utexas.edu/c.php?g=814724&p=5814056#s-lg-box-18449287>; Constitution of the Republic of Texas (1836), Article 1, Section 13: <https://tarlton.law.utexas.edu/c.php?g=815580&p=5820518>; Constitution of Texas (1845), Article 3, Section 12: <https://tarlton.law.utexas.edu/c.php?g=787754&p=5639717>; Constitution of the State of Texas (1861): Article 3, Section 12: <https://tarlton.law.utexas.edu/constitutions/texas-1861/article-3-legislative-department>; Constitution of Texas (1866), Article 3, Section 11: <https://tarlton.law.utexas.edu/c.php?g=810765&p=5785177>; Constitution of Texas (1869), Article 3, Section 15: <https://tarlton.law.utexas.edu/c.php?g=812156&p=5795229>; and the Texas Constitution of 1876, Article 3, Section 10: <https://tarlton.law.utexas.edu/c.php?g=813324&p=5803235>

⁸ Federal Constitution of the United Mexican States (1824), Title 7, Article 163: <https://tarlton.law.utexas.edu/constitutions/federal-mexican-1824-en/title-7>; Constitution of the State of Coahuila and Texas (1827), Title 7, Article 220: <https://tarlton.law.utexas.edu/c.php?g=814724&p=5814061>; Constitution of the Republic of Texas, Article V, Section 2: <https://tarlton.law.utexas.edu/c.php?g=815580&p=5820522>; Constitution of Texas (1845), Article VII, Section 1: <https://tarlton.law.utexas.edu/c.php?g=787754&p=5639730>; Constitution of the State of Texas (1861), Article 7, Section 1: <https://tarlton.law.utexas.edu/c.php?g=787754&p=5639730>; Constitution of Texas (1866), Article 7, Section 1: <https://tarlton.law.utexas.edu/c.php?g=810765&p=5785181>; Constitution of Texas (1869), Article 12, Section 1: <https://tarlton.law.utexas.edu/c.php?g=812156&p=5795238>; and Constitution of the State of Texas (1876), Article 16, Section 1: <https://tarlton.law.utexas.edu/c.php?g=813324&p=5803271>



TEXAS HOUSE *of* REPRESENTATIVES

James White

*House District 19
Jasper, Newton, Hardin, Polk, Tyler*

HOMELAND SECURITY
& PUBLIC SAFETY, CHAIR

CORRECTIONS

REDISTRICTING

Taking into account the constitutionality of employing a deliberate quorum break, I transition focus to the Texas Constitution, Article. IV, § 8(a), Texas Constitution Article. III, §§ 10–11, and Section 402.042 of the Texas Government Code. Texas Constitution, Article. IV, § 8(a) reads as follows:

“Sec. 8. CONVENING LEGISLATURE ON EXTRAORDINARY OCCASIONS. (a) The Governor may, on extraordinary occasions, convene the Legislature at the seat of Government, or at a different place, in case that should be in possession of the public enemy or in case of the prevalence of disease threat. His proclamation therefor shall state specifically the purpose for which the Legislature is convened.”

Texas Constitution Article. III, §§ 10–11 reads as follows:

“Sec. 10. QUORUM; ADJOURNMENTS FROM DAY TO DAY; COMPELLING ATTENDANCE. Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide.”

“Sec. 11. RULES OF PROCEDURE; PUNISHMENT OR EXPULSION OF MEMBER. Each House may determine the rules of its own proceedings, punish members for disorderly conduct, and, with the consent of two-thirds, expel a member, but not a second time for the same offense.”

Section 402.042 of the Texas Government Code addresses my authority to request this opinion.⁹ Undoubtedly, Article IV, Section 8 provides the Governor of Texas the discretion to call for a special session and set the agenda for that special session. Section 10 of Article III establishes the constitutional quorum requirement and allows for a smaller number of legislators to compel the attendance of the absent members. The subsequent provision, Section 11, allows for the House to determine its rules and punish members for disorderly conduct. This punishment may include expulsion. However, expulsion would require the consent of two-thirds of the chamber. To do any official business, the Texas Constitution requires the attendance of at least two-thirds of the members. Therefore, if at least a third of a chamber’s members expressly have engaged in an effort to break quorum this deprives either chamber, the House or the Senate, the opportunity to take any official action. Even more, if at least a third of the members from any particular Texas legislative chamber are expressly absent, that is, breaking quorum, and decamp outside the boundaries of Texas it creates a problematic situation for the present members to compel attendance. It also makes it difficult for the chamber’s presiding officer to enforce the rules that

⁹ <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.402.htm#402.042>



TEXAS HOUSE *of* REPRESENTATIVES

James White

*House District 19
Jasper, Newton, Hardin, Polk, Tyler*

HOMELAND SECURITY
& PUBLIC SAFETY, CHAIR

CORRECTIONS

REDISTRICTING

involve the issuing of civil arrest warrant because Texas peace officers' jurisdiction ends at our state borders.

With this in mind, does our constitution or state statutes expressly allow for the vacating of legislative seats or seeking a determination if legislators have vacated their legislative seats when members deliberately deny the constitutional quorum requirement, announce intentions to leave and remain outside the State the state in order to prevent the presiding officer from compelling attendance, and have taken the oath of office?

General Paxton I understand that the time horizon for issuing an opinion spans several months. However, I am requesting an expedited response because in times such as this we need the cooling saucer of reasoned and constitutional deliberation and not the cauldron of ideological fervor. In a 1963 sermon, Reverend Martin Luther King highlighted the “midnight of the social order.” He described a darkness that “is so deep that we hardly see which way to turn.”¹⁰

“Midnight is a time when everybody is desperately seeking to avoid getting caught. It is the hour when hardly anybody is concerned about obeying the ten commandments; everybody is passionately seeking to obey the eleventh commandment—“thou shall not get caught.” According to the ethic of midnight the only sin is to get caught and the only virtue is to get by. It's all right to lie, but do it with real finesse; it's all right to steal, but be a dignified stealer, so that if you are caught it becomes embezzlement rather than robbery; it's all right even to hate, but dress your hate up in the garments of love and make it appear that you are loving when you are actually hating.”

The only response to this darkness that grips our political culture at this moment is our U.S. Constitution, our Texas Constitution, the history, thoughts, and writings of our Framers. Our State has too many acute challenges that demand our attention. I pray that we do not lean to our own understanding and instead rely of that wisdom that is tried and proven.

For God & Texas!

¹⁰ <https://kinginstitute.stanford.edu/king-papers/documents/draft-chapter-vi-knock-midnight>



TEXAS HOUSE *of* REPRESENTATIVES

James White

*House District 19
Jasper, Newton, Hardin, Polk, Tyler*

HOMELAND SECURITY
& PUBLIC SAFETY, CHAIR

CORRECTIONS

REDISTRICTING

James White
State Representative
House District 19

