



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 24, 2021

The Honorable James White
Chair, House Committee on Homeland Security & Public Safety
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0382

Re: Whether Texas law allows for a determination that a legislator has vacated office
(RQ-0418-KP)

Dear Representative White:

You ask two questions about whether a legislator has a constitutional right to break quorum and whether Texas law allows for a determination that a legislator has vacated office.¹ Your questions arose in the context of the First Called Session of the Eighty-seventh Legislature, which began on July 8, 2021.² The Governor identified multiple subjects for the Legislature to consider during the special session. *See* Proclamation. On July 12, 2021, numerous legislators left the State for the express purpose of depriving the Texas House of a quorum, thereby prohibiting enactment of any legislation during the special session.³ The legislators stated they would not return to Texas until the thirty-day special session ended. As a result, the Legislature did not enact any legislation during the first called special session. The Governor convened the Second Called Session on August 7, 2021, and it is still in progress.⁴

¹See Letter from Honorable James White, Chair, House Comm. on Homeland Sec. & Pub. Safety, to Honorable Ken Paxton, Tex. Att’y Gen. at 1, 5 (July 27, 2021).

²See Proclamation of the Governor, https://gov.texas.gov/uploads/files/press/PROC_first_called_session_87th_legislature_IMAGE_07-07-21.pdf (“Proclamation”); TEX. CONST. art. IV, § 8(a) (authorizing the Governor to convene the Legislature for specific purposes).

³Jeremy Wallace, *Texas Democrats pledge not to return from D.C. until August*, HOUSTON CHRONICLE, July 20, 2021, <https://www.houstonchronicle.com/politics/texas/article/Texas-Democrats-pledge-not-to-return-from-D-C-16327715.php>.

⁴See Proclamation of the Governor, https://gov.texas.gov/uploads/files/press/PROC_second_called_session_87th_legislature_IMAGE_08-05-21.pdf.

I. The Texas Constitution requires a quorum of two-thirds of each House's members to be present to enact legislation.

A public body, including a house of the Legislature, must have a quorum present to conduct business. Generally, a quorum is a majority of the members of the body fixed by statute, unless the law specifically provides otherwise for that body. *See* TEX. GOV'T CODE §§ 311.013, 312.015. Regarding the Legislature, the Texas Constitution provides: “[t]wo-thirds of each House shall constitute a quorum to do business.” TEX. CONST. art. III, § 10. The House of Representatives consists of 150 members, and 100 members therefore constitute a two-thirds quorum. *Id.* § 2. Thus, at least 100 members of the Texas House of Representatives must be present to conduct most business.

In your first question, you ask whether a legislator has “a constitutional right to break quorum.” Request Letter at 1. Since the submission of your question, litigation in multiple courts has arisen involving the constitutional rights of legislators who attempt to avoid a quorum.⁵ The Texas Supreme Court recently issued a mandamus related to one of these proceedings, concluding that the Texas Constitution “empowers the House to compel the attendance of absent members.” *In re Abbott*, No. 21-0667, slip op. at 3 (Tex. Aug. 17, 2021). In so holding, the court directed the district judge to rescind a temporary restraining order prohibiting the arrest of the absent legislators. But the underlying litigation raising the constitutional issues remains pending.

It is the policy of this office to refrain from issuing an Attorney General opinion on questions that we know to be the subject of pending litigation. *See* Tex. Att’y Gen. Op. Nos. GA-0502 (2007) at 3–4; MW-205 (1980) at 1; V-291 (1947) at 5–6. This policy, which has been in effect for more than sixty years, is based upon the fact that Attorney General opinions, unlike those issued by courts of law, are advisory in nature. By contrast, court decisions are binding unless and until they have been modified or overturned by a higher court or until the law they construe has been amended. Consequently, when a legal matter is being litigated, the courts are generally the appropriate forum for resolving the issue. We therefore decline to issue an opinion in response to your first question but direct you to the Texas Supreme Court’s recent ruling for guidance. *See In re Abbott*, No. 21-0667, slip op. at 12–15.

II. Texas courts recognize that a vacancy may occur by abandonment of office.

In your second question, you ask whether Texas law allows for a determination that a legislator has vacated office. Request Letter at 5. Both the Texas Constitution and the Election Code establish the timing of when a vacancy occurs in public offices generally, accounting for vacancy by death, resignation, removal, acceptance of another office, a declaration of ineligibility, creation of a new office, if a deceased or ineligible candidate wins an election, or if an officer-elect declines to assume office. TEX. CONST. art. III, § 13; TEX. ELEC. CODE §§ 201.021 (providing that

⁵In *Hinojosa v. Abbott*, pending before the 261st District Court in Travis County, the legislators argue that the First Amendment to the U.S. Constitution prohibits infringement on their rights to speak and assemble outside of the House chamber. Plaintiffs’ Original Verified Petition at 9, *Hinojosa v. Abbott*, No. D-1-GN-21-003760 (261 Dist. Ct., Travis Cnty., Tex. filed Aug. 9, 2021). Similarly, in *Thompson v. Abbott*, the absent legislators argue that efforts to compel their attendance for a quorum deprive them of their constitutional rights. Complaint at 5, *Thompson v. Abbott*, No. 1:21-cv-00690-RP (W.D. Tex. filed Aug. 6, 2021).

a vacancy occurs at a time prescribed by statute), .022–.025 (prescribing the time of vacancy due to death, resignation, removal, or acceptance of other office). However, we find no constitutional provision or statute establishing an exhaustive list for why a vacancy occurs or the grounds under which an officer may be judicially removed from office. We therefore look to the courts for guidance.

The Texas Supreme Court has long recognized that “[a] vacancy may be made by resignation, death, expiration of the term of office, abandonment, removal, or forfeiture,” and that “[a]bandonment of an office is a species of resignation.” *Honey v. Graham*, 39 Tex. 1, 7 (1873). Describing abandonment of office, one Texas court explained:

Abandonment is a species of resignation. Resignation and abandonment are voluntary acts. The former is a formal relinquishment; the latter a relinquishment through nonuser. Abandonment implies nonuser, but nonuser does not, of itself, constitute abandonment. The failure to perform the duties pertaining to the office must be with actual or imputed intention on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact.

Steingruber v. City of San Antonio, 220 S.W. 77, 78 (Tex. Comm’n App. 1920). Whether a specific legislator abandoned his or her office such that a vacancy occurred will be a fact question for a court and is beyond the scope of an Attorney General opinion. *See id.*; *see also* Tex. Att’y Gen. Op. No. KP-0231 (2019) at 1 (refraining from opining on fact questions).

III. A district court may make a determination that a legislator has forfeited his or her office due to abandonment and can remove the legislator from office, thereby creating a vacancy.

Texas law recognizes a public officer may be removed from office. *See* TEX. ELEC. CODE § 201.024 (providing for vacancy upon removal of office). Subsection 66.001(2) of the Civil Practices and Remedies Code establishes an action in quo warranto if “a public officer does an act or allows an act that by law causes a forfeiture of his office.” TEX. CIV. PRAC. & REM. CODE § 66.001(2). If a legislator is believed to have forfeited his or her office by abandonment, “the attorney general or the county or district attorney of the proper county” may initiate a suit in district court. *Id.* § 66.002(a). If the court determines that the public officer has forfeited the office, the court “shall enter judgment removing the person from the office.” *Id.* § 66.003(1). If an officer is removed from office by a court or other tribunal, a vacancy occurs on the date the judgment becomes final. TEX. ELEC. CODE § 201.024.

S U M M A R Y

Texas courts recognize that a vacancy may occur by abandonment of office. Whether a specific legislator abandoned his or her office such that a vacancy occurred will be a fact question for a court and is beyond the scope of an Attorney General opinion.

Through a quo warranto action, a district court may determine that a legislator has forfeited his or her office due to abandonment and can remove the legislator from office, thereby creating a vacancy.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

MURTAZA F. SUTARWALLA
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee