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A NEW DEFENSE OF STATE-IMPOSED CONGRESSIONAL TERM LIMITS

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Do states have the authority to limit the legislative terms of their members of Congress? Up until very recently this question was merely hypothetical, pondered by those with the luxury to ask and develop answers to an assortment of constitutional "what if's." However, the success of the term limitation movement across the nation has moved this hypothetical question to the center stage of relevant constitutional debate.

Voters in fifteen states, including California, Florida, Michigan, Oregon, and Washington, have now approved initiatives to limit the number of terms served by their members of Congress.¹ In nine other states term limit advocates are actively gathering signatures to place similar initiatives on the ballot in 1994,² some for the second time.³ By 1995, as many as 24 states could have adopted initiatives to limit congressional terms. In the remaining states activists continue to lobby for legislation to limit the terms of state and federal legislators.⁴

Since a state's authority to impose term limits on members of Congress is of questionable constitutionality, it's likely many of these initiatives will end up in litigation (see Barnicle, 1992; Corwin, 1991; Greenberger, 1991; and Kovacevich, 1992). Lawsuits challenging the constitutionality of state-imposed term limits on members of Congress have already been filed and dismissed in Missouri and Florida. Legal action is pending in Nebraska and in the State of Washington where House Speaker Tom Foley has teamed up with the League of Women Voters to challenge the constitutionality of that state's term limitation initiative. The legal strategy against term limits has succeeded in overturning one initiative. In Arkansas, a July 29, 1993 decision by Arkansas Circuit Court Judge

Chris Piazza overturned Amendment 573 to the state constitution on the technical grounds that it did not contain the phrase "be it enacted," required of all statutes and amendments to the state constitution. The case is currently under appeal (see "What a Show," 1993).

Even in states which have adopted term limits of only six years for members of the House, such as California and Oregon, no current incumbent will be ineligible to run for reelection or restricted from access to the ballot until 1998. As a result, it may be some time before the U.S. Supreme Court has an opportunity to render a final decision on the constitutionality of state-imposed term limits.⁵ Nevertheless, court challenges to the constitutionality of state-imposed term limits are here and more are certainly in the making, beckoning political scientists to lend their knowledge of political theory, constitutional history, and public law to this emergent debate about states' rights, constitutional design, and the institutional foundations of liberal republicanism.⁶

The case against state authority to limit congressional terms is straightforward and at first glance incontrovertible. The critics claim states lack the constitutional authority to limit congressional terms because states may not amend or add qualifications to those already specified in Article I, Section 2 of the Constitution on who may serve in Congress. Therefore, to limit congressional terms Congress would have to approve and the states would have to ratify a constitutional amendment. A 1992 study prepared by the Congressional Research Service (CRS) for members of Congress concluded: "Based on the text and origins of the Constitution, congressional practice, and judicial precedent, it appears that the states may not limit the re-election of their congressional delegations" (Whitaker, 1992: 9).

However, despite the official hue of this conclusion, a very strong case can be made in defense of state authority to limit congressional terms. First, I consider the conventional case made to defend the constitutionality of state-imposed congressional term limits (see Glazier, 1990; Mitchell, 1991, 1992; Mellor, 1991; Otteson, 1991; Fund, 1992; Gorsuch and Guzman, 1991; Hillis, 1992; and Levy, 1992) and then scope out a new defense of state authority grounded in America's experience with the principle of rotation in office and republican political thought.

The Conventional Case Reviewed

To begin with, states can limit congressional terms, say the advocates, because the Constitution is silent on the issue. Pursuant to the 10th Amendment, all "powers not delegated to the United States, nor prohibited by it to the States" rest with the states and the people. "The powers delegated to the Federal Government," James Madison insisted, "are few and defined," those "to remain in the State Governments . . . numerous and indefinite" (Hamilton, et al., 1961: 292).

Hence, absent a direct grant of authority to the federal government or a prohibition against the exercise of such authority, states can impose term limits on Congress so long as they (a) do not violate other constitutional principles and (b) serve a compelling state interest. In challenges to the constitutionality of term limits for state legislators, courts in California and Massachusetts have already ruled that term limits violate neither 1st nor 14th Amendment guarantees of free speech and equal protection.⁷

Moreover, courts have upheld the validity of restrictions upon the succession of incumbents which serve a rational public policy, such as the promotion of competitive elections. The California State Supreme Court's

1991 conclusion in the case of Prop. 140, affirmed by the U.S. Supreme Court, is instructive: "On balance, we conclude the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them." Rather than threatening the rights of voters and candidates or damaging the prospects for democratic governance, "as a general rule," reasoned the California Court, "the over-all health of the body politic is enhanced by limitations on continuous tenure."⁸

Nevertheless, term limit critics respond by citing Powell v. McCormack, 395 U.S. 486 (1969) in which the Supreme Court held that the qualifications contained in Article I, Section 2 of the Constitution were "not occasional but fixed" and, quoting Alexander Hamilton, "unalterable by the legislature" (395 U.S. at 528, 539). From this decision the critics conclude: "Emphasis on the 'fixed' and exclusive nature of the qualification clause requirements would appear to foreclose state efforts to condition the eligibility of candidates for Congress on the extent of their prior service in public office" (Corwin, 1991: 580). In short, states cannot amend or add to the qualifications for members of the House and Senate already specified in Article I, Sections 2 and 3 of the Constitution. Term limitation would constitute an additional qualification which the states have no authority to impose.

The crux of the case against the constitutionality of state imposed congressional term limits is based upon an expansive reading of Powell which is fundamentally flawed for two reasons.

First, it misreads Powell by applying the Court's decision to the states. Powell limits the authority of Congress to add qualifications which it would then use to judge the eligibility of new members. This prohibition is designed to prevent Congress from acting arbitrarily and capriciously. However, the Powell court did not restrict a state's

authority to impose new qualifications on its representatives in Congress. In fact, Powell is completely silent on the issue of a state's authority to specify additional qualifications on its delegation to Congress.

Second, the Founders intended the Constitution to set forth minimal qualifications necessary to hold national office. This position is affirmed by the research of political historian Donald S. Lutz (1988: 162): "In effect, the qualifications (beyond age and residency), nomination, and election of all federal officers except the Supreme Court were outside the control of the national government and explicitly under the control of state governments." It was crucial to the operation of the new Constitution to determine "the size and nature of constituencies, the frequency of elections, and the size of the two houses of Congress." However, some things about elections, explained Lutz (1988: 162), "such as the characteristics of voters and of those who run for office" were not as crucial and could therefore be left for determination to the states.

Consistent with this distinction between federal and state authority and their concomitant responsibilities, the Supreme Court has ruled that "the right to vote, per se, is not a constitutionally protected right,"⁹ has upheld a range of restrictions on candidate eligibility,¹⁰ and has refused to recognize a fundamental right to candidacy.¹¹ Presumably, states can constitutionally add to qualifications specified in the Constitution so long as they serve a compelling state interest and do not violate other constitutional principles.

Beyond the applicability of Powell, term limit advocates also contend that pursuant to Article I, Section 4 of the Constitution, states have the authority to regulate "the time, place and manner for holding elections." Under this provision, states have been given considerable latitude by the

Supreme Court to regulate access to the ballot. Advocates contend that term limit initiatives which deny an officeholder access to the ballot are protected by this provision in the Constitution (see Glazier, 1990; Fund, 1992; and Hillis, 1992). Indeed, a number of states, such as Arizona, California, Florida, and Washington, took this route to limiting congressional terms in their initiatives, permitting term-limited incumbents to run for reelection as write-in candidates (see Petracca and Jump, 1992).

In response, critics claim that the ballot access cases decided by the Supreme Court affirming state authority to regulate access to the ballot "all focus on the procedural aspects of elections." "Denying ballot access for valid procedural reasons," said the Congressional Research Service, "is not the same as requiring an additional qualification for a congressional office" (Whitaker, 1992: 7 and 8). Hence, restrictions on access to the ballot may not be a constitutional means of adding another qualification on federal legislators.

Though there is clearly disagreement on the applicability of these cases to term limitation initiatives, the history behind the purpose of Article I, Section 4 of the Constitution lends greater credibility to the position taken by term limit advocates than it does to the position of the critics.

The Framers of the Constitution believed states should play a major role in regulating their own elections and could rightly determine the characteristics of voters and of those who run for office.¹² As explained during various state ratification debates, this section was included in Article I of the Constitution primarily to prevent the dissolution of the federal government by the states. James Madison

provided the following explanation during the Virginia Ratification Convention on June 14, 1788:

"It was found necessary to leave the regulation of these [time, manner, and place], in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. . . . were they exclusively under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised" (Farrand, 1966: 312).

Without the authority of the federal government to step in and require elections for federal offices, the Framers feared that some states might refuse to hold them, leading to the dissolution of the union. Madison's interpretation of the purpose behind this section of the Constitution was also confirmed by James McHenry and William Davie, former delegates to the Constitutional Convention, during the North Carolina Ratification Convention in July of 1788 (see Farrand, 1966: 344 and 359).

As a consequence, using state authority to regulate ballot access as a means to imposing term limits on members of Congress seems well within the boundaries of legitimate state action permitted, if not also anticipated, by the Framers of the Constitution.

A New Defense Advanced

The conventional case made in defense of state imposed congressional term limits can probably withstand the challenges posed by the critics of term limits. However, the conventional defense of state authority by term limit advocates seriously misrepresents the meaning of term limitation as

a principle of republican political design. Rather than contemplating the applicability of Powell or the constitutionality of circumvention mechanisms like ballot access rules, term limitation advocates should defend legislative limits on the grounds that they do not constitute a new qualification on officeholders at all.

This new defense of term limitation, grounded in republican political theory and American political practice, makes the disputed applicability of Powell irrelevant and the creation of circumvention mechanisms like ballot access restrictions unnecessary.

Instead of a qualification on officeholders, the principle of rotation in office, historical predecessor of term limitation, gave citizens the right to expect the periodic return of officeholders to private station and created a restraint on the legislature as a political institution. Viewing term limitation in this way could change the argumentation and possibly the outcome of litigation over the constitutionality of state-imposed congressional term limits.

The right of citizens to expect officials to return to "private station" or "private life" appeared in the bills of rights accompanying six of the state constitutions adopted from 1776-1780. The Virginia "Bill of Rights," for example, provided that members of the legislature and executive "may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to private station" (1776, Sec. 5). Similar provisions appeared in the bills of rights accompanying the constitutions of Pennsylvania (1776, Art. 19 and 11), Delaware (1776, Art. 4), New York (1777, Art. 11), South Carolina (1778, Art. 9), and Massachusetts (1780, Art. VIII).

In these declarations or bills of rights, rotation in office was a right of citizenship on par with freedom of speech and the press, trial by

jury, and frequent elections. Rotation in office was neither conceptualized nor presented as a qualification necessary to hold elected office. Instead it was adopted as a characteristic of the political regime (see Petracca, 1992b; cf., Wills, 1992). From Athenian and Roman experiments with democracy and the writings of the 17th and 18th century English Commonwealthmen to the advocacy by America's revolutionaries, the principle of rotation in office was discussed and practiced as an aspect or feature of the institutional design of a legislature—not as a characteristic of the individual officeseeker (see Petracca, 1992c).

Rotation in office was more akin to the length of a legislative session or the length of a particular electoral term than it was a qualification on eligibility for a prospective officeholder. Whether advocated by Aristotle or Cicero, James Harrington or James Burgh, John Adams or Thomas Jefferson, rotation was discussed as a characteristic of institutional design, not as a qualification on prospective candidates or current officeholders running for reelection.

The history of rotation as an idea reveals no instance (prior to the late 19th century) in which rotation was viewed as an additional qualification on a would-be or current officeholder (Petracca, 1992c). This was certainly true in America's experience with the practice of rotation in office. The principle of rotation in office appeared first in America in the New England Confederation of 1643 (see Bradford, 1908) and then in William Penn's Frame of Government (1682, Art. III) for the colony of Pennsylvania. In both cases it was conceived as a characteristic of newly created legislatures. This was also the case with the rotation requirement contained in the Articles of Confederation (1781, Art. V). In no case was rotation imposed as a personal requirement on prospective officeholders, like age, residency, or the common "stake in society"

through specified property ownership. Likewise, the inclusion of rotation in Edmund Randolph's "Virginia Plan," presented to the Constitutional Convention in 1787, occurred in a clause of the plan which followed a listing of conventional qualifications to be imposed by the new Constitution on prospective officeholders and was followed by a call for legislators to be "subject to recall."

State term limits for members of Congress pass constitutional muster because they reassert a fundamental right of citizenship and reestablish one of the primary structural features of republican government, a form of government guaranteed to every state by Article IV, Section 4 of the Constitution.

Not incidentally, the principle of rotation in office was considered an essential component of republican government. John Trenchard, author of the Cato Letters at the time of the American Revolution, called rotation "a truly republican principle." This view was shared by such a diverse group of American revolutionaries including Thomas Paine, John Adams, Thomas Jefferson, Benjamin Franklin, and George Washington. George Mason, Governor of Virginia and delegate to the Constitutional Convention, made the connection between rotation and republicanism succinctly: "Nothing is so essential to the preservation of a republican government as a periodical rotation" (Otteson, 1991: 22). State term limits for Congress constitutes a return to the republican principle of rotation, adopted on a state by state basis.

In the long run, the success of state term limitation initiatives may strongly encourage the House and Senate to get serious about congressional reform. State action may be the only way to jolt Congress into passing an amendment to limit congressional terms. With fifteen states now limiting congressional terms, comprising 36% of the members in the 103rd House of

Representatives, and nine states petitioning for the next available ballot, Congress will be compelled to place a constitutional amendment limiting congressional terms before the states for ratification. This could take place as early as 1996.

There were a number of major efforts in 1993 by members of Congress to begin deliberations on a term limitation amendment to the Constitution. "The Amendment for a Citizen Congress" was introduced by Rep. Bob Inglis (R-SC) in March with the backing of nine House colleagues, including Rep. James Barcia (D-Mich). This amendment would limit service in the House to 6 years and in the Senate to 12 (see Glasser, 1993). In May Senators Hank Brown (R-CO) and Lauch Faircloth (R-NC) unsuccessfully tried to attach an amendment to campaign finance legislation requiring that candidates who accept federal campaign dollars agree to term limits.

It took unilateral state action to pressure the Senate into passing a constitutional amendment requiring the direct election of U.S. Senators in 1912. The movement to amend the constitution to provide for the direct election of Senators started in Oregon in 1904 and stimulated similar activity in 28 other states by 1912. The 17th Amendment to the Constitution was ratified by a sufficient number of states only a year later.

A similar route to amending the Constitution is being pursued by the advocates of term limitation. Notwithstanding the objections of political scientists to term limitation (see Petracca, 1992a), members of the discipline should remain attentive to this lively reform movement. Constitutional change is in the air, to borrow a phrase from Gore Vidal; we are witnessing nothing less than the transformation of the American legislature as we have come to know it in the 20th century.

ENDNOTES

¹Add to the aforementioned states: Arizona, Arkansas, Colorado, Missouri, Montana, Nebraska, North Dakota, Ohio, South Dakota, and Wyoming. Moreover, with the addition of Oklahoma to this list and the deletion of North Dakota, which only limits terms for federal legislators, fifteen states now also limit terms for state legislators. For a discussion of the 1992 campaign for term limits, see Petracca and Jump, 1992.

²The states are: Alaska, Idaho, Illinois, Maine, Massachusetts, Mississippi, Nevada, Oklahoma, and Utah. In 1992, Mississippi voters approved a constitutional amendment permitting indirect initiative.

³For legal or political reasons, petitions are being circulated again to qualify term limit initiatives again in Alaska, Massachusetts, and Nevada.

⁴In 1993 term limit legislation passed at least one chamber of the state legislature in New Hampshire, New Jersey, and Texas but failed to win final approval.

⁵The leaders of Congress have been reluctant to consider a constitutional amendment to limit congressional terms until the Supreme Court has rendered a decision on the constitutionality of state-imposed limits.

⁶I have intentionally avoided discussing the wisdom or folly of limits on legislative terms. This debate can be reviewed by consulting: Coyne and Fund, 1992; Will, 1992; Kesler, 1990; Polsby, 1991; essays in Benjamin and Malbin, 1992; and the various law review articles cited herein.

⁷See State Legislature of California, et al v. Eu, Secretary of State, et al., 54 Cal. 3rd 492, 816 P. 2d 1309, 286 Cal. Rptr. 283 (1991), cert. den'd, 112 S.Ct. 1292 (1992) and "Opinion of the Justices to the Senate," S-5957 S.J.C. (Boston, MA, July 7, 1992).

⁸State Legislature of California, et al v. Eu, Secretary of State, et al., 54 Cal. 3rd 524, 520 (1991).

⁹See Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982).

¹⁰See Anderson v. Celebrezze, 460 U.S. 780 (1982) and State ex rel. Maloney v. McCartney, 223 S.E. 2d 607, 611 (1976).

¹¹See Clements v. Fashing, 457 U.S. 957 (1982).

¹²For a discussion of why the requirement of rotation in office was omitted from the U.S. Constitution, see Petracca, 1992c.

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CITIZENS BE DAMNED: THE TERM LIMIT DODGE

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Politicians will do almost anything to stay in office. Consequently, many are working feverishly to derail or at least slow down the term limit express. Term limitation is undoubtedly the 20th century's most popular institutional reform, as evidenced by election results and opinion polls. Yet from coast to coast the professional pols are determined to terminate, disrupt, circumvent, obstruct, and prevent the implementation or adoption of term limits.

In 1992 term limit initiatives were approved by voters in all 14 states where they appeared on the ballot. On average 66% of the voters approved these initiatives. Term limits received more votes than Bill Clinton in these 14 states and more people voted for term limits than for Ross Perot nationwide.

Polls tell a similar story. A Wall Street Journal/NBC poll in April of 1992 showed 80% of Americans favor a limit on congressional terms. Fabrizio, McLaughlin, & Associates found a 76% public approval rating for congressional term limits in May, 1993. Regardless of party, race, ethnicity, income, gender, or geographical location the vast majority of Americans support term limits.

Nevertheless, attempts to dodge the term limit express continue unabated.

Termination. The major effort to terminate term limits comes from lawsuits challenging their constitutionality. Speaker of the California Assembly Willie Brown tried unsuccessfully in 1991 to overturn Prop. 130 which limits terms for all state legislators. The probable landmark case challenging a state's authority to limit congressional terms has been filed in the State of Washington by House Speaker Thomas Foley along with the League of Women Voters. Foley is suing the people of Washington to overturn Initiative 573, adopted in 1992, on the grounds that it violates his 1st and 14th Amendment rights.

Foley's challenge is hardly unique. In Missouri, Florida, and Nebraska,-- where term limits were approved last November--lawsuits were filed to block the placement of these initiatives on the ballot. Courts in Missouri and Florida have dismissed the suits while in Nebraska litigation is pending. The morning after 77% of Florida's voters approved term limits another lawsuit was filed on grounds similar to Foley's. Preliminary motions for dismissal await a hearing. Likewise, the constitutionality of Maine's term limit initiative for all state legislators and constitutional officers was challenged by the State Attorney

General to prevent placement on the 1993 ballot. However, the Maine Supreme Court upheld its constitutionality, clearing the way for a vote this November.

Disruption. Litigants in Arkansas have been successful in disrupting the implementation of term limits. A July 29th decision by Arkansas Circuit Court Judge Chris Piazza invalidated Amendment 73 to the state constitution--limiting terms for state and federal legislators--on the technical grounds that it did not contain the phrase "be it enacted;" allegedly required of all statutes and amendments to the Arkansas constitution.

The decision was greeted with outrage by term limit advocates and even by Governor Jim Guy Tucker, no friend of term limits. "I believe the people of Arkansas expressed their will in November 1992," responded Tucker. "I believe they are understandably angry about this technical effect thwarting what they had hopes to accomplish." Not elegant, but to the point. Judge Piazza's decision has been appealed to the State Supreme Court. If not overturned advocates will be back next year with another legally ironclad initiative.

Circumvention. Wyoming adopted a term limitation initiative for state and federal legislators with 77% of the vote. Less than two months later Speaker of the Wyoming House Doug Chamberlain introduced two bills which would have doubled the number of years politicians could serve and delay implementation of term limits altogether. Once the public got wind of Chamberlain's attempt to circumvent the will of the people the State Capital in Cheyenne was flooded with letters and phone calls. Both bills were eventually quashed in committee.

Obstruction. Term limit advocates in Massachusetts have been stymied every step of the way in an attempt to place a constitutional amendment before the electorate. By the fall of 1991 "LIMIT" had gathered and certified the signatures necessary to place an amendment on the ballot. In Massachusetts however all constitutional amendments proposed by citizens must receive a favorable vote of 20% of the state legislature acting as a constitutional convention before placement on a statewide ballot.

The following spring the convention/legislature, led by Senate President Billy Bulger, quickly placed the term limit amendment at the bottom of its agenda and requested the Supreme Judicial Court to rule on its constitutionality. The

SJC found the proposed amendment constitutional but the convention/legislature still refused to bring it up for a vote. When the convention/legislature adjourned in December the term limit amendment died without consideration.

Unyielding, "LIMITS II" is back gathering signatures for a more stringent amendment to limit terms for federal legislators and terminate all pay, perks, and pensions for Massachusetts legislators and statewide officeholders after 8 consecutive years in the same office.

Various attempts to force the U.S. House and Senate to consider term limits have also been thwarted. Several Senators tried to amend the campaign finance bill to include a provision for term limits, but were defeated. "The Amendment for a Citizen Congress," introduced in March by freshman Rep. Bob Inglis (R-SC) would restrict House members to six year's of service and Senators to 12 years. It awaits action by various House committees.

Prevention. In non-initiative states legislators have cleverly prevented the adoption of term limit legislation. A term limit bill passed the House in New Hampshire this spring only to be marred in the Senate by the addition of three "killer amendments," one of which would repeal straight ticket voting, a measure already soundly defeated in the House. This guaranteed the House would reject the bill as amended by the Senate.

Term limit legislation introduced in Texas met a similar fate. But in New Jersey legislation limiting congressional terms has passed the State Assembly and awaits Senate action. Both Governor Jim Florio and GOP gubernatorial candidate Christine Todd Whitman have agreed to sign this historic legislation once it reaches their desk from the Senate.

Undaunted by these maneuvers, the term limitation movement is pressing ahead. Nine states are petitioning for initiatives on the 1994 ballot. Attorneys organized by the Term Limits Legal Institute and led by Griffin Bell are responding to the lawsuits. Activists in non-initiative states are pressuring officeholders and candidates to pledge support for term limit legislation. Professional politicians may be able to slow, but they cannot stop the inevitable, a constitutional amendment limiting terms for all members of Congress.

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