

THE POLITICS AND LAW OF TERM LIMITS

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1. An American Debate

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It is no overstatement to say that the term-limits movement—a national, grassroots effort to limit the terms of elected officials at all levels of government—is emerging as one of the most important political developments in this nation in a very long time. Reaching beyond such political staples as crime, economic policy, or welfare reform, term limitation speaks in fundamental ways to the question of how we will govern ourselves. Although the political establishment has often been slow, for understandable reasons, to acknowledge the movement, it can be ignored no longer.

Coming out of Middle America in September of 1990, when the voters of Oklahoma decided to limit the terms of their state legislators, term limits moved west in November of that year when California did the same while Colorado limited the terms of both its state and its federal legislators. Two years later, measures to limit the terms of federal legislators passed, often by overwhelming margins, in all 14 states in which they were on the ballot. With 7, and possibly 10, more states expected to follow suit this fall, voters in 16 states have now limited the terms of their state legislators, while hundreds of counties and cities, including New York and Los Angeles, the nation's largest cities, have limited the terms of their elected officials as well. As we go to press, a term-limits measure has just been certified for the ballot for this fall in Washington, D.C., which means that the term-limits movement has come at last even to the nation's capital.

But the movement has not been without opposition. Losing time after time at the polls, the political establishment that would be affected most directly by term limitation has sought relief in the courts, trying repeatedly to keep term-limits measures from the ballot, then to have those measures declared unconstitutional after the voters have spoken. Perhaps the most celebrated such effort, dubbed "Foley v. Voters," was a suit brought by Speaker of the

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House Thomas S. Foley, a 30-year incumbent of the U.S. House of Representatives, to have the term-limits measure that Washington state voters passed in 1992 declared unconstitutional. That suit is now before the U.S. Court of Appeals for the Ninth Circuit.

In the meantime, the Foley case has been overtaken by another, a suit brought by a number of interested parties in President Clinton's home state of Arkansas to overturn the term-limits measure that 60 percent of the voters of that state had passed in 1992. When the Arkansas Supreme Court, in a split decision, struck down the provisions of that measure that limited the terms of the state's congressional delegation, U.S. Term Limits, one of the defendants in the suit and the leading national organization promoting term limits, immediately appealed the decision to the United States Supreme Court. On June 20, 1994, the Court agreed to hear the case. Oral argument is scheduled for this fall.

To address both the political and the legal questions that the term-limits movement has raised, the Cato Institute's Center for Constitutional Studies held a conference on December 1, 1993, on "The Politics and Law of Term Limits." Drawing together some of the nation's leading experts on the subject, the conference featured both proponents and opponents of term limits and included heads of activist organizations, public policy analysts, and legal practitioners and scholars. The conference was aired nationally on the C-SPAN television network, and the spirited debate that ensued reflected, in our view, a prime example of the value of civil policy discourse. The essays that follow are based on the papers presented at the conference and are offered here in the spirit of continuing that debate.

The volume begins with an essay by the noted syndicated columnist and television commentator George F. Will, who may well be the nation's most visible proponent of congressional term limitation. A student of the American revolutionary period who originally was an opponent of term limitation, Will is a self-described American Tory who once wrote, "A great state can not be run by 'citizen legislators' and amateur administrators."

In recent years, however, George Will the Tory has become rather more George Will the Jeffersonian. The enthusiasm Will once had for the strong central government of the Hamiltonian vision—explaining his earlier opposition to congressional term limitation—

is today directed toward a more populist vision that emphasizes the need for citizen legislatures if we are to have a truly representative democracy.

Although Will thinks the Founding Fathers were right to not include them in the Constitution, he writes of term limits that "what justifies them now is the nature of the modern state." With the advent of the "interventionist state" in the post-Civil War era, Will sees legislative service as increasingly attractive to those who would like to make a career in government, creating in turn a political class peopled by professional politicians who by definition represent something other than civil society.

Unlike many conservative supporters of term limitation who believe that the institution of limits will lead to a reduction of government meddling in society, Will reserves judgment on the point—suggesting even that the opposite might well prove true. He does believe, however, that respect for Congress itself will grow if the institution is seen by the public to be more a citizen legislature than a political ruling class.

As for measures to limit campaign giving and spending or to have the government finance campaigns—which opponents of term limits often propose as alternatives to term limits—Will finds those alternatives "facially unconstitutional." Moreover, such measures inevitably help incumbents, who already have such advantages as incumbency, name recognition, franking privileges, and free television studios.

Although Will reminds those who believe term limitation to be anti-democratic that America has "never flirted for a minute with untrameled majoritarianism," many term-limit proponents, while granting Will's point, nevertheless believe that term limits will enhance the democratic process. Most contested races, they point out, are for open seats, and the number of open seats will be dramatically increased through the term-limitation process, leading to greater voter interest and involvement in elections. George Will's opening contribution to this book is a persuasive case for term limitation from someone who is less interested in bashing Congress than in restoring respect to an institution that is fundamental to the limited, albeit important, sphere of human affairs subject to democratic rule.

Two of the leading grassroots organizations engaged in the congressional term-limitation battle are represented in this volume by

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Paul Jacob, executive director of U.S. Term Limits, and Becky Cain, president of the League of Women Voters. As already noted, U.S. Term Limits is the principal national organization behind the term-limits movement and an appellant in the Supreme Court case that will decide whether states may limit the terms of their congressional delegations. The League of Women Voters has steadfastly opposed term limits and will file an amicus brief in the Supreme Court supporting those who want to strike down the Arkansas term-limits initiative, despite numerous polls indicating that support for term limits among women is even higher than among men.

(As we go to press, the National Women's Political Caucus has just released a study, reaching back to 1972, that shows that "success rates for male and female candidates were virtually identical at every level of office" and that incumbency, not sex, determines electoral success. Noting that House incumbents won 16 times as often as challengers, the study's author, NWPC executive director Jody Newman, added that "winning has nothing to do with sex and everything to do with incumbency. In order to win, women have had to defeat a sitting [usually male] incumbent, or wait for him to retire, resign, or die.")

In his essay, Paul Jacob makes a powerful case for term limits, then aggressively addresses the issues raised by term-limit opponents. To those who criticize the supposedly anti-democratic aspects of term limitation, Jacob points to polls that demonstrate between 75 and 80 percent support for them. In fact, pollsters are struck by the relatively little demographic variation they find within the overwhelming support for term limitation. Women support limits slightly more than men, blacks somewhat more than whites, and conservatives just a bit more than liberals. But in virtually all groups, support for term limits exceeds 70 percent.

The exception, not surprisingly, is provided by the political establishment. Jacob cites a Gallup poll among congressional staff, Washington corporate lobbyists, and federal bureaucrats that showed all three groups opposed to term limitation. But that opposition affords only another rejoinder to critics of term limits: to those who argue that under a term-limited Congress the power of such groups would be enhanced, Jacob responds that if that were the case, why are those groups opposed to term limits?

To the claim that term limitation reflects simply a visceral reaction to high levels of congressional corruption, Jacob points to existing

limits on the terms of the president and 37 state governors. Apart from their concern to apply limits to Congress as well, however, voters doubtless are frustrated by congressional scandal, including the unwillingness of Congress even to address the question of term limitation. In fact, Congress's overt antagonism toward term limitation, and its practice of exempting itself from the laws it imposes on the rest of us, only underscores the need to bring some humility to the institution. In Jacob's view that means rotation in office and a citizen legislature.

To Becky Cain, "Term limits are a smoke screen, a simplistic answer to hard questions about our government . . ." She provides an articulate litany of arguments that term-limit opponents typically put forth: we already have term limits, they're called elections; term limits are a "meat ax" approach to public policy; term limits will deprive us of our most experienced legislators; and term limits will turn power over to congressional staff and insiders. Cain devotes a good portion of her argument, however, to the need for such reforms as public financing of campaigns and public school requirements that get students involved in political activism in order to pass social studies courses. The views of the League of Women Voters on such issues parallel those of another major activist organization, Common Cause.

From the policy analysts, the essays by Mark Petracca, professor of political science at the University of California at Irvine, and Thomas Mann, senior fellow at the Brookings Institution, offer forceful, intelligent cases for their respective positions, for and against term limitation. Interestingly, both focus on two primary issues: the historical record concerning the term-limitation debate and the question of whether "professionalism" in politics is good or bad.

Petracca traces support for the concept of rotation in office from Aristotle and Cicero through the Articles of Confederation. He argues that the historical case for rotation in office rests on the desirability of "returning officeholders to private station," the increased opportunity for more citizens to participate in the political arena, and the enhanced quality of representation that results from a system in which officeholders are truly "representative."

Petracca then raises the more problematic question of why the Framers neglected to include term limits in the Constitution, suggesting that they viewed the issue as too specific for what was obviously

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a very general document and that, in any case, it was assumed that rotation in office would be the norm—as indeed it was until this century. In fact, the “professional legislator” is a wholly modern phenomenon. It was not until 1901, Petracca notes, that the average number of terms served by House members rose above two. More than half of the House membership during the entire second half of the 19th century was composed of first-term congressmen. Today, about a third of the House is composed of members who have served for 14 years or more, a pattern one finds in the Senate as well.

This trend toward “professionalism” in politics should disturb anyone concerned about the future of representative democracy. Sociologists have noted that professionalism in any field tends toward undesirable side effects—professional jargon, distance, unintelligibility to laymen. Perhaps such distancing can be justified in some fields, but politics is surely not one of them—assuming representative democracy is a desirable objective. In a democracy, Petracca argues, “professional representation” is an oxymoron. Echoing George Will’s theme, Petracca concludes that term limitation should be enacted “on the basis of principles necessary to enhance the democratic character of the American republic.”

To the Brookings Institution’s Thomas Mann, nothing could be further from the truth. Claiming that “the crux of the case for term limits is a rejection of professionalism in politics,” Mann sets out to defend such professionalism—or what he calls “legislative careerism.” As the world becomes more complex, the need for specialization grows, he argues, from which professionalism follows. Moreover, only professional politicians are likely to be “committed to the larger purposes of the institution of which they are a part.” In Mann’s view, the professional legislator is more likely to act in a manner consistent with deliberative democracy.

Defending a primary target of the term-limits movement, seniority, Mann argues that the elimination of seniority as the basis for selecting congressional leadership would “devalue the authority of those positions.” Here, perhaps, we have basic agreement among the various participants in this debate concerning a likely outcome of term limitation—and a rather basic disagreement concerning the value of that outcome. Mann also takes issue with certain points made by Paul Jacob, asserting that term limitation will not increase the competitiveness of congressional races and that there is no correlation between pork-barrel spending and congressional careerism.

Whatever the merits of term limits, there can be no question, as indicated earlier, about where the overwhelming majority of the American people stand on the issue. As George Will once noted, "To the question 'Where most recently have term limits passed?' the answer is: 'Wherever most recently people were permitted to vote on them.'" The operative word here, of course, is "permitted." For again, when not ignoring the term-limits movement, the political establishment has often turned to the courts to try to strike term-limits measures from the ballot—or to have them found unconstitutional once they have passed. We turn, then, from the political to the legal side of the issue and to the specific question of whether, under the U.S. Constitution, the voters of a state may limit the terms of their congressional delegation.

To address that question, our conference heard from two distinguished lawyers with long histories of Washington experience and two noted legal scholars, both of whom had written on the subject. Lloyd Cutler is "an old Washington hand" who served as legal counsel to President Jimmy Carter and now is acting counsel to President Clinton. His counterpart, John Kester, served in the Department of Defense in both the Nixon and Carter administrations and now is lead counsel for U.S. Term Limits. He will be arguing the term-limits case this fall before the Supreme Court.

On the academic side, Daniel Lowenstein served in the administration of California Governor Jerry Brown before joining the faculty of the UCLA School of Law. Ronald Rotunda, coauthor of a standard casebook as well as a four-volume treatise on constitutional law, is the Albert E. Jenner, Jr., professor of law at the University of Illinois College of Law.

Although the term-limits movement has been growing now for more than four years, there is still a relative paucity of legal analysis of the subject. One often hears some legal commentator say, offhandedly, that of course term limits are unconstitutional, yet the analysis one finds usually tends in the other direction. Perhaps that indicates only that the legal establishment, like the political establishment, has been slow to respond, or it may indicate instead that the argument for unconstitutionality is rather weaker than at first thought. In any event, the question will likely be one of first impression for the Court, which is why an open mind on the matter is so crucial.

But an open mind is never entirely open, of course, or without some presumption, even in law. One would hope that in a free

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society, in ordinary legal affairs, the presumption would always be on the side of individual liberty. In political affairs, when it is a question of whether the individual, as voter, may order his affairs as he thinks best, here too the presumption would seem to be on the side of liberty. At the least, the question ought to be whether there is anything in the Constitution that would override that liberty.

The importance of presumptions, and of framing an issue, is brought out clearly in the essays by our legal practitioners. Lloyd Cutler, for example, assumes that term limits are "qualifications for federal office." He then looks to the constitutional debates to conclude—with the Supreme Court in *Powell v. McCormack*, as he reads the case—that "the Founders agreed upon a final list of qualifications, and determined that they should be exclusive." In particular, "a member-elect who meets the constitutional qualifications cannot be excluded." (Query: Are the rules for exclusion of members-elect the same as the rules for ballot access?) To support his conclusions further, Cutler draws upon both the political and the legal record that runs from post-revolutionary American state constitutions through the Constitutional Convention and the ratification debates to the post-ratification experience. Finding the record clear on the point, he adds finally that efforts by supporters of term limits to recast them not as qualifications (controlled by Article I, sections 2 and 3 of the Constitution) but as "ballot-access restrictions" (controlled by Article I, section 4, which gives states the power to regulate the time, place, and manner of elections) are "entirely without merit"; however denominated, Cutler concludes, a term-limits measure "clearly imposes a qualification."

By contrast, John Kester begins not with the early constitutional debates, as interpreted by the Court in *Powell*, but with the text and structure of the Constitution. Finding the text "silent on the subject" of term limits, he frames the issue by noting that "the Constitution structurally limits state lawmaking far less than it limits the U.S. Congress." Thus, the question is whether anything in the Constitution prohibits the voters of a state from limiting the terms of the members of their congressional delegation. Taking sharp exception to Cutler, Kester argues that "a 'ballot-access' law does not amount to a qualification for holding office," nor are sections 2 and 3 of Article I of the Constitution properly called "the Qualifications

Clauses," for they set forth *disqualifications*. And those disqualifications can hardly be thought to be exclusive, both because of the logic of the language and because elsewhere in the Constitution we find other disqualifications for office. Unsupported by either text or history, the idea of exclusivity seems to have sprung, without authority, from Joseph Story, Kester notes, after which it was repeated by lower courts, but never addressed directly by the Supreme Court. What authority is drawn from *Powell*, he adds, arises from a misreading of the opinion, for the case "had nothing to do with state regulation of elections," or even with congressional regulation, but with the power of a single chamber of Congress, when sitting as "judge," to pass on the qualifications of one of its members. Finally, Fourteenth Amendment objections to term limits are weaker still, Kester concludes; indeed, were they to prevail, a huge number of state election regulations, many already approved by the Court, would have to go.

Turning now to the academic contributors, here too we see the importance of presumptions. Thus, Daniel Lowenstein begins by asserting that congressional term limits "violate the qualifications clauses of the Constitution," an assertion he defends by claiming that proponents, to show constitutionality, must establish at least one of three propositions: (1) that states are permitted to establish additional qualifications; (2) that term limits are not qualifications but regulations of election procedures or candidacy; or (3) that ballot-access restrictions do not evade the qualifications clause or violate the First and Fourteenth Amendments. Like Cutler, Lowenstein draws heavily upon *Powell v. McCormack*, concluding that proponents can establish none of those propositions, from which it follows that congressional term limits are unconstitutional. But does that follow? Or is it rather for term-limits *opponents* to show unconstitutionality? Lowenstein adduces a wide range of arguments toward that end. But in the end the distribution of the burden of proof—and the implications respecting constitutional structure—may be as important, and decisive, as the substantive arguments.

Ronald Rotunda frames the issue quite simply: Does anything in the Constitution or in Supreme Court case law preclude term limitation? With respect to the Constitution, he focuses on the qualifications clause, concluding from text and history "that the most natural reading . . . is that it sets forth necessary, but not exclusive,

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qualifications." That echo of Kester is repeated on the case-law side of the question, where Rotunda concludes that term-limits opponents have misread *Powell*: when exercising its power to exclude, pursuant to its power to judge the election returns of its members, Congress may not add qualifications "in the guise of ad hoc discipline of its members." This reading is a far cry from the broad reading many have given the case.

Of particular interest in Rotunda's essay, however, is the passage he cites from Jefferson, which Story had cited as a view that opposed his own on the qualifications clause:

Jefferson argued that if it is the rule of interpretation that, when the Constitution "assumes a single power out of many," we "should consider it as assuming the whole," then the Constitution "would vest the general government with a mass of powers never contemplated."

We return thus to the question of presumptions and the structure of the Constitution. As with so much in law, the framing of the term-limits question may prove crucial to its legal outcome.

In recent years the Cato Institute has held seminars and produced studies on congressional term limitation that have convinced the editors of this volume of the wisdom of what the Founders called "rotation in office." We will conclude this introduction, therefore, with two arguments in support of congressional term limits that are only obliquely addressed in this volume.

The first concerns the "adverse selection" that occurs under current political arrangements. In considering today whether to run for Congress, ordinary citizens who might constitute a truly representative legislature face a discouraging prospect. On one hand, under the current system there are very few open seats and ousting an incumbent is next to impossible. On the other hand, a considerable commitment of time is required before one has any influence in a Congress run under today's seniority system. Out of a sense of civic duty someone might be willing to commit two, four, or even six years to serving in the House of Representatives, but not if others are going to be setting the agenda. Committee chairmanships are awarded today to those who have been in the House for an average of 19 years.

Ironically, the kind of person we should have in Congress is the person who would prefer to be in the productive, private sector.

That kind of person is likely to be a good representative of private, civil society, as opposed to political society. But the prospect of spending a dozen years or more as a politician is what keeps such people from running for office. By contrast, the kind of person who eagerly anticipates spending the rest of his life in politics is not likely to be "representative" of his community.

With real congressional term limits—three terms in the House, two terms in the Senate—there would be a more open, collegial culture in Congress, a culture that would be inviting to those who would be more representative of their community than is now the case. We suspect, in fact, that under a limit of three terms in the House, many people would serve for only one term, as was common during our nation's first century.

Beyond the adverse selection issue, however, lies another that urges term limitation. We are all familiar with the phenomenon of legislative logrolling, whereby one legislator agrees to vote for another legislator's bill in return for support for his own bill. That process occurs on a regular basis in Congress and is a leading generator of pork-barrel legislation. Indeed, Tony Coelho, new senior advisor to the Democratic National Committee, has just been quoted in *Roll Call*, "the Newspaper of Capitol Hill," as saying that "the most important thing for the Members to do today is concentrate on adopting legislation and being able to go home and run on something."

But there is more to logrolling than the endless generation of legislation. Typically, congressmen agree to support each other's bills and agree further not to try to have repealed any law that others have sponsored. Indeed, there is an ethic in the current congressional culture that sharply rebukes those who deign to alter or repeal legislation of another congressman. The true gridlock in Congress is thus not related to the members' inability to pass laws. Rather, gridlock manifests itself in the inability of Congress to repeal the huge inventory of previously passed laws that are doing actual damage to our society.

With the passage of term limitation, the culture in Congress is likely to change radically. One positive element of that change will be a greatly enhanced willingness and ability in Congress to address that body's past mistakes, both liberal and conservative, and clean up the deadwood that is such a burden on both economic growth

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and personal liberty. Absent term limitation, however, the culture in Congress is likely to remain one of arrogance, perhaps no better demonstrated than in Coelho's *Roll Call* interview:

When I was DCCC [Democratic Congressional Campaign Committee] chairman we undertook an incumbent protection strategy and we lost very few incumbents. I felt very strongly that no incumbent should lose. You have tremendous, tremendous tools you can use that a challenger cannot use.

Stepping back from these policy arguments, however, one sees a deeper issue in the term-limits debate, an issue that takes us to our very foundations as a nation. No one can doubt that America was dedicated to the proposition that each of us is and ought to be free—free to plan and live his own life, as a private individual, under a government instituted to secure that freedom. Thus, implicit in our founding vision is the idea that most human affairs take place in what today we call the private sector. That sector—and this is the crucial point—is primary: government comes from it, not the other way around. When we send men and women to Congress to “represent” us, therefore, we want them to understand that they represent *us*, the overwhelming number of Americans who live our daily lives in that private sector. Moreover, we want them to remember that it is to that private world that they must return, to live under the laws they have made as our representatives. That, in essence, is the message implicit in the growing call for term limits. It is not simply or even primarily a message about “good government.” Rather, it is a message about the very place of government in the larger scheme of things. Government is meant to be our servant, to assist us by securing our liberty as we live our essentially private lives. It is not meant to be our master in some grand public adventure.

In this volume we endeavor to provide the reader with thoughtful arguments on both sides of this American debate. We leave it to the reader to determine where the merits of the arguments lie.