

Cato Institute Briefing Paper No. 22: Temporizing on Term Limits: The Speaker Likes 12 Years, Not 6

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Executive Summary

By overwhelmingly margins, Americans continue to support not only term limits but congressional limits of 12 years in the Senate, 6 years in the House. Unable to resist the voters any longer, many members of Congress are at last moving to limit their terms, but they are holding out for 12 years in the House as "the only limits that have a chance of passage." Leading this temporizing with the voters' demands is House Speaker Newt Gingrich. But his constitutional and policy arguments will not withstand scrutiny. Far from wanting the two houses of Congress to be equal, as Gingrich implies, the Framers repeatedly argued that they were to be different, with the House "closer to the people." As for Gingrich's belief that "a six year learning curve" is just too short, he is not listening to what the people are saying they want their representatives to learn to do--namely, return power to the people.

Introduction

On two grounds I'm opposed to six years. . . . I do not think that the House and Senate should be unequal. I think that violates the framework the Constitution set up, and the compromise between the large and small states. I think they ought to have the same length of time in the two. Secondly, . . . I think that if you have a leadership in this country that has only a six year learning curve, that it's just too short.

-- Newt Gingrich

No sooner had the sweeping elections of 1994 concluded than the question arose whether the new Republican Congress would keep its Contract with America. And on no part of the contract have Americans expressed that concern more sharply than on the promise to bring term limits to a vote. As Michael Kramer noted recently in an essay in *Time*, "The dissonance between the people and their leaders on term limits is deafening." [1] Whereas a balanced-budget amendment is easy, not least because no one knows how it will play out several years down the road, a term-limits amendment has real bite on real people--the very people who promised us a real vote.

Not wanting to be thought to be ignoring those concerns, Speaker Newt Gingrich appeared at a Capitol Hill press conference barely a week after gaveling the 104th Congress into session. There, along with 58 of his colleagues, 52 Republicans and 6 Democrats, he announced his support for term limits. But Gingrich "aligned himself with the old-guard among those favoring limiting Congressional terms," observed the *New York Times*. He was "supporting a bill that allows House members to stay in office for 12 years--even though a Republican poll shows that most voters favor 6-year limits." [2]

Commenting on the press conference, U.S. Term Limits executive director Paul Jacob said, "This will mean packaging

the same old system of seniority and careerism in a term limits wrapper and trying to peddle it to the American people." [3] Scott Rasmussen, head of the Term Limits Leadership Council, predicted that "a term-limits amendment allowing six [two-year] terms in the House would be dead on arrival in the states." [4] Indeed, there is no issue on which the voters in recent years have been more united--across all demographic categories--and more unequivocal than term limits. [5] It is terrain on which career politicians venture at their peril.

Apart from the politics of the matter, just how sound are the Speaker's arguments in favor of equal terms for House and Senate members? Invoking the original understanding of the Great Compromise between large and small states, Gingrich suggests, first, that unequal terms would violate the spirit of the compromise by undermining the resulting, presumably sound, constitutional structure. Second, he insists that a six-year learning curve is too short, suggesting that House members limited to but three terms would be unable to represent their constituents effectively.

For all his brilliance and understanding of American history, Gingrich is wrong on both counts. Indeed, he makes four fatal analytical errors. He

- * misconceives the nature of the Great Compromise,
- * overlooks the current insignificance of that compromise,
- * ignores the arguable irrelevance of the original understanding to any contemporary amendment process,
- * misjudges the appropriate balance between the relevant competing public policies.

The Nature of the Great Compromise

Although Gingrich did not elaborate on his understanding of the Great Compromise, he seems to believe that it was intended to equalize the power of the small or sparsely populated states with that of the large or populous states. Since he knows, presumably, that the Framers preferred liberty to equality, he ought to be suspicious of any argument that implies that they sought to enforce equality, even among the states.

In the first place, the Framers surely knew that any such enforced equality would dissolve over time, dependent as it necessarily would have been on static demographic patterns. More to the point, however, the compromise was not intended to equalize the power of the large and small states. Rather, it was intended to give the small states a check--something akin to a veto--on the power of the more populous states to adopt policies inimical to the interests of the small states. That veto was rooted, first, in the allocation of two senators to each state, regardless of size or population, and, second, in the grant of power to state legislatures to elect those senators. The small states, each with as many senators as the large states, could defend their collective interests, whatever the makeup of the House or, indeed, more accurately, in spite of the makeup of the House. Thus, regardless of how many or how few terms House members served, the small states would still have their two senators and their enhanced clout in the Senate.

The Speaker's conclusion that a shorter term limit for House members would undermine the veto power of the small states is thus perversely at odds with the very rationale for the Great Compromise. Gingrich apparently believes that a shorter term limit will make the House a weak sister in any struggle with the Senate. In his view, presumably, the short-serving and therefore naïve House members will consistently be outfoxed by their long-serving and hence wiler Senate adversaries. If that were the case, it would reinforce, rather than diminish, the veto power of the small states, since their enhanced strength is lodged in the Senate.

The Speaker compounds the confusion when he intimates that differential term limits would violate the constitutional structure that the Great Compromise was intended to preserve. Since he does not specify what that structure might be, one is left to guess about its nature. Perhaps the Speaker has confused the "equality-of-states" principle (which has no relevance to the Great Compromise) with some imagined and heretofore unheard of "equality-of-the-two-houses-of-Congress" principle. The latter is a preposterous principle in light of the Framers' intent to make the two houses different rather than the same. As Madison put it,

In republican government, the legislative authority necessarily predominates. The remedy for this

inconvenience is to divide the legislature into different branches; and to render them by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.[6]

Bicameralism, in short, was a check-and-balance mechanism, the successful functioning of which required that the two bodies be differently rather than similarly organized. In fact, Madison emphasized that the House and Senate should be filled by "different modes of election," just as the members of the two bodies reflected different qualifications: "The qualifications proposed for senators, as distinguished from those of representatives, consist in a more advanced age and a longer period of citizenship." [7]

In addition, the Framers assigned functions to the House that in their view the popularly elected body could more appropriately discharge because of its supposed greater closeness to the people. Only the House, for example, can originate tax bills. In that context, limiting its members to shorter terms would increase the likelihood of their reflecting the wishes of the people. Thus, limiting terms would better serve the particular and special role the Framers intended for the House. Similarly, longer tenures for senators might give them the opportunity to develop the mature judgment arguably needed for the wise discharge of the special responsibilities given the Senate, such as advising on and consenting to treaties and presidential appointments.

The only equality-of-the-houses-of-Congress principle embedded in our constitutional structure is the general requirement that both houses assent to the passage of all laws. Differential term limits for senators and representatives scarcely undermine that requirement. It remains. However limited the terms of the members of either house may be, both houses must still agree before any bill becomes law.

The Current Insignificance of the Great Compromise

There may be less identity of interests among the smaller or less populous states today than there was at the time of the founding. In any case, the evolution of the American political system has substantially eroded the power of the small states--or any group of states--to protect their interests from interference by the national government. The development of political parties reduced the Electoral College to a constitutional anomaly as early as 1800. The adoption a century later of the Nineteenth Amendment, providing for the direct election of senators, further undercut the power of the states. Since senatorial aspirants no longer had to secure the support of a majority of the state legislature, they could turn a deaf ear to any threat that they would be retired if they failed to vote in favor of the state's interest (at least as determined by its legislature). Today, presidential aspirants routinely ignore the sparsely populated states. Instead, they concentrate their efforts on "bagging" a relatively few big states, rich in electoral votes.

The larger point, however, is that the federal structure, not the Great Compromise, was intended to preserve the powers of the states. As that structure waned, especially through the demise of the doctrine of enumerated powers, state power waned as well.[8] Gingrich wants to revive federalism and "return" (I would prefer "restore") power to the states and to the people. What is perplexing is his failure to appreciate that the principles of federalism should protect the right of a state to adopt differential term limits. Under federalism, the people should enjoy the discretion to set term limits, including differential limits, if they choose. As the Supreme Court has rightly said,

The authority of States' people to determine the qualifications of their most important government officials lies at the heart of representative government . . . and is reserved under the Tenth Amendment.[9]

If the states cannot establish reasonable limits on those they send to Congress to represent them--thereby ensuring that their representatives truly do "represent" them--they are denied a significant power by which to protect themselves in the political process. Some states might reject term limits, one imagines, while others would embrace them--as 22 states already have. Among the latter, in only one state have voters chosen uniform limits. In others they have chosen varying arrangements. Such differences among states should hardly surprise. After all, federalism enables states to exercise powers they never surrendered in the first place. And not all states will exercise their powers alike--any more than individuals do.

The implication of Gingrich's position, however, is that the differential term limits that have been produced already by the efforts of 22 states to limit the terms of their representatives constitute a per se violation of the Constitution. Thus,

he must expect (or hope) that the Supreme Court will reject the right of the people of Arkansas to adopt differential term limits in the case that was argued before the Court last November.[10] Exercising their sovereignty, the people of Arkansas decided that they wanted to experiment with the principle of rotation in office. They voted, therefore, to exclude from their ballot those senators who had served two terms and those representatives who had served three terms--the precise amendment Gingrich rejects.

Yet the legislative history of the Constitution suggests that both the Framers and the ratifiers of the document thought that the states had retained the power to set limits of any length on the terms of their senators and representatives. The idea that the people in the states had retained such a power is certainly consistent with the most likely reason why the delegates to the Constitutional Convention declined to list qualifications in addition to those of age, citizenship, and residency--namely, they simply wanted to constrict as little as possible the freedom of the people to choose their own representatives. As Robert Livingston put it, "The people are the best judge of [who] ought to represent them." [11]

Since the people are sovereign, they may limit their own, otherwise untrammelled, power to elect whom they wish.[12] After all, a term limit may be one of the "effectual precautions" by which, according to Madison, the people can keep their representatives "virtuous whilst they continue to hold their public trust." [13] To deny them that power in the name of preserving their sovereignty would be Orwellian. Indeed, when responding to President Clinton's offhanded call for retroactive term limits, Gingrich was quite willing to defer to the judgment of the states, which have passed no such measures. "I think [retroactive measures] wouldn't pass and I think there's no point in trying to bring up something like that. I don't know of any state that's done [term limits] retroactively." [14] Why he ignores the states on the length-of-term issue--again, voters in only 1 state in 22 have selected 12 years in the House--remains unexplained.

The Irrelevance of the Original Understanding

Perhaps the dispositive response to Gingrich's embrace of an imaginary original understanding is simply to point out the obvious: any amendment is intended to change, not preserve, the past. If the Framers and ratifiers of the Constitution actually believed that it precluded the states from imposing term limits generally or, more specifically, differential term limits, then the Constitution needs to be changed. Any such past should be buried.

Thus, in deciding whether to adopt a term-limits amendment to the national Constitution, the question becomes one of policy rather than of original understanding. There is every reason to believe, however, that the founding generation would support such an amendment today. The Framers, after all, generally subscribed to the idea that rotation in office was a good thing. Indeed, Jefferson thought the failure to include term limits in the Constitution was one of the document's two principal flaws (the other was the absence of a bill of rights).[15] Similarly, George Mason, who had been a delegate to the Constitutional Convention, considered "periodical rotation essential to the preservation of republican government." [16] And in the Federalist Papers Madison conceded that tenure "for a limited period" was a defining characteristic of representatives in a republican government.[17] Yet he never said that limit had to be the same for both senators and representatives. Indeed, the Founders scarcely could have shared Gingrich's concern that senators might be able to serve twice as long as representatives, since they themselves specified longer tenure for senators.

The Framers nevertheless saw no need to specify term limits in the Constitution because they assumed frequent elections would ensure regular turnover in the membership of both houses. Madison, for example, predicted that "new members would always form a large proportion" of the House.[18] One anti-federalist thought that two-thirds of the House would be new each term.[19] Today, however, most incumbents who choose to stand for reelection are virtually assured of winning. In one recent year, in fact, more members of Congress were carried out of office in coffins than were sent packing by the voters.[20]

Balancing the Competing Public Policies

In fairness to the Speaker, he does favor term limits. He just wants the limits to be the same in the Senate and the House. What public policy reasons does he offer in support of his view? He says that he wants identical 12- year limits so that members of the House have enough time to learn their jobs. The Speaker's unspoken message is clear: running this country is a complex job; it takes time to find out where the levers of power are located and how to pull them.

I submit, however, that the unspoken message of the people who elected Gingrich and his Republican colleagues this past November was equally clear: they're sick and tired of that conception of government. If the national government were truly one of delegated, enumerated, and thus limited powers, citizen representatives who served a maximum of three two-year terms would be wholly adequate to the task of deciding the general public policy questions that are appropriately within the purview of the national government.

The assertion that representatives could not master their jobs quickly enough to maximize their effectiveness over six years refutes itself. If representatives cannot master their jobs in two years, they should not be reelected to even one more term, much less five, as Gingrich wishes. We limit presidents to two four-year terms. Is the president's job so much less demanding and complex that we can limit his tenure to eight years, whereas a representative needs more time?

Term limits are an idea whose time has come. They are intended to serve a variety of important purposes: They may encourage new people with fresh ideas to enter politics. They may encourage representatives to fashion public policy on the basis of principle rather than to ensure reelection. They may reduce the influence of money in political campaigns. They may prevent the growth of a permanent political class more interested in preserving its privileges than in serving the needs of constituents. The latter is certainly a concern that the Framers and ratifiers of the Constitution would have considered not just legitimate or even important but compelling. All those reasons favor shorter rather than longer terms, especially for representatives. It is particularly sad, after November's stunning elections, that the Speaker seems to be part of that camp of self-serving politicians who praise term limits publicly while privately urging long tenures that preserve their sinecures.[21]

Gingrich has urged us all to reread the Declaration of Independence. That is good advice, but careful reflection on that document's self-evident truths suggests that if "governments are instituted among men" to secure their "unalienable rights," and "the people" have "the right to alter or abolish" any government "whenever [it] becomes destructive of these ends," surely those same people may exercise the lesser right of imposing meaningful limits on the terms of the people they choose to represent them. Let us indeed start returning power to the states and to the people--beginning with the power to limit the terms of their representatives as they think fit.

Notes

[1] Michael Kramer, "The Hypocrite's Oath," *Time*, January 23, 1995, p. 36.

[2] Katharine Q. Seelye, "House Republicans Hit a Snag over the Extent of Term Limits," *New York Times*, January 12, 1995, p. A1.

[3] Quoted in Jeanne Cummings, "Term Limits Rally Marred by Leader's Dissent," *Atlanta Constitution*, January 12, 1995, p. A7.

[4] Quoted in George Archibald, "Gingrich Backs 12-Year Term Limit, Not 6," *Washington Times*, January 12, 1995, p. A5.

[5] See Paul Jacob, "From the Voters with Care," in *The Politics and Law of Term Limits*, ed. Edward H. Crane and Roger Pilon (Washington: Cato Institute, 1994), pp. 27-43.

[6] Federalist Paper 51 in Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor Books, 1961).

[7] Federalist Paper 62, in Rossiter.

[8] See Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," *Notre Dame Law Review* 68 (1993): 507.

[9] *Gregory v. Ashcroft*, 501 U.S. 452 (1991), at 463.

[10] U.S. Term Limits v. Thornton (93-1456), argued November 29, 1994.

[11] Jonathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution (1987 ed.), p. 320.

[12] Compare Akhil Reed Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V," University of Chicago Law Review 55 (1988): 1044.

[13] Federalist Paper 57, in Rossiter.

[14] Taken from a tape of the January 11, 1995, press conference.

[15] Letter from Jefferson to Madison, December 20, 1787, The Writings of Thomas Jefferson (Washington: Government Printing Office 1853), vol. 2, p. 330.

[16] Elliot (1937 ed.), vol. 3, p. 485.

[17] Federalist Paper 39, in Rossiter.

[18] Elliot (1836 ed.), vol. 5, p. 225.

[19] The Founders' Constitution, ed. Philip B. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987), vol. 2, p. 51.

[20] William Kristol, "Term Limits: Breaking Up the Iron Triangle," Harvard Journal of Law & Public Policy 16 (1993): 95, 97.

[21] According to Kramer, What's possible, then, is numerous House votes on varying schemes, with none garnering the 290 yeas needed. "That's the idea," concedes a G.O.P. Congressman. "You fulfill the contract's promise to vote on the issue--there's no pledge of actual passage--while minimizing the chances of its becoming law. As Newt says, if you're artful, 'you can favor public policy without having to be a martyr.'"