

DEBATE: *THE FEDERALIST* AND THE CONTEMPORARY DEBATE ON TERM LIMITS*

TERM LIMITATIONS: BREAKING UP THE IRON TRIANGLE

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From the perspective of *The Federalist Papers*, one can say that the current issue of term limitations is historically analogous to the 1978 California voters' initiative known as Proposition 13.¹ At first glance, *The Federalist Papers*, which defended representative democracy against participatory or direct democracy, seem to teach that popular initiatives are a poor way to make policy.² Upon further reflection, however, such a wooden application of this Federalist principle fails to account for differences between the political environments of the Eighteenth and Twentieth Centuries.

The fact is that Proposition 13 was the correct policy choice in 1978, and it was also consistent with the arguments of *The Federalist Papers*, properly understood. In a phrase liberally borrowed from Madison, Proposition 13 was "a populist remedy for the diseases most incident to populist government."³ One can think in a fresh way about contemporary problems—in a way animated by the spirit of *The Federalist Papers*, but not enslaved to their letter.⁴ One can apply the principles of Madison, Hamilton, and Jay to modern politics, and yet reach conclu-

* This debate was introduced by the Honorable Will Garwood, Judge, United States Court of Appeals for the Fifth Circuit.

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1. Proposition 13 was a California voters' initiative concerning the limitation and control of state and local governmental spending. The initiative was passed in a special statewide election on November 6, 1979. See CAL. CONST. art. XIIB, §§ 1-11.

2. See, e.g., THE FEDERALIST No. 49, at 313-17 (James Madison)(Clinton Rossiter ed., 1961)(arguing that "occasional appeals to the people would be neither a proper nor an effectual provision" for altering governmental powers or for restraining them within their legal limits).

3. Madison's exact words were "we behold a republican remedy for the diseases most incident to republican government." THE FEDERALIST No. 10, at 84 (James Madison)(Clinton Rossiter ed., 1961).

4. For instance, Madison recited that "to preserve the spirit and the form of popular government" should be "the great object . . . [of] our inquiries." *Id.* at 80.

sions that appear different from those reached by these men. In an ideal world, populist initiatives would be unnecessary. In the last 200 years, however, various developments have forced us to apply the philosophy of *The Federalist Papers* in light of present-day realities. By 1978, the creation of a welfare state had given government nearly unrestrained power to levy taxes and dole out benefits. The citizens had (and still have) difficulty controlling that power. Proposition 13 was worth supporting as a check on that power, not just for the sake of the economy, but for the polity.

A similar case exists today with respect to the issue of term limits. In the best of all possible democracies, one would not want term limits for legislators. The authors of *The Federalist Papers* emphasized the need for wise, capable, and experienced representatives.⁵ On that basis, they considered term limits and rejected the idea.⁶ In today's American democracy, however, three considerations outweigh their arguments against term limits.

First, term limits would effectively confront the enormous, paralyzed government produced by the welfare state. The development of the welfare state has created an "Iron Triangle" consisting of Congress, the federal bureaucracy, and special interest groups.⁷ This Iron Triangle has changed the character of Congress and, indeed, the entire political system. The separation of powers no longer functions in the manner which had originally been envisioned. According to *The Federalist Papers*, the separation of powers is a device for the protection of liberty; it prevents the distinct branches of government not only from intruding upon one another, but also from intruding

5. See, e.g., THE FEDERALIST No. 53, at 332 (James Madison)(Clinton Rossiter ed., 1961)(arguing that competent legislators must possess a degree of knowledge which "can only be attained . . . by actual experience in the station which requires the use of it").

6. Hamilton offered the following reasoning:

[Re-eligibility] is necessary to enable the people, when they see reason to approve of [the government official's] conduct, to continue him in the station in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration.

THE FEDERALIST No. 72, at 436 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

7. See, e.g., Timothy B. Clark, *The President Takes on the "Iron Triangles" and So Far Holds His Own*, NAT'L J., Mar. 28, 1981, at 516 ("Any change in government programs is hard to achieve because of the combined opposition of mid-level bureaucrats, members of highly specialized congressional panels and lobbyists for the beneficiaries of government programs.").

upon the citizenry.⁸

Today, the different “powers” are no longer so distinct. Congressional committees, bureaucracies, and interest groups work *together*.⁹ Insulated from the public, these bodies cooperate rather than check one another. The benefits distributed through the welfare state make it possible for legislators to co-opt particular constituencies and interest groups. Term limits would help dismantle the Iron Triangle by increasing turnover among the long-serving committee and subcommittee chairmen who dole out benefits.

Opponents of term limits argue that greater congressional turnover would increase the power of congressional staffs. This reasoning is not valid. A staff’s power is derived from the power of the congressman it serves, and the staffs of congressmen who have reached seniority are more powerful than the staffs of recently elected congressmen.¹⁰

A second consideration weighing in favor of term limits is that they would foster more competitive elections. Today, incumbents are virtually assured of reelection. In the 100th Congress, more congressmen left office because of death (seven) than were defeated at the polls (six).¹¹ Incumbents have huge

8. Madison argued:

[S]eparate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty. . . .

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. . . [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.

THE FEDERALIST No. 51, at 321-22 (James Madison)(Clinton Rossiter ed., 1961).

9. See generally Lou Cannon, *Reagan Ruled with a Soft Fist*, WASH. POST, Dec. 19, 1988, at A2 (arguing that lobbyists, congressional committees, and federal employees have a shared vested interest).

10. New Hampshire Senator Gordon Humphrey has addressed this argument. He notes: “[Some] suggest that term limits would give more power to staff members. I have seen very few members of Congress led around by their staffs, instead of vice versa, in my 12 years.” *Congressional Terms Must be Limited*, N.Y. TIMES, Mar. 13, 1990, at A28.

11. See Dan Quayle, Remarks to the Federalist Society Convention (June 12, 1992) (“In the 100th Congress, more House members actually died (seven) than were defeated at the polls (six).”); Chris Black, *The Political Revolution: How to Throw the Bums Out: Putting “None of the Above” on the Ballot Would Put the Politicians on Notice*, BOSTON GLOBE, Oct. 28, 1990, at A29 (“A Congressman is more likely to die during his term than be defeated for reelection in 1988.”). The six who were defeated were Representatives Bill Chappell of Florida, Jack Davis of Illinois, Joseph J. DioGuardi of New York, Fernand J. St. Germain of Rhode Island, Mac Sweeney of Texas, and Pat Swindall of Georgia. The seven who died were Representatives Sala Burton of California, Dan Daniel of Virginia, John J. Duncan of Tennessee, James J. Howard of New Jersey, Stewart B. McKinney of Connecticut, Bill Nichols of Alabama, and Melvin Price of Illinois. Additionally, Ernest L. Konnyu of California was defeated in the primary, and Mario

advantages over challengers, including access to \$44.7 million of taxpayer-financed mailings to constituents¹² and the ability to control or influence the petitioning process.¹³

Competitive elections would not only make our political system more open and democratic, but they would also elevate the importance of merit, rather than access to power, in the election process. In this manner, term limits may encourage better-qualified people to run for Congress, and thus provide more capable legislators than we have today. These changes are important considerations that have not been sufficiently addressed by either the proponents or the opponents of term limits.

In *The Federalist Number 57*, Madison wrote that "[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue, the common good of the society."¹⁴ Instituting term limits today would increase the likelihood of obtaining such rulers. The current system prevents legislators, especially in the House of Representatives, from achieving significant power until they have attained seniority. It discourages people who have accomplished something in other walks of life from running for Congress. Such individuals are put off by the notion that they will have to serve as members of Congress for fifteen or twenty years before they have amassed enough influence for their voices to be heard by the others on Capitol Hill.¹⁵

Opponents of term limits argue that the limits would deprive Congress of the technical knowledge and mastery of the issues that are necessary for representatives to legislate wisely.¹⁶ If term limits would result in less capable, less experienced, and less responsible people running for Congress, indeed, such

Biaggi of New York resigned. 1988 CQ ALMANAC 14-A to 20-A (Christine C. Lawrence ed., 1988); NAT'L J., Nov. 12, 1988, at 2864.

12. *Congress members' mailings rise steeply*, CHI. TRIB., Mar. 23, 1992, at C4.

13. See, e.g., Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL. 147 (1992)(discussing the right to petition).

14. THE FEDERALIST No. 57, at 350 (James Madison)(Clinton Rossiter ed., 1961).

15. See George Archibald, *Reformers Often Ignore Own Pleas*, WASH. TIMES, Mar. 7, 1990, at A1 (arguing that young office-seekers are deterred because they would have to serve in Congress for several terms to become effective).

16. See, e.g., *Robbing Voters of Their Rights*, N.Y. TIMES, Sept. 10, 1991, at A18 ("[I]f term limits became nationwide, there would soon be no one in Congress with any depth of experience.").

measures would be undesirable. If, however, one randomly compares five House members who have been in Congress less than twelve years with five who have been there longer, it is unlikely that he will find that the senior representatives possess a greater degree of wisdom, knowledge, and technical mastery than their junior colleagues. In the executive branch, the political appointees who administer the departments perform jobs as difficult as those of congressmen, and they do so competently, without the benefit of twelve years of experience.

The final advantage of term limits is that they would change the culture of Congress and the culture of our politics. An example of the culture presently prevailing is the attitude ingrained in members of Congress regarding the proper relationship between those governing and those governed. In *The Federalist Number 57*, Madison wrote that the following safeguard would prevent the House of Representatives from engaging in oppressive measures:

[T]hey can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.¹⁷

Congressional self-exemption from many of the laws that ordinary citizens must obey is one of the most unhealthy developments in recent decades.¹⁸ Structural changes such as term

17. *THE FEDERALIST* No. 57, *supra* note 14, at 352-53.

18. See *Let Congress Live by the Law Too*, CHI. TRIB., Oct. 31, 1991, at C22 (noting that Congress regularly exempts itself from worker protection laws, including those covering age discrimination, worker safety, and sexual harassment); Thomas C. Palmer, Jr., *The House is not a home: Check-kiting may have sparked latest round of outrage, but resentment of Congress runs much deeper than that*, BOSTON GLOBE, Mar. 22, 1992, at 67 (noting congressional exemptions from disabilities acts, Equal Opportunity Act, and Occupational Safety Act).

limits would restore the community of interests and sympathy of sentiments between the representatives and the represented.

The current system of representation in America breeds resentment among the American people. Many citizens now feel disaffected and rebellious toward the very government that exists to serve them.¹⁹ In contrast, *The Federalist Papers* paint a picture of a political system that will encourage boldness, responsibility, and courage among the people.²⁰ The increased turnover produced by term limits would be a breath of fresh air for the political system and would improve the performance of Congress. More importantly, these limits would improve the overall political culture of the country in a way that would benefit the future of liberal democracy.

In essence, the debate over term limits is a debate between those who consider our current political system to be sufficiently flawed as to warrant basic reform, and those who believe either that the current system works well enough or that any systemic reform would fail to provide significant improvement. Rather than dismiss term limits as too drastic a measure, Americans instead should engage in this debate and welcome it as an opportunity to think through what we want from our Congress and what we want from our government.

19. See Palmer, *supra* note 18, at 67.

20. See, e.g., THE FEDERALIST No. 57, *supra* note 14, at 353 (noting "the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it"); THE FEDERALIST No. 14, at 104 (James Madison)(Clinton Rossiter ed., 1961)("To this manly spirit posterity will be indebted.").