

SOME ARGUMENTS AGAINST CONGRESSIONAL TERM LIMITATIONS

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The most important argument against Congressional term limitations is that term limitations will almost certainly weaken Congress and decrease the influence that Congress has in the American political system. I will save for last the elaboration of this argument and deal briefly with four subsidiary points that in my opinion also weigh against term limits for Congress.

These points are (1) term limits are unconstitutional; (2) they violate conservative principles and reflect partisan strategies only tenable over the short run; (3) their advocacy rests on faulty factual premises; and (4) they constrict options available to electorates that electorates are entitled to have.

I. TERM LIMITS ARE UNCONSTITUTIONAL

In 1969 the Supreme Court held in *Powell v. McCormack*¹ that Congress could not add qualifications for Congressional office to those explicitly enumerated in the Constitution having to do with age, citizenship, and place of residence.² If the case controls, as seems likely, it implies that various states have by initiative made prior service in Congress a disqualification from office. Term limits, then, are unconstitutional. The only issue remaining is whether various states will be permitted to do by initiative what Congress may not do. Not even the editorial pages of the *Wall Street Journal*, uncommonly—even for them—seized with zealotry on this issue, have persuasively dodged this reasoning.³

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1. 395 U.S. 486 (1969).

2. See U.S. CONST. art. 1, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); U.S. CONST. art. 1, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

3. See the following *Wall Street Journal* editorial articles: *A Victory for Term Limits*, WALL ST. J., Oct. 11, 1991, at A8; *Eight Is Enough*, WALL ST. J., Jan. 2, 1992, at A8; *Kitegate Spills Over*, WALL ST. J., Oct. 4, 1991, at A14; *The Rascals Sue*, WALL ST. J., Aug. 23, 1991, at A6; see also John H. Fund, *There's No Debate—The Career Congress Lives*, WALL ST. J.,

2. TERM LIMITS ARE A PARTISAN GAMBIT VIOLATING CONSERVATIVE PRINCIPLES

Not all advocates of term limits are Republicans, but most are. The current movement for term limits started and was organizationally sustained in the offices of Eddie Mahe, an ingenious Republican political consultant.⁴ It is animated by the same partisan spirit that enacted the constitutional amendment establishing two-term limitations on American Presidents as a retroactive rebuke to the memory of Franklin Roosevelt. Conservatives should in particular consider whether constitutional amendments are the best solution to their current political problems. Madison's view was that a constitution should be hard to amend,⁵ an attitude compatible with the conservative "propensity to use and to enjoy what is available rather than to wish for or to look for something else."⁶

We observe self-identified conservatives, such as President Bush or newly-elected Republican members of Congress, asking for constitutional changes on such issues as balanced budgets, line-item vetoes, school prayers, flag desecration, and term limitations. Some of these issues require restrictions of rights the Supreme Court has determined that Americans enjoy. Others seek to weaken Congress, currently and for many years dominated by Democrats.

Another approach would be for Republicans to nominate better candidates for Congress and work harder to elect them. This is an approach more in keeping with conservative principles.

3. ARGUMENTS FOR TERM LIMITS ARE FOUNDED ON FACTUAL ERROR

Most of the substantive arguments in favor of congressional term limitations are grounded upon misleading statistics that conceal the actual turnover in the membership of Congress.

Apr. 11, 1991, at A14; John H. Fund, *Why the Kiting Scandal Has Soared*, WALL ST. J., Oct. 9, 1991, at A14; Neil Gorsuch & Michael Guzman, *The Constitutional Case for Term Limits*, WALL ST. J., Nov. 4, 1992, at A15.

4. Americans to Limit Congressional Terms (ALCT) was founded by, and is run out of the offices of, Republican consultant Eddie Mahe, Jr. See Glenn R. Simpson, *Drive to Restrict Hill Tenure Gaining National Momentum*, ROLL CALL, Feb. 5, 1990.

5. See THE FEDERALIST No. 49, at 313 (James Madison)(Clinton Rossiter ed., 1961).

6. Michael Oakeshott, *On Being Conservative*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 407, 408 (1991).

Common Cause's frequently quoted reelection rate for Congress of over ninety-eight percent is supposed to be evidence that individual members are improperly entrenched.⁷ But suppose this figure actually demonstrates that members of Congress are doing a good job of serving their constituents? If in fact members are representing their districts, then this reelection rate would not be too high. Independent evidence of voter dissatisfaction is needed to sustain the view that high rates of reelection show improper entrenchment.

In fact, numerous surveys demonstrate that constituents actually approve of their members of Congress by substantial margins.⁸ One factor that no doubt leads to such a result is that members of Congress communicate effectively with their constituents. This communication includes listening to constituents and providing them with services and information when they have problems with their government. It is rightly observed that these services come at the expense of taxpayers. But this, in part, is the job we have elected members of Congress to do, to inform themselves about the human consequences of public policy and the impact of government on the lives of ordinary Americans.

The actual turnover rate in Congress exceeds ten percent in every election. As a result, one-half of the House is replaced every eight to ten years. The average length of service for members has been between four and five terms for the last forty years. In that time period, on three occasions as many as twenty-five percent of members departed, and three times the departing members were as few as ten percent. Turnover between all the other Congresses has been between these figures.⁹

There is no way to determine whether these numbers are ideal; they do, however, appear to be within reason. Any organization, Congress included, that does serious business, needs some members to provide experience, continuity, and institu-

7. See, e.g., Nancy Gibbs, *Keep the Bums In*, TIME, Nov. 19, 1990, at 32.

8. See, e.g., WARREN E. MILLER & SANTA A. TRAUOGOTT, AMERICAN NATIONAL ELECTION STUDIES DATA SOURCEBOOK 1952-1986, at 341, 371 (1989) ("Citizens generally like how their incumbent is doing, but disapprove of the performance of the Congress as a whole. More than 85% . . . approve of the performance of their incumbent.").

9. NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS, 1991-1992 58 (1992). The last line in the table on that page gives turnover in the House excluding deaths from 1946 (24.6 percent not reelected) to 1990 (10.3 percent not reelected).

tional memory. It does not seem entirely unreasonable that twenty of the 435 members of the House of Representatives who voted on the Persian Gulf resolution in 1991 were also present in the House to vote on the Tonkin Gulf resolution twenty-seven years earlier.

4. TERM LIMITS LIMIT ELECTORATES, NOT JUST MEMBERS OF CONGRESS

If American voters, in the free exercise of their judgment, wish to reelect members of Congress that they believe have served them well, ought they be permitted to do so? To what extent should one electorate, in enacting a term-limitation initiative, be able to constrain the choices available to another electorate, voting in the same geographical space but at a later time? One of the stronger arguments for requiring that changes in a constitution take place only through the act of special majorities is the supposition that no single electorate voting at one moment in time has some greater entitlement to make choices for an ongoing community than a later electorate. Indeed, the later electorate may have a better understanding of contemporary needs and wishes, more experience and information. Or it may be larger, and reach more effectively into the community.

Thus, there may be a class of decisions that have to be protected from ephemeral majorities. Whether term limits fall within that domain requires deliberation and discussion. I am inclined to say that the imposition of a limitation of this kind upon electorates in the face of strong evidence that, left to their own devices, electorates would actually make the choices to be forbidden to them and would reelect senior members to Congress creates at the least a presumption that we are dealing with an issue of constitutional dimension.

5. TERM LIMITS WEAKEN CONGRESS AS A BRANCH OF GOVERNMENT

It seems self-evident that Congress as an institution would function less well under term limits. While time-servers would be automatically eliminated by term limits, so would conscientious legislators, specialists, and other members whose acumen is sharpened by experience.

Term limits would cripple the ability of Congress, by which I mean elected members working collectively, to do its job properly of legislating and not legislating, appropriating and not appropriating, advising, consenting and not consenting, checking and balancing, and legitimizing the acts of government. This follows from propositions that might seem too obvious to need an elaborate defense: Experience helps in the acquisition of knowledge. Knowledge is necessary to have influence in a complex system, where measures require technical mastery. Legislation is complicated. Public policy requires knowledge. Influence over public policy requires knowledge, technical understanding, and experience. The fact that some members never acquire this knowledge is no argument for requiring that none ever should. So in the end congressional term limits merely empower lobbyists, congressional staff, bureaucrats, presidents, journalists, all those upon whose experience and guidance an inexperienced Congress would have to depend. Reducing the strength and the competence of Congress reduces the legitimacy of all the acts of government over which Congress is entitled to express an opinion. Given the diversity of people that our Constitution is required to serve, anything that reduces the legitimacy of our government strikes at our capacity to govern ourselves. Congressional term limitations, arising out of mean-spirited, short-sighted, historically ignorant partisanship, are capable of doing real damage to our fundamental constitutional order.

6. CONTRARY ARGUMENTS

Proponents are not all of one mind about the effects term limits for Congress might have. There is some sentiment, however for at least three propositions: (1) Term limits would weaken the "iron triangle" through which interest groups, executive branch agencies, and congressional committees act to serve narrow clientele without proper regard for the larger public interest; (2) prolonged congressional incumbency is an evil in itself, leading to complacency, narrowness of vision and a lack of legislative creativity; (3) by shaking up the culture of Congress, term limits might improve the overall legislative product.¹⁰

10. See, e.g., William Kristol, *Term Limitations: Breaking Up the Iron Triangle*, 16 HARV. J.L. & PUB. POL'Y 95 (1993).

The idea of weakening iron triangles rests on at least two weak presumptions that responding to clientele sector-by-sector will add up to bad news in the aggregate and that only the President can be trusted to police the net effects of policy properly. I think it is more apt to say that Republican presidents will arrive at different conclusions about the overall shape of public policy than Democratic presidents, or Democrats in Congress. Differences of this sort are contemplated in a constitutional design featuring a separation of powers. Congress under a separation of powers scheme is required to contribute to policy making and to express the needs and desires of its constituents who, after all, add up to an electorate roughly the same size as the President's.

If the real target of an attack on iron triangles is meant to be interest groups, term limits on Congress are an inefficient device, because they tend to strengthen the dependence of members on interest groups. This occurs because term limits create turbulence in congressional organization and reduce the number of experienced members having independent knowledge of policy. Term limits require members to think about next stages in their careers outside Congress, in which interest groups may play a significant part. They increase members' reliance on interest groups in order to get elected in the first place. And they heighten the usefulness of policy information that non-term-limited lobbyists can offer green legislators.

So the notion that term limits weaken iron triangles seems far-fetched; they merely weaken the Congressional component—the one to which ordinary citizens have by far the best access—and strengthen bureaucrats and interest groups.

There is no empirical basis for the idea that incumbency leads to legislative inertia. If anything, the opposite seems to be the case; experience in office leads to mastery of subject matter and to independent impact on public policy.¹¹ The culture of Congress, which nurtures this independence, needs to be ap-

11. John R. Hibbing concludes in his systematic study of Congressional careers: [R]equiring representatives to leave after a set number of years would likely result in a devastating loss of legislative acumen, expertise, and activity. . . . [I]ncreasing tenure is strongly and positively related to legislative activity as well as to legislative specialization and efficiency. Tenure in and of itself helps members to be focused and successful legislative players. . . .

JOHN R. HIBBING, *CONGRESSIONAL CAREERS: CONTOURS OF LIFE IN THE U.S. HOUSE OF REPRESENTATIVES* 180 (1991).

preciated rather than attacked. The underlying idea is that the system of checks and balances and separation of powers built into the Constitution ought to be permitted to work, rather than trashed, because the inevitable disagreements between the two elected branches of government produce frustrations for Presidents and their appointees.

