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WHY WE NEED TERM LIMITS FOR CONGRESS: FOUR IN THE SENATE, TEN IN THE HOUSE

RICHARD A. EPSTEIN*

I. INTRODUCTION: TERM LIMITS ALL OVER AGAIN

In *U.S. Term Limits, Inc. v. Thornton*,¹ a closely divided United States Supreme Court held that individual states could not impose term limits on their members of Congress.² On its facts, the decision was quite close, but on balance Justice Stevens had the better argument when he held that the Constitution sets the sole qualifications for election to the Senate or the House.³ On matters that affect the entire nation, establishing uniform state requirements makes commendable sense.⁴ To be sure, *U.S. Term Limits* addressed a very close and difficult question of constitutional interpretation. Many have sufficiently addressed the pros and cons of that decision, so I will not re-canvass it.⁵ Rather, I will argue in this short Article that the case for imposing term limits is sufficiently compelling that it should be introduced by constitutional amendment at the national level, so that it is equally binding on all states.

In adopting term limits, I think it is unwise to insist upon adopting two terms in the Senate and three terms in the House, as Arkansas did in *U.S. Term Limits*.⁶ Rather, my position allows for far longer terms than the earlier proposal: four in the Senate and ten in the House. But even in this more restrained form, it should ultimately have major consequences. In order to make out this case, I shall proceed as follows. In Part II, I shall explain why both sides of the term-limits debate are mistaken in appealing to some notion of “the people.” The real issue is the dangerous prisoner’s dilemma game that arises whenever representatives of a national party are chosen along territorial lines.⁷ In Part III, I explain why longer terms for both House and Senate members will thread the needle between excessive

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1. 514 U.S. 779 (1995).

2. *Id.* at 783.

3. *Id.* at 782; *see also* U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3 (enumerating the eligibility requirements to serve as a member of Congress).

4. *See* *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356 (Ark. 1994).

5. *See U.S. Term Limits*, 514 U.S. at 837.

6. *See id.* at 783.

7. *See* ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER’S DILEMMA: A STUDY IN CONFLICT AND COOPERATION 13 (1965) (“In the game called Prisoner’s Dilemma, the rational choice of strategy by both players leads to an outcome which is worse for both than if they had chosen their strategies ‘irrationally.’”).

turnover in government on one side and entrenched, corrupt leadership on the other.

II. THE PEOPLE AND THEIR PRISONER'S DILEMMA GAME

One of the most notable features of the opinions in *U.S. Term Limits* is the broader arguments to which each side appealed in order to demonstrate that its view was the most consistent with the highest values of democracy. As so often happens in constitutional adjudication, each side sought to wrap itself in the mantle of “the people,” the highest authority in democratic politics.⁸ For these purposes, it is worth mentioning the jarring conflict inside a document whose Preamble begins with the words “We the People,” as if the Constitution writ large celebrated a system of popular democracy.⁹ Yet the moment one turns away from the soaring rhetoric of the Preamble, the Constitution introduces a dense network of textual provisions. Many of these provisions aim to restrain popular democratic institutions, in part with a plethora of electoral obstacles that prohibit simple political majorities from impressing their will upon the public at large.¹⁰ The two Qualifications Clauses are part of that strategy.¹¹

Notwithstanding the built-in constitutional safeguards, Justice Stevens assures us that it is a “fundamental principle of our representative democracy . . . that *the people* should choose whom they please to govern them.”¹² One corollary to that principle is “that the opportunity to be elected [is] open to all.”¹³ And later: “[W]e recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on *the people* the right to choose freely their representatives to the National Government.”¹⁴ Justice Stevens’s argument clearly tells us that, if everyone should be eligible for office, then no one can be barred by term limits. Not to be outdone, Justice Thomas referred to a different group of “the people” in his dissent:

8. See *infra* notes 12–15 and accompanying text.

9. U.S. CONST. pmb.; see, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5 (2005) (arguing that “courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts”). For criticism, see Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2394 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

10. See BREYER, *supra* note 9, at 29 (“The Framers’ goal was to ‘secure the public good and private rights against the danger of [factionalism], and at the same time to preserve the spirit and form of popular government.’”).

11. See U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.

12. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 (1995) (quoting *Powell v. McCormick*, 395 U.S. 486, 547 (1969)) (emphasis added) (internal quotation marks omitted).

13. *Id.* at 793–94 (emphasis added).

14. *Id.* at 794.

I see nothing in the Constitution that precludes the people of each State (if they so desire) from authorizing their elected state legislators to prescribe qualifications on their behalf. If *the people* of a State decide that they do not trust their state legislature with this power, they are free to amend their state constitution to withdraw it. This arrangement seems perfectly consistent with the Framers' scheme.¹⁵

In my view, both sides of this debate missed the essential element by treating an appeal to "the people" as the ultimate source of legitimacy. The real difficulty associated with term limits arises in quite a different fashion. In its crudest form, the objection is simply a prisoner's dilemma game that fosters an odd sense of inversion in our constitutional structure.¹⁶ For example, in the presidential election, it is the people at large who must choose only one person to serve as President of the entire nation. At this point, much can be said for the view that there is no reason why the people cannot elect the President for as many terms as they choose. Nonetheless, in the aftermath of Franklin D. Roosevelt's nearly four-term presidency, the Twenty-Second Amendment introduced term limits for the President.¹⁷ Today there are no term limits for the Senate or the House. There is only a serious prisoner's dilemma game because "the people" of one state cannot vote out of office the longstanding senators or representatives of *other* states and *other* districts.

All elected state officials face some conflict in balancing their state interests with their national responsibilities. That the people of one state cannot unpend another state's senators or representatives is troublesome because some mechanism is necessary to mediate that conflict.¹⁸ This difficulty is one that the current system of democratic politics cannot address, let alone resolve. As a matter of brute public choice theory, reelection is one key constraint that weighs heavily on just about all members of Congress. To gain reelection, members of Congress must meet a powerful territorial constraint: garnering support from a majority of voters in their district.¹⁹ As for campaign support, outside sentiments matter only indirectly.

The territorial nature of our political system directs elected officials to look locally even though their public duties extend nationally.²⁰ At this

15. *Id.* at 883 (Thomas, J., dissenting) (emphasis added).

16. See BREYER, *supra* note 9, at 28 ("[T]he Constitution's structural complexity . . . [seeks] to produce a form of democracy that would prevent any single group of individuals from exercising too much power . . .").

17. See U.S. CONST. amend. XXII, § 1.

18. See BREYER, *supra* note 9, at 29.

19. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983) ("The economic approach to political behavior assumes that actual political choices are determined by the efforts of individuals and groups to further their own interests.").

20. See BREYER, *supra* note 9, at 28. In the post-revolutionary United States, "the

point, few politicians can resist such a great temptation. They hope to obtain key committee positions, enter into strategic alliances, and gain enough local publicity to persuade their constituents to support their reelection campaigns. To accomplish these goals, elected officials are tempted to funnel benefits back home that are disproportionate to their district's population.²¹ In this context, airports are for construction jobs—not national transportation—and paving “roads to nowhere” leads to political success. This strategy is feasible because of the virtually nonexistent constitutional constraints on the ability to redistribute wealth through various permutations of the taxing and spending power.²²

Length in office offers a huge advantage to those seeking localized benefits. Although seniority does not decide everything in Congress, the clout that accompanies long service in office remains a prominent ingredient in obtaining political power. Constituents understand this point well. In their role as “the people,” they are quite happy to reelect those officials who bring home the bacon, even if it comes at the expense of the nation's overall welfare.²³ There is no magic formula in appropriations that can balance this tendency. Whether in the form of a new military base and processing facility or a new regional office for an administrative agency, even so-called public goods must have a designated location. The longer one remains in office, the more constituent goodies the diligent politician can secure, thereby reducing the voters' incentive to vote that official out of office. This prisoner's dilemma game for the House and Senate is a true scourge on national politics.

As I have lamented on more than one occasion, there was no way that I could vote against Robert Byrd or Jesse Helms while a resident of Illinois, even though removing them from public office would benefit me far more than choosing my own senator.²⁴ As these individuals gained clout, they could certainly direct more goodies to their home states, while the less powerful Illinois senators could not match their entrepreneurial activity. As a local citizen, I envied senators and representatives from other regions who had the clout that my elected officials so lacked. As an academic theorist,

great objects' of society were 'sacrificed constantly to local views.'" *Id.* Groups with “divergent social, economic, and religious interests” tended to “choose representatives . . . for their willingness to act solely to advance [their] particular interests.” *Id.*

21. See Burton A. Abrams & William R. Dougan, *The Effects of Constitutional Restraints on Governmental Spending*, 49 PUB. CHOICE 101, 102 (1986) (“In equilibrium, successful politicians choose the set of expenditures . . . and taxes . . . that maximize political support.”).

22. See U.S. CONST. art. I, § 8, cl. 1.

23. See Abrams & Dougan, *supra* note 21, at 102 (“[R]elatively influential groups will be net beneficiaries of government spending, while the members of relatively weak groups will tend to pay more in taxes than they receive in benefits from spending.”).

24. JOINT COMM. ON PRINTING, CONGRESS OF THE UNITED STATES, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 762, 1232–33 (2d Sess. 2005).

however, the more pressing point was not to make sure that my district joined the list of preferred locales, but rather to make sure that fewer districts carried that coveted title in the first place.

Short of term limits, I do not think that there is any conceivable way in which this could be done, at least within any sensible time horizon. In my own distinctive take on substantive constitutional law, any government program that by taxation and expenditure, or by direct regulation, worked a net transfer from A to B should count as a taking that must be enjoined if not compensated.²⁵ If this regime were put into place, the opportunities for territorial manipulation would surely be reduced as big-ticket items like ethanol subsidies for the good state of Iowa come off the table.²⁶ Nonetheless, there is always unevenness in the distribution of traditional public goods, which have to be located somewhere. Perhaps good service rules would mute the scope of competition for these plums. For instance, in some cases, as with the closing of military bases, pressures get so strong that an independent panel must take care of the task to ensure success.²⁷ However, the long and short of it is that reforms of this sort could easily take decades to be introduced. Even the agricultural subsidies from the New Deal are still very much with us as the key provisions of the Agricultural Adjustment Acts continue in force to this very day.²⁸ What is needed is the short-term clout that term limits can impose.

In similar fashion, reform of the budget process can do little to stop the skew in the distribution of public goods.²⁹ Even a balanced budget

25. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 286 (1985).

26. See Roberta F. Mann & Mona L. Hymel, *Moonshine to Motorfuel: Tax Incentives for Fuel Ethanol*, 19 *DUKE ENVTL. L. & POL'Y F.* 43, 72–73 (2008) (discussing how presidential candidates have used the importance of ethanol to Iowa's economy as a political tool).

27. See Base Closure and Realignment Act, 10 U.S.C. § 2687 (2006) (creating an independent commission to cut government costs by closing military facilities); Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 *U. COLO. L. REV.* 331, 333–40 (1991) (following the development of the Commission for the Base Closure and Realignment Act). On the one hand, members of Congress fought to get and keep military bases in their own jurisdictions to funnel defense money into the state economy. *Id.* at 333–34. However, in 1988 Congress faced budget pressure and authorized the independent commission to make reports on base closings. *Id.* at 336. Members of Congress were torn between fighting for military money in their respective states and cutting the budget costs to appease voters. *Id.*

28. See Guadalupe T. Luna, *The New Deal and Food Insecurity in the "Midst of Plenty"*, 9 *DRAKE J. AGRIC. L.* 213, 217, 240 (2004) (noting both the legacy of the New Deal and its particular impact on current agricultural subsidies).

29. See Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 *HARV. J. ON LEGIS.* 387, 387 (1998) ("The federal government's budget decisions inevitably involve trading the demands of some groups against those of others."). See generally Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*,

amendment, which attempts to limit aggregate expenditures, cannot prevent goods' skewed distribution across different constituencies.³⁰ Further, the power of the small states in the Senate, which remains a constitutional constant, gives them a long-term advantage in this game. Public criticism may work to slow down the skew for a short while, but the heavy hitters can lay low while the public storm rages and reassert their traditional prerogatives after the storm passes. Therefore, none of these options will work to constrain factionalism. Term limits offer the best prospect of reform.

III. LONGER TERM LIMITS

The use of term limits should have a desirable short-term effect. Rotation in and out of office, an ancient practice, was designed to limit the corrosive effects of time in public service.³¹ A constitutional amendment for term limits could push this concept along mightily by refusing to exempt entirely those individuals who now hold public office. Under this new term-limit amendment, incumbent senators who are over the four-term limit would be able to finish their current terms and hold office for one additional term. A similar solution would hold in the House. Those who have been in office under five terms in the House would be immediately subject to the rule. However, those House members who have served between five and ten terms would get one additional term. Consequently, the outward procession of Congress would start sooner rather than later.

The point of longer terms than those adopted by Arkansas in *U.S. Term Limits* is clear enough. Three terms in the House, is, for sure, too short.³² In effect, a three-term House limit would require a rotation in and out of office of one-third of the House membership every two years, leading to massive disruption in government operations and the loss of any acquired expertise of particular House members.³³ Undermining the institutional memory of

95 GEO. L.J. 1555 (2007) (explaining how the federal budget process has created skewing of congressional choices).

30. See Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (And No More)*, 106 YALE L.J. 1449, 1461–62 (1997) (discussing how the scarcity of public goods supports one rationale behind a balanced budget).

31. See Mark P. Petracca, *Do Term Limits Rob Voters of Democratic Rights? An Evaluation and Response*, 20 W. ST. U. L. REV. 547, 564 (1993) (“Throughout history, from the Athenian and Roman experiments with democracy and the writings of the English Commonwealthmen in the 17th and 18th centuries to advocacy by America’s revolutionaries, the principle of rotation in office was an institutional feature of a legislative body.”) (footnotes omitted); see also *id.* at 563 (linking the historical concept of rotation in office to the modern concept of term limits).

32. See 141 CONG. REC. 9723 (1995) (proposed amendment for three-term limit in the House).

33. See U.S. CONST. art. I, § 2, cl. 1 (requiring members of the House to be chosen every second year).

the House could easily destabilize short-term politics and result in inordinate influence by key staff members, who could take over the reins of power. When the House term limit moves up to ten terms from three, the rate of rotation in equilibrium now slows down. At each election cycle, ten percent of members have to leave, and probably another five percent or so will leave for a variety of reasons, including defeat at the polls. Yet the members of the House that remain should be able to carry on in an orderly fashion. A similar set of arguments applies to the Senate, where the rate of turnover is only slightly higher.³⁴

To get some idea of what congressional term limits could do, just think of what they would have done to the careers of some of the most notable figures in both houses of Congress. Start with the barons of the House who would have lost office under these rules. That list includes just about all of the Speakers of the House:³⁵ Sam Rayburn, who served forty-eight years;³⁶ John McCormack, who served for forty-three years;³⁷ Jim Wright, who clocked in at thirty-four years;³⁸ and Nancy Pelosi, who is still active with twenty-three years in office and assumed the speakership in her twentieth year in office.³⁹ A quick look on the Senate side shows such notables as Lyndon B. Johnson with twelve years each in the House and in the Senate, where he served as majority leader for his last six years.⁴⁰ His rapid rise in the Senate was due, in part, to his earlier experience in the House, and I see no reason to be unduly worried about the switch between the two chambers. Few can make it from the House to Senate, and few will choose to make the return trip from Senate to House. The two longest-serving senators were Robert Byrd⁴¹ and Strom Thurmond,⁴² each with close to sixty years in office. Another notable senator, Ted Kennedy, served for forty-seven years.⁴³ Ten terms could make a huge difference in the House. The four-term limit in the Senate could also transform that body, in general, for the better.

Note that under the current rules, these individuals did not come to power in either the House or Senate during the early part of their careers, in

34. See Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401, 1436–37 (2010) (comparing rate of reelection for incumbents in the House and the Senate).

35. See generally *House History: Speakers of the House*, OFF. CLERK U.S. HOUSE REPRESENTATIVES, http://clerk.house.gov/art_history/house_history/speakers.html (last visited Jan. 26, 2011) (listing House Speakers from 1789 to 2011).

36. JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1774–2004, H.R. DOC. NO. 108-222, at 1787–88 (2005).

37. *Id.* at 1533.

38. *Id.* at 2203.

39. *Id.* at 1718.

40. *Id.* at 1339.

41. *Id.* at 762.

42. *Id.* at 2045.

43. *Id.* at 1371–72.

part because senior officials stood in their way. Yet that is exactly why there is much to be said for having a rapid rotation so that abler people can rise more quickly to the top. In addition, the mindset of those people who know that they are about to leave, like those who are just entering, is likely to be somewhat less statist than might otherwise be the case. A system of rotation ensures, moreover, that the government will not become a geriatric society in which a disproportionate influence rests in the hands of individuals who are likely to plump hard to Social Security and Medicare entitlements. The new brush will sweep clean.

The question then arises whether imposing term limits has the downside of driving out individuals from government who belong there on their individual merits. No one could doubt that this outcome would occur in some cases. But it is a mistake to think that the issue is one that should dominate the discussion on this matter. Like so many other questions, this one boils down to a clear assessment of two kinds of error. The first of these is the error of keeping people in office who should be out. In my view, the longer the passage of time, the more likely it is that this form of error will dominate. Worse still, the harm that comes from continued excessive influence based on seniority only gets worse with age. But on the other side, those individuals who are forced out of office in their prime still have useful lives ahead of them. They can run for other political offices or undertake other useful endeavors. In short, there are ways to correct through individual action the mistakes that arise when people are forced out of office, but it is far harder to take corrective steps against entrenched government representatives with the capacity to barricade themselves in office.

CONCLUSION

One notable feature about the term-limits movement is that virtually all of its ardent supporters hold a small government, libertarian orientation. I can recall attending meetings of the Cato Institute,⁴⁴ where a report on term limits was a standard agenda item, about which there was no substantive disagreement. The compliment is returned on the other side of the aisle. Most of the term limit opponents are far more comfortable with the large welfare state. I doubt that this is a coincidence. Indeed, I think that the support for the term limit movement is part and parcel of a small-government approach that should be defended, especially in these hard times, on the grounds that, given where we now stand, more government is worse government.

The great tactical mistake of the earlier generation of term-limit supporters is that they often had a not-so-covert desire to cripple government. I do not. Even limited governments have huge amounts of

44. See CATO INSTITUTE, <http://www.cato.org> (last visited May 1, 2011).

constructive things that they can and must do. The case for term limits is much like the case for exit rights under federalism.⁴⁵ It does not necessarily lead to any particular substantive result, but it creates an environment that, on balance, will tend to shrink government when that change is most needed. That gamble is, of course, no different from the original gamble of the Framers that devices intended to reduce government power would do better, on average, than those devices intended to expand it. The air is now out of the term-limits movement,⁴⁶ but as the reaction to the current malaise increases, voters from all parties should come to realize that a new broom that sweeps relentlessly clean is yet another of the structural protections that form the nondemocratic backbone of a sound and stable democratic society, which cannot survive under a simple regime of majority rule.

45. See generally Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992).

46. See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 624 (1996) (calling the Supreme Court's decision in *U.S. Term Limits, Inc. v. Thornton* "a substantial roadblock" to the term-limits movement).

