

August 10, 1994

## TERM LIMITS: THE ONLY WAY TO CLEAN UP CONGRESS

### INTRODUCTION

The movement to limit political terms is steamrolling through American politics. Voters have approved term limits for Congressmen in each of the fifteen states where referenda have been held, with votes averaging over 66 percent in support, and another four to ten states will permit their citizens to vote on congressional term limits this November. If past elections and current polls are any indication, these proposals also will pass easily. In addition, eighteen states and hundreds of cities and counties across the country have adopted term limits for state and local officials.

Such substantial public support suggests widespread distaste for careerism in politics, as well as a conviction that continual infusion of fresh blood into the federal legislature will be good for both the Congress and the country. Support for term limits extends to significant majorities of diverse demographic groups: polls show that majorities of men, women, blacks, whites, Republicans, Democrats, and Independents all favor term limits, typically by 60 percent or better.<sup>1</sup> Such politically diverse figures as Ed Koch, Doug Wilder, Ralph Nader, Paul Tsongas, and George Will support term limits; over 100 Members of Congress have signed a discharge petition to force a vote in the House of Representatives on a constitutional amendment; and both Ross Perot and numerous United We Stand America chapters have made term limits a central goal. The United States Supreme Court has preempted a major argument of opponents—that term limits are clearly unconstitutional—by accepting a state case for review. Regardless of the outcome of the case, however, term limits are here to stay as an important issue on the American political landscape.

**Term limits are a powerful political force**, as demonstrated by the results of numerous state referenda, state legislative outcomes, and candidate election results.

**Term limits are a vital political reform** that would bring new perspectives to Congress, mandate frequent legislative turnover, and diminish incentives for wasteful election-related federal spending that currently flourish in a careerist congressional culture.

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1 *New York Times*/CBS survey of 1,515 adults, April 1990.

**Term limits as enacted on the state level are constitutional** as a legitimate exercise of the states' power to regulate their own elections.

**Term limits are opposed primarily by elected officials and the special-interest groups that depend on them** because the weakness of the case against term limits does not appeal to the public.

**Term limits have a promising future on numerous political fronts**, such as candidate elections, state referenda, state and federal legislative action, and congressional and presidential politics.

## THE TERM LIMITS PHENOMENON

When Americans are polled about their respect for the people in charge of their major institutions, Congress consistently comes out next to the bottom.<sup>2</sup> By substantial majorities, Americans have fixed firmly on term limits as the solution to problems in Congress, and will not easily be persuaded to change their minds. In one case, pollsters—after asking about subjects' views on term limits—gave four leading arguments against them; after the subjects heard these arguments, their support for term limits rose from 71 percent to 74 percent.<sup>3</sup> Moreover, in contrast to other issues which are initially popular but fade under criticism, term limits are supported in actual voting nearly as strongly as in initial polls.

Skepticism about and distaste for long-term political careerism are central to the American experience. Term limits were contained in America's first governing document, the Articles of Confederation; they do not appear in the Constitution primarily because its drafters saw them as "entering into too much detail" for a short document.<sup>4</sup> Several modern Presidents, including Truman and Eisenhower, have supported congressional term limits. Since the Constitution was amended in 1951 to limit Presidents to two terms, many political scientists have observed that congressional term limits could cure the imbalance between these two branches of the federal government.

As a political movement, term limits first achieved statewide success in September 1990 when Oklahoma opened the floodgates for statewide referenda by limiting the terms of its state legislators. Two months later, Colorado became the first state to place term limits on its congressional delegation. California, however, because of its size and influence on the rest of the nation, by its 1990 action in limiting the terms of state legislators may have been more influential in laying the groundwork for the victories that were to follow in 1992.

That year, fourteen more states passed term limit referenda the same day they helped elect a new President. In each of these fourteen states, term limits received more votes than did Bill Clinton; when added together, term limits received more votes in fourteen states than Ross Perot did nationwide. The appeal of limiting the terms of elected officials is also evident in the passage of term limits laws for hundreds of cities and counties across the country, including Los Angeles and New York City.

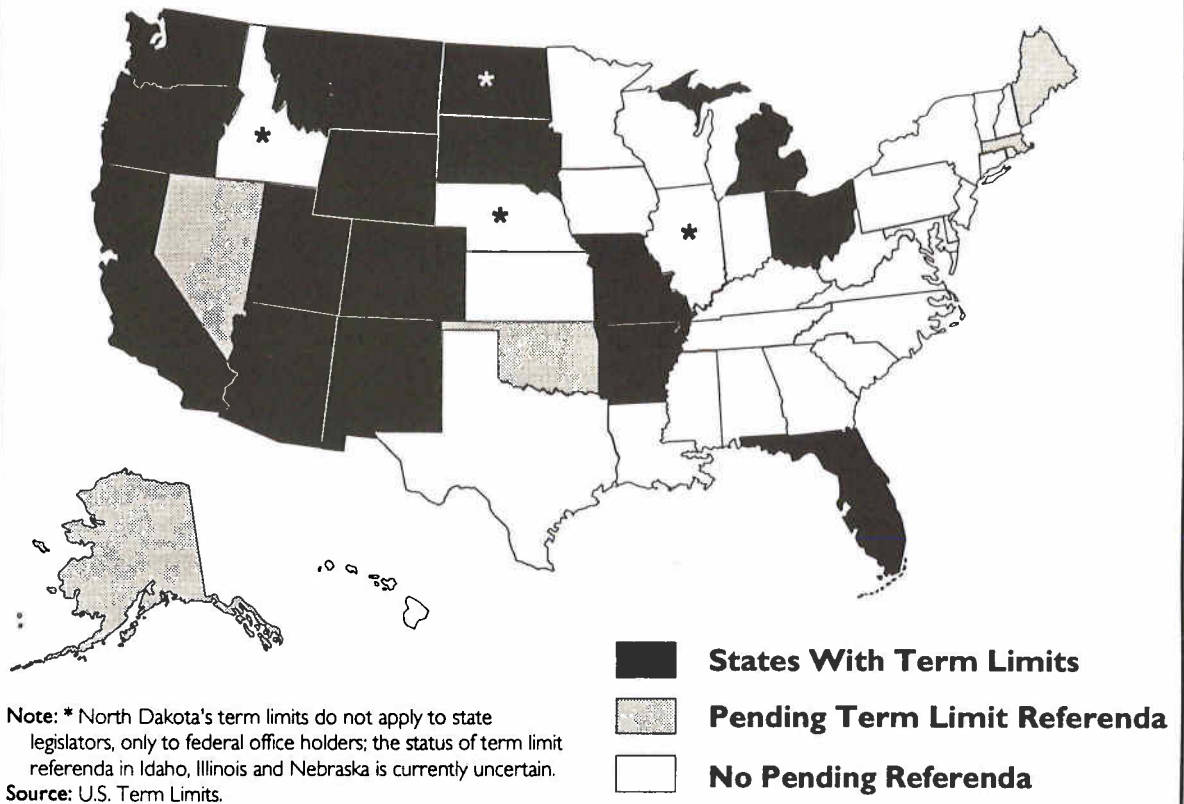
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2 Law firms are the only group that the poll identifies as more unpopular than Congress. Louis Harris and Associates, "Confidence in Institutions" poll, 1966-1993.

3 Americans Talk Issues poll, January 1994.

4 John H. Fund, "Term Limitation: An Idea Whose Time Has Come," *Cato Institute Policy Analysis* No. 141, October 30, 1990.

## States with Term Limits or Future Term Limits Referenda: 1994



Although opponents have attempted to create mass movements to fight term limits, they have been singularly unsuccessful because of term limits' widespread popularity. The term limits movement shows signs of becoming in the 1990s what the tax revolt became in the 1970s: a popular movement which politicians ignore at their peril. Although numerous state legislatures have dealt with term limits, to date only Utah's has successfully passed a bill (in March 1994), and a state referendum drive is currently under way there to correct what some activists see as weaknesses in the measure. More typically, state legislatures have resorted to various maneuvers in order to sidestep term limits. Last year in New Hampshire, the House successfully passed a term limits measure, but the Senate added a "killer amendment" that emasculated the legislation. The New Jersey House also passed a term limits measure in 1993, but the state Senate, relying on an advisory opinion from its in-house counsel that term limits are unconstitutional, refused to vote on the bill. In Wyoming, some members of the state legislature unsuccessfully attempted to amend the term limits referendum already passed by the voters by adding a proviso that term limits would not go into effect until every state in the Union passed them.

Legislative resistance to term limits is in sharp contrast with private citizens' strong support for them. Texas Republican Jim Tallas, a state legislator who bottled up a term limits measure in a subcommittee he chaired, was ousted in a March 1994 primary when his challenger, who made Tallas's opposition to term limits the center of his campaign, received 71 percent of the vote. The intensity of citizen support for term limits was demonstrated most recently in Ne-

braska after a May 1994 decision by the state supreme court voiding a successful term limits initiative on a technicality. Despite the fact that organizers had only nine weeks to gather signatures to place a second initiative on the November ballot, the names rolled in: over 60,000 in one week alone. As a result, Nebraskans almost certainly will re-enact term limits this fall. Speculation about whether the Supreme Court will find that state-imposed term limits on Members of Congress are constitutional diverts attention from the real story: a nationwide grassroots movement that has won popular votes in fifteen of fifteen states, has convinced a state legislature to pass them in a sixteenth (Utah), and almost certainly will expand its reach this November to as many as ten more states. This movement is animated by the conviction that the American people have lost control of their government but can take it back by using the most direct means available to control their elected representatives: frequent, mandated rotation that ensures they are truly of—not just from—their communities.

## THE REAL POLITICS OF TERM LIMITS

The only serious opponents of term limits are incumbent politicians and the special interests—particularly labor unions—that support them. The specter of term limits creates powerful emotional reactions in opponents, at least two elected legislators (one the chairman of the House Administration Subcommittee on Elections) having publicly compared the term limits movement to Nazism. Such overheated rhetoric indicates both the threat that term limits poses to established special interests and the urgency of the battle for them.

It is clear that special interests do not believe term limits will help them. Among the major contributors to an anti-term limits campaign in Michigan, for instance, were Chrysler Corporation, Blue Cross-Blue Shield of Michigan, Michigan Bell Telephone Company, Detroit Edison Company, Southern California Edison Company, The Coastal Corporation, Kellogg Company, USX Corporation, and Pacific Telesis Group<sup>5</sup>—all large, heavily regulated businesses. Their unlikely allies were a coalition of unions, such as the Teamsters, the United Auto Workers, the Michigan Education Association, and the AFL-CIO, who rely on specific forms of government intervention in labor markets. All these groups' efforts were coordinated by Debbie Dingell, wife of Michigan Democrat and House Energy and Commerce Committee Chairman John Dingell. A similar assortment of regulated industries and unions that fought term limits in Washington State was spearheaded by Heather Foley, the spouse and unpaid chief of staff of Speaker of the House Tom Foley.

Special interests oppose term limits because they do not want to lose their valuable investments in incumbent legislators. Many are organized to extract programs, subsidies, and regulations from the federal government—to use the law, in other words, as a lever to benefit their own constituencies or harm their rivals. The zero-sum transfer economy from which skilled lobbyists profit—as well as their own high-paying jobs—will be decimated by term limits that force lobbyists to relearn the priorities of new Members and make arguments on the merits, not on the strength of personal connections. The number of groups listed in the *Encyclopedia of Associations* has quadrupled in the last four decades from fewer than 5,000 in 1956 to over 20,000 today as special interests have taken advantage of legislators' vulnerability to pro-

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5 Norman Leahy, "Corporate Interests: Why Big Business Hates Term Limits," U.S. Term Limits Foundation, *Term Limits Outlook Series*, Vol II, No. 1 (March 1993).

posals that concentrate benefits but disperse costs. Such growth in lobbies and organizations is anything but a sign of democratic vigor.

## WHY CONGRESS NEEDS TERM LIMITS

Term limits are needed at all levels of government. However, because of the large electoral advantages wielded by incumbents, the historically low rate of turnover, the greater threat from special interests, and the unique power that federal legislators hold, it is especially important to apply term limits to Congress.

- ✓ **Term limits counterbalance incumbent advantages.** Congressional term limits are a necessary corrective to inequalities which inevitably hinder challengers and aid incumbents. Each House Member, for instance, receives nearly a million dollars per year to pay for franked (free) mail, staff salaries, and office and travel expenses. While campaigning, incumbents continue to receive salaries upwards of \$130,000 a year, which typically dwarf the income of challengers (who often must resign from their jobs while running for office). A small army of congressional staffers does volunteer work during campaign season; they have every motivation to do so, since they are campaigning for perpetuation of their jobs. On official time, these political aides perform all sorts of jobs unrelated to legislation but closely tied to reelection, such as soliciting media attention and doing favors for constituents. The power of the frank permits each Member to send thinly disguised reelection propaganda to every residence in his district several times per term. The money allotted to each incumbent for franking alone—over \$160,000 per year—is higher than the average challenger's total campaign expenditures. State legislators, who recognize the benefits to their state from long-term congressional incumbency, redraw election districts to maximize incumbents' electoral chances. The extent of incumbent resources prevents their exhaustive listing here, but their electoral impact is sizable; both the House and the Senate, for instance, have authorized taxpayer-funded lawyers to intervene in term limits litigation. When these benefits are added to such natural incumbent advantages as name recognition, media access, and higher political contributions, it is no wonder that challengers unseat incumbents so rarely. Despite increasing complaints about the drudgery of life in Congress, a remarkable number of incumbents continue to seek (and secure) reelection.
- ✓ **Term limits ensure congressional turnover.** The turnover rate for House incumbents who attempt reelection typically is below 10 percent. This is in stark contrast to the first century of America's government, when long-term congressional incumbency was rare and Members often voluntarily chose to leave Washington and return home.<sup>6</sup> In the nineteenth century, the average turnover in each new Congress was over 45 percent,<sup>7</sup> and this ensured a continual influx of Members free from the institutional biases that long-term incumbency brings. Today, however, despite a large 1992 turnover fueled primarily by retirees, there is little or no turnover among those

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6 See e.g., George Will, *Restoration* (New York: Free Press, 1992), p. 84.

7 Figures from Norman Ornstein, Thomas Mann, and Michael Malbin, *Vital Statistics on Congress 1993-1994* (Washington, D.C.: Congressional Quarterly, 1993), and Will, *Restoration*.

who set Congress's agenda: the committee chairmen and other members of the Democratic leadership. In the House of Representatives, for instance, the average job tenure is ten years. However, the principal leaders (the committee chairmen, speaker, majority leader, and whip) have served an average of *twenty-seven years*—which means that the average member of this group has been in the House since the Johnson Administration.<sup>8</sup> For every congressional election in the last twenty years, incumbents running for reelection in the House of Representatives have been returned to office at rates averaging higher than 90 percent.<sup>9</sup> Term limits would end such entrenchment and concentration of power, and the number of legislators who chose to retire or refused to run again also would increase. In California, for instance, the prospective imposition of term limits on the state legislature has more than doubled voluntary turnover (from 11 percent to 25 percent) in two years.<sup>10</sup>

- ✓ **Term limits secure Congress's independent judgment.** In one of the few cases where Congress itself has established term limits, service on the House and Senate Intelligence Committees is limited on the grounds that long-term membership might cause Members to develop a loyalty to the intelligence bureaucracy that would undermine their ability to exercise critical and independent judgment over it. This mandatory term limit is based on a sound theory of human conduct, but it deserves wider application; in an age where scores of federal agencies and special interests continually lobby for funding, there is a very real danger that Congressmen will become enmeshed in a culture that is overfamiliar with the federal government and insulated from the communities they ostensibly represent. Public sentiment in favor of term limits is likely influenced by the fear that Congressmen will become captured by this alien federal culture, as well as by frustration with the sclerotic representation that results from incumbents of all political stripes routinely getting reelected.
- ✓ **Term limits are a reality check.** Term limits also would provide inescapable, bracing reminders of what life in the real world is like. After former Senator George McGovern tried (and failed) to succeed in small business after spending eighteen years in Congress, he observed: "I wish I had known a little more about the problems of the private sector....I have to pay taxes, meet a payroll—I wish I had a better sense of what it took to do that when I was in Washington."<sup>11</sup> Ensuring that Members eventually are exposed to life outside of Congress should inculcate a more sophisticated understanding of the logic and the limits of federal regulation.
- ✓ **Term limits minimize Members' incentives for reelection-related "pork-barrel" legislation.** As government has grown larger, legislative careerism has become more prominent in Congress. Because long-tenured Congressmen have increasing power over the fate of federal projects due to the seniority system, senior members of both parties now routinely campaign by stressing their ability to bring federal projects to

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8 See chart, "Unpopular Representation," *Insight*, April 11, 1994, page 22.

9 Ornstein, Mann, and Malbin, *Vital Statistics on Congress 1993-1994*, p. 118, table 4-7.

10 See John C. Armor, "'Foreshadowing' Effects of Term Limits: California's Example for Congress," U.S. Term Limits Foundation, Term Limits Outlook Series, Vol III, No. 1 (June 1994), p. 3.

11 Fund, *op. cit.*, p. 10.

their home districts rather than by explaining their views on the important issues of the day. When Members express their preferences in committee assignments, they are aware of the electoral impact of federal spending directed at their districts. After the 1992 elections, so many freshman Congressmen chose the Public Works and Transportation Committee that new seats had to be created, making Public Works the largest committee in Congress.<sup>12</sup> Term limits, by eliminating incentives for careerism, would curb reelection-oriented federal spending which is targeted to particular districts but contributes little to the general welfare of the country.

Term limits thus provide an escape from the Faustian bargain that voters face: they know that returning an incumbent for another term may help their district, but in the long run it has dire institutional and national consequences. Long-term officeholders, less vulnerable because of a well-honed reelection machine fueled by public resources, come gradually to identify their interests more and more with those of the federal government. There is a strong correlation between length of legislative service and votes in favor of more public expenditures.<sup>13</sup> Political scientist John Armor, for example, has calculated the effects of term limits on congressional votes by eliminating the votes of senior legislators who would be locked out by term limits and replacing them by the proportion of votes for and against legislation made by junior members of their parties (in order to simulate the additional, hypothetical term-limited legislators); he found that the President's 1993 tax increase would not have made it through the House, while last year's Penny-Kasich federal spending cuts would have passed the House overwhelmingly.<sup>14</sup> Longer-serving Congressmen are also more hostile generally to other fiscally conservative measures, such as a balanced budget amendment to the Constitution,<sup>15</sup> and a forthcoming study by Cato Institute analysts Steve Moore and Aaron Steelman finds that term limits would push numerous other congressional vote totals in a more fiscally conservative direction.

- ✓ **Term limits would restore respect for Congress.** Use of discreditable tactics like pork-barreling that have powerful electoral effects is a major cause of declining respect for and satisfaction with Congress. Term limits would arrest the decline of congressional legitimacy, ensuring that Members would be more truly representative of their communities, and would renew American citizenship by writing into law the principle that people can govern themselves—and that this representation falls within the competence of any reasonably interested and well-educated citizen. The objection that long service is essential to understanding the complex legislative process says far more about the current congressional system than it does about the concept of term limits.

In short, the best way to reinvigorate government is to bring in legislators with fresh outlooks, new ideas, and better incentives. Term limits are the only realistic

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12 Jackie Calmes, "Tables Turned: Candidates of Change in 1992 Find Congress Reforms Them Instead," *The Wall Street Journal*, May 6, 1994, p. A1.  
13 See James L. Payne, *The Culture of Spending* (San Francisco: ICS Press, 1991), chapters 5, 11.  
14 See Pat Buchanan, "Term Limits Revolution," *The Washington Times*, July 7, 1994, p. A16.  
15 Payne, *The Culture of Spending*, pp. 178-179.

way to change the culture of legislative careerism in Congress—a culture that undermines the public interest.

## ARGUMENTS COMMONLY USED AGAINST TERM LIMITS

### Argument #1: Term limits are undemocratic.

Perhaps the most popular argument against term limits is that they restrict the choices available to voters. Voters, say opponents, should be able to vote for as wide a field of candidates as possible. Additionally, the ballot box makes statutory term limits unnecessary. “In effect, there are term limits in place every two years—candidates have to go before constituents and get reelected,” says Jeff Biggs, press secretary for House Speaker Tom Foley.<sup>16</sup> But arguments that term limits are undemocratic because they restrict voters’ choices run into two problems: (1) the tremendous electoral advantages enjoyed by incumbents make it difficult to argue that the elections they win are truly democratic, and (2) term limits would be more likely to expand the field of candidates than to restrict it.

Because the perquisites of office present huge barriers to entry by challengers, incumbents always have the privilege of fighting a defensive war. Taxpayer-funded benefits like franking, staff, and travel allowances tilt the field in incumbents’ favor, and political donors—who typically view their contribution as wasted if it does not go to the winning candidate—magnify these incumbent advantages by disproportionately favoring candidates already in office. In 1992, House challengers raised 28 cents for every campaign dollar received by incumbents, while Senate challengers raised 47 cents.<sup>17</sup> Challengers’ donations relative to those of incumbents have been dwindling more or less steadily since 1980. It is no wonder that challengers facing such long odds routinely lose to incumbents over 90 percent of the time.

Term limits will likely end incumbents’ traditional ability to insulate congressional elections from true competition. In fact, experience at the state level suggests that voter choice actually is increased by term limits. In California, for instance, the imposition of state-level term limits in 1990 led to a 1992 increase of over 25 percent in candidate filings for the state senate and over 50 percent for the state assembly; senate candidate filings for 1994 reflect yet another increase, and while assembly candidate filings have dropped from 1992, they remain 15 percent higher than they were in 1990. Although the limits do not take effect un-

<b>California Sees Explosive Candidate Growth Under Term Limits</b>		
	<b>STATE SENATE</b>	<b>STATE ASSEMBLY</b>
<b>1988</b>	68	243
<b>1990</b>	61	275
<b>1992</b>	76	415
<b>1994</b>	78	325

**Source:** See John C. Armor, “Foreshadowing’ Effects of Term Limits: California’s Example for Congress,” U.S. Term Limits Foundation, Term Limits Outlook Series, Vol III, No. 1 (June 1994), p. 3), and California Certified List of Candidates for the Direct Primary Election, 1988, 1990, 1992, 1994 editions.

16 Debbie Howlett, “Speaker Foley Challenges Home State Term Limit,” *USA Today*, June 8, 1993, p. 8A.

17 Ornstein, Mann, and Malbin, *Vital Statistics on Congress 1993-1994*, p. 81, table 3-5.



til 1996, they have encouraged some incumbents to find other work before they were forced to do so.<sup>18</sup>

Term limits also would ensure regular opportunities for candidates' political advancement. For instance, when George Mitchell announced his retirement from the U.S. Senate, candidates in Maine attempted advances at all levels of government. There were "city council members running for state representative, state representatives running for the state senate, state senators running for Congress, and United States representatives running for the Senate."<sup>19</sup>

By creating more choices for voters, increased filings like those in Maine and California aid democracy. Nationwide, congressional term limits likewise will create more choices for voters, more competitive elections, and more democracy.

### **Argument #2: There already is high congressional turnover.**

Some opponents note the scores of new Members in the 103rd Congress, or predict that Members seated after 1990 will be the majority in the House after the November elections, in order to resist term limits. In fact, however, the large number of new faces in Congress results primarily from Members resigning or seeking other office. In the 1992 House races, over 88 percent of incumbents running for reelection were victorious, but incumbents typically fare much better even than that: the 1992 reelection rate was the lowest in two decades.

Even with a healthy influx of new Members, the seniority system allows entrenched Congressmen to control newcomers and encourages newcomers to behave like the long-term incumbents they replace. Until term limits force a change in the seniority system and in the incentives of new Congressmen, those who control the passage of legislation will remain in control for decades, not years, at a time. As noted above, while some turnover takes place every election, members of the congressional leadership have been in office for decades, and it is they who set the agenda; for example, Representative Jack Brooks, a 21-term representative who has been in office since the Truman Administration, as chairman of the House Judiciary Committee can routinely block term limit measures from coming to the floor for a vote.

### **Argument #3: Term limits will harm small states.**

Some opponents argue that states with smaller populations (and thus fewer representatives in Congress) will be systematically disadvantaged by term limits; Democratic Senator Ernest Hollings of South Carolina, for instance, makes this argument on behalf of the Southern states.<sup>20</sup> Historically, some smaller states have attempted to compensate for this by continually reelecting incumbents regardless of their views on issues in order to accumulate power through seniority. Without such seniority, goes the argument, smaller states will be at the mercy of states like California which, by virtue of their size, can send scores of representatives to Congress and are assured seats on numerous important committees.

Such an argument ignores the tremendous institutional changes that congressional term limits would trigger. Instead of confining important committee chairmanships and other positions of power to incumbents who have spent decades in office, term limits would shut down the seniority system. Important legislative positions would be assigned by merit and willingness

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18 Armor, *op. cit.*

19 "Mitchell's Decision Not to Run Sets Off a Statewide Scramble in Maine," *The New York Times*, June 16, 1994, p. A24.

20 See his "Term Limits: Beware the Yankee Conspiracy," *The State* (Columbia, S.C.), May 22, 1994, p. D-3.

to shoulder responsibilities. The infusion of new perspectives would cause legislative positions to rotate so frequently that it would be difficult for any one legislator to hold onto power long enough to abuse it. Furthermore, the central qualification by which candidates for Congress are judged would shift in a healthy direction, toward being a voice for sound federal policy and away from being a siphon from the federal treasury.

#### **Argument #4: Term limits will lock out experienced legislators.**

Experience in one's profession is a good thing, but even House Members who only serve one term—two years—clearly have time to develop significant experience. Despite the protestations of some foes of term limits that Members need a great deal of seasoning before they can make real decisions, no other profession requires two years of on-the-job training. Moreover, the skills developed by years of legislative service surely will find numerous other outlets under term limits; those Members who reach the end of permitted service can still work to improve people's lives in the law, in business, in academies and think-tanks, or even in other branches of government.

Many freshman legislators have worked as congressional staff or state legislators. Under term limits, legislators are more likely to have the freshness of outlook that enables them to envision solutions for problems after their more experienced colleagues have conceded defeat. The claim that the legislative process takes years and years to understand is less an indictment of inexperienced legislators than of the current legislative process. Any system not readily understandable to the average well-informed person raises troubling questions about what has happened to representative democracy in America.

Ultimately, anyone who argues that term limits would deprive Congress of some of its best legislators must face the point made by Hendrik Hertzberg in *The New Republic* that while depriving Congress of valuable legislative talent “would be a real cost...it would be a cost worth paying to be rid of the much larger number of timeservers who have learned nothing from longevity in office except cynicism, complacency, and a sense of diminished possibilities.”<sup>21</sup>

#### **Argument #5: Campaign finance reform is needed, not term limits.**

Reforms in federal campaign finance law—particularly in order to eliminate tremendous incumbent advantages in congressional elections—are urgently needed. However, they have little or no relevance to term limits. Proposals for campaign finance reform currently on the table are written by incumbents and for incumbents and are likely to create even more advantages for them. As former Congressman Bill Frenzel has noted, “No legislature has ever passed a campaign law that made it harder for incumbents to get reelected.”<sup>22</sup>

The centerpiece of the campaign reform bills currently under consideration (S. 3 and H.R. 3) is their limit on the amount congressional candidates can spend, but these spending caps are the same for challengers and incumbents, despite the tremendous incumbent advantages described above. Twenty years ago, the Supreme Court declared that spending limits are an unconstitutional limit on First Amendment freedoms.<sup>23</sup> The pending bills circumvent this problem by calling their spending limits “voluntary,” even though candidates who exceed

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21 Hendrik Hertzberg, “Twelve Is Enough,” *New Republic*, May 14, 1990, p. 23.

22 Bill Frenzel, “Term Limits and the Immortal Congress,” *Brookings Review*, Spring 1992, p. 22.

23 *Buckley v. Valeo*, 424 U.S. 1 (1976).

them are penalized harshly through punitive taxation, subsidies to opponents, and the suspension of opponents' spending limits. Incumbent advantages make incumbent spending effectively far higher than challenger spending. The cleverness of the spending limit penalty is that it is the challenger, not the incumbent, who will have to break it.

Challengers who wish to avoid the problem by running cheaper campaigns will face another difficulty: it takes a substantial amount of spending just to reach parity with incumbents' natural advantages in media access and name recognition. The proposed spending limit of \$600,000 for House candidates is less than the average amount a House challenger needed to defeat an incumbent in 1988. The 1992 House general election statistics are even more instructive. They indicate clearly that success rates for challengers rise with their spending totals.

- ◆ No challenger who spent less than \$200,000 defeated an incumbent.
- ◆ Fewer than 15 percent of those who spent between \$200,000 and \$400,000 toppled sitting officeholders, but 25 percent of those who spent between \$400,000 and \$600,000 did.
- ◆ Over half—54 percent—of all challengers who spent over \$600,000 won election.
- ◆ Under the proposed campaign finance reforms, this last set of victories no longer will be an option; the genius of the spending limit is that it is set just at the point where challengers become dangerous.
- ◆ Campaign spending is increasing because the value of the prize—a congressional seat—continues to grow. It will likely continue to grow, given the increase in the federal government's size and power and the greater and greater involvement of citizens in the political process. As George F. Will has noted, the \$678 million spent by congressional candidates on elections in 1992 is "40 percent of what Americans spent on yogurt."<sup>24</sup>

Instead of eliminating the tremendous advantages incumbents hold in congressional elections today, the proposed campaign reform bills attempt to increase them. This is probably to be expected, however; one can hardly expect a legislature to pass a law that targets its own privileges for destruction. Real reform measures almost certainly will have to emerge from outside the Beltway—as term limits have done so far in fifteen states nationwide.

#### **WHY INCUMBENTS LIKE SPENDING LIMITS**

<b>Challenger spends less than \$200,000</b>	0.0% win
<b>Challenger spends \$200,000 - \$400,000</b>	14.7% win
<b>Challenger spends \$400,000 - \$600,00</b>	25.0% win
<b>Challenger spends \$600,000+</b>	<b>54.0% win</b>

Source: Federal Election Commission.

24 George F. Will, "So, We Talk Too Much?", *Newsweek*, June 28, 1993, p. 68.

### **Argument #6: Under term limits, unelected people will run Congress.**

Many opponents of term limits argue that to oppose them will increase the deficiencies of today's congressional culture, which grants tremendous discretionary power to people other than elected legislators. This argument typically relies on a "vacuum theory," according to which the departure of senior incumbents will create a vacuum in which more and more decisions will be made by the unelected. Such an argument is a simplistic portrayal of how Congress works, however, and ignores the tremendous systemic changes that term limits would create. In fact, term limits would decimate the power of unelected Washington operatives.

**Lobbyists.** Some argue that a vacuum formed by the departure of veteran incumbents would be filled by special-interest lobbyists, but the strength of special interests actually would be vastly diminished by term limits. Special-interest lobbyists thrive precisely because of the relationships they have with and the investments they have made in long-term incumbents. Many former staffers, and even some ex-Congressmen, become lobbyists to trade on their relationships they have with former colleagues; according to *Congress Daily/A.M.*, for example, 40 percent of the Members of the House of Representatives who left in January 1993 cashed in on their incumbency by taking jobs as lobbyists. The rapid turnover created by term limits would make these connections less useful and confine lobbyists' influence to the strength of the arguments they make on the merits of issues.

**Staff.** A related argument by opponents of term limits is that congressional staff somehow would have more influence on freshman Congressmen than they do on long-term incumbents. Anyone who has ever seen a congressional office in action, however, knows that Congressmen give assignments rather than taking them. More important, however, term limits would empower Members to make far more efficient use of their staff. Instead of responding to constituent inquiries, writing press releases, sending mass mailings to everyone in the district, and in general pursuing activities that increase the likelihood of reelection, aides would be able to do more substantive research on legislation and give their Members more sophisticated counsel. In any case, the specter of career staff employees manipulating freshman Members has little support in reality; while the average Member today has spent more than ten years in office,<sup>25</sup> staff employees on average work for Congress for between five and six years.<sup>26</sup> Under term limits, these figures would likely shrink as new Members replace aides inherited from former Congressmen with their own loyalists.

**Bureaucrats.** Other opponents suggest that the absence of long-term incumbents would strengthen employees of federal administrative agencies. Again, however, such a prediction misses the mark. Congress routinely rewards or punishes bureaucracies each year by means of the federal funds it grants them; this would not change under term limits. More important, however, term limits would likely break the vicious cycle in which Congress delegates responsibility to administrative agencies, which make life more difficult for some citizens, who complain to their Congressmen, who order the agencies to solve the problems of those who have complained, who then are grateful to their Congressmen. Many observers have noted that this process permits each Congressman to pose as a white knight who rescues constituents from

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<sup>25</sup> Ornstein, Mann, and Malbin, *Vital Statistics on Congress 1993-1994*, pp. 19, 21.

<sup>26</sup> Staff data from Congressional Management Foundation, *1992 U.S. House of Representatives Employment Practices and 1993 U.S. Senate Employment Practices*.

federal dragons, despite the fact that it was Congress which created the problem in the first place.<sup>27</sup>

As former Representative Vin Weber (R-MN) has noted, “We create the government that screws you, and then you’re supposed to thank us for protecting you from it.” Under term limits, Members of Congress would be motivated to solve problems, not create them. If Congressmen know they will not be around to micromanage the bureaucracy, they will be more careful about the powers they delegate. Term-limited Congressmen would have every reason to work for major reforms that transfer responsibility away from bureaucrats and back to Congress. Instead of transferring power among branches, term limits are likely to result in overall restraints on government activity.

Ultimately, critics who suggest that new Members will fall under the thrall of unelected Beltway insiders miss the point: term limits would create major changes in the way Congress works. Under term limits, Congress would attract talented candidates with demonstrated expertise and diverse life experience. Such candidates have little reason to seek election to Congress today, when it takes decades of incumbency to reach a position of legislative influence. Under term limits, citizen-legislators could exercise real policy influence for a few years and then return to private life.

## ARE TERM LIMITS CONSTITUTIONAL?

Although the Arkansas case recently accepted by the United States Supreme Court for review—*U.S. Term Limits v. Thornton*<sup>28</sup>—will likely be the most crucial in establishing whether state-imposed term limits are constitutional, several other cases have been moving through state and federal trial and appeal courts.

At the center of these cases are the “qualifications” and “times, places, and manner” clauses of the Constitution.<sup>29</sup> The qualifications clause often is held to prevent imposition of any requirements for Members of Congress other than the age, citizenship, and state residency requirements mentioned in that section of the Constitution. Some argue that *Powell v. McCormack*, a 1969 case, supports this reading of the qualifications clause.

In March of this year, a split majority of the Arkansas Supreme Court found the state’s term limit law unconstitutional for federal (but not state) officeholders. The Arkansas court based much of its decision on a 1969 case, *Powell v. McCormack*,<sup>30</sup> in which the U.S. Supreme Court held that the Constitution barred Congress from creating additional qualifications for membership in the federal legislature or from excluding duly elected Members who met these tests.<sup>31</sup> The Court noted that the qualifications clauses contained few requirements in order to give voters as much choice in representation as possible.<sup>32</sup>

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27 See, e.g., David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven: Yale University Press, 1993), especially chapter 5.

28 Arkansas Supreme Court, case no. 93-1240 (1994).

29 U. S. Constitution, Art. I, sec. 2, cl. 2; sec. 3, cl. 3.

30 395 U.S. 486.

31 *Ibid.*, pp. 522, 550.

32 *Ibid.*, pp. 532-534. It is important, however, not to interpret the rule against qualifications too literally. The Constitution provides numerous examples of additional qualifications for all House and Senate Members; for example, they may not hold office simultaneously in the executive branch (Art. I, sec. 6, cl. 2), after impeachment and conviction (Art. I, sec. 3,

Two of the seven justices dissented from the Arkansas decision, arguing that the court should have upheld congressional term limits. The Arkansas decision gives the Supreme Court an opportunity to distinguish *Powell*—which dealt with Congress’s power to control the seating of elected representatives—from questions of how the states may regulate their own congressional elections. Whether states can write new qualifications for federal officeholders has never been litigated.

In February, a federal judge struck down Washington State’s term limit law in *Thorsted v. Munro*, using arguments similar to those of the Arkansas Supreme Court and suggesting that First and Fourteenth Amendment liberties would be violated by term limits. (If such an argument were taken seriously, numerous state and local term limits laws—including those that currently apply to the governors of 34 states—would have to be struck down on constitutional grounds.) The judge also suggested that although term limits are unconstitutional, legislators could enact “politically neutral” reform measures such as public financing of campaigns. Such comments suggest that the court’s decision was grounded more in politics than in law. That ruling was appealed to the Ninth Circuit Court of Appeals in San Francisco. The U.S. Supreme Court considered, but eventually decided against, reviewing the Washington case simultaneously with the one from Arkansas.

In Nebraska, despite the 68 percent victory won by the state’s term limits amendment in 1992, the state Supreme Court voided that amendment in May on a technicality, ruling that an insufficient number of ballot petition signatures had been gathered. As noted above, the outcry this provoked led to a second wave of petition signatures by angered and energized citizens. And in Florida, federal court hearings on that state’s term limits law took place in June.

Although these cases rely on the qualifications clauses, much case law suggests that term limits are understood better as an exercise of the power to regulate the “times, places, and manner” of congressional elections — a power which the Constitution grants to states.<sup>33</sup> Most state term limit laws restrict long-term incumbents’ access to the ballot instead of explicitly prohibiting them from running in perpetuity. The Supreme Court’s central ballot access opinion is *Storer v. Brown*,<sup>34</sup> which upheld California’s prohibition of ballot access for independent candidates if they had registered with a political party within the last year. In this case, the Court recognized that, “as a practical matter,” the states are entitled to regulate substantially the elections that take place within their boundaries.<sup>35</sup> When deciding whether any particular election regulation is reasonable, *Storer* permits the Court to weigh “the facts and circumstances behind the law, the interests which the state claims to be protecting, and the in-

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cl. 7), or after fighting for the Confederacy in the Civil War (Am. XIV, sec. 3). Arguments that congressional qualifications are limited to the three stated in the clause are therefore weak. Furthermore, another category of legislation that has been found to be a permissible regulation of the manner of congressional elections is “resign to run” laws which force state officeholders to resign once they become congressional candidates. Such laws are upheld routinely by courts, although they arguably present an additional qualification for federal officeholding. The cases which deal with such laws, however, make the point that the ban on federal office-holding is not absolute; rather, it can be evaded by resigning the state office already held. Similarly, the Hatch Act’s former prohibition of congressional candidacies by federal employees was routinely found constitutional; an absolute bar on officeholding, on the other hand, would be a prohibited qualification.

<sup>33</sup> U. S. Constitution, Art. I, sec. 4.

<sup>34</sup> 415 U.S. 724 (1974).

<sup>35</sup> *Ibid.*, p. 730.

terests of those who are disadvantaged by the classification.”<sup>36</sup> Numerous cases reiterate the right of states to bar candidates who, for instance, fail to garner a minimum number of primary votes<sup>37</sup> or petition signatures.<sup>38</sup> Although the *Storer* plaintiffs asked the *Powell* court to extend its earlier ruling to the states, the Court declined to discuss *Powell’s* relevance. In fact, the Court noted in *Storer* that the authority of states to regulate their own elections seems to grant them precisely the power that Congress was barred from exercising in *Powell*:

The states have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and *the selection and qualification of candidates*.<sup>39</sup>

Using the *Storer* balancing test, courts have upheld numerous election regulations, such as “reasonable” filing fees,<sup>40</sup> petition signature requirements for independent candidates,<sup>41</sup> and denial of ballot access for five years to those found guilty of violating campaign finance disclosure laws.<sup>42</sup> These cases suggest that state-imposed term limits must be designed to protect the interests of a state and its people: for instance, to mandate fair and competitive elections, or to broaden the opportunities for citizens to serve in Congress, or to ensure that citizens elect legislators truly representative of their districts.

Ultimately, the power of the states to restrict the ballot access of their congressional delegations is supported not only by the “times, places, and manner” clause of the constitution, but also by the Tenth Amendment, which states that all powers not reserved to the federal government but not prohibited to the states, rest with the states and the people. As the Constitution is silent on the issue of rotation in office, the Tenth Amendment gives the states the authority to implement an organizational structure for election of their Congressmen and Senators which would encourage such rotation. As Justice Sandra Day O’Connor observed in *Gregory v. Ashcroft*, which upheld Missouri’s right to require mandatory retirement for its state judges despite federal age discrimination statutes: “The ability of the states and the people to determine for themselves who will represent them goes to the very heart of representative government.”

At least five arguments suggest that state-imposed term limits are a permissible exercise of a state’s authority to regulate federal elections rather than an impermissible additional qualification for office.

**First**, *Powell* is about Congress’s ability to set new qualifications, not the ability of the people of the several states to establish new electoral regulations. In fact, *Powell* specifically put aside the question of state regulation.<sup>43</sup>

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36 *Ibid.*

37 See *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

38 See *American Party v. White*, 415 U.S. 767 (1974).

39 *Storer v. Brown*, p. 730 (emphasis supplied).

40 *Bullock v. Carter*, 405 U.S. 134 (1972).

41 *Jenness v. Fortson*, 403 U.S. 431 (1971).

42 *Lukens v. Brown*, 368 F. Supp. 1340 (S.D. Ohio 1974).

43 See *Powell v. McCormack*, p. 543.

**Second**, *Powell* clearly is motivated by the fear that Congress, if not barred by the Constitution, might well create new qualifications for federal office protecting incumbents from electoral competition.<sup>44</sup> Term limits evade that danger, by, if anything, making it easier for newcomers to enter Congress.

**Third**, the Supreme Court has interpreted election laws as “manners” regulations far more often than as additional qualifications.

**Fourth**, the Tenth Amendment to the Constitution assigns to the states and their citizens all powers not reserved to the federal government. This distribution of powers creates strong constitutional opportunities for congressional term limits.

**Fifth** (and perhaps most important), two-thirds of state term limit laws deny ballot access, not election, to long-term incumbents who remain free to run, and win, as write-in candidates.

Although the Supreme Court has not yet ruled explicitly on the question, appellate courts in three different circuits have held that a state law which prevents a candidate’s name from being printed on the ballot does not run afoul of the qualifications clause. As the First Circuit ruled, “The test to determine whether or not the ‘restriction’ amounts to a ‘qualification’ ... is whether the candidate ‘could be elected if his name were written in by a sufficient number of electors’ ”<sup>45</sup> The Ninth and Eleventh Circuits also have found that a state’s refusal to print a candidate’s name on the ballot creates no constitutional problem.<sup>46</sup> Although a write-in candidacy obviously poses disadvantages to a candidate, its challenges can be met. Three Members of Congress are there today because of write-in elections: Representatives Ron Packard of California and Joe Skeen of New Mexico, and Senator Strom Thurmond of South Carolina.

## WHERE TERM LIMITS GO FROM HERE

Numerous fronts in the battle for term limits will open up in the weeks and months ahead.

- ✓ The Supreme Court’s announcement on June 20 that it would hear the appeal of the Arkansas case preempts a major argument of those who have claimed term limits are clearly and unambiguously unconstitutional. The Court will likely hear the case by early 1995.
- ✓ As many as nine or ten additional states, as well as the District of Columbia, are expected to hold statewide votes on term limits this November. Alaska, Maine, Massachusetts, and Oklahoma will have measures on the ballot, and activists continue to gather signatures in efforts to secure statewide votes in the District of Columbia, Idaho, Illinois, Mississippi, Nevada, and Utah. Nebraska will likely hold a second successful vote on term limits.
- ✓ Over 100 Members of the U.S. House of Representatives have signed a discharge petition that would take control over a term limits constitutional amendment from the House Judiciary Committee. The amendment limits Senators and Representatives to

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<sup>44</sup> See, e.g., *ibid.*, pp. 547-548.

<sup>45</sup> *Hopfman v. Connolly*, 746 F. 2d (1st Cir. 1984), at 103, *vacated in part*, 471 U.S. 459.

<sup>46</sup> *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993).



twelve years of service in each House. Nearly half of the cosponsors—47 out of 100—are freshmen, demonstrating once again how new Members often are more sympathetic to public sentiments than those who have served for decades.

- ✓ Republican Representative Peter Hoekstra of Michigan has introduced H.R. 3835, the Voter Opportunity to Inform Congress Effectively (VOICE) Act, which would provide for a nationwide, non-binding referendum on term limits. Hoekstra argues that his measure, by permitting the American electorate to speak with a unified voice on term limits, would be more effective than scattered referenda in different states. H.R. 3835 has 57 cosponsors so far.
- ✓ Two recent special congressional elections produced two term limits advocates as victors. Newly elected Republican Congressman Ron Lewis of Kentucky, for example, used term limits as one of his main issues, according to an aide. Term limits also were an issue in the previous House election cycle in many districts: for instance, in South Carolina, where Republican Bob Inglis used them as his principal campaign issue.
- ✓ Term limits even may be a factor in the 1996 Presidential race. Lamar Alexander, William Bennett, Dan Quayle, and Ross Perot all have announced their support for term limits. President Clinton opposes them.
- ✓ Perhaps most important, numerous state legislatures—especially in Iowa, Kansas, North Carolina, and Texas—probably will be considering term limits measures in the near future. In the long run, grass-roots organizing in the states is probably the most important facet of term limits activism, especially in light of the Supreme Court's pending decision, because it lays the groundwork for future state legislation and referenda, as well as federal legislation and constitutional amendment.

## CONCLUSION

It is difficult to overstate the extent to which term limits would change Congress. They are supported by large majorities of most American demographic groups; they are opposed primarily by incumbent politicians and the special interest groups which depend on them. Term limits would ameliorate many of America's most serious political problems by counterbalancing incumbent advantages, ensuring congressional turnover, securing independent congressional judgment, and reducing election-related incentives for wasteful government spending. Perhaps most important, Congress would acquire a sense of its own fragility and temporariness, possibly even coming to learn that it would acquire more legitimacy as an institution by doing better work on fewer tasks.

Many arguments against term limits, on the other hand, are either mistaken (the claim that there already is high congressional turnover) or irrelevant (the attempt to change the subject to proposals for campaign finance reform). Although many opponents claim that term limits are plainly unconstitutional, the Supreme Court's recent acceptance of the Arkansas case undercuts their argument; indeed, federal cases on election law strongly suggest that the states are constitutionally empowered to regulate such matters as the terms of federal officeholders.

The term limits phenomenon is a tribute to public involvement in politics and is one of the few reforms devised and implemented by people who live beyond the Beltway. It is substantive, not cosmetic; both allies and enemies concede that limiting political terms would create

fundamental change in American politics. At the most practical level, the term limits movement has demonstrated political strength and, no matter what the nature of the Supreme Court decision handed down, is here to stay.

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