

Term Limits and Political Conscience

By David M. Mason

Term Limits as a Democratic Principle

A principal purpose of representative democracy is the limitation of power. Our Constitution represents an effort to divide, define, and limit power in such a way as to provide for the governing of a large and powerful nation while limiting the size and power of the government. Term limitation is simply another method of limiting the power of elected officials and of assuring genuine representation. Periodic elections themselves are the most fundamental expression of these limitations, but limits on service in public office have been integral to democracy since its origins. In America, limits on executive officials in particular have existed since the founding, and are now so ingrained as to pass almost without comment. In my own state of Virginia, for instance, the governor can serve only one four-year term, a situation which most voters and politicians seem satisfied with. With increasing frequency in recent years, term limits have also been imposed on mayors: in Philadelphia in 1951, in Wilmington, Jacksonville, and Nashville in the 1960s, and in Atlanta in 1973, among others. Somewhat more recently, cities began to impose term limits on members of city councils, including Bangor, Maine, in 1976, Dallas in 1981, Tacoma and Tampa in 1983, and El Paso in 1984. Thus, while to many term limits seem to have sprung inexplicably into public view in about 1990, in fact, the concept has been applied continuously in America and increasingly since the 1960s, with the new twist being its application to legislative offices. As a matter of fundamental principle, however, it is difficult to distinguish between limitations on executives and legislators, particularly, as I will discuss further, as legislative offices become full-time positions.

There are at least two general objectives in limiting the terms of elective officials: the first, to prevent an acquired familiarity with government and its functions from creating among officials a different set of interests and views than among the public generally. This was a great concern among the founders, who held out regular and frequent elections (at which times officials would presumably be returned to private status) and the principle that Congress could make no law that did not apply to itself, as protections against a tyranny of democratically elected officials. A second and related objective of term limits is to prevent the ability of elected officials to bend their legally acquired powers in order to expand their influence or perpetuate their incumbency. The House of Representatives recognizes both of these functions of term limitations in its own rules in regard to service limitations on the Intelligence and Budget Committees. An explicit purpose of the six-year limit on Intelligence Committee service is to prevent Members from becoming overly familiar with, and presumably captive to, the intelligence bureaucracy. The limits on the Budget Committee arose in response to fears on the part of members of other standing committees that the Budget Committee might acquire too much power over the other organs of the House. In addition, Republicans have recently imposed limitations on service by their Ranking Members, and Democrats on certain members of their party leadership, apparently for similar reasons.

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Term limits, then, are not so much a solution in search of a problem, as has been suggested by one commentator, as they are a valid principle in need of application. It is appropriate and necessary to engage in a discussion of term limits on the level of fundamental principle, but blanket assertions that term limits are undemocratic or that the idea is unthoughtful can be dismissed out of hand. Instead, we need to ask, in this context, whether conditions in Congress or in the country at large merit the application of this legitimate principle to election to the House and Senate.

Changes in Congress and the Nation Supporting Term Limits

The founders incorporated the rotational principle in the Constitution through varying terms of office and staggered service in the Senate, and seemed to assume that there would be frequent turnover in federal office. Though they obviously knew about explicit term limits, they did not impose them on Congress, and a respect for their judgments and for the usage of over 200 years compels us to ask whether conditions have changed in such a way as to make term limits appropriate for Congress today.

Among the most frequently discussed factors in regard to term limits is the rate of reelection and return to Congress. Counting retirements and election defeats, return rates to the House had generally increased from about 75 percent just after World War II to around 90 percent until last year, when the rate dipped back down to about 75 percent. Senate trends have been less obvious, with the return rate of the relevant class dipping below 50 percent for three successive elections from 1976 to 1980. These rates are significantly higher, however, than those that prevailed in the founding era, when House turnover was frequently in the 50 percent range. In addition to return rates, there is a substantial body of work on what have been referred to as the vanishing marginal districts: the increasing trend, again broken in the last election, for House incumbents to win reelection by margins greater than 60 percent.

A number of factors have been advanced as contributing to increased reelection rates, including a decline in intraparty competition, the increase in the population of districts, a more vigorous exploitation of the advantages of office, such as constituent service operations and the frank, and the increasing regulation of political campaigns, which has led, among other results, to a large and growing financial advantage for incumbents over challengers. Left unaltered, these factors will continue to keep reelection rates higher than they would be otherwise, meaning that the House has become more resistant to political change, though not immune to it. I believe this development is unhealthy, even undemocratic, and that the general reduction in turnover, and the factors contributing to it, constitute a valid reason to support term limits.

There is demonstrable evidence that Members change their views in predictable ways over time. Economist James Payne has documented in *The Culture of Spending* (ICS Press, San Francisco, 1991) that Members of Congress tend to support more government spending as their tenure increases, and that this tendency operates across the ideological spectrum. The National Taxpayers' Union Budget Tracking System shows similar results. Public choice economists as well have contributed important new insights into the actions of public officials, arguing that there is unavoidably, and perhaps even unconsciously, a heavy dose of self-interest in the actions of public officials. Representative Tim Penny (D-MN), among others, has criticized the congressional pension system as a heavy contributor to an inappropriate careerist attitude.

A more important argument for term limits is the significant change in the role and operation of the professionalized legislature, particularly since the 1960s. In general terms, Congress has taken an increasingly active role in the management and administration of federal programs, which has resulted in a blurring of the separation of powers, with a consequent loss of political accountability, and has permitted an expansion of the scope and scale of federal activities far beyond what would have been permitted by earlier Congresses. The emergence of essentially

continuous sessions of Congress is both a result of and reinforcement to this managerial impulse, as is the rapid growth in congressional staff, most of which occurred during the sixties and seventies.

As Congress has become a continuously meeting body, and as opportunities for outside income, and consequently for non-political outside activities, were reduced and then eliminated, as Congress exempted itself from the application or objective enforcement of various social policy laws, Members of Congress unavoidably became more detached from, or in the words of *The Federalist*, less sympathetic to, the plight and concerns of ordinary citizens. For most Members, election to Congress means that you no longer work, shop, commute, or send your children to school among your constituents. The attitudes and outlook inside the Beltway among what has become a professional political class is indeed different from that in the rest of the nation. Members of Congress spend far more time here than they did twenty or thirty years ago, and vastly more time than was the case in the founding period. Also important, time spent back in the district is as campaigner and officeholder, rather than as businessowner, commuter, or parent. The reply that Congress is, to the contrary, hypersensitive to changes in public opinion, only strengthens the case that Congress is indeed out of touch. Members who have a firm grasp of their constituents' opinions and views are unlikely to be swayed by transient changes in polls or by superficial public relations efforts. It is those who put their own job security first in order of priority who are more likely to react inappropriately to such factors.

The professional, managerial Congress clearly acts differently than its predecessors. This new Congress is, for instance, far more willing to delegate broad powers to executive agencies, on the assumption that Members and committees will have a major say in the implementation and execution of their mandates. Indeed, there has arisen an unfortunate tendency to pass particularly contentious issues into the bureaucracy, but under procedural mandates that allow Congress to attempt to manage or prejudice the outcome. Such practices leave voters who are frustrated with government performance in general or with particular policy outcomes with no one to hold accountable: Congress points to the bureaucracy and the President points back at Congress, yet both sides have incentives to postpone and temporize rather than to resolve issues clearly.

The development and increasing use of non-legislative means of exercising power has aided the career Congress in avoiding accountability while managing the executive branch policy process. Among these practices are: insistence on adherence to report language as equivalent to law; attempts to construct detailed and definitive legislative histories; detailed requirements on executive branch decisionmaking procedures, including, incredibly, prohibitions on contact among executive officials; reporting requirements to Congress; and, the Independent Counsel law, particularly the congressional triggering mechanism. All of these practices and many others less formal permit—if they are not themselves, per se—violations of the separation of powers. The result, again, is a lack of accountability to voters as to who is responsible for the results. This entanglement also robs legislators of the objectivity which is essential to proper legislative oversight of executive activity: to the extent that Congress is involved in executive branch decisions it simply cannot be a fair judge or referee.

To the degree that the President, governors, and mayors had their tenure limited because of the full time nature of their offices, the extent of their powers, and the resources under their control, the same imperative applies to Congress, state legislatures, and even city councils as they lengthen sessions, increase staffs and budgets, and take a larger role in government management.

In addition to changes in the legislature, changed conditions in government generally seem to have contributed to support for term limits. The entire developed world is experiencing a post-Cold War revolution in government, as we have seen in Italy, Japan, and Canada even more dramatically than in the United States. Much as in situations of active wars, governments have

grown in scope and power while policies in a broad range of areas have ossified, becoming increasingly at variance with changing public opinion. As with tectonic forces that build up over time, the sudden reduction in military and foreign policy tension is likely to result in large and sudden changes in other areas of policy and society, changes that have by no means yet been spent.

Benefits of Term Limits

In assessing the likely effects of term limits, honest observers on both sides of the issue are likely to admit that predictions are uncertain. Because most term limits laws have included grandfather clauses, we have no significant experience with term-limited legislatures, and the judgments would take years to form. Unintended and unpredicted consequences are likely.

The most important changes under term limits would be in the political process and system itself. Most important, term limits would change the role, outlook, and attitude of elected officials. Legislators would be more willing to question established programs and policies and would have greater independence from existing administrative and political arrangements. Legislators would be more inclined to fix problems than to manage them. One case in point is the genuine scandal of existing congressional constituent service operations. Political scientist Morris Fiorina has detailed the demonstrable political benefits of casework to Members of Congress, and internal congressional documents emphasize the media and political aspects of securing proper credit for casework. Yet lawmakers across the political spectrum defend constituent services as essential to the representative function. Among conservatives, the belief is that constituent services are an essential means for individual citizens to deal with the federal behemoth. What is lost in the discussion is that fact that Congress collectively is responsible for the bureaucratic messes that make casework so voluminous while individual Members profit from solving the problems one at a time. The incentive, intended or not, is to manage problems rather than to solve them. That system serves the public poorly. A term-limited Congress would likely demonstrate a different attitude.

A term limited Congress would be less willing to delegate broad powers to the executive branch. A better defined separation of powers would emerge as a result. Internally to Congress, except under the most lengthy of term limits, the seniority system, and the system of standing committees which depends on it, would be destroyed. There also needs to be greater discussion than there has been about how the committee system might be replaced or changed under term limits. Term limits might well revive the possibility of a return to a part-time legislature, or at least to some reduction in the length of sessions. There is at least one survey comparing states with and without gubernatorial term limits which indicates that term-limited states have more competitive elections, even in the terms in which the seat is not open. This is contrary to the claim that term limits would result in a free ride after the first election since competitors would wait for an open seat. Finally, term limits would almost certainly result in greater diversity in the Congress, as we saw in the results of the large turnover last year. Even more than the 1992 elections, term limits would open service in Congress to people from a wider range of backgrounds.

Objections to Term Limits

The first, but least credible, objection to term limits heard in Washington is that they are a plot designed by frustrated Republicans who could otherwise never gain a majority in Congress. The positions of Republican officeholders and the Republican record in open seats over the past decade indicate that this theory is implausible. Further, the emergence, growth, and progression of the term limits movement indicates that Congress, and even Democrats generally, are not the intended targets. The first statewide term limit initiative, in Oklahoma, applied to the state

legislature only, as did California's 1990 initiative. While the Colorado initiative, also that year, applied term limits to a congressional delegation for the first time, it also applied to the Republican-controlled state legislature. The initiative in Washington state the next year was led by a liberal peace activist. In municipalities around the country citizens have applied term limits to various local officials, including some areas such as New Orleans and Kansas City, and now New York, where no one expects a change in the partisan or racial composition of officeholders as a result of term limits. There is nothing personal about the term limits movement, and the prevailing congressional reaction to the contrary simply confirms the suspicions of most term limits advocates.

Opponents also argue that term limits will deprive the nation of talented legislators. But this argument ignores the genius, and indeed the basic supposition of democracy: that people are capable of ruling themselves. To argue that only one among a over a half million people is well qualified to serve in Congress is simply insupportable. This argument also ignores the design of most term limit measures. Not only are politicians permitted to sit out a term or more and then run again, but most state limits allow incumbents to run as write-in candidates, a route which has been successful in some cases.

Opponents also argue that staff, bureaucrats, and special interests would run a non-professional Congress. As a former staffer, I would assert that junior Members rely far less on staff than their senior colleagues. Further, Congressional Management Foundation surveys indicate that the average tenure of congressional staff in their current position is between six and eighteen months, probably depending on the age of the Congress itself. While there are certainly a number of long-term staffers, their tenure is largely a result of the seniority system and the tenure of their patrons. Term-limited legislators will have no compunctions about making their own staffing arrangements.

As for bureaucrats and special interests, the infamous iron triangles that serve them were born of the congressional committee and seniority system. Term-limited legislators would be more suspicious of bureaucrats, and special interests would have less leverage and less incentive to pressure or cultivate them. A cursory look at the major contributors to anti-term limit efforts will show that the most infamous of the special interests find it in their interest to oppose term limits.

The charge that inexperienced legislators would, whatever their intentions, be manipulated by these interests again denigrates the very concept of democratic rule.

Finally, opponents charge that term limits are undemocratic because they limit choice. We have discussed how term limits are analogous to other institutional arrangements that distinguish our republican system from pure democracy. Beyond that, it is difficult to argue that term limits have a more limiting effect on voter choice than other prejudices and barriers built into the current electoral system which would be relieved by term limits. The first of these are the electoral advantages of officeholding for the incumbent, many deriving directly from the use of public funds. Even if constituent service staffs, pork barrel spending, and newsletters were eliminated from the congressional arsenal, continuing biases toward incumbents would exist in the political and media structures. The argument for unlimited tenure also runs counter to the basic premise of representational democracy, the focus of which is not on the officeholder but on his selection from among the people.

Constitutional Issues Affecting Term Limits

The principal activity on congressional term limits thus far has been through state initiative. A number of constitutional questions arise, particularly from opponents. Some say that state limits on congressional tenure are clearly unconstitutional. Honest commentators would have to admit

that no one really knows what the Supreme Court might say. The most commonly cited case, that of Adam Clayton Powell, is simply not applicable. The decision dealt with the power of Congress, not of the states. Both parties to the case stipulated that Congressman Powell held a valid election certificate from the state of New York, so any state powers affecting a politician's ability to secure election were not an issue. Also, it is apparent in its reliance on the qualifications clause, that the court was very conscious of the Congress's ability to expel a Member, which the House chose not to attempt in Powell's case.

Advocates of state authority rely heavily upon the time, place, and manner clause, under which the Supreme Court has given states wide latitude to regulate ballot access, including prohibitions on write-in candidates and prohibitions on losing major party primary candidates running in the general election. Clearly the courts have determined that there is no fundamental right to ballot access, making claims by officeholders of a 14th Amendment equal protection right to run unlikely to prevail. Advocates also claim a 10th Amendment reserved powers right for states or citizens to limit the tenure of their representatives. It would be unfortunate if this matter were simply relegated to the courts, and a decision were sprung on a hapless electorate or on Congress without a more general debate and discussion of the constitutional issues, or of alternative approaches. This committee in particular should consider holding additional hearings focusing specifically on the constitutional and other legal issues involved in term limits.

These arguments would be moot if, as most term limit advocates prefer, Congress approved a constitutional amendment. Nearly everyone would agree that a national system would be more fair and rational. As this committee well knows, Congress has the right to supersede state laws under that clause, as has been done under the Voting Rights Act, the Motor Voter bill, and other legislation. For advocates, once implemented, such a change is unlikely to be reversed, and for skeptics, a statutory approach would allow for adjustments or emergency changes with relative ease. Unfortunately, it is the continuing and vociferous resistance to term limits on the part of elected officials that lead advocates to seek the surest fix, a constitutional one. If advanced in a timely fashion, compromise is entirely possible. Bitter end resistance is likely to result in less favorable outcomes.

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Finally, I would address the question of why officeholders continue to oppose term limits in large majorities while the public supports them, by margins as high as 80 percent in some opinion polls. This is not a matter of a shallow or transient blip in public opinion. Support for term limits is broad, remaining remarkably consistent across every demographic and political grouping. It is persistent, having been successful, with only one notable exception which was later reversed, in elections in diverse areas over three successive years. Notably, for referendum measures, support seems to hold up relatively well when applied to a specific proposal, and even when supporters are outspent by large margins. A recent issue of *The American Enterprise* contained some interest polling data from the Gallup Organization indicating that support for term limits has grown from 49 percent in 1964 to 64 percent in 1990, and to 67 percent in 1992 on the specific question of twelve-year limits for the House and Senate. *The American Enterprise* also notes that support for term limits was lowest in 1964 among college graduates, but is now highest among the best educated portions of the electorate.

Term limits have been enthusiastically supported for a variety of municipal, state, and federal offices. Voters in many California jurisdictions have supported the concept three different times for these different levels of government. Voters in San Jose went so far as to impose retroactive term limits on city officials, as have Houston voters. Seventeen states and scores of cities and counties have voted for term limits. With the probable addition of Illinois and Massachusetts

among others next year, well over 50 percent of the population will have had the opportunity to vote on term limits at least once. No issue in recent memory has commanded such broad and consistent support.

It may be time for elected officials to ask themselves honestly whether they are thinking about term limits as their constituents are, or whether they are reacting on the basis of their own employment and career situations. The extent that judgments are formed on that basis proves that public officials have lost sight of the public interest. When the public supports term limits broadly and overwhelmingly, over time and in specific referenda for a variety of offices, it is time for elected officials to reflect honestly on why their own judgment is at variance with that of their constituents. If opposition is a matter of conscience, they must ask why in a democracy the judgments of representatives and citizens are so much at variance.

