



South Dakota Legislative Research Council

Issue Memorandum 95-22

Term Limits and the Supreme Court: Fathoming the Minds of the Founding Fathers

Introduction

During the spring of 1995, the United States Supreme Court issued a series of controversial and significant decisions with far-reaching political implications for federal as well as state lawmakers. First, on April 26, in the case of *United States v. Lopez*, the Supreme Court struck down a popular 1990 law creating gun-free school zones and stating that Congress had overreached its constitutional powers by basing the restriction on an ever expanding interpretation of the Interstate Commerce Clause. On May 22, in *U.S. Term Limits v. Thornton*, the statutes and constitutional provisions establishing congressional term limits in twenty-three states were judicially wiped out in one fell swoop. Next, the Court turned its back on affirmative action programs to encourage minority contracting for government projects in the case of *Adarand Contractors v. Peña* which was handed down on June 12. Finally, the Court outlawed race-based legislative redistricting on June 29, reversing in the case of *Miller v. Johnson* a judicially-imposed mandate favoring majority-minority congressional districts for black and Hispanic minorities.

Whether these important cases represent the beginning of a cycle of judicial activism remains to be seen. The four cases do, however, share more with each other than the mere ability to displace foreign military engagements and domestic politics from the lead on the nightly network news. All four cases revolved around issues which are essentially political rather than legal; all four

were narrowly decided by five to four majorities; all four were evidence of the increasing tendency of the Reagan appointees to the Supreme Court to form an ideological bloc distinct from their colleagues; and all four dramatically reverse social and political policies that were, until then, well established on the American legal landscape.

Term Limits

Since Colorado became the first state to impose term limits on its congressional delegation in 1990, the effort to enact similar restrictions on consecutive service in elective office in all states and at all levels of government, from counties to Congress, has achieved broad-based support and enjoyed considerable inertia. Although the twenty-three states that had enacted term limits for their congressional delegations were located primarily in the West and Midwest, advocacy groups like U.S. Term Limits and United We Stand America were finding a sympathetic and committed constituency among conservatives and disgruntled voters nationwide. The dynamics of the term limits movement were fundamentally altered by U.S. House Speaker Gingrich's call for federally-imposed congressional term limits as a plank in his Contract with America. Congress' failure to enact nationwide congressional term limits early in the 1995 congressional session not only served to politicize what had begun as a grassroots issue, but left the door open to the Supreme Court to review any of the numerous cases challenging state-imposed congressional term

States with Congressional Term Limits

limits. The U.S. House Republican leadership remains committed to federally-imposed term limits for Congress and has vowed to press for an early vote in the next Congress.

That is not to indicate, however, that determined opposition to term limits was ever lacking. Especially in the South and East, which have traditionally benefitted from the committee chairmanships that long seniority and one-party politics tend to produce, supporters of term limits made less headway. Many argued that it made little political sense for any state to unilaterally impose congressional term limits on its own representatives if all other states failed to do likewise. Their contention was that reform should be uniform and impact all states equally and that could only be achieved by federal legislation.

South Dakota approved term limits of two consecutive terms in the United States Senate and of six consecutive terms in the United States House of Representatives by means of an initiated constitutional amendment at the general election on November 3, 1992. The ballot measure, supported by several groups headed by former state legislator John Timmer, who was also a candidate for the U.S. House of Representatives at the same election, passed by a wide margin of 205,074 to 117,702. As part of the same initiated measure, term limits were also imposed on state legislators. The Supreme Court's decision in *U.S. Term Limits v. Thornton* does not, of course, affect term limits on state legislators, including South Dakota where term limits went into effect with the 1994 election.

The Case

U.S. Term Limits v. Thornton was only one of many cases challenging the legality of state-enacted congressional term limits that had been working their way through the federal appellate court system when the Supreme Court accepted the appeal. It arises out of Arkansas, where the people amended their state constitution on November 3, 1992, to restrict U.S. representatives from Arkansas to three terms and U.S. senators to two terms. Suit was initiated by a private citizen, Bobbie Hill, on behalf of herself and the League of Women Voters of Arkansas, seeking a declaratory judgment that the state constitutional provision violated the federal constitution. The original complaint named then-Governor Bill Clinton and other Arkansas state officials as defendants, but Attorney General Winston Bryant intervened for the state in support of the amendment. In a five to two decision of the Arkansas Supreme Court (*U.S. Term Limits v. Hill*, 316 Ark. 251, 872 S.W. 2d 349, 1994), Justice Robert L. Brown held for the plaintiffs and concluded that the states have no authority “to change, add to, or diminish” the qualifications for congressional office enumerated in the U.S. Constitution.

The state of Arkansas, through its Attorney General, petitioned the U.S. Supreme Court on appeal, and a writ of certiorari was granted in 1994. Numerous interested parties joined the case as it was being prepared for hearing or filed amicus briefs as it became clear that *U.S. Term Limits v. Thornton* would be the decisive test of the legality of state-imposed congressional term limits. The appeal (No. 93-1456) was argued before the high court on November 29, 1994.

When the Supreme Court’s decision was announced on May 22, 1995, the decision of the Arkansas Court, that the voters’ attempt to limit the terms of their congressional delegation was unconstitutional, was upheld in a five to four opinion. Justice Stevens wrote for the majority which was composed of

himself, Kennedy, Souter, Ginsburg, and Breyer. Justice Kennedy filed a concurring opinion. The minority opinion, which would have sustained the Arkansas law, was written by Justice Thomas who was joined by Rehnquist, O’Connor, and Scalia. The opinion is unusual not only for its length (over 37,000 words) and its political impact, but also for the interesting and instructive tone of the legal arguments that are set forth. Because so few meaningful precedents exist, the opinion is grounded primarily in historical interpretation and logic. As such, it constitutes a virtual treatise on the constitutionality of term limits.

The Majority Opinion

In the absence of direct legal precedents about the constitutionality of state-imposed term limits, Justice Stevens places heavy emphasis on historical analysis. He quotes no fewer than seventeen of the founding fathers, including such impressive names as Alexander Hamilton, James Madison, George Mason, James Wilson, Edmund Randolph, Gouverneur Morris, Rufus King, Timothy Pickering, John Marshall, and George Washington, as support for the majority opinion. Term limits were not unknown in revolutionary days, and several states imposed them on their state legislatures. Moreover, in a situation directly analogous to Congress, several states imposed term limits on their representatives to the Continental Congress which served as the thirteen colonies’ federal assembly between independence in 1776 and the promulgation of the U.S. Constitution in 1789. In fact, during the ratification debates, several states suggested that the proposed Constitution should be amended to provide for congressional term limits. Typical is the resolution of the Virginia Constitutional Convention that states that members of the executive and legislative branches “should, at fixed periods, be reduced to a private station and return to the mass of the people.”

There is persuasive historical evidence that the merits of term limits, or “rotation” as it was then called, was familiar to the founding fathers, was debated at length, and that mention of it was omitted from the Constitution because the majority disfavored the concept. James Madison, generally considered to be the “Father of the Constitution,” noted in the Federalist Paper No. 52 the difficulty in achieving uniformity in the qualifications for electors, which resulted in the Framers’ decision to require only that the qualifications for federal electors be the same as those for state electors. Madison then explicitly contrasted the state control over the qualifications of electors with the lack of state control over the qualifications of the elected:

The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election be an inhabitant of the State he is to represent; and, during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

Madison emphasized this same idea in Federalist Paper No. 57:

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

Hence, Justice Stevens views the intent of the Founding Fathers as conclusive. The Constitution sets out uniform, if minimal, qualifications for holding congressional office and with the intent that they be exclusive. The only legal way to establish congressional term limits, in his opinion, would be to amend the constitution.

The Minority Opinion

Justice Clarence Thomas, writing for the minority, bases his dissent on a literal reading of the Constitution. Relying almost exclusively on the Tenth Amendment, which states that any power not specifically delegated to the federal or state government is retained by the people, he states:

Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.

Justice Thomas is unimpressed by the historical analysis of the majority opinion. He feels that, whatever the thought processes of the Founding Fathers, only their words can be interpreted today. In fact, the only historical personage that he quotes is that staunch

defender of states' rights and the Tenth Amendment, Thomas Jefferson, who wrote in a letter in 1814:

Had the Constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the Constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications But it does not declare itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State.

Thomas deems it only reasonable that the electorate would not want to be represented by lunatics, paupers, felons, or nonresidents and sees no objection to restricting eligibility statutorily, stating:

[T]he authority to narrow the field of candidates in this way may be part and parcel of the right to elect Members of Congress. That is, the right to choose may include the right to winnow.

The Concurring Opinion

In his concurrence with the majority, Justice Anthony Kennedy, while praising the erudition of the majority opinion and the logic of the dissent, implies that both have missed the essential point at issue. For Kennedy the crucial point is not whether the Framers intended to give the states the authority to impose additional qualifications on their congressional delegations or deny them that authority. For him, the American people created a federal system which gives each American a dual citizenship. South Dakotans have complete authority to enact laws affecting South Dakota, but no authority, as South Dakotans, to enact any law affecting the United States. To enact laws affecting the United States, South Dakotans must act as Americans, in concert with all other Americans. In an eloquent summation more reminiscent of the federalist era than the present political scene, Justice Kennedy declares:

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. . . .

The political identity of the entire people of the Union is reinforced by the proposition, which I take to be beyond dispute, that, though limited as to its objects, the National

Government is and must be controlled by the people without collateral interference by the States.

Conclusion

In the wake of the decision in *U.S. Term Limits v. Thornton*, the primary battleground over congressional term limits shifts conclusively to Congress. Whereas the Contract with America originally proposed national congressional rotation as a beneficial supplement to state-

imposed congressional term limits, a constitutional amendment is now the only effective relief for supporters of congressional rotation. Since congressional action is necessary, the question of term limits is sure to be an issue in most congressional elections. By sharpening the focus and polarizing the arguments, the Supreme Court has once again defined the parameters of an important political debate.

This issue memorandum was written by Reuben D. Bezpaletz, Chief Analyst for Research and Legal Services for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
