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Term Limits and Lessons from Our Past

Voters in nearly half the states in the U.S. (23 at last count) have imposed term limits on their federal legislators. Nationwide, opinion polls show that support for congressional term limits reaches as high as 80 percent. Still, Congress has refused to propose a constitutional amendment or enact a statute that would require term limits. Moreover, Congress has rejected a bill that would merely *authorize* term limits for states that have imposed them on their own U.S. senators and representatives.

> The fact that the Supreme Court holds a law unconstitutional does not mean that the law is unwise. The debate over term limits is far from over.

What next? *U.S. Term Limits, Inc. v. Thornton*[1] offered the Supreme Court an opportunity to uphold state voters' efforts to impose term limits on Congress. Instead, the Court, by a narrow 5 to 4 majority, declared unconstitutional an Arkansas law limiting ballot access for congressional candidates because the state law "intended" to impose term limits. The majority rejected a carefully reasoned dissent and announced that state efforts to impose term limits are unconstitutional because —

> allowing the several states to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual state, but rather—as have other important changes in the electoral process—through the amendment procedures.

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1. *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994), *affirmed, U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. __ (1995). See Ronald D. Rotunda, "Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution," *Oregon Law Review* 73 (1994), page 561.

Some opponents of term limits contend that the issue is now settled. Those people view the Constitution as a sort of magical piñata that, if struck at the right angles, will reveal all the answers to our most pressing social problems. The Constitution, however, does not work like that. The fact that the Court holds a law unconstitutional does not mean that the law is unwise.

One obvious response to the Supreme Court's decision in *Thornton* is to lobby for a constitutional amendment. That was the tactic taken nearly 150 years ago, in response to the landmark *Dred Scott v. Sandford*.[2] In *Dred Scott*, the Supreme Court had held that the Missouri Compromise, which sought to limit the spread of slavery, was unconstitutional. The people responded by enacting the Thirteenth Amendment, prohibiting slavery.[3]

Although Congress already has rejected the constitutional amendment option with respect to term limits, history indicates that some amendments are eventually accepted even though initially rejected. Several important examples from American history suggest that the debate over term limits is far from over, even if Congress continues to block efforts at reform.

This *Heartland Policy Study* reviews two instances in which the Constitution has been effectively amended. The first example addresses presidential electors, where there has been no formal amendment of the Constitution. The second example addresses the direct election of U.S. senators, where a *de facto* change in the Constitution was later formalized as the Seventeenth Amendment. Both examples offer historical insight as to what might happen as the term limit debate moves into second gear.

Presidential Electors

Technically, we do not vote for the President or Vice President. We vote for electors, who in turn cast ballots for President and Vice President. I say "technically" because the modern election ballot does not even indicate that we are casting our votes for electors, rather than for Clinton-Gore, Bush-Quayle, or some other ticket. The names of the presidential electors do not appear on the ballot, they conduct no campaigns, and they usually are unknown to the electorate.

The framers believed that members of the Electoral College, unencumbered by voters' preferences, would exercise their careful (read, "nonpolitical") judgement to decide who was the best person for the presidency.[4] The framers foresaw many things, but clearly they did not foresee how the Electoral College would operate. Political parties quickly developed, and by 1800 the

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2. 60 U.S. (19 How.) 393 (1857).

3. *Dred Scott* also held that even freed slaves were ineligible for U.S. citizenship. The people responded by enacting the Fourteenth Amendment, which provides in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside.

For further discussion of this provision, see vol. 4, Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* §§ 22.3 to 22.6 (West Publishing Co., 2d ed. 1992).

4. See, for example, *The Federalist Papers, Federalist No. 68. Gray v. Sanders*, 372 U.S. 368, 376 n.8 (1963) noted: "The electoral college was designed by men who did not want the election of the President to be left to the people."

electors began to evolve into agents of the political party. They were faceless scriveners whose only real job was to ratify what the voters had already decided.[5]

There have been exceptions over the years, but it has long been established that the voters expect the electors to act as their agents, not as independent decision-makers.[6] Thus, in *Thomas v. Cohen*[7] a New York court held that an elector who pledged to vote for a certain candidate had a *legal* duty to vote for that candidate, and that the court could issue mandamus to force the elector to vote as pledged.[8]

It has long been established that the voters expect members of the Electoral College to act as their agents, not as independent decision-makers.

There are, of course, some observers who rebel against the notion that electors should be forced to keep their promises to the voters. Thus, we find language in other state court decisions arguing that any attempt to limit an elector's discretion would violate the U.S. Constitution. In 1948, an advisory opinion of the Alabama Supreme Court so argued.[9]

That year, all of the duly elected Democratic electors from Alabama refused to vote for President Truman, the nominee of the Democratic Party convention, and instead voted for the Dixiecrat candidate. Some states, in an effort to prevent a reoccurrence of that situation, and to enact common understanding into law, allowed the party to require its electors to pledge to vote for the party's nominee. The Alabama Democratic Party, after 1948, exercised its state-delegated authority, requiring its electors to sign a pledge to support the Democratic Party nominee.

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5. See *McPherson v. Blacker*, 146 U.S. 1, 36 (1892). Alfred H. Kelly & Winfred A. Harbison, *The American Constitution: Its Origins and Development* (4th ed. 1970), page 135, note 5: "By 1800 the principle was fairly well established that electors were mere creatures of party and could exercise no personal discretion in voting, but instead must vote for the designated party candidates for President and Vice-President. Thereafter electors virtually never acted as other than mere instruments of party will." See also Rosenthal, "The Constitution, Congress, and Presidential Elections," *Michigan Law Review* 67 (1968), page 1.

6. Indeed, electors pledged for Horace Greeley, the Democratic candidate in 1872, felt obligated to vote for him even though, by the time the Electoral College voted, Greeley was dead in his coffin. Edward S. Corwin, *The President: Office and Powers: 1787-1984* (5th rev. ed. by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984,) pages 385-386.

7. 146 Misc. 836, 262 N.Y.S. 320 (1993). See also *State ex rel. Nebraska Republican State Central Committee v. Wait*, 92 Neb. 313, 325, 138 N.W. 159, 163 (1912); *Johnson v. Coyne*, 47 S.D. 138, 142, 196 N.W. 492, 493 (1923). In *Thomas v. Cohen,* 262 N.Y.S. 320 (1933), for example, the court said:
   > The services performed by the presidential electors to-day are purely ministerial, notwithstanding the language of the Constitution written over 100 years ago. To read that document with an eye to the language only . . . would mean to hold that our primaries, nominating, campaigning, and voting, are empty gestures. 262 N.Y.S. at 326.

8. 146 Misc. at 841-42, 262 N.Y.S. at 326.

9. *Opinion of the Justices, No. 87,* 250 Ala. 399, 400, 34 So.2d 598, 600 (1948).

In 1952, the U.S. Supreme Court held, in *Ray v. Blair,*[10] that Alabama could constitutionally permit the party to require Democratic electors to pledge to vote for the Democratic nominee. While upholding the pledge, the majority did not reach the question of how it could be enforced, although the dissent explicitly assumed that the pledge was legally binding.[11]

Noting that the electors "are not the independent body and superior characters which they were intended to be" and "are not left to the exercise of their own judgement,"[12] *Blair* relied on the "long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector. . . ."[13]

> ***Blair* illustrates how the Constitution can, in effect, be amended without enacting a formal amendment. The state and the state political party required electors to be faithful to their pledge, and no constitutional amendment for popular election of the president was proposed.**

In the context of term limits, states should be able to allow candidates for federal office to volunteer to take a pledge that they will vote for a constitutional amendment to impose term limits, or that they will serve no more than a specific number of terms. A state, by analogy to *Ray v. Blair*, should be able to authorize a political party to *require* its candidates to pledge to support the enactment of term limits, if elected, and to pledge to personally abide by term limits.

The Enactment of the Seventeenth Amendment

Prior to the enactment of the Seventeenth Amendment, the Constitution provided, in Article I: "The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof,* for six Years; and each Senator shall have one Vote."[14] In 1913, the Seventeenth Amendment was ratified; it provided that the voters of each state would elect their senators directly.

As early as 1828, the House of Representatives had considered a constitutional amendment to provide for direct election of senators. The House actually voted in favor of such an amendment in 1893, 1894, 1898, 1900, and 1902.[15] Each time, the Senate refused to support the

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10. 343 U.S. 214 (1952).

11. 343 U.S. 214, 233 (Jackson, J., joined by Douglas, J., dissenting): "It may be admitted that this law does no more than to make a legal obligation to what has been a voluntary general practice."

12. S. Rep. No. 22, 19th Cong., 1st Sess. (1826), at page 4, quoted in *Ray v. Blair,* 343 U.S. at 288 note 15.

13. 343 U.S. at 229-30.

14. U.S. Constitution, Article I, §3, clause 1 (emphasis added).

15. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* (4th ed. 1970), pages 629, 631. While a majority voted in favor of the amendment on each of these dates, the House (prior to 1912) passed the proposed amendment by the requisite two-thirds majority only in 1893 and 1902. See George H. Haynes, *The Senate of the United States: Its History and Practice* (1938), page 97, note 1.

amendment. But in 1912, the Senate finally joined the House. Why would the senators, who had been chosen by their state legislatures, and who had previously never supported direct elections, suddenly change their minds?

The answer is that by 1912, the language of Article I notwithstanding, *senators already were picked by direct election* in 29 of the 48 states. As Senator William E. Borah said in 1911, "I should not have been here [in the U.S. Senate] if it [direct election] had not been practiced, and I have great affection [for this system]."[16]

As first written, the U.S. Constitution provided that senators were chosen by state legislatures. In 1913, the Seventeenth Amendment was ratified, providing for direct election of senators by the voters.

How is it that U.S. senators were selected by direct vote at a time when Article I clearly mandated that state legislatures choose senators? The story starts with strong public rejection of the procedure that provided for selection by the state legislature.

The members of state legislatures often were divided over whom to elect as senator. Their deadlock would result in no senator being chosen, and the state was then deprived of representation for a period of time that lasted up to a year or more.[17] Election by the state legislature also made it easier for senate candidates to buy elections: The number of votes needed to be bought were few, and the state legislators voted by open ballot. Corrupt political bosses, who could not win an election by the public at large, could more easily win an election in state legislatures.[18]

It should be no surprise that the U.S. Senate, a product of this corrupt system, would oppose any constitutional amendment to change it. In 1874, California and Iowa requested that Congress propose such an amendment, but Congress was unmoved.[19] In 1893 and 1902, two-thirds of the House of Representatives voted for an amendment providing for direct election, but the measure was never allowed to come to the Senate for a vote.[20]

Determined to elect their senators directly, the people turned to primary elections. These primaries were not binding in a constitutional sense, because Article I still provided that the state legislature would choose the senator. But voters in a party primary could register their choice for U.S. senator, and then urge the party's state legislators to vote for the senator who won the

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16. *Congressional Record* 46 (Feb. 16, 1911), page 2647.

17. For example, George H. Haynes, *The Senate of the United States: Its History and Practice* (1938), pages 91-95, 195; Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* (4th ed. 1970), pages 629-631.

18. See, for example, Alfred H. Kelly and Winfred A. Harbison, supra at pages 630-631.

19. George H. Haynes, supra at pages 97-98. For earlier examples of states urging Congress to provide for direct elections of U.S. Senators, see, for example, H.R. Rep. No. 88, 56th Cong., 1st Sess. (1900); S. Doc.No. 236, 55th Cong., 2nd Sess. (1898).

20. George H. Haynes, supra at page 97.

primary election.[21] In southern states, which were effectively one-party (Democratic) states with strong party discipline, voters in essence chose their Senate candidates in a special primary election. The state legislators of the dominant Democratic Party voted for the candidate who had won the primary.[22]

States that were not one-party states were, initially, less effective in their efforts to circumvent the requirements of Article I. But a second mechanism for *de facto* direct election was found, this time by western states. In 1904 the people of Oregon, by use of the initiative, passed a state law that allowed the virtual direct election of Oregon's senators.

Before the Seventeenth Amendment's enactment, Oregon provided for virtual direct election of its senators through "advisory" primaries and pledges required of candidates for the state legislature.

First, Oregon voters selected their party's Senate candidates in a primary election. The voters then cast, at a general election, their votes for senator by choosing among the primary winners.

The people's "advisory" votes were given teeth by a provision of the new state law that authorized candidates for the state legislature to sign one of two pledges. In PLEDGE 1, the candidate solemnly vowed to vote:

> for that candidate for United States Senator in Congress who received the highest number of the people's votes for that position at the general election next preceding the election of a Senator in Congress, *without regard to my individual preference*.[23]

In PLEDGE 2, the candidate for state legislature promised that, if elected, he would:

> consider the vote of the people for United States Senator . . . as nothing more than a recommendation, *which I shall be at liberty to wholly disregard* if the reason for so doing seems to me to be sufficient.[24]

The Oregon legislature had to choose two U.S. senators shortly after the pledge system went into effect. A majority of the state legislators had signed Pledge 1, and on the first ballot they elected to the Senate those candidates whom the people had earlier chosen in the general election. (In previous Senate elections, the state legislature often had deadlocked for weeks.) The politicians had kept their promise and Oregon, in effect, bypassed the Article I requirement that the state legislature, not the people, should choose Oregon's U.S. senators.

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21. George H. Haynes, supra at page 99.

22. Ibid. This procedure was not limited to the one-party states, but it was less effective in the other states. For example, in 1890 in Illinois, the people in the Democratic Party voted for John M. Palmer, and then the state legislature, controlled by the Democrats, selected Palmer. However, party discipline was not great, and the legislature was still deadlocked for several weeks before accepting the people's choice.

23. Quoted in George H. Haynes, supra at page 101 (emphasis added).

24. Ibid.

Two years later, the Oregon legislature was again called upon to choose a U.S. senator. This time, the people had selected a Democratic candidate; the legislature was Republican; but nearly 58 percent of the legislators had signed Pledge 1. Once again, the politicians kept their promise, and the Republican state legislators promptly voted for the Democratic candidate, because they had promised to vote for the winner of the people's election.

Other states followed Oregon's example; some went even further. Nebraska required that *on the official ballot, next to the names of candidates for state legislature,* would be printed either:

"Promises to vote for people's choice for United States Senator."

or

"Will not promise to vote for people's choice for United States Senator."[25]

Progressives in other states adopted the Nebraska system. Because the promise (or refusal to promise) was printed on the ballot (like the candidate's party affiliation is printed on the ballot), voters were well aware of which state legislative candidates promised to follow the people's desire for direct election of U.S. senators.[26]

As early as December 1910, fourteen of the thirty U.S. senators whom state legislatures were to select at the next election were already known, although the state legislatures had not yet convened.

As early as December 1910, so many states followed the Oregon/Nebraska example that fourteen of the thirty U.S. senators whom state legislatures were to select at the next election were already known, although the state legislatures had not yet convened. In all fourteen cases, the people had chosen senators by direct election, and the state legislators had bound themselves to respect that choice.[27]

By 1912, when the Seventeenth Amendment was approved, about 60 percent of the senators already were chosen by popular election.

Conclusion

The U.S. Supreme Court ruled on May 23, 1995 that the voters of 23 states acted unconstitutionally when they chose to limit the terms of their representatives in Congress. Justice John Paul Stevens, writing for the slim majority in *U.S. Term Limit, Inc. v. Thornton*, would have

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25. *Nebraska Laws,* §253 (1909), quoted in George H. Haynes, supra at page 103.

26. Eventually, the Oregon state constitution *required* that the state legislature choose as U.S. senator the person whom the people had chosen in the direct election. Comment, "Garcia, the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism," *Harvard Journal of Law and Public Policy* 10 (1987), pages 189, 208.

27. *Boston Herald,* December 26, 1910, quoted in George H. Haynes, supra at page 104.

us believe that, without an amendment to the Constitution, congressional term limits will never be a reality. But history tells us otherwise.

Congress' past refusal to support a constitutional amendment for term limits does not mean such a proposal would fail to win congressional support in the future.

Recall that a constitutional amendment providing for the direct election of U.S. senators was first proposed in 1828. At the time, the American people supported direct election of senators by very high margins (rivaling those currently favoring term limits)—yet it took nearly a century to persuade Congress to propose such an amendment. The effort to amend the Constitution is not a race for the short-winded. But a constitutional amendment may not be needed.

Even without a constitutional amendment, presidents today are *de facto* elected by a vote of the general public.

Even without a constitutional amendment, presidents today are *de facto* elected by a vote of the general public. The names of the presidential candidates, not members of the Electoral College, are on the ballots. Some states *require* electors to promise their support for the candidate to whom they are pledged. The faithless elector is a rare (if not extinct) phenomenon, held in disregard.

Moreover, years before there was a Seventeenth Amendment providing for direct election of U.S. senators, many states allowed their voters to choose Senate candidates. To give teeth to those "advisory" elections, the states then required that candidates for the state legislature indicate whether they would automatically vote for the senator the voters had chosen—and their position on this issue was clearly stated on the state legislative ballot.

We should expect the proponents of term limits to lobby for similar statements on the ballot for U.S. representative and senator. Does this candidate pledge to vote for a federal statute and constitutional amendment favoring term limits? Does the candidate pledge to abide by term limits?

Political parties might begin, as did the Republican Party in its Contract With America, by encouraging congressional candidates to pledge their support for term limits, and/or their intention to subject themselves to such limits. Other organizations—the League of Women Voters, perhaps, or even local newspapers—could elicit pledges from candidates and base their recommendations to the voters on such pledges. There is every reason to believe that such voluntary pledges, over time, would take on the force of law. The "limitless" Congressman could very well become as rare as the "faithless" elector.

Even opponents of term limits should support placing a statement on the ballot that clearly explains to voters where each candidate stands on term limits.

There is nothing unconstitutional or even unusual about placing such information on the ballot. Ballots have listed party membership for years and the experience of the Progressives in Nebraska, during the early part of this century, demonstrates that pledges are also appropriately placed on the ballot. Like the requirement that the ballot list the name of the presidential candidates (rather than the name of the anonymous electors pledged to them), the requirement that the term limit pledge be on the ballot simply makes easier the voter's job of determining where the candidate stands.

Opponents of term limits often argue that voters can always vote against incumbents without the need to impose term limits. While that facile answer ignores the problem of gerrymandered

districts and campaign financing, it suggests that even opponents of term limits should support placing a statement on the ballot that clearly explains to voters where the candidate stands on term limits. Voters then can cast their ballots against (or for) the candidate who supports term limits.

While it cannot be denied that the Supreme Court's recent decision represents a setback for the term limits movement, the end is nowhere near. The American people are nothing if not creative in their efforts to exert control over their elected representatives.

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ABOUT THE AUTHOR

Ronald D. Rotunda is the Albert E. Jenner, Jr. Professor of Law at the University of Illinois College of Law. He is the author of *Modern Constitutional Law*, a leading casebook on constitutional law, and has coauthored *Treatise on Constitutional Law*, a four-volume publication that has been cited over 500 times by state and federal courts throughout the country. The dissent in *U.S. Term Limits, Inc. v. Thornton* cited him several times. Rotunda has advised several countries developing new constitutions. In 1993 he was the Constitutional Law Adviser to the Supreme National Council of Cambodia.

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