IN THE SUPREME COURT OF FLORIDA

Case No. 78,647

Upon A Request From The
Attorney General For An
Advisory Opinion As To The
Validity of An Initiative Petition

IN RE:

ADVISORY OPINION
TO THE ATTORNEY GENERAL -
LIMITED POLITICAL TERMS
IN CERTAIN ELECTIVE OFFICES

REPLY BRIEF OF PETITIONER TERM LIMITS LEGAL INSTITUTE IN SUPPORT OF THE INITIATIVE PETITION SPONSORED BY CITIZENS TO LIMIT POLITICIANS' TERMS

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IN AND BEFORE THE SUPREME COURT OF FLORIDA

IN RE:

ADVISORY OPINION TO THE ATTORNEY GENERAL - LIMITED POLITICAL TERMS IN CERTAIN ELECTIVE OFFICES

CASE NO. 78,647

REPLY BRIEF OF PETITIONER TERM LIMITS LEGAL INSTITUTE IN SUPPORT OF THE INITIATIVE PETITION SPONSORED BY CITIZENS TO LIMIT POLITICIANS' TERMS

Petitioner Term Limits Legal Institute, a project of Americans Back in Charge ("TLLI") respectfully files this Reply Brief in support of the initiative petition sponsored by Citizens to Limit Politicians' Terms, pursuant to the Order of this Court on October 2, 1991. TLLI will make an effort to reply to the voluminous number of issues propounded by Respondents in their initial briefs filed herein. Again, however, TLLI reiterates that this is a summary proceeding as evidenced by the brevity of time allowed by the Court for this response, and the specific language of the Interlocutory Order. Respondents Let the People Decide, R.Ed. Blackburn, et al., (hereafter "Dignitaries"), National Conference of State Legislatures ("NCSL") and Council of State Governments ("CSG"), (together referred to as "State Officials") and Congressman Lawrence J. Smith ("Congressman"), (collectively referred to as "Opponents") have asked this Court to convert these proceedings into something more than a customary review of an initiative proposition. Without waiving its objections to such a transformation of these proceedings, TLLI files this Reply.

THERE IS NO CASE LAW EXISTENT WHICH HAS HELD THAT LIMITING THE TERMS OF POLITICAL OFFICIALS IS UNCONSTITUTIONAL OR ILLEGAL

Opponents have together filed briefs totalling 119 pages, but have cited not one court decision or any other precedent (of more than 150 legal authorities cited) which has held that term limits are unconstitutional or illegal. Opponents have also attempted to distinguish the case authority cited wherein courts have held that term limitations ARE constitutional, particularly the recent California Supreme Court opinion upholding term limits imposed by California voters on their elected officials. A copy of that opinion is attached to this brief for the Court's convenience. See Exhibit A.

In its decision, Legislature of the State of California, et al. v. Eu, Slip. Opinion 19660, October 10, 1991, the California Court rejected the very arguments being offered to this Court. It is noteworthy that one of the Respondents herein, NCSL, filed its Amicus Curiae brief in the California proceeding, unsuccessfully arguing to that Court that the term limitation enacted by the voters of that state should be declared unconstitutional. The California Supreme Court disagreed, upholding in a 6-1 decision a lifetime ban on candidates seeking continued election to the same office:

> "On balance, we conclude the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them. As Maloney observed (223 S.E.2d at p.612), no decisions of the United States Supreme Court have been found that suggest a limitation on incumbency would be unconstitutional. Although such limitations may restrict the franchise (but see cases indicating voters have no right to vote for particular candidates, e.g., Burdick v. Takushi, supra, 927 F.2d 469, 473-473), if we use a

> balancing test that weighs "the enlargement of the franchise by guaranteeing competitive primary and general elections" against "incidental disenfranchisement" of some voters, the court "must conclude that restrictive provisions on the succession of incumbents do[] not frustrate but rather further[] the policy of the Fourteenth Amendment." (Maloney, supra, 223 S.E. 2d at pp. 612-613.)
>
> . . . In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" (Cal. Const., art. IV, §1.5), is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency." (Emphasis added) Id. at 48-49.

Opponents rely on a multitude of case law in their efforts to extrapolate some glimmer of pertinence to the issue of term limits - but the fact remains, the only case authority in which limited political terms has been squarely before a court has resulted in favorable rulings for term limits. State ex rel. Maloney v. McCartney, 223 S.E. 2d 607 (W.Va. 1976) app. dism. sub nom Moore v. McCartney, 425 U.S. 946, (1976); Legislature of the State of California v. Eu, supra.

Insofar as the issue of a state's right to limit the terms of federal legislators, Opponents rely heavily on Powell v. McCormack, 395 US 486 (1969). However, Powell does not stand for the proposition for which it is advanced by Opponents. Rather, the Supreme Court in Powell specifically recognized that in addition to Mr. Powell's having met the qualifications for membership in Congress as contained in Article I, Sec. 2 of the United States Constitution, viz, age, citizenship and inhabitancy, Mr. Powell had also been duly elected to the United States

House of Representatives, under the election laws of the State of New York, which were enacted by that state pursuant to Article I, Sec. 4 of the United States Constitution.

The exclusion resolution adopted by the U.S. House of Representatives at issue in Powell, supra, stated in the very first paragraph:

> "First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of election from the State of New York." (Emphasis added) U.S. House Resolution 278, in the House of Representatives approved March 1, 1967.

Throughout the proceedings involving Mr. Powell, there was never any argument that his election under New York's election code had been unconstitutional nor was there ever any dispute about the authority of the State of New York to set requirements for Mr. Powell's election, including candidacy, party affiliation, ballot appearance, and the like.

In fact, a review of New York's election code then - and now - reveals that all candidates, even those for federal office from New York, are bound by strict rules regarding their candidacy, designation by a political party, nominations and elections. See New York Statutes, CLS Election Laws §§6-100 et seq.

Further, the Second Circuit Court of Appeals in a 1976 opinion affirmed a lower court's ruling upholding the constitutionality of New York's election law requirements governing candidacy for the United States Senate from New York, wherein an individual had been denied the right to run as a candidate for U.S. Senate by a political party. The lower court, via a three-judge federal panel, concluded that a political

party and the State of New York have a vital interest in regulating qualification of candidates for office, including federal office." citing Storer v. Brown, 415 U.S. 724 (1974), Jenness v. Fortson, 403 U.S. 431 (1971); Art. I, §4, Cl. 1 of the U.S. Constitution. (Emphasis added) See Clark v. Rose, 379 F. Supp. 73 (DCNY, 1974), aff'd 531 F.2d 56 (2d Cir. 1976).

Opponents desperately want this Court to believe that there is some law or case authority somewhere in which the limitation of incumbents' terms of office is unconstitutional. The reality is, Opponents have cited no such authority, because none exists. To compound their problem, the primary case cited by Opponents and relied upon by them to support their argument, namely, Powell v. McCormack has virtually no relevance to the issue of term limitations other than to demonstrate that the U.S. House of Representatives, the U.S. Supreme Court and the litigants and participants in the case, all agreed that in addition to the qualifications set forth by the Constitution in Article I, Sec. 2, Mr. Powell had been duly elected to Congress pursuant to the powers conferred on the State of New York under Article I, Sec. 4.[1]

OPPONENTS' RECITATIONS OF CONSTITUTIONAL HISTORY ARE INCORRECT AND MISLEADING AND THESE PROCEEDINGS ARE NOT THE PROPER FORUM FOR AN IN-DEPTH REVIEW OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY

Despite the lengths to which Opponents have gone to conjure language from early American legal history which they would have this Court construe as supporting a constitutional ban on term limits, the

[1] Powell primarily dealt with the application and construction of congressional power set forth in Art. I, Sec. 5, and really has little relevance to these proceedings except as set forth above.

fact is that no such ban exists. Opponents have cited certain writings of James Madison and others as somehow rejecting the notion of rotation in office by the Founding Fathers. See State Officials' Brief, pp. 13, 33-34, citing The Federalist Papers, No. 53 and No. 62; see Congressman's Brief, p. 10.

However, Federalist Papers No. 53 and 62 were not addressed to the issue of rotation in office (term limits). Rather, Federalist Paper No. 53 was an explanation of why U.S. House of Representatives' terms should be two years, rather than having annual elections. Federalist Paper No. 62 was directed toward certain factions in 1788 who were distressed because the proposed constitution did not provide for a single legislative house, elected directly by the people. One must read the entire papers cited (and those immediately preceding) in order to understand that Madison's remarks were designed to explain why there should be two (2) houses of Congress, why House terms should be two (2) years, not one, and why the Senate should be elected indirectly by the state legislatures, rather than directly by the people themselves.

Madison would be startled to learn in 1991 that the rotation planned by the framers (one-third of the United States Senate rotated every two years) does not occur in reality today, and that the presumed biennial rotation of members of the U.S. House of Representatives, in what was supposed to be the raucous, lively, ever dynamic people's house, is nonexistent. Instead, incumbents return there at nearly a 100% rate every two years. How would one explain to the Founding Fathers that members of Congress have devised elaborate systems to maintain their continuation in office, whereby, for example, in 1990,

incumbent members of the U.S. House of Representatives collectively received $88 million from political action committee (PAC) contributions compared to challengers' receipt of less than $7 million from PAC's.[2] And that in a year where, according to Common Cause, a non-partisan public interest group, of the 406 House incumbents seeking reelection in 1990, 79 had no major party opposition; another 168 had opponents who had raised less than $25,000 by three weeks before the election, and 124 others had opponents who had raised more than $25,000, but less than half the amounts, the incumbents had raised. "The Best Way To Clean Up Congress", Rowland Evans and Robert Novak, Readers Digest, March, 1991. The 102d Congress currently sitting is comprised of nearly 90% incumbents, and almost half of those have been in the same office longer than a decade. "Term Limits: False Hope or Cure", Nation's Business, Nov. 1991, citing "Term Limitation: An Idea Whose Time Has Come", by John Fund for the Cato Institute.

FACT: THE CONSTITUTION IS SILENT ON THE ISSUE OF LIMITING TERMS OF OFFICE FOR MEMBERS OF CONGRESS, AS ARE THE FEDERALIST PAPERS. The only mention of "rotation" of federal office discussed in various Federalist Papers referenced the fact that one-third of the U.S. Senate would be "rotated" every two years, Federalist Papers 59 and 61, Alexander Hamilton. See The Federalist Concordance, Thomas Engerman, (Univ. of Chicago: 1980) p. 477. Perhaps we could infer from these writings that the members of the U.S. Senate were to be limited to one term only, to assure the rotation Mr. Hamilton described.

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[2] Common Cause Year-End Study of Campaign Contributions and Expenditures for U.S. House of Representatives for 1990 Election.

It is not for this Court to attempt in these proceedings to glean from the silence of the Constitution a sufficient directive to deny Florida voters the right to vote on limiting political terms. "In many instances we do not know whether an omission from the Constitution of 1787 represents (1) an oversight, (2) a deliberate rejection of some proposal by members of the convention; or (3) an intentional ambiguity that resulted from an expedient compromise." Michael Kammens, The Origin of the American Constitution: A Documentary History, (Viking Penguin: 1986) pp. xii-xiii.

The silence of the constitution on a particular issue has never been held to be a permanent prohibition on its development. For instance, the concept of judicial review is not set forth in the language of the constitution, yet, is one of the central features of American democratic government.

Furthermore, even the explicit language of the Constitution did not act to supersede the powers of the citizenry to alter the manner in which the members of the United States Senate were elected. In a strong empirical precedent for allowing voters to limit their elected officials' terms -including federal officials - there was a long, and ultimately successful struggle to eliminate indirect election of the U.S. Senate. During the period before the U.S. Constitution was amended to make uniform the direct election of all U.S. Senators, the states (particularly those with the initiative and referendum powers) acted in a grass roots movement to do so. In 1875, Nebraska provided for a popular preferential vote on candidates for the Senate. In 1899, Nevada enacted a senatorial primary law. In 1904, Oregon, by initiative,

adopted a new election law providing that the legislature could elect only members of the U.S. Senate nominated by petition of the people, and further stating that the candidates would be selected by popular vote in a general election on a ballot which advised voters whether the candidates did or did not support the direct senatorial preference election. By 1912 twenty-nine (29) states had senatorial primaries whereby candidates were chosen by popular vote, thus creating, over time, a U.S. Senate in which over half the members had been elected via this route,[3] NOTWITHSTANDING the explicit language in the U.S. Constitution - and the Federalist papers - to the contrary. (Emphasis added) The Constitution specifically conferred the selection of U.S. Senators on the State Legislatures, in Article I, Section 3, but the people had other ideas. The precedent of history establishes that Article I, Sec. 4 permits states to unilaterally regulate the procedure of federal election within their borders, even contrary to explicit constitutional provisions, except where those actions may be directed at wealth, race, or some other narrow, protected grounds.

Finally, let us not forget that all constitutional power is derived from the consent of the governed, and it would ill-behoove this Court to interfere with the authority of the people to express themselves on the issue of term limitations based on some non-existent constitutional prohibition, particularly when the Constitution is fundamentally an instrument of the people. "If the concept of consent informs the political theory underpinning the Declaration of

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[3] The American Senate, Lindsay Rogers (1926); The Senate of the United States, George H. Haynes (1938)

Independence, it is also mentioned no fewer than forty-eight times in the Federalist Papers." Origins of the American Constitution, supra, p. xiii.

THE TEST TO BE APPLIED IN THESE PROCEEDINGS IS WHETHER THE INITIATIVE PETITION IS "CLEARLY AND CONCLUSIVELY DEFECTIVE" AND NOT A CONSTITUTIONAL TEST OF "STRICT SCRUTINY"

Opponents assert that this Court should "strictly scrutinize" the term limits initiative petition. Petitioners reply that this summary proceeding precludes a "strict scrutiny" of the merits of the term limits initiative petition.

Further, it has never been the rule of this Court to subject proposed initiative measures to the kind of "strict scrutiny" sought here by Opponents. Rather, this Court has historically done just the opposite, establishing its own framework for reviewing initiative petitions, which framework has been outlined at length by Petitioners in our initial briefs and more explicitly examined in the Reply Brief filed herein by Citizens for Limited Political Terms. This Petitioner submits that it would be wholly improper to suddenly substitute a fundamentally different legal standard for deciding whether Citizens for Limited Political Terms can continue with their initiative petition.

Justice Shaw in his concurring opinion in Fine v. Firestone, 448 So. 2d 984, (Fla. 1984) articulated the standard of review of initiative petitions which includes (among others) the following:

> "The standard of review established in Weber and Floridians consisted of ten principles which I summarize as follows:
>
> * * *

2. The burden is on a challenger to establish that the initiative proposal is clearly and conclusively defective.

* * *

4. The wisdom of the proposed initiative is not a matter for judicial review."

* * *

Id, at 996-997.

The Opponents argue that a citizens group seeking to have its initiative proposal validated in order to proceed with its signature-gathering and its election process must put itself in the position (in advance of a final outcome) of meeting a strict constitutional scrutiny test. Such a suggestion is simply preposterous. No such requirement exists here, nor should it. Citizens for Limited Political Terms is not the state of Florida, defending a state law.

In the event that Petitioners are successful here and in the electioneering process, then (and only then) will it be appropriate for a prospective challenger to the enacted law to argue the applicability of the strict constitutional scrutiny test. However, it should be noted that the California Supreme Court rejected the strict scrutiny test and, instead, applied the balancing test in its consideration of the constitutionality of term limitation. See Legislature of the State of California v. Eu, supra, p. 34.

The proper test here is whether the proposition is clearly and conclusively defective, and Petitioner asserts that such a finding is impossible when there exists not a single Court decision, statute or other authority which so states.

Using the arguments of Opponents that the initiative violates Article 1, Sec. 2 of the U.S. Constitution (which it doesn't), even

Justice Black in staying the effect of Florida election laws in Davis v Adams, 400 US 1203 (1970), stated that while he was "inclined" to think Florida had exceeded its constitutional powers, he acknowledged the possibility that the Court might instead sustain the Florida statute. Id at 1204.[4] Similarly, in the very next case dealing with the constitutionality of Florida's filing fee requirements imposed on a candidate for Congress, the candidate asked the high court to order his name put on the ballot, notwithstanding his non-payment of the fee. Fowler v. Adams, 400 U.S. 1205 (1970). The State of Florida asserted its power to impose a candidate filing fee under Art. 1, Sec. 4, Cl. 1 of the U.S. Constitution. Justice Black ordered the candidate's name placed on the ballot because "The case raises questions which make it impossible for me to predict with certainty what the majority of this Court would decide". Id, at 1206.[5]

If a Justice of long-standing cannot "predict with certainty" the Supreme Court's decision construing the Art. I, Sec. 4, powers of the states, it is equally impossible for this Court to here conclude

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[4]Both that decision and the decision of the Federal Court of the Northern District of Florida were before the U.S. Supreme Court's ruling in Storer v. Brown, 415 U.S. 724 (1974) and the outcome today might well be to support the opinion rendered by this Court contrary to Stack in State ex rel Davis v. Adams, 238 So. 2d 415 (Fla. 1970)

[5]Petitioner TLLI wishes to draw the Court's attention to an error contained in its Initial Brief, wherein Petitioner misstated the ruling of the U.S. Supreme Court on the issue of a Texas statute imposing candidate filing fees. In a unanimous ruling, the Court struck down the statute, while specifically recognizing the legitimate interest of the state in regulating elections. Bullock v. Carter, 405 U.S. 134 (1972). Petitioner regrets the error and hereby apologizes to the Court. A corrected page 10 to the Initial Brief has been filed with the Clerk of this Court.

that the term limits initiative is "clearly and conclusively defective". Absent such a finding, the Court must allow the initiative to proceed.

Finally, to subject Petitioners to a "strict constitutional scrutiny" test at this stage of the process is to bypass and, otherwise, circumvent the normal rules of constitutional challenges. There exists a well-established body of law which adheres to the U.S. Supreme Court's rulings providing that a party who challenges the constitutionality of an enactment must demonstrate injury, in order to have the legal standing necessary to bring the challenge. Buckley v. Valleo, 424 U.S. 1, 11 (1975), citing Baker v. Carr, 369 U.S. 186, 204 (1962) and Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-241 (1937); Davis v. Scherer, 104 S.Ct. 3012 (1984); U.S. v. Gurney, 558 F.2d 1202 reh'g den'd 562 F.2d 1257, cert den'd; Miami Herald Pub. Co. v. Krentzmen, 98 S.Ct. 1606, 435 U.S. 968, 56 L.Ed. 2d 59 (1977); Sandstrom v. Leader, 370 So. 2d 3 (Fla. 1979); Acme Moving & Storage Co. of Jacksonville v. Mason, 167 So. 2d 555 (Fla. 1964).

Allowing these Opponents to raise the kinds of constitutional issues enumerated in their briefs on behalf of unidentified voters and phantom third parties about an issue that is merely proposed flies in the face of customary principles of constitutional law - and simply cannot be sustained by this Court.

Opponents are primarily incumbent officeholders and former officeholders from Florida who oppose the issue of term limits politically. Indeed, Respondent State Officials devoted over half their initial brief arguing to the Court why term limits are a bad idea and wholly unnecessary in Florida.

Petitioners submit that Opponents have displayed an impressive ability to assemble a strong campaign steering committee and a host of arguments to present to Florida voters in opposition to term limitations. But such committees and arguments are more properly directed at the political, not the judicial process.

It would seem only appropriate that Opponents join with Petitioners to debate our differing views regarding term limitations for elected officials in a statewide campaign on the initiative petition, and, then, to ultimately "let the people decide . . . . "

Until that is done and until term limitations are enacted, constitutional issues sought to be raised by Opponents in their initial briefs are not ripe for this Court's consideration or review, and must be set aside in favor of Petitioner's right to proceed with the initiative process.

CONCLUSION

Term limitations are merely another element to be included in the complex system of regulation of candidates, nominations and elections already enacted by the State of Florida. See §99.012 FSA et seq.

There is nothing in the term limitation proposition to prevent an incumbent officeholder from running for another office, becoming a write-in candidate for the same office or returning to private life. Surely these Opponents, particularly Dignitaries, with their distinguished backgrounds as public officials, do not assert that it is a penalty to have served in public office before returning to private life.

Term limits do not impose penalties on any individual for any proscribed reason. Term limits will, however, eliminate the uninterrupted advantages enjoyed by current officeholders to ongoing and seemingly automatic reelection to the same office.

Clearly, the voters of Florida have the right - possibly even the duty - to express their views on this fundamental aspect of representative government, and the citizens having met the requirements of the ballot summary and single subject rules of the State of Florida, ought to be allowed by this Court to move forward with their initiative petition.

Respectfully submitted,

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