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Essay

If It Quacks Like a Lame Duck, Can It Lead the Free World?: The Case for Relaxing Presidential Term Limits

JEREMY PAUL

This Essay explains why the post-war constitutional amendment limiting Presidents to two terms has been bad for our country. Since the amendment's adoption, presidential second terms have been ineffective and plagued by scandal. Leading the country has become more difficult because the President's political opponents and the broader citizenry understand the President's days are officially numbered. Presidents are forced from office just at the point when leaders in other fields are beginning to hit their stride. And post-war tendencies towards political polarization and an activist judiciary can both be linked to the loss of a national leader who can lay claim to a long-term agenda. The Framers generally, and George Washington in particular, considered and rejected presidential term limits. The Essay suggests we should move closer to the original constitutional structure by amending the Constitution to permit three consecutive presidential terms and an opportunity to run for a fourth term after four years out of office.



If It Quacks Like a Lame Duck, Can It Lead the Free World?: The Case for Relaxing Presidential Term Limits

JEREMY PAUL*

The Twenty-Second Amendment limiting Presidents to two terms in office is a failed constitutional experiment. Having heeded President Eisenhower's 1959 advice to let the amendment "lay on the shelf for a while and see how it works,"¹ we should focus now on fixing it.

This is not a partisan position. I'm not suggesting Barack Obama, George W. Bush, or Bill Clinton should get to run for a third term as President. Any change in our Constitution should apply to future Presidents only. But just to get the specifics out of the way, here is the constitutional amendment I propose.

Commencing with the second President inaugurated following ratification of this amendment, each President shall be eligible to serve up to three consecutive terms of office before being required to vacate that office. Any President leaving office after serving three consecutive terms would remain ineligible to assume the Presidency for four years.

Let me start by observing that this seemingly dramatic change in our constitutional order would actually be only a partial move toward the scheme originally designed by our Framers and that was in place for most of our history. So there is nothing radical about relaxing presidential term limits. Indeed, as carefully documented by David A. Crockett in his unrivalled treatment of debate over presidential tenure at the founding, George Washington himself was a strong opponent of placing term limits for Presidents in our Constitution.² Today's commentators who cite the tradition Washington started in support of formal term limits³

* Jeremy Paul teaches property and constitutional law at the University of Connecticut, where he is Dean and Thomas F. Gallivan, Jr. Professor of Real Property Law.

¹ *The President's News Conference: President Dwight D. Eisenhower*, THE AMERICAN PRESIDENCY PROJECT (May 13, 1959), <http://www.presidency.ucsb.edu/ws/?pid=11382>.

² David A. Crockett, "An Excess of Refinement": *Lame Duck Presidents in Constitutional and Historical Context*, 38 PRESIDENTIAL STUD. Q. 707, 707–21 (Dec. 2008).

³ The venerable academic practice of noting the longstanding tradition established by George Washington, see, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 34–35 (1957), has spawned innumerable comments in the popular press blurring a tradition with what has become a constitutional requirement. See, e.g., Bill Ohm, Op-Ed., *Term Limits Are Better . . . than*

misunderstand his view that the President and the public are the best judge of how long any President should serve. Washington chose to step down; he did not choose to be pushed out.

I anticipate, nonetheless, a certain amount of inertia from readers wondering why this is the constitutional change upon which we should now focus our energy. My reasons include concern that world class executive leadership takes time to develop after a President takes office and that our current two-term limit cripples the Executive during the lame duck period. I believe the two-term limit diminishes the aura of the Presidency, and that some of the recent, universally condemned political polarization stems from the weakening of our Presidents, who are best-positioned to serve as unifying leaders. The inability of either party successfully to implement a long term agenda also undermines faith in government as a whole. And the frantic rush in a President's first "hundred days" is now also part of a system in which a recalcitrant Congress can start the clock ticking on day one, knowing that powerful committee chairs will long outlast the seemingly more powerful unitary executive.

My quarrel with the two-term limit for Presidents, however, starts not with analysis but with observation. Each President elected for a second time since the adoption of presidential term limits has found his second term unfulfilling or worse. Although the history is familiar, it's worth retelling simply to emphasize what a trauma second terms have become. Richard Nixon's second term never finished as he was forced to resign as a result of the Watergate scandal. Many factors led to his departure, but certainly his downfall was aided by congressional hearings and investigations aimed directly at a sitting President. Ronald Reagan may today be viewed as a heroic president in many quarters. But the years 1985 through 1989 found the country embroiled in the Iran-Contra scandal, in which once again defiant Members of Congress took aim at a sitting President.⁴ During his second term, William Jefferson Clinton became the second U.S. President to be impeached by the House of Representatives and Senate Republicans were overwhelmingly willing to vote for his ouster from office.⁵ George W. Bush turns out to be the winner in the bunch. His difficulties, such as the failed response to Hurricane Katrina, the absence

Public Financing, TELEGRAPH (Nashua, N.H.), Jan. 28, 2010; Ron Sereg, Op-Ed., *Congress Needs Reform Only Term Limits Can Bring*, TIMES (Shreveport, La.), Jan. 10, 2010.

⁴ See, e.g., LEE H. HAMILTON & DANIEL K. INOUE, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. Rep. No. 100-433, S. Rep. No. 100-216, at 21 (1987) ("[T]he ultimate responsibility for the events in the Iran-Contra Affair must rest with the President. If the President did not know what his national security advisers were doing, he should have.").

⁵ Allison Mitchell, *Impeachment: The Overview—Clinton Impeached*, N.Y. TIMES, Dec. 20, 1998; William J. Clinton, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/williamjclinton> (last visited Apr. 22, 2011).

of weapons of mass destruction in Iraq, and the worst financial collapse since the Great Depression, seem unrelated to his status as a lame duck. Consider, however, that immediately upon his re-election in 2004, President Bush announced that he planned to spend the political capital he had earned on a grand plan to re-make Social Security.⁶ No one, however, seemed afraid of his political checkbook.

I leave to historians the difficult work of interviewing those who led government during these four presidential second terms to determine how much lame duck status contributed to the President's lack of clout in resisting political defiance and attack. I am content simply to draw the lesson staring us in the face. Ever since our Constitution was amended to limit Presidents to two terms, our Presidents have found their second four years to be extremely difficult. Since any President will need some time to get his or her bearings during a first term, my concern runs very deep. We may have ruined entirely the constitutional structure left to us by the original Framers. Certainly, then, some discussion is worthwhile.

I can already imagine readers accusing me of overreaction.⁷ After all, didn't George Washington establish a tradition that Presidents serve only two terms? Doesn't this mean that all second-term Presidents before Franklin Delano Roosevelt faced the same sort of challenges confronting Nixon, Reagan, Clinton, and George W. Bush? The short answer is no. Anyone who has ever run an organization knows there is a huge difference between leaving after eight years and letting everyone know in year five that you will certainly be leaving after year eight. Because of the Twenty-Second Amendment, the day after a President's re-election signals the end of his or her career as a presidential candidate. In contrast, Washington announced his decision in 1796 at the end of his second term.

Indeed, prior to the Twenty-Second Amendment, many second-term Presidents, including FDR, kept their own counsel about their re-election plans until the last possible moment. Woodrow Wilson and his confidants struggled to keep his October 1919 stroke and his inability to run again

⁶ ANDREW KOHUT, PEW RESEARCH CENTER, BUT WHAT DO THE POLLS SHOW? HOW PUBLIC OPINION SURVEYS CAME TO PLAY A MAJOR ROLE IN POLICYMAKING AND POLITICS (Oct. 14, 2009), available at <http://pewresearch.org/pubs/1379/polling-history-influence-policy-making-politics>.

⁷ One such reader, Professor Jack Beermann, suggests that I over-emphasize the extent to which a President's lame duck status weakens his or her power vis-à-vis the Congress. See Jack M. Beermann, *A Skeptical View of a Skeptical View of Presidential Term Limits*, 43 CONN. L. REV. 1105, 1110–12 (2011). Professor Beermann is correct that Presidents continue to wield substantial clout through use of the appointment power, control over regulatory agencies and as Commander-in-Chief of the armed forces. None of these abilities, however, represents the most effective sort of political authority within a democracy. To make meaningful change, a President needs more than a few avenues to coerce political opponents. He or she depends upon the more fundamental ability to rally the electorate in favor of a chosen direction. Nothing in Professor Beermann's analysis persuades me that the imposition of presidential term limits has not robbed second-term Presidents of this core function as leaders who can move the legislative branch and more importantly move the country.

secret. Grover Cleveland waited until the 1896 convention before clarifying that he would not seek a third term. Ulysses Grant seriously considered a third term and it was political pressure during his last two years in office that kept him from trying. In contrast, Theodore Roosevelt's decision to announce after the 1904 election that he would not seek re-election in 1908 was regarded as his biggest political blunder.

It's easy to see why these two-term Presidents wanted to hide their intentions. Once any organization's chief fixes a date for his resignation, power begins shifting to the apparent successor. Consider how seldom CEOs of large corporations announce their retirement four years in advance. Or, to put it another way, if you were working your way up Washington's political ladder in 1998, and you sensed a conflict between President Clinton and Vice President Gore, on whose side would you want to be? Jockeying for position is the hallmark within any large organization, and it doesn't take an MBA to observe that the period of transition will be one where managers focus on their next position rather than executing the strategy of the current leader. Our current constitutional order guarantees that the executive branch will be in one form of transition or another nearly all the time. Indeed, it is odd that with all the focus in recent years on the importance of a so-called "unitary executive" few have focused on the tension between concentrating power in the hands of one decision-maker and limiting authority by restricting that decision-maker to a fixed and relatively short term of office.

Another problem with our current system of presidential term limits is the obvious loss of qualified individuals just at the time when such leaders have had considerable experience that might help them excel at the job. Harvard University was founded in 1636, and Drew Gilpin Faust is its 28th President. In contrast, Barack Obama is our 44th President since 1789. It took Geno Auriemma ten years to win his first national title as coach of the University of Connecticut women's basketball team. Coach John Wooden took sixteen years to bring home UCLA its first brass ring. If you prefer a business analogy, consider some recent, successful captains of industry and finance. Bill Gates ran Microsoft for roughly thirty years. Steve Jobs has run Apple Computers off and on since its founding. Warren Buffet has run Berkshire Hathaway for nearly fifty years. Sanford Weill ran the empire that became Citigroup for more than twenty years. Indeed, the very idea of a serious leader in the private sector seems to correspond to longevity. Are we really sure that we can relinquish this capacity for learning on the job in what is arguably the hardest job in the world?

Still another problem is the way that presidential term limits create perverse incentives for Presidents on day one. Knowing that the clock is ticking fast means a President may never have time to really get it right on tough policy questions such as health care, education or immigration. So there's all the more pressure just to get something done. Worse still, the

long-term consequences of decisions may never come back to benefit or haunt a President whose effective political life ends the day after re-election. It's hard to imagine a more oft-repeated phrase in today's political lexicon than that government is broken. What should we expect, however, from any massive, complex institution whose chief executive has so little time to form long-term relationships, experiment with alternate solutions, and build constituency support?

Indeed, it is this final point concerning national unity that most convinces me that our country took the wrong road in enshrining the current two-term limit for Presidents. Our system maintains the trappings of national leadership for our Commander-in-Chief. The majesty of the State of the Union address and the symbolism of the Oval Office remain powerful. But at the end of the day, how much allegiance can a President expect from her political opposition when the defeated party knows she will be gone in what feels like the blink of an eye? When the country elects a President with whom you profoundly disagree, you might choose to give him the benefit of the doubt if you know he may be around a long time. But if you need only raise the flag of resistance for eight years before he is beaten, it's tempting to just keep saying no. This is especially true since only once since the adoption of the Twenty-Second Amendment has the opposition party failed to reclaim the White House after a President served eight years.

And, if the country never fully gives a President the chance to lead, how can we expect our Presidents to command full respect on the international stage? Does our President represent the people of the United States of America or just the slice of the electorate that happened to prevail this time? There are no answers to such questions, but there is also no doubt that a term-limited President faces challenges in winning national and international respect that would be less severe for one who could keep going back to the voters for electoral ratification. If the measure of leadership is moving a group in your direction with the force of conviction and then reaping the reward for being right or paying the price for being wrong, we have made such leadership very difficult for the person constitutionally charged with the task. Perhaps this is why the much longer-lasting Justices of the U.S. Supreme Court, for better or worse, have assumed so much of the mantle of national leadership in the era since term limits were adopted.⁸

Given the many problems with presidential term limits, why not simply eliminate them altogether? One obvious reason is that any change

⁸ For a fascinating treatment assessing the legal and political history of the modern United States from the standpoint that we have relied more heavily on courts and laws to make political decisions, see GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009).

at all from our current structure will face substantial political opposition. Accordingly, abolition is a hopeless political strategy. Beyond that, however, we must give some credence to the ideas that led to the adoption of presidential term limits in the first place. We need potentially longer tenure in office so our President can be a true leader. There are, however, legitimate concerns that a President who serves too long will become so entrenched that elections won't serve as a meaningful check on his or her authority. And certainly we should be mindful of the compelling case made by Professor Bruce Ackerman that recent developments have shifted too much power to the executive branch.⁹

The final question then is where a potential new line should be drawn. No clear way to determine this appears to me. But as I noted at the outset, three terms in a row seem enough. This would at least offer Presidents the potential to serve as long as Senators who are merely re-elected once. And it would provide tremendous possibilities during what might be a middle term. If history is a guide, and what else can be, few Presidents will actually seek a third term. The real gain is that during the second term no one would know. So the President would be in reality, as well as in name, the true leader of her party and her nation. For all the reasons noted above, this will give our Commander-in-Chief the stature to rally the civilian troops. Finally, I find very attractive a suggestion recently made by President Clinton that a President who is forced to leave office due to term limits, ought to be eligible to return after sitting out a term.¹⁰ This will prevent true lame duck status, while also shaking things up at the White House. He meant this to be the sole addition to the two term limit, but I see no reason not to use the same approach even if the number of permissible terms is extended to three. It's hard to imagine someone coming back to serve but harder still to imagine that someone who could succeed at such a comeback would not have a great deal to offer.

No one can be sure that extending the potential tenure of future Presidents won't backfire and produce leaders who are less accountable and responsive to public needs. But what we can be sure about is that the system we have in place now is not the one embraced by the Framers nor is it working effectively. Despite all the political obstacles in the path toward relaxing term limits, our current approach is broken. We all have an obligation to fix it.

⁹ See generally BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 15–41 (2010).

¹⁰ *Debate: Presidential Term Limits*, CBS NEWS (Jun. 08, 2003), <http://www.cbsnews.com/stories/2003/06/06/60minutes/clintondole/main557364.shtml>.