Supreme Court rediscovers Constitution, rejects term limits scheme

by Edward Spannaus

These are turbulent times—even in the U.S. Supreme Court.

On April 26, five Justices of the Supreme Court indicated that they were entertaining thoughts of joining Newt Gingrich and Phil Gramm in their campaign to dismantle the federal government. In that case, *U.S. v. Lopez*, the court invalidated a federal law barring guns near schools, holding that the statute was not a proper exercise of federal power under the Constitution's provision of power to the Congress to regulate interstate commerce (see *EIR*, May 12, 1995). In giving their interpretation of the commerce clause, some of the justices went on to moot a return to the years before 1937, when the Supreme Court routinely struck down any exercise of economic power by the federal government.

Then, on May 22, with a switch of one vote, the same court issued a remarkable ruling which reaffirmed—in striking and powerful terms—some of the most fundamental principles on which our Constitutional Republic is based. Specifically at issue was an Arkansas law which limited terms in the U.S. Congress to three terms for the House of Representatives, and two terms for the Senate. Arkansas was not alone in this endeavor: 23 states had passed laws imposing term limits on their congressional representatives, and the issue has become a rallying cry for radical populist groups.

The majority opinion in the term limits case was written by Justice John Paul Stevens—now the second most senior member of the Court—and was joined by Justices Kennedy, Souter, Ginsberg, and Breyer, the latter two being Clinton appointees. Anthony Kennedy was the swing vote; he had voted with the Rehnquist bloc in the commerce clause case, but voted with the opposing bloc in the term limits case.

Both of these cases, but especially the term limits case, demonstrate the absurdity of the "liberal-conservative" categories which most commentators use in analyzing the voting blocs on the Supreme Court.

"Conservative" columnist Joseph Sobran, for example, described the decision as "a liberal victory," and wrote that the dissenting opinion, written by Justice Clarence Thomas, "has shaken the liberal establishment to its depths." Liberals are those who want to build up a powerful federal government, according to Sobran, thus departing from the historical mainstream.

Columnist Phyllis Schlafly praised Associate Justice Clarence Thomas, who wrote the dissent in the term limits case, and who took the most extreme position in the commerce clause case, as "the Supreme Court's strongest and most articulate voice for constitutional government." "Constitutional government," she explained, "means government in accord with the U.S. Constitution as its makers wrote it, rather than as liberal Supreme Court activists would like to rewrite it."

In the view of a Sobran or Schlafley, a "conservative" is one who believes that the federal government should be as small and powerless as possible, and that all power derives from, and should reside in, the states.

The truth is that today's "conservatives" correspond to the radical opponents of the United States Constitution and of the Founding Fathers. This is illustrated dramatically in the term limits case, where the so-called "conservatives" literally adopted the arguments used by the adversaries of the Constitution during the debates over its ratification in the 1780s.

What are called "term limits" today, were known as "rotation" in the 18th century. The Articles of Confederation, which were replaced by the Constitution of 1787, had a rotation provision—i.e., delegates to the Continental Congress could not serve more than three years out of six, and were subject to recall at any time by the state legislatures. There were vigorous debates over the desirability of a rotation provision during the Constitutional Convention and in the subsequent state ratification conventions. Term limits lost.

The opinion written by Justice Stevens in this case thoroughly documents that not only were term limits rejected, but that the Framers intended that the specific qualifications put in the Constitution were not to be added to, or supplemented, by the states. Stevens shows, as well as one could expect from a modern Supreme Court Justice, that this is not just a technical question, but that it bears on the fundamental question of the nature of the Union. He lays out compelling evidence, using quotations from Alexander Hamilton, Chief Justice John Marshall, and others, that the national govern-

ment derives its power from the people of the United States as a whole, not merely from the states, or even from the people of the states as such.

The irony, of course, is that George Washington, Hamilton, Marshall, and Marshall's protégé Joseph Story were not the "liberals" of their day. By today's categories, the Federalists of the 18th century, and the American Whigs of the first part of the 19th century, were the "conservatives." They absolutely believed in the necessity for a vigorous national government, which could, in the words of Hamilton, "baffle all the combinations of European jealousy to restrain our growth." (Federalist No. 11.) In arguing the need for a strong central government, Hamilton argued: "Let the thirteen states, bound together in a strict and indissoluble Union, concur in erecting one great American system superior to the control of all transatlantic force or influence and able to dictate the terms of the connection between the old and the new world."

From England, and post-revolutionary France, came the efforts to weaken the Union, to decentralize power, and to promote separatism and secessionism. It was treason then, and it is treason now.

The fraudulent (and tedious) argumentation of Clarence Thomas in his 88-page dissenting opinion in the term limits case belongs to that anti-Federalist, anti-American System tradition. Conservatism it is not.

It is no less outrageous that three other Justices (Rehnquist, O'Connor, and Scalia) signed onto Thomas's dissent without a quibble. But it just shows that the Supreme Court is not exempt from the same political currents which are so evident in the Congress this term, attempting to subvert the U.S. political and economic system in the name of "conservatism."

But what is encouraging is the fact that five members of the court were able to rally around fundamental principles as expressed by the Framers of the Constitution. That is refreshing indeed.

Documentation

The following are excerpts from the Opinion of the Court of the Supreme Court of the United States in U.S. Term Limits, Inc., et al. v. Thornton et al. *(certiorari to the Supreme Court of Arkansas No. 93-1456, argued Nov. 29, 1994, decided May 22, 1995), as delivered by Associate Justice John Paul Stevens. Legal citations have been omitted. A subhead has been added.*

As the opinions of the Arkansas Supreme Court suggest, the constitutionality of Amendment 73 depends critically on the resolution of two distinct issues. The first is whether the Constitution forbids States from adding to or altering the qualifications specifically enumerated in the Constitution. The second is, if the Constitution does so forbid, whether the fact that Amendment 73 is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance.

Our resolution of these issues draws upon our prior resolution of a related but distinct issue: whether Congress has the power to add to or alter the qualifications of its Members. Twenty-six years ago, in *Powell v. McCormack,* we reviewed the history and text of the Qualifications Clauses in a case involving an attempted exclusion of a duly elected Member of Congress. . . . Because of the obvious importance of the issue, the Court's review of the history and meaning of the relevant constitutional text was especially thorough. We therefore begin our analysis today with a full statement of what we decided in that case. . . .

[W]e viewed the Convention debates as manifesting the Framers' intent that the qualifications in the Constitution be fixed and exclusive. We found particularly revealing the debate concerning a proposal made by the Committee of Detail that would have given Congress the power to add property qualifications. James Madison argued that such a power would vest " 'an improper & dangerous power in the Legislature,' " by which the Legislature " 'can by degrees subvert the Constitution.' " Madison continued: " 'A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect.' "

We also recognized in *Powell* that the post-Convention ratification debates confirmed that the Framers understood the qualifications in the Constitution to be fixed and unalterable by Congress. For example, we noted that in response to the antifederalist charge that the new Constitution favored the wealthy and well-born, Alexander Hamilton wrote:

" 'The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. . . . The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.' "

We thus attached special significance to "Hamilton's express reliance on the immutability of the qualifications set forth in the Constitution."

Moreover, we reviewed the debates at the state conventions and found that they "also demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution."

In *Powell,* of course, we did not rely solely on an analysis

of the historical evidence. . . . We noted that allowing Congress to impose additional qualifications would violate that "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.' "

Our opinion made clear that this broad principle incorporated at least two fundamental ideas. First, we emphasized the egalitarian concept that the opportunity to be elected was open to all. We noted in particular Madison's statement in *The Federalist* that " '[u]nder these reasonable limitations [enumerated in the Constitution], 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.' "

Second, we recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government. For example, we noted that "Robert Livingston . . . endorsed this same fundamental principle: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.' " Similarly, we observed that "[b]efore the New York convention . . . Hamilton emphasized: 'The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.' ". . .

Our reaffirmation of *Powell,* does not necessarily resolve the specific questions presented in these cases. For petitioners argue that whatever the constitutionality of additional qualifications for membership imposed by Congress, the historical and textual materials discussed in *Powell* do not support the conclusion that the Constitution prohibits additional qualifications imposed by States. In the absence of such a constitutional prohibition, petitioners argue, the Tenth Amendment and the principle of reserved powers require that States be allowed to add such qualifications.

Petitioners argue that the Constitution contains no express prohibition against state-added qualifications, and that Amendment 73 is therefore an appropriate exercise of a State's reserved power to place additional restrictions on the choices that its own voters may make. We disagree for two independent reasons. First, we conclude that the power to add qualifications is not within the "original powers" of the States, and thus is not reserved to the States by the Tenth Amendment. Second, even if States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for members of Congress, and that the Framers thereby "divested" States of any power to add qualifications.

The "plan of the convention" as illuminated by the historical materials, our opinions, and the text of the Tenth Amendment, draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument."

This classic statement by the Chief Justice endorsed Hamilton's reasoning in *The Federalist* No. 32 that the plan of the Constitutional Convention did not contemplate "[a]n entire consolidation of the States into one complete national sovereignty," but only a partial consolidation in which "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.". . .

Tenth Amendment not applicable

Contrary to petitioners' assertions, the power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. As Justice Story recognized, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed."

Justice Story's position thus echoes that of Chief Justice Marshall in *McCulloch v. Maryland.* In *McCulloch,* the Court rejected the argument that the Constitution's silence on the subject of state power to tax corporations chartered by Congress implies that the States have "reserved" power to tax such federal instrumentalities. As Chief Justice Marshall pointed out, an "original right to tax" such federal entities "never existed, and the question whether it has been surrendered, cannot arise. . . ."

With respect to setting qualifications for service in Congress, no such right existed before the Constitution was ratified. The contrary argument overlooks the revolutionary character of the government that the Framers conceived. Prior to the adoption of the Constitution, the States had joined together under the Articles of Confederation. In that system, "the States retained most of their sovereignty, like independent nations bound together only by treaties." After the Constitutional Convention convened, the Framers were presented with, and eventually adopted a variation of, "a plan not merely to amend the Articles of Confederation

but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature." In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States. . . . In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. . . . Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people."

We believe that the Constitution reflects the Framers' general agreement with the approach later articulated by Justice Story. . . .

For example, Art. I, 5, cl. 1 provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." The text of the Constitution thus gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State. For this reason, the dissent falters when it states that "the people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress.". . .

The merits of term limits, or "rotation," have been the subject of debate since the formation of our Constitution, when the Framers unanimously rejected a proposal to add such limits to the Constitution. The cogent arguments on both sides of the question that were articulated during the process of ratification largely retain their force today.

We are, however, firmly convinced that 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 set forth in Article V. The Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the Nation. That decision reflects the Framers' understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government. In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a "more perfect Union."

'Clear the shadows over LaRouche'

by Prof. Tullio Grimaldi

Prof. Tullio Grimaldi is vice chairman of the Judiciary Committee of the Italian Chamber of Deputies in Rome, and a judge in the Italian Supreme Court, the Corte di Cassazione. Over May 5-12, he visited Washington, accompanied by the president of the Judiciary Committee, Tiziana Maiolo, and committee member Enrico Nan, for meetings in Congress to discuss the question of the exoneration of the American economist and political leader Lyndon LaRouche. Following the visit, Professor Grimaldi wrote the following comment for EIR.

Does the sentence against Lyndon LaRouche hide a true case of political persecution through a court action? This question accompanied the visit in Washington made some weeks ago by myself and two other members of the Judiciary Committee of the Chamber of Deputies.

There are many cases in history of political trials, and not infrequently one can speak of a plot, when the indictment goes against an uncomfortable personality whom someone tries to eliminate, or when it is conducted with the massive use of state agencies. That is why the function of judges should be more prudent, and all the more distanced and impartial, whenever elements of evidence may give rise to the suspicion that there is a plot from forces in power.

On LaRouche and his case, during a meeting in Rome we were briefed by James Mann, former member of Congress for the Democratic Party; also, more than a thousand members of parliament, politicians, and former members of government from a great many countries addressed a call to President Clinton for LaRouche's exoneration. This is the reason for the interest which this case holds for those who, like myself, have been dealing with jurisprudence, first as a judge, then as a university professor, and now as a member of parliament.

At a conference held in Eltville, Germany, on Dec. 10, 1994, which was reported on in the weekly news magazine *EIR* on Jan. 13 of this year, Representative Mann listed a series of very interesting and striking irregularities in the trial proceedings. He quoted a letter dated Aug. 19, 1982, sent by Henry Kissinger to then-FBI Director William Webster, in which Kissinger drew Webster's attention to some activities of LaRouche's organization. This letter seems to have given the true impetus for the legal action. The trial started in Boston, where it did not yield the hoped-for result; therefore, it was moved to Alexandria, Virginia, with a very rushed