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A SKEPTICAL VIEW OF A SKEPTICAL VIEW OF PRESIDENTIAL TERM LIMITS

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A Skeptical View of a Skeptical View of Presidential Term Limits

Jack M. Beermann*

The President of the United States is the only official of the United States government with a constitutionally-prescribed term limit.¹ Dean Jeremy Paul is concerned that the presidency has been weakened and that the President's term limit is at least partly to blame.² Dean Paul has common sense and some history on his side. As far as common sense is concerned, Dean Paul is clearly correct that once a President reaches the point beyond which re-election is not constitutionally possible, usually the day after the second time the person is elected, the President is effectively a lame duck. As far as history is concerned, Dean Paul points out that since 1951 when the amendment limiting Presidents to two terms went into effect, there have been several instances of very poor results in the President's second term.³ It is tempting to attribute the second term problems of some recent Presidents at least partly to term limits.

Dean Paul may be correct. Perhaps the Twenty-Second Amendment is a failed experiment that ought to be repealed. However, despite the strength of Dean Paul's arguments, I am skeptical of Dean Paul's skepticism concerning presidential term limits. After first airing some skepticism over whether the presidency has actually been weakened in recent decades, my main critique of Dean Paul's thesis proceeds as follows: First, I argue that there is reason to be skeptical of the claim that term limits have anything to do with any weakening of the presidency. In this section, I suggest that the President's continued control over the Executive Branch

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¹ U.S. Const. Amend. XXII.

² Jeremy Paul, 43 Conn. L. Rev. xxx (2011).

³ Paul, *supra* note x.

throughout the duration of a second term means that any relative increase in the power of Congress and the federal courts relative to the President is likely to derive from a source other than term limits. Second, I discuss reasons to be skeptical, even fearful, of a potentially unlimited presidency. In short, the ambition to stay in office might lead incumbent Presidents to take extreme measures to stay in power, especially in a system such as ours with formally separated powers. Finally, risking the skepticism of readers, if concern over the balance of power within the federal government is legitimate, I speculate that better ways to increase the President's power relative to the other branches might involve term limits on Members of Congress and reforms to separation of powers doctrine and constitutional provisions aimed at weakening them, rather than increasing presidential power directly.

I. The Weak Presidency?

The issue of the effect of presidential term limits is fascinating. It is a subject that keeps attracting attention—on the first day of the previous Congress, before Barack Obama was sworn into office, a Joint Resolution was again proposed to repeal the Twenty-Second Amendment.⁴ Although the euphoria over the election of Barack Obama may have died down just a bit since then, the issue is clearly on the political agenda of some who may be sympathetic to Dean Paul's analysis.

A. A Little Background

The national consciousness of presidential term limits dates back to the first President of the United States, George Washington, who famously declined to seek a third term in office.⁵

⁴ See H. J. Res. 5, 111th Cong., 1st Sess. (2009). In 2005, a bipartisan group introduced the same resolution. See H. J. RES. 24, 109th CONGRESS, 1st Session, Press Release, Hoyer Introduces Bipartisan Bill to Repeal 22nd Amendment, available at <http://democraticleader.house.gov/content/hoyer-introduces-bipartisan-bill-repeal-22nd-amendment>.

⁵ Much of the discussion of George Washington's views on term limits and his reasons for declining to seek a third term is drawn from Bruce G. Peabody, *George Washington, Presidential Term Limits, and the Problem of Reluctant Political Leadership* 31 *Presidential Studies Quarterly* 439 (2001).

The myth is that Washington did this to establish a precedent against more than two terms in office and that this precedent was respected until Franklin Delano Roosevelt gave in to political vanity and won not only a third term but also a fourth term as President. Like most myths, it contains a kernel of truth wrapped in a cloak of inaccuracy and imprecision.

It is true that Washington was somewhat concerned over the effect it would have on the presidency if he sought a third term and that the concern was consistent with the universal rejection in the United States of anything resembling a monarchy. But Washington's thoughts are more complex than a simple desire to establish a two term tradition as a way to ensure that the presidency did not become a lifetime position that would resemble a monarchy.

There is a draft farewell address from Washington that suggests he declined a third term because he wanted to set a two term precedent. But this address was not delivered, and Washington did not write it.⁶ The primary reason that Washington chose not to seek a third term was his fervent desire to return to private life.⁷ His concern for the presidency was part of it, in the form of a sort of double move. He favored a strong presidency, but he knew that the American people, who rejected anything smelling of a monarchy, might not be happy if their new government under the Constitution moved things too far in that direction, as compared with the virtually non-existent national executive under the Articles of Confederation. Washington apparently thought that it would in the long run strengthen the presidency if, by leaving after two terms, he could help relieve some of the suspicion the people had of a vigorous national executive.⁸ Just as a poker player feigns weakness in the early going, Washington seems to have

⁶ See Peabody, *supra* note x at 442 n. 2.

⁷ Peabody, *supra* note x at 443. Peabody names three reasons for Washington's decision to retire after two terms: "a desire to strengthen the institution of the presidency, his longstanding interest in securing personal honor and reputation, and a deepening weariness with public service (and a corresponding wish to return to his private affairs in Virginia)."

⁸ *Id.*

believed that a weak opening would ultimately strengthen this new creature known as the presidency.

Just as legal precedents acquire their meanings in subsequent decisions, Washington's two term precedent acquired its significance primarily in the hands of his successors. It was subsequent political leaders who pointed to Washington's example when they proclaimed the wisdom of the customary two-term limitation on presidential service.⁹ The association with Washington surely solidified the acceptance of the custom by nearly every subsequent President. What patriotic American political leader wants to be cast as having rejected the example set by the father of all founding fathers?

B. A Weakened Presidency?

As is familiar history, although there were occasional rumblings by incumbent Presidents in the direction of seeking a third term, and at least one who actually sought a third term,¹⁰ it was not until Franklin Delano Roosevelt that a President actually sought and was elected to more than two terms. The national psyche was not willing to accept this as a long-term possibility, and only a few years after FDR's death, the twenty-second amendment was proposed and ratified, thus imposing real limits on presidential service. Dean Paul's argument for repealing the amendment has two elements, first that the presidency has been weakened in recent decades

⁹ See, e.g., the Concurrent Resolution passed by the House of Representatives in 1875, quoted in Peabody, *supra* note x at 442.

¹⁰ President Theodore Roosevelt ran for a term that would not be allowed under the twenty-second amendment, although he had only been elected once, after serving out the remaining three and one-half years of President William McKinley's second term after McKinley was assassinated. Upon being elected to a full term as President in 1904, Roosevelt proclaimed "Under no circumstances will I be a candidate for or accept another nomination." See David Henry Burton, Theodore Roosevelt, American politician: an assessment 125 (1997). He apparently did this to observe the two-term tradition--he viewed his three and one-half years as a first term and his elected term beginning in 1905 as his second. Then, in 1908, he changed his mind and ran for a third term as the candidate of the Progressive Party. Interestingly, supporting Dean Paul's position, Burton reports that Roosevelt did suffer some diminution of power when he effectively became a lame duck after his "no third term" announcement, although he did maintain a firm grip on the administration and enjoyed some great second term successes, most notably with the designation of vast areas as wilderness. See *id.* at 126-29. See also Kathleen Dalton, Theodore Roosevelt: A Strenuous Life 267-68 (2002).

and second that this weakening is due, at least in large part, to presidential term limits. There is logic to Dean Paul's position. Once the President is elected for the second time, lame duck status sets in. As Dean Paul puts it quite simply, moving past the possibility of reelection after only four years saps the presidency of political power because others in the system can wait out the incumbent and will be more concerned about the views of potential successors than with the desires of the incumbent.¹¹

Has the presidency been weakened in recent decades and if so, are term-limits (partly) to blame? These are difficult questions to answer. On the first question, my sense is that opinions are likely to differ, with some agreeing with Dean Paul and others holding the contrary view, that the power of the presidency has increased.¹² The second question is even more difficult to answer since it is not possible to conduct a controlled experiment on the power of the presidency with and without term-limits. Would strong Presidents such as FDR or Abraham Lincoln be significantly weakened at the outset of their second terms had term limits existed during their presidencies? Although I cannot claim anything close to certainty in my attempt to answer these questions, my sense is that the presidency is not significantly weaker than it was before the twenty-second amendment and that repeal of the amendment would not significantly strengthen the presidency.

Dean Paul's primary evidence for the weakened presidency lies in the disastrous second terms that some recent Presidents have experienced. Second term events such as Richard Nixon's resignation, Ronald Reagan's Iran-Contra scandal, Bill Clinton's impeachment and George W. Bush's low approval ratings and savaging at the hands of the media are Exhibits A,

¹¹ Paul, *supra* note x.

¹² See generally, Arthur M. Schlesinger, Jr., *The Imperial Presidency* (1973); Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (2007).

B, C and D.¹³ Although there is no disputing this evidence, I am skeptical that the presidency has been weakened overall and I am even more skeptical that any actual weakness can be traced to the effects of the twenty-second amendment.

In my view, the contemporary presidency is very strong and has been strengthened by technology and world events. The President of the United States controls the world's most powerful military and has the ability to deploy weapons of mass destruction at the push of a button. Despite the hangover of Vietnam-war induced angst, Presidents have continued to deploy the United States military throughout the world. The President also presides over intelligence gathering and foreign relations institutions of unprecedented scope and power. On the domestic side, the growth of the regulatory state beginning in the 1960s has greatly expanded the overall power of the Executive Branch. As regulatory problems become larger and more complex, Congress must rely on discretionary Executive Branch implementation more than ever before. Further, the growth of the federal budget has injected federal regulation into programs far beyond whatever boundaries might exist regarding direct federal regulation, and all of this is directed by the President.¹⁴ The creation and institutionalization of centralized White House review of the regulatory state beginning in the 1980s has also greatly enhanced the President's influence over the regulatory state. In short, my sense is that the power of the presidency has increased, not decreased, since the adoption of the twenty-second amendment.

Given my sense that the presidency has not been weakened, how can I explain Dean Paul's examples of weakness several recent President's have suffered in their second terms? Put another way, even if the overall power of the presidency has increased, is it possible that

¹³ Paul, *supra* note x.

¹⁴ Congress extends the reach of federal law by providing federal funds with strings attached containing conditions that Congress might not have the power to legislate directly. See U.S. Const. Art. I § 8; *South Dakota v. Dole*, 483 U.S. 203 (1987).

Presidents are much weaker in their second terms due to the effects of the twenty-second amendment? Here, I don't think I can separate the two issues of weakness and causation. In my view, many of the attacks on the power of the presidency can be traced to Richard Nixon's Watergate scandal, and none of the problems Dean Paul identifies are uniquely second term problems. In the wake of the Nixon campaign's burglary of Democratic Party offices and the administration's illegal coverup, Congress greatly strengthened ethical controls on presidential conduct and, perhaps more importantly, the country suffered great stress over the trauma of a President being forced to leave office under threat of impeachment and removal. I don't see how Nixon's troubles can be traced to the twenty-second amendment. I suppose his supporters might have fought more had it been possible for him to seek reelection again, but once the facts became known, it is hard to imagine Nixon being a serious candidate for election to a third term.

One significant ethics reform passed by Congress in the wake of Watergate was the provision allowing a federal court to appoint an independent counsel to investigate Executive Branch wrongdoing free from control of the Department of Justice, which had been entangled in the Watergate coverup and related scandals.¹⁵ In my judgment, it was this, more than anything else, that prevented Presidents Reagan and Clinton from sweeping their ethics problems under the rug. Prosecutors with no direct connection to politics are not likely to be concerned over possible retribution from the President even if that President might be elected again. The fact that Reagan and Clinton's major troubles occurred in their second terms may be coincidence, due to the fact that it takes time to do something bad enough to create a scandal and conduct an investigation. Further, ethics investigations of politicians always seem to find some way to drag on past election day.

¹⁵ See Ethics in Government Act of 1978, codified at 28 U.S.C. §§ 49, 591 et. seq. The independent counsel provisions, which were last reauthorized for five years in 1994, lapsed in 1999 when they were not reauthorized again. See 28 U.S.C. §599.

What of George W. Bush's second term difficulties? Again, I find it very difficult to trace these to the existence of term limits. George W. Bush got caught in a major lie to the American people, one that cost thousands of lives and entangled the country in a major war in Iraq that seemed to have no end in sight. His handling of the war in Afghanistan also provoked serious doubts about his leadership, as did the administration's mishandling of the disastrous hurricane Katrina. He seemed to develop a tin ear for politics, as evidenced by his Iraq war speech on an aircraft carrier with a banner proclaiming "mission accomplished"¹⁶ when the worst in Iraq was yet to come, and his "Brownie you're doing a heckuva job"¹⁷ statement while relief efforts after hurricane Katrina were failing. It also didn't help that the economy tanked during G.W. Bush's second term, and at least some of the blame was placed on lax regulation of financial institutions.

Perhaps paradoxically, it can be argued that George W. Bush actually became a stronger President in his second term, even though he ultimately failed. During his first term, it was sometimes unclear what policies were his and what policies were the creation of Vice-President Cheney and his faction in Washington. During the second term, President Bush appeared to become more his own man as President. Perhaps because he no longer needed to worry about being reelected, he could dismiss the concerns of Cheney and his faction and chart his own course. In general, lame ducks share some freedom from political constraints when reelection is no longer possible.

¹⁶ See Remarks by Bush from the deck of the USS Abraham Lincoln, at Sea off the coast of San Diego, Calif., on May 1, 2003. White House transcript available at <http://middleeast.about.com/od/usmideastpolicy/a/me080921a.htm>; CNN, Commander in Chief lands on USS Lincoln, available at http://articles.cnn.com/2003-05-01/politics/bush.carrier.landing_1_bush-speech-observation-deck-flight-deck?_s=PM:ALLPOLITICS (reporting "Mission Accomplished" banner).

¹⁷ See Arthur Spiegelman, President Bush's "Brownie" Quote Wins Award (Dec. 30, 2005) available at <http://www.commondreams.org/headlines05/1230-01.htm>, (reporting that Global Language Monitor named this George W. Bush's most memorable statement of 2005).

The failures of Lyndon Baines Johnson, Jimmy Carter and George H.W. Bush to be reelected provide additional historical reasons to be skeptical of the claim that the twenty-second amendment has weakened the presidency.¹⁸ They were sufficiently weak in their first terms that they couldn't even manage to get reelected. There is no weaker second term President than the ones who "preside" over it from the comfort of their presidential libraries. I don't see how their failure to be reelected could be traced to the twenty-second amendment since their weakness occurred when it was still possible for them to be reelected. Is it possible that the twenty-second amendment has so weakened the presidency that one-term presidencies have become more likely? I don't think so, but of course it is impossible to know for sure.

It seems to me that weak Presidents are Presidents whose policies fail or appear to be failing or who get caught with their hands in the cookie jar before dinner. President Obama's currently weak position could turn around before the next presidential election if the economy and the wars in Iraq and Afghanistan take significant turns for the better. Even if that doesn't happen and he still manages to squeak out a second term victory, he is likely to appear weak in his second term, and it won't be due to the twenty-second amendment.

There are additional reasons that lead me to be skeptical concerning the effects of the twenty-second amendment on the presidency. Dean Paul's intuitively appealing idea is that the day after the second election, the President becomes a lame duck and no one really has to listen to him or her anymore. The future is with some other leader, maybe of a different party, and no one's future success depends on this lame duck President. While there some theoretical truth to this view, as a practical matter it seems to me to be wrong, or at least to grossly overstate any effect of the twenty-second amendment.

¹⁸ I do not include the failure of Gerald Ford to be elected President because his status as the only person to serve as President without being elected at least as Vice-President and the immediate post-Watergate environment make his case unique.

The primary reasons I am skeptical concerning the effects of the twenty-second amendment have to do with the structure of the government of the United States and its unique version of separation of powers. The President's disconnection from the party and legislative majority makes the President a relatively strong leader even during the second term. The second term is a relatively long four years, a long time to wait out the incumbent, especially in today's 24/7/365 news world. Further, the identity of potential successors in the opposition and the President's own party maybe unknown until relatively late in the game. Potential successors may need to be in the incumbent's good graces as they jostle for position in the ever-lengthening process of choosing nominees.

The President's second term power is also preserved because, unlike the system in many other countries, the term is fixed. Neither the legislature nor the President's party can force early elections or remove the President from his or her position of leadership. This so called "lame duck" retains enormous power over the Executive Branch including the power to appoint and remove the entire layer of political appointees. Many Presidents have cleaned house at the beginning of the second term and replaced important officials at the Cabinet level and within the White House. Through these political appointees, the President retains a high degree of control over administrative agencies and the military, and still has the exclusive power to appoint federal judges. The President also retains the veto power, and Members of Congress may need the President's support at mid-term election time.

I recognize, and have written extensively about, the fact that Congress exerts a great deal of power over the administration of the law.¹⁹ Both formally and informally, congressional committees and individual Members of Congress engage in extensive oversight of the administrative state. Congress uses substantive legislation and the budget process to tie or force

¹⁹ See Jack M. Beermann, *Congressional Administration*, 43 *San Diego L. Rev.* 61 (2006).

the President's hands in numerous areas. The President needs the cooperation of Congress to accomplish much of anything both in terms of legislation and appointments that need confirmation by the Senate. The reality is that many appointees, especially to independent agencies, are "recommended" to the President by Members of Congress, and the President has strong reasons to go along. But this activity occurs even in the President's first term, and does not represent any weakening historically or unique to the second term. In fact, the President's hand may be strengthened in the second term vis a vis legislators since the President no longer needs their help with reelection.

The realities of the job also lead me to suspect that the twenty-second amendment does not have much effect on the President's power or even his or her longevity in office. The job is demanding and exhausting. Further, enemies are likely to accumulate over time, so that long-serving Presidents will find it harder and harder to be reelected. A comparative perspective bears this out. Very few leaders of western democracies serve much longer than eight years. Most serve less. It is true that the twenty-second amendment prevents the United States from continuing in office exceptional leaders like Germany's Helmut Kohl and Konrad Adenauer or France's François Mitterrand who all served substantially longer than eight years. Add to that a few more leaders who served in the ten to twelve year range, like Margaret Thatcher of Great Britain and France's Charles de Gaulle and Jacques Chirac, and maybe the United States is missing out. Perhaps the country would have been better off had Ronald Reagan, Bill Clinton or George W. Bush been able to run again. But notice this is not primarily an argument based on the weakening of the presidency, but rather an argument that we have foolishly made great leaders ineligible for continued service even if they would still be the best choice for President

after completing two terms.²⁰ Given that it took 150 years for a President to be elected for a third term, I doubt that many of our two term Presidents would actually run for and win a third term.

II. The Potentially Unlimited Presidency

In addition to reasons for doubting that the twenty-second amendment has done much, if anything, to weaken the presidency, there are reasons to fear the potentially unlimited presidency. These reasons can be sorted into two rough categories, namely effects of the potentially unlimited presidency in terms of the potential for abuse of the power of the presidency and effects of the potentially unlimited presidency on the political environment surrounding the presidency. As we shall see, these are somewhat related but it find it useful to distinguish them for purposes of analysis.

A. Power of the Potentially Unlimited Presidency

My greatest fear of a presidency without term limits is the potential for abuse of the power of the presidency by an incumbent hoping to stay in office. In my view, we are better off with the President knowing that at a date certain, it's over. I don't mean excessive photo opportunities or even the use of Air Force One for trips that straddle the fuzzy line between presidential business and campaigning. My concern is the use of the apparatus of the state to maintain power through covert activity, spying, dirty tricks and the like. The tantalizing possibility of three, four even five terms may induce extreme efforts to maintain power. I fear

²⁰ I recognize that this argument is related to the strength of the presidency since it is likely that a great leader who was reelected multiple times would be a strong President.

the use of the FBI, the Department of Homeland Security, the CIA and even the military as tools to protect the incumbent.

It takes but a cursory glance around the world to find dozens of national leaders who place their own interest in maintaining power ahead of the political, social and economic aspirations of their people. This may seem far-fetched in the United States, with our strong tradition of resolving even the most difficult presidential transitions in an orderly fashion. However, the activities of the administration of Richard Nixon should remind us that we are not immune to excessive concern for personal position and privilege. If a President is willing to lie to convince the American people to go to war and risk the lives of thousands of young men and women, it should not be surprising if an American President would also be willing to employ whatever means at his or her disposal to remain in office.

What's more, the American President is likely to have less difficulty convincing others in the Executive Branch to participate in efforts to stay in power than would be the case in other western democracies. Unlike parliamentary systems in which Cabinet Ministers have their own political power bases, in the United States nearly all officials with significant responsibilities in the Executive Branch owe at least their current positions to the President.²¹ The general lack of independence we see in Department Heads in the United States might be exacerbated if Presidents had even more incentive to keep close control over the Executive Branch throughout a potentially unlimited presidency.

The potentially unlimited presidency could result in the realization of one of the greatest fears of the founding generation, resemblance between the presidency and a monarchy. Service for decades would be a first step in that direction. Further, a 60 year old President with a 35 year

²¹ The major exception involves the independent agencies, whose appointment is often "recommended" by powerful Members of Congress who leave the President without much choice in the matter. See Beermann, *Congressional Administration*, supra note x at 136-37 n. 362.

old child could serve four terms and then “bequeath” the presidency to his or her child. This could, of course, happen after one or two terms with the twenty-second amendment in place, and some people have bemoaned the genesis of political dynasties like the Kennedys and the Bushes.²² While the likelihood of a child succeeding a parent as President is obviously small, and the child would still need to be elected, the potentially unlimited presidency makes it more likely.

At first glance, this argument against repealing the twenty-second amendment might seem inconsistent with the claim above the repeal is unlikely to have much effect. The former discussion is addressed to the normal situation in which the President behaves as Presidents usually do, but perhaps enjoys enhanced political power because he or she does not automatically become a lame duck at the moment after the second election is over. This latter discussion is about an extraordinary situation in which a President becomes so obsessed with power that he or she uses the awesome power of the presidency to perpetuate his or her presidency without regard to the will of the people or good of the country. These tools exist regardless of the existence of the twenty-second amendment. The twenty-second amendment merely reduces the payoff of the abuse of the power of the presidency.

B. Altered Political Environment

I am also concerned that repealing the twenty-second amendment would alter the political environment in undesirable ways not directly related to the power of the presidency. One possibility is that it would increase the percentage of time when the President’s actions are

²² See *The Economist*, Meritocracy in America: Ever higher society, ever harder to ascend, December 29th 2004. The conclusion that there is a dynasty effect in Congress is supported by Ernesto Dal Bó, Pedro Dal Bó, & Jason Snyder, *Political Dynasties*, 76 *Review of Economic Studies* 115 (2009). The *Economist* article was cited in the working paper version of the Bo, Bo & Snyder Article. See NBER Working Paper 13122 available at <http://www.nber.org/papers/w13122>.

constrained by concern over the next presidential election. It is often said that in the second term, Presidents attend to their legacies, and may leave partisan politics behind to take action more generally aimed at the public interest. This would happen less often, only when the President announces relatively early in a term that the current term will be his or her last.

The potentially unlimited presidency may also make it less likely that Congress would cooperate with the President in the second term if the President was not a lame duck. The costs of cooperation may be less for the opposition party if it is known that the President cannot parlay legislative success into reelection. With the potentially unlimited presidency, there is never an end to the jockeying for position between the President and Members of Congress, especially those with presidential ambitions of their own. In fact, the second term presidency may be weakened by the possibility of repeated reelection because the incentive to attack the President would continue throughout the second term.

I am also concerned that the potentially unlimited presidency will hinder the grooming of new generations of potential presidential candidates. Faced with a strong President who might continue to serve indefinitely, potential leaders may focus their energies elsewhere, for example in state government or in developing a power base in Congress. Of course, the country may be better off with an experienced, popular President than with the alternatives, so this is not an especially important reason to be concerned about the elimination of presidential term limits.

III. Alternative Ways to Change the Balance

My general sense is that the President has not been weakened and that the twenty-second amendment has had little effect on the power of the presidency. Suppose, however, for the sake of argument that I am wrong. Would eliminating term limits be a cure or even a palliative? In my view, there are better alternatives for beefing up the power of the presidency than eliminating

presidential term limits. These alternatives are likely to work better, with less reason to be concerned about the negative effects of the potentially unlimited presidency discussed above.

The first alternative would be to strengthen separation of powers norms concerning intrusions on presidential power. The generally lax enforcement of separation of powers norms has benefitted the presidency in some respects and has weakened the presidency in others. The virtual absence of a non-delegation norm has, at least on the surface, benefitted the presidency by allowing the Executive Branch to exercise vast discretionary power pursuant to delegations.²³ However, my sense is that the primary beneficiary of weak separation of powers norms is Congress, which is allowed to place conditions and restrictions on the appointment and removal of Executive Branch officials and which has been allowed to legislatively micro-manage many of the operations of the Executive Branch. The power of the Executive Branch would be enhanced relative to Congress if the federal courts created and enforced separation of powers norms against some of the myriad ways that Congress, formally and informally, oversees the operation of the Executive Branch. Even the lenient non-delegation doctrine may benefit Congress politically by making it easier to pass legislation when agreement on more specific legislation could not be achieved.²⁴

In particular, the courts could rule that Congress may not place restrictions in the form of qualifications or bi-partisanship requirements on who a President may appoint as officers of the United States and may not place any restrictions on presidential removal of such officers.²⁵ In

²³ See *Whitman v. American Trucking Associations*, 531 U.S. 457, 474-75 (2001) (Scalia, J.) (“we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law’” quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

²⁴ The classic works making this point are Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* 92-126 (2d. ed 1979) and David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).

²⁵ The recent decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), took a small step toward increased presidential control over independent agency officials but at the same

essence, the courts could force Congress to place the independent agencies under presidential control. The courts could even go so far as to rule that Members of Congress violate the Constitution if they suggest potential nominees for Executive Branch positions to the President. This may be an unlikely norm to create and a difficult one to enforce, but it would have a significant effect if it were to be voluntarily obeyed in a substantial proportion of cases. Many independent agency heads are more loyal to key Members of Congress than to the President because they owe their political lives to the Member of Congress who pushed the President to nominate them. The courts could also prohibit Members of Congress from engaging in *ex parte* contacts during agency proceedings and prohibit Congress from requiring the extensive reporting that legislation now requires from the Executive Branch. The courts could enhance the President's veto power by ruling that legislation may address only a single subject or that each separate subject, including each line in an appropriations law, is a separate bill for the purposes of the Presentment Clause²⁶ and it could prohibit Congress from passing substantive legislation in the guise of appropriations provisions. Finally, the courts could rule that the Senate must bring all presidential nominees to the floor of the Senate for a vote.

If I had to choose a single change to the structural aspects of the Constitution to enhance the power of the presidency, it might be to eliminate the Senate's power of advice and consent over the appointment of Officers of the United States. Given Congress's control over legislation governing the substance of agency action and the budget, this check on presidential power may

time appeared to accept the tradition of for-cause restrictions on the removal of agency heads. In that case, the Court held that Congress may not require cause for agency heads to fire a subordinate when the agency heads themselves are protected from presidential removal by a for-cause restriction on termination. No statute provided that the agency heads in that case, the Securities and Exchange Commissioners, were protected by a for-cause termination provision, but the Court accepted the agreement of the parties that the Commissioners were so protected for the purposes of deciding the case. See *id.* at 3148-49 (“The parties agree that the Commissioners cannot themselves be removed by the President except [for] “inefficiency, neglect of duty, or malfeasance in office,” . . . and we decide the case with that understanding.”)

²⁶ U.S. Const. Art. I § 7.

be overkill. The Senate uses this power to frustrate the President's agenda and force the President to appoint officers favored by Senators. In my view, repealing this provision would have a more certain and immediate effect on the balance of power than would eliminating presidential term limits. The President's power would also be enhanced if the Senate's advice and consent power over federal judges was eliminated. On balance, I would not favor this change because I would be concerned over the elimination of judicial review as a reliable check on executive action. Judicial independence may not require Senatorial advice and consent, but the requirement serves to temper the President's ability to load up the federal courts with judges who will be sympathetic to the administration's policies.²⁷

Another way to enhance the President's power relative to Congress would be to impose term limits on service in Congress. The Supreme Court has ruled that state-imposed congressional term limits are unconstitutional.²⁸ Perhaps Congress would have the power to impose term limits on itself, but language in the *Term Limits* opinion suggests that Congress is in the same position as the states and may not impose qualifications for service different from or in addition to those specified in the Constitution.²⁹ If Dean Paul is correct that term limits weaken the presidency in relation to long-serving Members of Congress, imposition of term limits on Congress might be a more effective corrective than repealing presidential term limits. The

²⁷ The earliest district court decisions concerning the constitutionality of federal health care reform legislation illustrate the importance of appointing sympathetic judges. In the first three decisions, two democratically appointed district judges ruled in favor of the law and one republican appointee ruled against it. See Mark Sherman, Big legal setback for Obama's health care overhaul, Associate Press story Mon. Dec. 13, 2010 ("The ruling by U.S. District Judge Henry E. Hudson, a Republican appointee in Richmond, Va., marked the first successful court challenge to any portion of the new law, following two earlier rulings in its favor by Democratic-appointed judges.") This admittedly small sample suggests that party affiliation may be correlated with judicial sympathy for legislation that is challenged in court as unconstitutional. In my view, partisan appointment of judges has proven contrary to the ideal of the rule of law as a law of rules and not of people, and either partisan appointment should be abolished or judicial independence should be reduced by subjecting judges to periodic retention elections or overruling by a super-majority in Congress. Issues surrounding judicial behavior are far beyond the scope of this article. For more on this see Jack M. Beermann, The Supreme Common Law Court of the United States, 18 B.U. Pub. Int. L.J. 119 (2008).

²⁸ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

²⁹ See id. at 832-33.

demands and political realities of the presidency make long-term presidential service much less realistic than long-term service in Congress. Members of Congress are able to make a career of legislative service, and their power depends on their longevity and networks of cooperation among Members and with administrative agencies. As Members of Congress become entrenched through long service, they build relationships with agency officials through which they can in effect conspire to undercut the President and advance Congress's preferred policies.³⁰ If Members of Congress were subject to term limits, they would lose some of the ability to pull the levers at the federal agencies subject to their oversight. Congress would undoubtedly lose some able and dedicated legislators, but it could easily pick up the slack in terms of quality by heavier reliance on professional, career staff.

These proposed reforms, and perhaps others, would enhance the power of the presidency more than removing the two term limitation on presidential service.

IV. Conclusion

George Washington's example of the two term presidency was not broken until Franklin Delano Roosevelt was elected for a third and then fourth term in the 1940s. The national reaction was swift and certain—the twenty-second amendment effectively limited presidential service to two terms. Dean Paul laments that this change has weakened the presidency by turning all Presidents into lame ducks after four years and proposes repeal of the amendment to restore a more healthy balance. While his claim has strong intuitive appeal, I am skeptical. In my view, it is unlikely that the twenty-second amendment has had much of an effect on the

³⁰ See Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 *Minn. L. Rev.* 1696, 1701 (2009) (“If rational bureaucrats are given a choice between pleasing a President who is here today and gone tomorrow and pleasing a long-serving congressional committee member, they will always choose to please the committee member.”) Calabresi and Terrell overstate congressional power, because they don't account for the power the president has over the bureaucracy, even in the short term. However, the general point is well-taken, and reducing the ability of Members of Congress to serve indefinitely would strengthen the President's hand.

power of the presidency and it is similarly unlikely that repeal of the twenty-second amendment would significantly enhance its power under normal conditions. Further, there are reasons to fear the potentially unlimited presidency that repeal of the twenty-second amendment would create. Chief among those fears is the incentive it would create for incumbent Presidents to abuse the awesome power of the office to perpetuate their rule. The actions of the power-hungry President would certainly demonstrate enhanced presidential power, but at an unacceptable cost to democracy and accountability. Instead, if the goal is to re-shape the balance of power within the federal government, other reforms, such as term limits on Members of Congress and strict enforcement of separation of powers, might be better alternatives. I realize that much of this is highly speculative, and perhaps Dean Paul is correct, but he faces a heavy burden of justification for making a change to a principle that has been so deeply ingrained in the political culture for so long.