Sultan
Constitutional Law I
Spring 1996

At the general election on November 3, 1995, the voters of Ohio adopted Amendment 73 to their State Constitution. Proposed as a "Term Limitation Amendment," its preamble stated:

> "The people of Ohio find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Ohio exercising their reserved powers, herein limit the terms of the elected officials."
>
> Section 3 of Amendment 73, applies to the Ohio Congressional Delegation. It provides:
>
> "(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Ohio shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Ohio."
>
> "(b) Any person having been elected to two or more terms as a member of the United States Senate from Ohio shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Ohio."

Pork Barrell Spender [PBS], a member of the Congress from Ohio, brings an action for a declaratory judgment that Section 3 of Amendment 73 violates the United States Constitution, and for an injunction prohibiting its implementation. In his pleadings, PBS indicates that should the amendment be implicated, he would have to run as a "write-in candidate" as his name would be excluded from the Ohio ballot. In response, the Ohio Attorney General's brief argues that Amendment 73 is valid because it merely precludes certain congressional candidates from being certified and having their names appear on the ballot, and still allows them to run as write in candidates and serve if elected. The Attorney General also contends that Amendment 73 is constitutional because it is

formulated as a ballot access restriction, rather than an outright disqualification of congressional incumbents.

A recent graduate from the University of Dayton Law School, you are a clerk to the U.S. District Court judge assigned the case. She requests that you do an extensive study of the issue(s) and prepare a memorandum on how she should rule, and why she should rule that way.

Energetically researching the problem you came upon the following groups of materials:

I U.S. Constitution

A. Art I, § 2, ¶ 2 (House Qualifications Clause"):

> No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

B. Art. I, § 3, ¶ 4 ("Senate Qualification Clause"):

> No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

C. Art. I, S 4, ¶ 1, ("Times, Places and Manner Clause):

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.

D. Art. I S 5, ¶ 5, ¶ 1 ("Legislative Judgment Clause"):

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.

E. Art. V ("Amendments Provision"):

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

F. Art. VI, ¶ 3 ("Religious Test Prohibition"):

... no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

G. Amendment X ("States Rights Amendment"):

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II FEDERALIST PAPERS

A. Number 52 (James Madison):

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election be an inhabitant of the State he is to represent; and during the time of his service must be in no office under the United States. Under these reasonable limitations, 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."

B. Number 57 (James Madison):

"Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."

III HISTORICAL MATERIALS AFTER RATIFICATION

A. Five States supplemented the constitutional disqualifications in their very first election laws. In other words, five of the state election laws enacted immediately after ratification of the Constitution imposed additional qualifications for their respective members of the United States House of Representatives. These qualifications took various forms, but did not involve House Districts.

B. House Districts:

In addition to III A above, seven states, after ratification, divided their respective states into House Districts. While the Constitution merely requires representatives to be inhabitants of their State, the legislatures of five of the seven States that divided themselves into districts for House elections also added that representatives had to be inhabitants of the district that elected them. Three of these States adopted durational residence requirements too, insisting that representatives have resided within their districts for at least a year (or, in one case, three years) before being elected.

III POLITICAL SCIENCE MATERIALS

A. Presently, states have disqualified as possible congressional candidates, mentally incompetent persons currently in prison, and persons with past vote fraud convictions.

B. Federal law gives incumbents enormous advantages in building name recognition and good will in their home districts:

(permitting Members of Congress to send "franked" mail free of charge), permitting Members to have sizable taxpayer funded staffs, and establishing the House Recording Studio and the Senate Recording and Photographic Studios. At the same time, incumbent Members of Congress enjoy spending and contribution limits in congressional campaigns that can prevent challengers from spending more than theydo, so as to overcome their disadvantage in the name recognition. Many observers believe that the campaign finance laws also give incumbents an enormous fund-raising edge over their challengers by giving a large financing role to entities or "special interests" with incentives to curry favor with incumbents.

Indeed, there exists no instance in which Congress changed election laws in

such a way as to lessen the chances of re—election for incumbents or to improve the election opportunities for challengers.

At the same time that incumbents enjoy the electoral advantages that they have conferred upon themselves, they also enjoy astonishingly high reelection rates. Thus, it is no surprise that, over the past thirty years, a weighted average of ninety percent of all House and Senate incumbents of both parties who ran for re-election were re-elected, even at times when their own party lost control of the Presidency itself.
