CONGRESSIONAL TERM LIMITS: GOOD GOVERNMENT OR MINORITY VOTE DILUTION?

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INTRODUCTION

Americans have become increasingly frustrated with their elected representatives in recent years. One result of this frustration is that many are seeking to limit the number of terms that their representatives can remain in office.¹ Although state² and local officials³ are targets of this discontent, it seems to be most vehemently aimed at the United States Congress.⁴

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¹ See Tom Teepen, *Term Limits Lose Out to Real Reform*, ATLANTA CONST., Feb. 14, 1993, at H7 ("Term limitations are supposed to be the populist answer to the public's frustration with entrenched incumbents."); Liza M. Velazquez, *Disgruntled Voters Seek Change; Term-Limit Initiatives Nationwide*, NEWSDAY, Aug. 18, 1993, at 3 (quoting John Fund, a Wall Street Journal editorial writer who has written a book on term limits as stating: "Term initiatives are the product of a general belief that career politicians have failed us"); see also W. John Moore, *So Long, Mr. Smith*, 24 NAT. J. 2052, 2054 (1992) ("Frustration with the power of entrenched incumbents in Congress and in state legislatures produced many of the leaders of the term limits movement. Popular discontent with legislatures has provided the troops."); Martin Nolan, *One-party Grip Stills Hill Wind of Change*, BOSTON GLOBE, Jan. 7, 1993, at 6 ("The term-limit movement, which would restrict voters . . . expresses self-destructive frustration.").

² See Sherry Bebitch Jeffe, *Have The Term-Limit Babies Broken Up Sacramento's Gridlock?*, L.A. TIMES, July 25, 1993, at M6 (commenting on the effect of California's Proposition 140, which limited the terms of that state's legislators and stating "[t]erm Limits were a reaction to the perceived arrogance and corruption of professional politicians.").

³ See Katti Gray, *Suffolk Agrees to Put Term-Limit Issue on November Ballot*, NEWSDAY, Aug. 18, 1993, at 3 (reporting that New York's Suffolk County legislature decided to allow voters to consider a term-limit measure which, if passed, would bar county legislators from running for more than six two-year terms); Maralee Schwartz & Dan Balz, *Term-Limit Efforts In New Orleans Decried As Racist*, WASH. POST, Oct. 13, 1991, at A8 (stating that New Orleans citizens petitioned for a ballot measure to limit city council members to two four-year terms in order to "bring new faces" into local government); Velazquez, *supra* note 1, at 3, (noting that there is a proposed ballot initiative in New York City to limit "major city office holders" to two consecutive four-year terms).

⁴ This is not only due to the complaints that many voters have about Congress, see *infra* notes 5-11, but also the national attention focused on Congress by the presidential campaign of 1992 and the success of term limits at the state legislative level. See D'Jamila Salem, *Where The Candidates Stand On Campaign Reform*, L.A. TIMES, May 25, 1992, at A22 (discussing the presidential candidates' respective stances on limiting donations by special interest groups, term limits, and caps on corporate

America's frustration with Congress is understandable. The House check-kiting scandal,⁵ the indiscretion of the Senate's "Keating Five,"⁶ stories of outlandish perks,⁷ allegations of embezzlement,⁸ sexual harassment,⁹ and charges of general congressional inactivity¹⁰ have combined to diminish the respectability of Congress. The result has been a public cry for congressional term limitations, intensifying over the years from a murmur to a great din.¹¹

donations); see also Jay Mathews, *California Term-Limit Law Upheld*, WASH. POST, Oct. 11, 1991, at A1 (describing how the California Supreme Court upheld California's state legislative term limit law).

⁵ According to one commentator:

In [the autumn of 1991] interest in term limits reached the political equivalent of what nuclear physicists call "critical mass." . . . Historians may one day conclude that Congress's slide into disrepute became especially steep on September 18, 1991, when the General Accounting Office released a report on the administration—or lack of administration—of the bank run for members of the House of Representatives. It was the first sputtering of the fuse that would lead, four months later, to the Big Bang of the check-bouncing debacle.

GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* 15 (1992).

⁶ See Jerry Roberts, *How Big Risks Led To Scandal For Lincoln S & L*, S.F. CHRON., Dec. 19, 1989, at A1 (linking five U.S. senators to a savings and loan calamity).

⁷ See Sara Fritz, *Congress Is Not Junking Its Junkets, Reports Show*, L.A. TIMES, June 12, 1992, at A6 (claiming that "despite criticism, House members are still jetting around on the tab of special interests and collecting honorariums").

⁸ See Linda Feldman, *Rostenkowski's Troubles Could Tarnish Congress*, CHRISTIAN SCI. MONITOR, July 22, 1993, at 1 (noting that claims that Illinois Representative Dan Rostenkowski, Chairman of the House Ways and Means Committee, embezzled approximately \$21,000 dollars from the House Post Office could further damage the reputation of a Congress trying to improve its image.).

⁹ See Judi Hasson, *Scandal Puts Senate on the Spot*, USA TODAY, Nov. 25, 1992, at 4A (discussing allegations of sexual harassment leveled at Oregon Republican Bob Packwood and other senators); see also Karen Tumulty, *Senate Ethics Panel Pursues Packwood Harassment Case*, L.A. TIMES, Aug. 26, 1993, at A5 (stating that the Packwood "scandal has outraged women's groups, which had considered Packwood a staunch ally in their fight for abortion rights and other causes.").

¹⁰ See Elizabeth Neuffer, *House Delays a Vote on Bill for Urban Aid*, BOSTON GLOBE, June 12, 1992, at 3 (noting how congressional gridlock slowed passage of aid to riot-torn Los Angeles and other cities).

¹¹ See, e.g., WILL, *supra* note 5, at 3 ("I, like millions of other Americans, have been driven to the conclusion that something must be done to restore Congress to competence and respect, and that term limits can do it."). According to another commentator:

[T]he term limits steamroller . . . has been fueled by popular disgust for a Congress that's widely perceived to be out of touch with ordinary Americans. Incumbents, by voting themselves pay raises . . . , writing rubber checks, lobbying federal agencies on behalf of big campaign contributors

This Comment joins the voices cautioning against term limitations by focusing on the effect that they would have on minority voting power. Although the call for congressional term limits may be well-intentioned, it amounts to throwing the baby out with the bath water. In the estimation of some, term limits would herald both legislative responsiveness and civic empowerment. In actuality, this Comment argues, term limits would cause a detrimental shift in power from the legislative to the executive branch of government, reducing the influence of minorities¹² in national politics. As will be shown, this would occur because while minorities have more influence over Congress than over the president, their influence is dependent on having a Congress with the seniority and expertise necessary to counterbalance the president's substantial powers. Reducing the power of Congress would thus reduce the influence of minorities in national policy-making. Specifically, this Comment argues that by reducing, or more accurately, *diluting*, the ability of minorities to participate in the national decision-making process,¹³ state initiatives to limit the terms of congressional representatives violate Section 2 of the Voting Rights Act as amended in 1982.¹⁴

and otherwise exploiting the privileges and perks of power, have reinforced such perceptions.

Moore, *supra* note 1, at 2052.

Colorado was the first state to pass term limit legislation, in 1990. See COLO. CONST. art. 18, § 9a. California, Missouri, Washington, Florida, Ohio, Nebraska, Montana, Arizona, Arkansas, North Dakota, South Dakota, Michigan, Oregon, and Wyoming all passed term limit legislation in November of 1992. See, e.g., CAL. ELECTIONS CODE § 25003 (West 1989 & Supp. 1993); OHIO CONST. art. V, § 8. The measures impose limitations ranging from six to twelve years of congressional service. There are several other state drives for term limit legislation gearing up for referendum votes, with Nevada, Idaho, Utah, Oklahoma, and Maine considered the next states likely to adopt them. See Jennifer Warren & Alan C. Miller, *Wins in 14 States Fuel U.S. Term Limit Drive*, L.A. TIMES, Nov. 5, 1992, at A13 ("Energized by a 14-state sweep, proponents of congressional term limits . . . set their sights on a constitutional amendment."); see also *National Group Supports LaMura's Effort to Limit Town Board*, PR Newswire, Aug. 10, 1993, available in LEXIS, Nexis Library, CURRNT File ("To date, 15 states have imposed congressional term limit measures, earning over 22.5 million votes. In addition over 100 local term limit measures have been adopted nationwide.").

¹² The term "minority" or "minorities" in this Comment primarily refers to African-Americans, due to the fact that the majority of studies on minority voting analyze African-American voting patterns. Information regarding the voting patterns of other minority groups is presented where available.

¹³ The terms "national decision-making process" and "national politics" will refer to the means by which the federal government reaches the decisions that, by law or executive order, affect the citizens of the United States.

¹⁴ 42 U.S.C. § 1973 (1988). For the full text of Section 2, see *infra* note 151. The

Moreover, beyond their effect on the national decision-making process, term limits would also be a substantial setback for minorities who have made great gains in the realm of congressional leadership since the Voting Rights Act was signed into law in 1965.¹⁵ Term limits threaten to erase many of these gains secured through the seniority system in Congress.

As previously stated, this Comment argues against term limits on the grounds that they will dilute the ability of minorities to participate in national politics. To understand this argument, one must first understand what the term "minority vote dilution" means. This is defined in Section I. Section II then discusses the powers of the executive branch relative to Congress, and argues that despite a term limitation on the presidency, such a limitation does not balance the executive's extensive powers with those of Congress. Section III discusses why Congress is more representative of minorities than the executive branch and it explains how the Voting Rights Act works to ensure that Congress provides minorities a voice in the national decision-making process. Finally, Section IV discusses why congressional term limits violate Section 2.¹⁶ But

essence of the amended provision is that voting procedures which result in an abridgement of the right of minorities to vote violate the Act. Evidence showing that such procedures result in minorities having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" can establish a violation. 42 U.S.C. § 1973(b) (1988). It is important to emphasize that discriminatory intent is not needed for a violation of Section 2; discriminatory result is sufficient.

¹⁵ See *infra* notes 213-20 and accompanying text.

¹⁶ Before beginning, the reader should note that this Comment does not discuss the constitutionality of term limits, which is a separate issue. In addition, it focuses only on the domestic powers of Congress and the president. For cogent discussions of both sides of the constitutionality issue, see Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341, 344 (1991) (arguing that state-imposed term limits are constitutional); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 101 (1991) (defending attempts to amend state constitutions to limit congressional terms against attacks based on the federal Constitution); Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415, 415-16 (1992) (arguing that term limits enacted through voter initiatives are unconstitutional and can only be properly enacted through a federal constitutional amendment); Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913, 1913-14 (1992) (exploring the "dubious constitutionality of state laws setting term limits on representatives in the United States Congress").

first, what is minority vote dilution?

I. DEFINING MINORITY VOTE DILUTION

Vote dilution

is a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group. [Minority vote dilution] is a special case, in which the voting strength of an ethnic or racial minority group is diminished or canceled out by the bloc voting of the majority. In extreme cases, minority vote dilution results in the virtual exclusion of one or more groups from meaningful participation in a political system.¹⁷

For example, imagine a city where minorities make up about 40% of the population, and they band together to support a candidate for mayor whom they feel represents their interests. Imagine that the remaining 60% of voters, all white, decide to place their support behind a different candidate whom they feel represents their concerns. On election day the white representative wins. In essence, the votes cast by whites washed out or diluted the strength of the minorities' votes. As long as the division of interests continued along the same lines, and the population ratio remained the same, minorities would never be able to elect a representative of their own to the office of mayor.¹⁸

There are three aspects of minority vote dilution that should be kept in mind as the arguments of this Comment unfold. First, minority vote dilution is a "phenomenon [that] occurs because the propensity of an identifiable group to vote as a bloc waters down the voting strength of another identifiable group."¹⁹ Similar to the example above, racial bloc voting in presidential and congressional elections affects the voting strength of minorities by limiting their ability to elect legislators who will faithfully represent their interests. Second, "[i]n the case of 'dilutionary laws,' . . . there is nothing in

¹⁷ Chandler Davidson, *Minority Vote Dilution, An Overview*, in MINORITY VOTE DILUTION 1, 4 (Chandler Davidson ed., 1984).

¹⁸ This hypothetical is drawn from the experiences of Tyler, Texas over a decade ago. In Tyler, blacks and Hispanics jointly comprised 37% of the town's population, yet even when voting as a bloc in the town's at-large elections they could not elect a minority candidate to the post of city commissioner. The effect of this racial bloc voting was that the white "ballots deluged those of . . . minorities year after year." *Id.* at 5.

¹⁹ *Id.*

their wording to suggest that they are discriminatory.”²⁰ While on their face term limits seem to affect all voters evenly, as will be shown, they do not.²¹ Finally, it should be noted that minority vote dilution can occur even *after* a minority representative or group of minority representatives is elected to Congress by virtue of the representatives being consistently outvoted on issues of concern to their constituents. Congressional longevity can actually work to curb such situations. With this factor in mind, “[p]olitical effectiveness [should] be measured by the actual ability to affect legislative decision-making,” and not just the presence of minorities in Congress.²²

A central thesis of this Comment is that term limits will increase the power of the president and the executive branch relative to the power of Congress. One major counter-argument that proponents of term limits like to emphasize is that the president already labors under term limits. So, they ask, don’t term limits just level the playing field?²³ The short answer is “no,” because the president’s powers are broader and more substantial than those of Congress. Indeed, the president’s powers are not as neatly defined as some might think.

II. THE POWERS OF THE EXECUTIVE BRANCH COMPARED WITH THOSE OF CONGRESS

A. *Separation of Powers: Reality or Myth?*

According to Supreme Court Justice Antonin Scalia, the Massachusetts Constitution set out the nuclear concept of separation of powers in 1780:

[T]he legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The

²⁰ *Id.*

²¹ See *infra* part IV.

²² Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1494 (1991).

²³ See Mark B. Liedl, *The Case For Limiting Congressional Terms*, THE HERITAGE LECTURES NO. 291 (Nov. 10, 1990), available in LEXIS, Nexis Library, ARCHIV File (on file with the Heritage Foundation, Washington, D.C.) (“Some critics of term limits argue that such a reform would tilt powers to the president at the expense of Congress. This argument fails to account for the fact that the balance already has been tilted toward Congress by the 22nd Amendment [which limited the presidential office to two terms].”).

judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.²⁴

Similarly, Scalia believes, "[t]he Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government."²⁵ Nevertheless, although the United States Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"²⁶ the concept does not reflect the way the three branches of the federal government actually work.²⁷

While many might share Justice Scalia's view that separation of powers is crucial to a lawful government, the fact that powers are shared among the branches of the federal government is not something to be considered negatively.²⁸ It is the cumulative effect that shared powers and congressional term limits would have on minority voting power that this Comment seeks to caution the reader about.²⁹ Without the power and influence accumulated by

²⁴ *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting MASS. CONST. of 1780 pt. 1, art. XXX).

²⁵ *Id.*

²⁶ U.S. CONST. art. I, § 1.

²⁷ One author states:

Part of the folklore taught in civics classes deals with the importance of separation of powers to the U.S. political system. Like other examples of folklore, however, there is much that is misleading about that term. . . . The problem is that this notion of separation—whether correctly conceived as separate institutions or incorrectly as separation of powers—has become part of the public's expectations about government.

MICHAEL L. MEZEY, CONGRESS, THE PRESIDENT, AND PUBLIC POLICY 206-07 (1989); see also EMMET J. HUGHES, THE LIVING PRESIDENCY 212 (1973) ("The President—any President—has some power to do almost anything, absolute power to do a few things, but never full power to do all things."); ARTHUR S. MILLER, PRESIDENTIAL POWER IN A NUTSHELL 72 (1977) ("[T]he historical theory has been supplanted sub silentio: legislation is a resultant of actions of all three branches, with Congress having the formal authority to enact statutes but with the Executive (and the courts) having effective control over much of the process."); see generally *infra* text accompanying notes 31-96 (discussing the powers of the president).

²⁸ "The Constitution . . . separated institutions and required that they share powers, an arrangement that remains today the cornerstone of the constitution against government." MEZEY, *supra* note 27, at 206-07.

²⁹ In fairness to the office of the president, just as the chief executive exercises power considered to be "legislative," Congress has *de facto* inroads into domains of Executive power as well. See *Morrison*, 487 U.S. at 696-97 (holding that the Ethics in Government Act does not violate the separation-of-powers principle by unlawfully interfering with the functions of the Executive branch). But see *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that Congress cannot reserve for itself the power to remove an officer charged with execution of a law except by impeachment, because

congressional members over time,³⁰ power and influence which is not affected by the possibility of "lame duck" status, the totality of presidential powers will outweigh those of Congress. As will be shown, this is true despite the fact that the president has a maximum term of office of eight years.

B. *The Administrative Powers of the Executive Branch*

1. The Administrative State

The president's extensive powers are most evident in the area of the federal bureaucracy. As one author has described it, "[t]he locus of governmental power lies in the congeries of agencies and departments that make up the Federal bureaucracy, topped by a Chief Magistrate and his several thousand . . . close associates. The United States, beyond question, is the 'administrative state' with presidential leadership."³¹

The modern day administrative state results in part from Congress's own actions in response to the growth of the United States and its responsibilities.³² As the United States grew from a

that would give Congress control over execution of the laws).

For example, the Appointments Clause of the Constitution allows Congress to review the president's nominees for certain government posts and to delegate the appointment of "inferior" officials to the courts or administrative agencies. See U.S. CONST. art. II, § 2, cl. 2.

³⁰ In fact, as one supporter of term limits has noted: "Bureaucrats are far more responsive to congressmen, who likely will remain in office long after the president and his team have left town." Leidl, *supra* note 23, at 1. Keep in mind, however, that there is a distinction between bureaucrats and the agency chiefs (i.e., Cabinet members) appointed by the president. See *infra* text accompanying notes 36-40.

³¹ MILLER, *supra* note 27, at 31. Professor Miller is not alone in coming to this conclusion. See also MEZEY, *supra* note 27, at 67 ("In short, the twentieth-century United States has become a presidential nation, with the president at the head of its government and at the center of the nation's political consciousness."); SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT* 268-69 (1990) (noting that reforms which established the Executive Office of the President under Franklin Roosevelt "hastened the development of the 'administrative presidency,' which exercise[d] extensive domestic power autonomously on behalf of the president, through rulemaking and policy implementation" (footnote omitted)); BERNARD ROSEN, *HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE* 4 (1989) (stating that the Constitution vests executive responsibility over the bureaucracy in the president and establishes the president as the bureaucracy's head).

³² Note, for example, that in 1789 less than 800 employees worked for the executive branch and were basically concerned with collecting taxes, delivering the mail, running a small military, and conducting the country's limited foreign relations. See ROSEN, *supra* note 31, at 5. Currently the executive branch has over two-and-a-half million employees proposing, implementing, and enforcing thousands of laws. See *id.*

small democracy into a vast and complex nation, Congress responded by becoming increasingly professionalized internally and by delegating power to the agencies of the executive branch.³³ Therefore, although the legislative branch was not solely responsible for the growth of the administrative state, it did play a major part in its creation.³⁴ A relevant question is "If Congress helped to create this administrative state, why can't it exercise more control over it than the president?" There are two reasons. One is that the Constitution entrusts the president with the task of managing the administrative agencies.³⁵ The second reason is that presidents have means by which they can exercise control over the bureaucracy which, although not absolute, are strong enough to give them more power than Congress over administrative policies. These means are discussed below.

2. How the President Exercises Control Over the Administrative State

a. *The Power of Appointment*

One means by which the president controls the administrative state is the substantial power of appointment given to him by the Constitution.³⁶ The president picks the members of his cabinet, who are the officers heading the administrative agencies of the federal government.³⁷ Most commentators agree that, for the most

³³ See MEZEY, *supra* note 27, at 73 (discussing the development of administrative agencies).

³⁴ "The administrative state did not spring from the soil or descend from the heavens. It was created piece by piece over the past two centuries, mostly by legislatures, sometimes by elected officials, judges, or the electorate acting by referendum." RONALD A. CASS & COLIN S. DIVER, *ADMINISTRATIVE LAW* 3 (1987). Professors Cass and Diver provide an excellent and concise history of the growth of the administrative state. See *id.* at 3-6.

³⁵ See U.S. CONST. art. II, § 3 (mandating that the president "take Care that the Laws be faithfully executed"). The effect of this section of the Constitution on presidential control of administrative agencies is reflected in a statement by President William Howard Taft: "Let any one make the laws of the country, if I can construe them." WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 78 (1916).

³⁶ See U.S. CONST. art. II, § 2, cl. 2.

³⁷ The officers of the cabinet are the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health and Human Services, the Secretary of Education, the Secretary of Energy, the Secretary of Housing and Urban Development, the Secretary of Veterans Affairs, and the Secretary of Transportation. See BLACK'S LAW

most part, the cabinet is not a body that is appointed and then operates independently of the White House.³⁸ Because cabinet members serve at the will of the president, they have a very strong incentive to institute his policies within their various administrative agencies. A president who has a strong agenda in a particular field will more than likely follow his own lead rather than any contrary opinion of his administrative chief.³⁹ In addition, that cabinet member will probably reconsider an issue if her opinion is different from that of the chief executive.⁴⁰

In essence, the cabinet officers are called upon "to administer a bureaucratic principality, subject to overriding policies, largely

DICTIONARY 140 (Abridged 6th ed. 1991).

³⁸ "The Cabinet has . . . stayed through most of the Republic's history an accommodating creature, rather than an enlightening creation, of the President." HUGHES, *supra* note 27, at 155; *see also* JEFFREY E. COHEN, *THE POLITICS OF THE U.S. CABINET* 26 (1988). Cohen states:

[T]he cabinet is not autonomous because it is overly dependent on the president. The president decides who will be the members of the cabinet and what role it will play in the administration. Unlike parliamentary systems, where cabinet and chief executive form a team and are indistinguishable, the U.S. cabinet is subservient to the president.

Id.

Clayton Fritchey, an aide to President Truman has written: "A President's advisers unquestionably play some part in his decisions, but in the long run a President gets the advisers he deserves or at least wants around him." HUGHES, *supra* note 27, at 340.

³⁹ As Clayton Fritchey asserts:

Our Chief Executives never lack for advice—including good advice. It's a question of what advice they take. The Pentagon Papers, along with the White House Papers . . . show that both Lyndon Johnson and Richard Nixon had a wide range of advice and intelligence on Vietnam, but, predictably, they chose to ignore the information and recommendations that ran counter to their war policy.

Id.

⁴⁰ *See* JAMES MACGREGOR BURNS, *PRESIDENTIAL GOVERNMENT* 149 (1966) ("Almost always the presidential preferences overcome the cabinet member's . . ."); *see also* COHEN, *supra* note 38, at 26 (noting that "secretaries generally lose in disagreements with the president"). For example, before being chosen as Secretary of Health and Human Services for the Bush Administration, Dr. Louis Sullivan was quoted by the Atlanta Journal and Atlanta Constitution as saying that he supported a woman's right to have an abortion but opposed federal funding for such procedures, and that he opposed government involvement in the issue. *See* David Hoffman, *Kemp Chosen for HUD*, WASH. POST, Dec. 20, 1988, at A1. At his appointment introduction, however, Sullivan stated that his view on abortion "is the same as that of President-elect Bush, with whom I agree completely." *Bush Transition*, 48 FACTS ON FILE 972, 972-73 (1988). Dr. John C. Wilke, president of the National Right to Life Committee noted, "Either Dr. Sullivan has been totally misquoted or he has completely changed his position in the last few days." *Id.*

dictated by the White House.”⁴¹ For those appointed officials who would disagree substantively with the president, the possibility of being fired, or not hired in the first place, is a stimulus to change their position on an issue. Granted, the president will be reluctant to use this power in all but the most extreme circumstances. Still, this fact should not discount recognition that potential removal from office is an element contributing to a cabinet official’s decision making and recommendations.⁴² The Supreme Court showed such recognition in *Bowsher v. Synar*,⁴³ noticing: “Once an officer is appointed, it is . . . the authority that can remove him . . . that he must fear and, in the performance of his functions, obey.”⁴⁴ Thus, presidential control over many of the policies and directives of administrative agencies is considerable, because the cabinet is “devoid of constitutional or personal power.”⁴⁵ One might think that the Senate’s power to approve presidential appointments would serve as a substantial check on the president’s control in this area; however, that is not the case.⁴⁶

⁴¹ HUGHES, *supra* note 27, at 150.

⁴² Most cabinet “removals” do not occur as outright firings. See, e.g., *Sununu’s Out; Now Bush Needs a Domestic Pro*, *NEWSDAY*, December 4, 1991, at 58 (remarking on former President Bush’s dismissal of White House Chief of Staff John Sununu: “President George Bush didn’t really kick Sununu off the White House Grounds. Instead, he created a new Cabinet-level post for the imperious Sununu and gave it the title ‘counselor.’”). Forced resignations are another popular tool of Presidents. See COHEN, *supra* note 38, at 26. In fact, the Reagan administration “prid[ed] itself on never . . . firing a Cabinet officer.” *Heckler’s Departure*, *L.A. TIMES*, Oct. 2, 1985, pt. 2, at 4 (noting that Health and Human Services Secretary Margaret Heckler, Interior Secretary James Watt and other high officials who had conflicts with the Reagan White House either were “promoted out” of their positions or “resigned”). A notable exception occurred within the Carter Administration in the summer of 1979. In a “cabinet shakeup” linked to tightening White House control of government departments President Carter fired Health, Education and Welfare Secretary Joseph Califano, Treasury Secretary W. Michael Blumenthal, and Transportation Secretary Brock Adams and accepted the resignations of several other top officials. See *Jordan’s New Role Signals An End to Cabinet Government*, 11 *NAT’L J.* 1356 (1979).

⁴³ 478 U.S. 714 (1986).

⁴⁴ *Id.* at 726 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)). The Court was explicitly referring to the unconstitutionality of Congress assigning to the Comptroller General certain “executive” powers to enforce the Gramm-Rudman-Hollings (deficit reduction) Act. See *id.* The Court’s rationale was that since Congress could fire the Comptroller, it essentially had control over him. Therefore, the Act violated the separation of powers principle. See *id.*

⁴⁵ HUGHES, *supra* note 27, at 151.

⁴⁶ While some might think that Lani Guinier’s aborted nomination for the position of Assistant Attorney General for Civil Rights is an example of the Senate acting as a check on a president’s power of appointment, it appears that the Clinton administration hindered the nomination more than any other person or group. For

The Constitution requires that the Senate "[c]onsent" to presidential appointments.⁴⁷ Congress, however, "has given the President pretty much free rein . . . in selection of cabinet members and other top appointees."⁴⁸ In fact, when former Texas Senator John Tower was rejected as President Bush's Defense Secretary, he was only the ninth cabinet nominee rebuffed by the Senate in 200 years.⁴⁹ One reason why the president is given "wide latitude in the selection of members of his cabinet . . . [is] that if he is not given a free hand in the choice of his cabinet, he cannot be held responsible for the administration of the executive branch."⁵⁰

example, when President Clinton, a longtime friend of Guinier, announced that he was withdrawing her nomination, he asserted that he had not read Professor Guinier's legal writings. The President stated that had he read them, he would not have nominated Guinier. See Ruth Marcus, *Clinton Withdraws Nomination of Guinier; Legal Writings Controversy Dooms Choice*, WASH. POST, June 4, 1993, at A1. Granted, a president cannot be expected to read everything a nominee has written. Someone in the Clinton administration had read Guinier's articles, however, and should have given the President a general idea of Guinier's views. Having noted that fact, President Clinton still seems to have wavered in his support for Guinier. For example, a month before withdrawing her nomination the President had "suggested that [Guinier's] writings were irrelevant because civil rights policy would be made by him and [Attorney General Janet] Reno." *Id.* at A11.

At best, the botched nomination was the result of staffers not properly informing the President. At worst, the President failed to support his nominee. The second hypothesis has been alleged by several commentators. See, e.g., Karen Grigsby Bates, *Scene 2, Take 3: Mr. Bill Learns to Count to 1,000%*, L.A. TIMES, June 6, 1993, at M5 (stating that Clinton's claim that he had never read any of Guinier's writings was a "slightly more sophisticated version of 'The dog ate my homework'"); see also Leslie Phillips & Bill Nichols, *Clinton Pulls Rights Nominee*, USA TODAY, June 4-6, 1993, at 1A (quoting Jesse Jackson saying: "If President Clinton and Senate Democrats had stood by Lani as President Bush and the Republicans stood by Clarence Thomas, she would be confirmed"). A comparison of President Bush's support of Clarence Thomas, despite vehement opposition from various interest groups and claims of sexual harassment, lends support to these allegations. See Jessica Lee, *Bush Doesn't Waiver on Thomas*, USA TODAY, Oct. 10, 1991, at 3A (quoting President Bush's response to questions about Anita Hill's charges of sexual harassment by Thomas: "Any question you ask me is going to be answered by saying, I support Clarence Thomas . . . There's no wavering. There's no condition. That's where it is and that's where it's going to stay!"). But cf. Marcus, *supra*, at A1 (quoting President Clinton as stating: "I cannot fight a battle that I know is divisive, that is an uphill battle, that is distracting to the country . . .").

⁴⁷ U.S. CONST. art. II, § 2, cl. 2.

⁴⁸ Joseph P. Shapiro, *The Presidency: The Office that Never Stops Changing*, U.S. NEWS & WORLD REPORT, Jan. 28, 1985, at 40, 41.

⁴⁹ See *Senate Rejects Tower 53-47; Bush to Rush Replacement*, L.A. TIMES, Mar. 9, 1989, at A1.

⁵⁰ Ronald C. Moe, *Senate Confirmation of Executive Appointments: The Nixon Era*, 32 PROC. ACADEMY POL. SCI. 141, 149 (1975).

b. *The President, the Administrative State, and the Media*

Another way in which the president controls the administrative state is through his substantial influence with the media, often to the detriment of any congressional members who would oppose his appointment choices or other administrative decisions.⁵¹ By calling a press conference or giving an address from the Oval Office the president can communicate directly with millions of Americans to promote his decisions. By contrast, congressional leaders usually do not have the same access to national television to tell their side of a story.⁵² By utilizing the mass media, the president can often prompt voters to call, write, or otherwise put pressure on their representatives to support his programs.⁵³ Briefly stated, the president has "unequaled public visibility[] and unparalleled ability to influence public opinion, to mobilize public support, and to set the policy agenda."⁵⁴ Besides using the media and the public to set the national agenda, the president also uses his power over budget proposals to control the administrative state.

⁵¹ See Shapiro, *supra* note 48, at 42; see also HUGHES, *supra* note 27, at 218 ("The modern network of mass media has given the Presidency an almost revolutionary opportunity to create, to control, to distort, or to suppress the news."). President Reagan, in particular, excelled in using the media to put pressure on Congress:

Reagan carefully used nationally televised speeches, calibrated to important congressional votes, to generate public support for his position. These speeches explicitly encouraged citizens to communicate with their legislators and to urge them to support the president. In several cases, the television appeal and the follow-up constituency effort led to a major presidential victory in Congress

MEZEY, *supra* note 27, at 106.

⁵² See BURNS, *supra* note 40, at 75 (stating that the president has "[a]ccess to television and radio to tell his side of any political story, with no equivalent right conceded by the networks to . . . say, the Speaker of the House, the opposition party, or the majority leader of the Senate").

⁵³ See ROBERT A. LISTON, *PRESIDENTIAL POWER, HOW MUCH IS TOO MUCH?* 135 (1971) ("[The President's] ability to stand before the microphones and cameras and speak directly in language people can understand [allows him to use] his esteem to enlist their support. Thus, he may be able, by arousing public support, to force his program upon reluctant . . . congressmen, bureaucrats, and lobbyists."); see also Shapiro, *supra* note 48, at 42 ("Television gives a President a direct opportunity to get to the public, shape opinion and form coalitions to help get his legislation before Congress." [President] Reagan's gift for using TV . . . won him the nickname 'the Great Communicator" (quoting Professor Martha Kumar of Towson State University)).

⁵⁴ Frederick M. Kaiser, *Congressional Oversight of the Presidency*, *THE ANNALS*, Sept. 1988, at 75, 79.

c. *The President's Budgetary Control of the Administrative State*

A third way in which the president exercises a substantial amount of control over the administrative state is by approving or rejecting the budget proposals and the recommended rules of administrative agencies. The Budget and Accounting Act of 1921⁵⁵ states that administrative agencies cannot submit their budget requests directly to Congress but, instead, must pass them on to the president who reviews and revises the proposals before sending them on to Congress.⁵⁶ President Franklin D. Roosevelt centered that review power in the Bureau of the Budget in 1936.⁵⁷ Although initially the Bureau of the Budget and its successor, the Office of Management and Budget ("OMB"), operated in a nonpartisan fashion, over the past two decades both Republican and Democratic presidents have made it much more of an ideological organization that pursues the policy goals of the White House.⁵⁸ By determining funding priorities for different administrative agencies, the OMB is somewhat of a policy-making arm of the White House.⁵⁹

This policy-making function of the OMB became particularly acute after President Reagan issued Executive Orders 12,291⁶⁰ and 12,498,⁶¹ which established that all new, and existing, "major" administrative rules would be reviewed by the OMB.⁶² The Reagan

⁵⁵ Pub. L. No. 67-13, ch. 18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.)

⁵⁶ See H.R. No. 14, 67th Cong., 1st Sess., 4-5 (1921); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 226-27 (1985).

⁵⁷ See FISHER, *supra* note 56, at 135.

⁵⁸ See MEZEY, *supra* note 27, at 90; see also FISHER, *supra* note 56, at 138-39.

⁵⁹ As noted by one author:

The politicization of OMB was part of a larger movement toward centralization of executive-branch policymaking in the White House. In recent years, presidents have devoted more of their own and their staff's time to the process of policy development—to the assembling of ideas for policies, to the discussion of these ideas in the White House, and to the drafting and ultimate submission of legislative proposals embodying these ideas to Congress.

MEZEY, *supra* note 27, at 91.

⁶⁰ Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988).

⁶¹ Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988).

⁶² See MILKIS & NELSON, *supra* note 31, at 343; see also Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write A Regulation* 99 HARV. L. REV. 1059 (1986). Mr. Morrison states:

[O]ne of [the Reagan administration's] first acts was to issue Executive Order 12,291, which dramatically changed the relation between the agencies

administration, however, was not the first to attempt to control administrative policy-making. Presidents Nixon, Ford, and Carter are recent examples of chief executives who have tried to do the same thing.⁶³

The discussion above illustrates one of the president's means of making laws through administrative agencies. Administrative review, however, is not the only legislative power the president possesses.

C. *The Legislative Powers of the President*

The president acts both directly and indirectly as a legislator. Directly he legislates through formal interactions with Congress, through his power to interpret statutes, and through the issuance of executive orders and directives. He legislates indirectly primarily through his judicial appointments (most notably the Supreme Court), through his administrative subordinates,⁶⁴ and through his use of the veto power.⁶⁵

and OMB. First, the Order require[d] that agencies promulgate only those regulations that are the product of cost-benefit, least-cost analysis Second, the Order authorize[d] OMB to review virtually all proposed rules for consistency with the substantive aims of the Executive Order before an agency can even ask for public comment on the proposal. Finally, at the conclusion of the rulemaking process, the matter is sent once again to the OMB, which may delay issuance of the final rule until the agency has considered and responded to OMB's views.

In one sense, . . . 12,291 [was] merely an extension of the prior system of control over agency rulemaking. In another sense, however, the Order creates a very different system, because the professed aim of [the Reagan administration was] to cut back significantly, if not actually to destroy, *the regulatory system established by Congress*.

Id. at 1062-63 (footnotes omitted) (emphasis added).

⁶³ See generally CASS & DIVER, *supra* note 34, at 93-94 (discussing the efforts of Presidents Nixon, Ford, and Carter to control administrative policy-making).

⁶⁴ See *supra* notes 55-63 and accompanying text.

⁶⁵ See Woodrow Wilson, *The President's Role in American Government*, in *THE POWER OF THE PRESIDENCY* 89, 95 (Robert S. Hirschfield ed., 2d ed. 1973). Wilson states:

[The President's] veto . . . abundantly equips him to stay the hand of Congress when he will. It is seldom possible to pass a measure over his veto, and no President has hesitated to use the veto when his own judgment of the public good was seriously at issue with that of the houses.

Id. Written in 1908, these words still ring true. See *infra* notes 89-94 and accompanying text.

1. Legislation Through Formal Interaction with Congress

The president's means of legislation through formal interaction with Congress stems from the budget proposals he sends to Capitol Hill each January. In fact, the White House initiates much of the legislation Congress ultimately considers. One commentator has stated:

The nerve center for legislation is the institutionalized presidency. Congress . . . is no longer the self-starter it was during the latter part of the 19th century: It awaits the President's legislative proposals, submitted each year in broad general terms in the State of the Union message and detailed in the annual budget message. *The latter is the basic planning document of the American government; it is wholly executive in origin.*⁶⁶

In addition to the president's power over the legislative arena due to his role in the formulation of the budget, he can also marshal substantial public pressure on Congress in the areas of spending and budget cutting.⁶⁷ Still, the president possesses an even more potent legislative power in his authority to interpret the laws that Congress passes.⁶⁸

⁶⁶ MILLER, *supra* note 27, at 73 (emphasis added); see also FISHER, *supra* note 56, at 234 ("[Under the Budget and Accounting Act, although Congress formally retained the power to increase budget estimates, the President gained an important advantage by shaping the agenda for legislative action. Because Congress works off his budget, a majority is needed to delete funds recommended by the President.]); Robert S. Hirschfield, *The Power of the Contemporary Presidency*, in *THE POWER OF THE PRESIDENCY* 285, 296 (Robert S. Hirschfield ed., 2d ed. 1973) (noting that with the President having "control over formulation of the budget . . . this function gives the executive the dominant position in determining the final plan for governmental expenditures"); Shapiro, *supra* note 48, at 42 ("Presidents can fight Congress . . . with an array of constitutional powers. Budget proposals that Presidents send to Congress each January shape the debate over programs the administration wants to start, expand, cut, or eliminate.").

⁶⁷ See Hirschfield, *supra* note 66, at 296-97. Hirschfield notes:

Indeed the congressional power over the executive traditionally assumed to be the greatest—the power of the purse—is often ineffectual. . . .

. . . Emphasizing his roles as head of state and sole national representative, and utilizing all the media of mass communication, [the President] is able to generate pressure which Congress cannot easily withstand.

Id.; see also *supra* notes 51-54 and accompanying text.

⁶⁸ See *supra* note 35 and accompanying text.

2. Legislative Power Through Statutory Interpretation

The president's power to interpret statutes arises from his duty to "take Care that the Laws be faithfully executed."⁶⁹ This power becomes legislative when the president construes statutes in a manner different from what Congress intended.⁷⁰ As one commentator has noted: "As important as intent is the extent to which a law is carried out."⁷¹

A relevant example of the president's ability to interpret statutes differently from Congress's expectation is the Reagan administration's enforcement of the Voting Rights Act. Both advocates and critics of the Voting Rights Act agree that the administration deserved low marks for the way it handled voting rights and other civil rights issues.⁷² Although it was and is clear that,

[a]t a minimum, the Act was passed and renewed to protect the full exercise of the franchise by black and other minority voters. . . .

. . . [The administration's] appointed leadership of Attorneys General [William French] Smith and [Edwin] Meese and Assistant Attorney General [for Civil Rights] William Bradford Reynolds encouraged conservative policymakers of the Reagan Justice

⁶⁹ U.S. CONST. art. II, § 3.

⁷⁰ For example:

When this is done, the "obligation to" take care that the laws are faithfully executed becomes at times a power . . . to "dispense with" some of the law as enunciated by Congress. . . .

. . . This is not to say that there is systematic flouting of the laws. The situation is more subtle and less pernicious.

MILLER, *supra* note 27, at 95-96.

⁷¹ FISHER, *supra* note 56, at 124.

⁷² According to voting rights lawyer and law professor Lani Guinier:

[T]he Reagan Administration's Department of Justice took every opportunity through its enforcement authority under the Act to protect incumbent white elected officials. This was done without regard for the effect such policies would have upon black voters, although their interests were the primary concern of the initial legislation and all succeeding amendments.

Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 401-02 (1989).

Author Abigail Thernstrom, who has been very critical of the Voting Rights Act as amended in 1982, has written: "The administration included no veterans of civil rights battles—men and women who, while perhaps disagreeing with current civil rights orthodoxy, understood both the history of discrimination and the persistent fears of blacks. And it displayed both inexperience and ignorance in handling civil rights issues." ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?* 116-17 (1987).

Department to launch a profound assault on Division policies and goals, and upon those whom the Act was intended to protect.⁷³

The Civil Rights Division of the Justice Department is primarily responsible for enforcement of the Voting Rights Act.⁷⁴ Prior to the Reagan administration, the division was considered apolitical.⁷⁵ During the Reagan administration, however, the division became more representative of the president's view of civil rights and the role of the Voting Rights Act.⁷⁶ This is significant because President Reagan's view of the Act was not that of Congress's in enacting it, and it illustrates the president's power of interpretation, which can be utilized as a quasi-legislative power.

3. Legislation Through Executive Orders

Through the issuance of executive orders and directives, the president and the administrative bodies which he controls actually perform more legislative work than Congress.⁷⁷ Moreover, executive orders are just as legally binding as bills passed by Congress and

⁷³ Guinier, *supra* note 72, at 401-03 (footnote omitted). For example, in 1985 Meese and Reynolds were prodding President Reagan to issue an executive order to ease the affirmative action requirements for federal contractors. See *Going to the Back of the Bus*, N.Y. TIMES, Nov. 10, 1985, at D26; see also Michael Wines, *Administration Says It Merely Seeks a 'Better Way' to Enforce Civil Rights*, 14 NAT'L J. 536, 536 (1982). The Wine article quotes William Bradford Reynolds as saying, "[t]here's a growing sense that the agencies that enforce civil rights laws have been overly intrusive." *Id.* In addition, the Smith Justice Department opposed the denial of tax-exempt status to racially discriminatory universities and fought the 1982 amendments to the Voting Rights Act. See DONALD G. NIEMAN, PROMISES TO KEEP 216-217 (1991).

⁷⁴ See Wines, *supra* note 73, at 536 (noting that "the Justice Department's Civil Rights Division [is] the key federal agency for enforcement of anti-discrimination laws.").

⁷⁵ See Guinier, *supra* note 72, at 402.

⁷⁶ For example, two of the key *opponents* of the amendments to section 2 of the Voting Rights Act were Attorney General Smith and Assistant Attorney General Reynolds. See Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING* 7, 39 (Bernard Grofman & Chandler Davidson eds., 1992).

⁷⁷ See FISHER, *supra* note 56, at 139. Fisher states:

Much of the original legislative power vested in Congress is now exercised, as a practical matter, by executive agencies, independent commissions, and the courts. The President's legislative power, invoked on rare occasions in the early decades, is now discharged on a regular basis throughout the year in the form of executive orders, proclamations, and other instruments of executive lawmaking.

Id.; see also MILLER, *supra* note 27, at 84 ("In terms of sheer volume, presidential and administrative rule-making out-number by far the statutes passed by Congress each year . . .").

signed by the president.⁷⁸ Although the president cannot promulgate executive orders that violate the Constitution or statutes, "since both are couched in nebulous terms, he has a wide area in which to maneuver."⁷⁹ Congress can attempt to block such orders by passing a law negating their effectiveness, but this process requires a majority vote of both houses of Congress and the president's signature, or in the case of a veto, a two-thirds override of both houses.⁸⁰

4. Legislation Through Judicial Appointments

Just as the president's interpretation of the Constitution and laws gives him the power of a legislator, the "the Supreme Court, as well as other Federal courts, are lawmakers."⁸¹ Since the president appoints Supreme Court justices and other federal judges, "[h]e thus is an influential, albeit indirect, lawmaker, a participant in the continuing process of updating the Constitution."⁸²

Most Supreme Court appointments, particularly as evinced in recent years, are political appointments.⁸³ Moreover, "[w]ith his power to fill vacancies in the federal judiciary, a president can put an imprint on government felt long after he leaves the White

⁷⁸ See RUTH P. MORGAN, *THE PRESIDENT AND CIVIL RIGHTS* 4 (1970) ("[P]olicies established by Executive order have the force of law, even if some scholars dispute their status as 'law'.")

⁷⁹ MILLER, *supra* note 27, at 87.

⁸⁰ The abortion "gag-rule," which banned giving out abortion information at federally funded clinics, provides a relevant example. See 42 C.F.R. § 59.7 (1990). The rule was promulgated in the last year of the Reagan administration. Despite raising congressional fury, and being challenged in the Supreme Court, see *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), the rule survived congressional attempts to overturn it. In fact, only an executive memorandum, issued by President Clinton in the first week of his administration, finally succeeded in retracting the gag-rule initiated by the Bush and Reagan administrations. See Exec. Mem., 58 Fed. Reg. 7455 (1993); Robin Toner, *Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush*, N.Y. TIMES, Jan. 23, 1993, at A1.

⁸¹ MILLER, *supra* note 27, at 68.

⁸² *Id.* at 69.

⁸³ See BURNS, *supra* note 40, at 316 (recognizing that Supreme Court appointments are "affected by the general set of ideas, as well as by the political interrelationships, of a presidential administration" (footnote omitted)); Guinier, *supra* note 72, at 398 ("Before offering prospective nominees appointments to the federal bench, [President Reagan's] advisers tested them by using ideological litmus tests on civil rights issues such as school desegregation, affirmative action, and other race-conscious remedies." (footnote omitted)).

House."⁸⁴ And Congress rarely rejects a president's Supreme Court nominee,⁸⁵ for reasons similar to those given for cabinet appointments.⁸⁶

Meanwhile, the Supreme Court is limited in its ability to check the president's actions, due to the fact that it relies on the executive branch to enforce its judgments. As one commentator has noted:

[T]he Court itself has no power other than public opinion, [and] the willingness of the people to abide by its decisions. It has no armies and few administrators. It depends upon the President and the executive branch to support its rulings and to carry out its edicts. Thus, one effect of the growth in judicial power [during the Earl Warren era] was an increase in the power of the President.⁸⁷

In fact, another commentator has argued that due to the above factors "[t]he case of the Supreme Court approaches something of a study in institutional timidity."⁸⁸

Besides legislating through Supreme Court appointments, there is yet another means by which the president acts as an indirect legislator: the veto.

5. Legislation by Veto

Although the foregoing presidential powers are substantial, probably the single most significant power that the president has relative to Congress is his power to veto, at his discretion, "[e]very bill which shall have passed the House of Representatives and the Senate . . . before it become[s] a Law."⁸⁹ Of course, if the

⁸⁴ Shapiro, *supra* note 48, at 42; see also Linda Greenhouse, *Lightening Scales of Justice: High Court Trims Its Docket*, N.Y. TIMES, Mar. 7, 1992, at A1 (noting that by the end of 1991, Presidents Reagan and Bush had appointed 64 percent of all federal appellate judges).

For a sobering look at the Reagan-Bush legacy with respect to African-American judges on the federal appellate bench, see A. Leon Higginbotham, Jr., *The Case of Missing Black Federal Judges*, ST. PETERSBURG TIMES, July 31, 1992, at 14A (stating that as a result of Bush and Reagan appointments "black judges have been turned into an endangered species").

⁸⁵ The most notable recent exception to this point was the defeat of Judge Robert Bork's confirmation to the Supreme Court in 1987. See Linda Greenhouse, *Bork's Nomination Is Rejected*, 58-42, N.Y. TIMES, Oct. 24, 1987, at A1.

⁸⁶ See *supra* notes 47-50 and accompanying text.

⁸⁷ LISTON, *supra* note 53, at 45.

⁸⁸ HUGHES, *supra* note 27, at 220.

⁸⁹ U.S. CONST. art I, § 7, cl. 2.

proponents of a bill in Congress can muster a two-thirds vote in *each* house of the legislature, a president's veto can be overturned.⁹⁰ Note, however, that from George Washington to George Bush, presidents have vetoed 2,469 bills; Congress has only successfully overridden about *seven percent* of them.⁹¹ Moreover, often the president does not need to use his veto power to get Congress to go along with his legislative agenda. "Simply by threatening to veto a proposed measure, the president can often deter Congress from passing it. Such a threat can also influence Congress to put a measure in a form that is acceptable to him."⁹²

Although the veto power was envisioned as a presidential tool preventing the enactment of unconstitutional legislation,⁹³ modern presidents have used the veto more as an instrument to advance their policies.⁹⁴ Moreover, Congress does not have a power similar to the president's veto.⁹⁵ Therefore, in order to prevent administrative actions taken by the president through his cabinet, Congress must first pass a bill, which then requires the president's signature before becoming law. Quite simply, the chief executive has the power to veto a bill attempting to contravene his actions. This weighs heavily in the president's favor, because it allows him to fund certain programs and restrict spending for others while only being subject to a two-third's override vote by both houses of Congress.

The above discussion illustrates some of the broad powers of the presidency. Through both oversight of the vast administrative bureaucracy and the combination of direct and indirect legislative influence, the president exercises substantial power over the passage of laws, their enforcement, and the allocation of resources and services throughout the country. This exposition of the president's broad powers casts light on Congress's significance as a counterweight in our system of checks and balances. As one *supporter* of

⁹⁰ See *id.*

⁹¹ See MEZEY, *supra* note 27, at 61.

⁹² Richard A. Watson, *The President's Veto Power*, THE ANNALS, Sept. 1988, at 36, 45-46.

⁹³ See CHESTER J. ANTIEAU, THE EXECUTIVE VETO 89 (1988).

⁹⁴ Shapiro, *supra* note 48, at 42.

⁹⁵ See INS v. Chadha, 462 U.S. 919, 956-58 (1983) (holding that a one-house legislative veto is unconstitutional on the grounds that it breaches the president's veto power and the bicameral design of Congress).

term limits has stated, "executive power is a perennial problem, and Congress must be counted on to be the primary check upon it."⁹⁶ As will be discussed in the next section, term limits would actually reduce Congress's ability to curb presidential power.

D. *What is Wrong with Term Limits?*

Term limits take from Congress one of its most effective tools to combat presidential power: *longevity*, and the benefits which stem from it. As presidential scholar Robert Hirschfield has stated: "Congress is not impotent in exercising control over the President. The political longevity of congressional leaders and the absence of party discipline allow for displays of legislative independence which can and do check, embarrass, or inhibit the executive."⁹⁷

The president's powers discussed in detail above can be summarized as power over administrative agencies through cabinet members, and power to garner public support for his policies and appointments through the use of his popularity. Allowing congressional members to serve without limits on their terms works as a countervailing force to those factors.

First, although the president has a substantial amount of control over administrative policies, as congressional members serve for a longer period they establish inroads with bureaucratic chiefs within the administrative agencies. These relationships can serve as a check on a president. "Many [bureaucrats] have accumulated great power and influence among committee chairmen in Congress."⁹⁸ The converse is also true.⁹⁹ Longevity gives congressional mem-

⁹⁶ WILL, *supra* note 5, at 8.

⁹⁷ Hirschfield, *supra* note 66, at 297. Several good examples of such legislative independence occurred in connection with the battle over President Clinton's budget. Veteran Democratic senators such as David Boren of Oklahoma, Sam Nunn of Georgia, and Frank Lautenberg of New Jersey voted against the President's package. See Eric Pianin & David S. Hilzenrath, *Senate Passes Clinton Budget Bill, 51-50, After Kerrey Reluctantly Casts "Yes" Vote*, WASH. POST, Aug. 7, 1993, at A1. Meanwhile, over in the House, where the package passed 218 to 216, out of 64 freshman Democrats, all but nine voted for the spending plan. See Leslie Phillips, *Freshman Feel Hometown Heat, Voters Angry over Support of Budget Bill*, USA TODAY, Aug. 23, 1993, at 5A. In fact, one first-term Representative, Carolyn B. Maloney of New York felt "that she and other newly-elected women legislators were subjected to intense pressure to support the President's program, while older, more secure Democrats, some of whom hold prestigious committee and subcommittee chairmanships, cast their votes against it." Michael Ross, *A Bull's-Eye For an 'Aye': GOP Targets Freshman*, L.A. TIMES, Aug. 15, 1993, at A1 (quoting Maloney as saying: "The women cleaned up after the men's mess . . . [t]he traditional role.").

⁹⁸ LISTON, *supra* note 53, at 128-29.

⁹⁹ See *supra* note 30 and accompanying text. Dr. Austin Ranney, former president

bers "clout" in the nation's capital, and clout translates into power. "Clout can mean a lot of things in Washington circles."¹⁰⁰ The ability to influence others and call attention to the state ensures that the voices and needs of the representative's constituents are heard in the nation's capital.¹⁰¹ "There is no set measurement for clout, but factors include the size of a state's elected delegation, *positions held in powerful House and Senate committees and connections to federal agencies and departments.*"¹⁰² Limiting the terms of congressional members would certainly reduce this *de facto* check on presidential power in the administrative agencies.

Second, a freshman legislator probably would be less able to survive running the gauntlet of public disfavor than an incumbent who has served several terms.¹⁰³ One commentator states that congressional longevity is partially responsible for the broad support for voting rights legislation in Congress.¹⁰⁴ Although one could

of the American Political Science Association, has posed a relevant question that should be considered when one thinks of term limits and the bureaucracy: "I wonder how we are going to control that [bureaucracy] with the Congress, . . . whose members [not only] have limited service before them but . . . become lame ducks when they are elected to their last elective term." AMERICAN ENTER. INST., *LIMITING PRESIDENTIAL AND CONGRESSIONAL TERMS* 24 (1979) (alterations in original) (quoting *Congressional Tenure, Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 48 (1978)).

¹⁰⁰ Dennis Camire & Brad Bumsted, *Pennsylvania Will Have to Scramble to Regain Clout*, Gannett News Service, June 21, 1991, available in LEXIS, Nexis Library, CURRNT File.

¹⁰¹ See *id.*

¹⁰² *Id.* (emphasis added).

¹⁰³ Again, the arduous passage of President Clinton's budget serves as an example. Congresswoman Margorie Margolies-Mezvinsky, Montgomery County, Pennsylvania's first Democratic representative since 1916, had voted against the President's budget when it first reached the House. See Ross, *supra* note 97, at A1. She had planned to oppose the budget plan again when it came time for the final vote. But after a phone call from Clinton, "who told the congresswoman . . . that he had to have her vote," she cast the last ballot in support of the package. *Id.* As a result, she quickly had to mount an advertisement campaign in her affluent Philadelphia suburb because "[l]ocal Republicans are already circling [her] like sharks sizing up an injured swimmer, with an eye toward moving in for the kill in the November, 1994, elections." *Id.* Margolies-Mezvinsky was not alone. Several freshman Democratic legislators, such as Don Johnson of Georgia, Karen Shepherd of Utah, and Ted Strickland of Ohio, were pressured by Clinton to support the budget plan and are now facing angry voters at home who are focusing on next year's election. See Phillips, *supra* note 97, at 5A ("Freshman are always the most susceptible to election defeat . . .").

¹⁰⁴ See J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 76, at 135, 160 ("[T]he durability of congressional incumbents, the decline of party loyalty among voters and elites, and the inattention of the public explain the consensus supporting voting rights for blacks

argue that an incumbent would be more concerned about reelection than someone with a limited term in office, the opposite would actually seem to be the case. If permitted to serve more than one term, the incumbents under term limits presumably would still seek reelection.¹⁰⁵ Moreover, there is a potential that "[r]ather than coming to Washington to do something, [the] chief concern [of freshman legislators] may be to stay out of trouble."¹⁰⁶ One could speculate that if term limits were instituted nationwide the country might see a new type of gridlock take hold in Congress, where the large crop of freshman legislators would be too cautious to take any substantial actions.

Another advantage that incumbents have over novices is access to the media. Even those who would discount the effect of the media on increasing the president's power and decreasing that of Congress acknowledge that "people already in power within the chambers [of Congress] are the ones receiving the bulk of the media attention outside of [those chambers]."¹⁰⁷ A counter-argument here is that, with everyone serving the same amount of time in Congress, access to the media would be a factor that all congressional members would face on an equal basis. This argument, however, only supports the viewpoint that term limits should be

and other minorities.") (emphasis added).

¹⁰⁵ The American Enterprise Institute has noted:

Critics [of term limits] claim that proponents have inconsistent expectations. On one hand they expect that legislators with limited terms will be better representatives of the people and will be less likely to establish permanent residence in Washington. On the other hand they claim that members will not be "errand boys" performing minor favors for constituents. In fact, there is little evidence that the members are not now representing their states and districts well, or that tenure limitation will actually produce an improved quality of representation. *In fact, members will run for reelection within the total period of service permitted, and they can be expected to behave just as members of Congress now do.*

AMERICAN ENTER. INST., *supra* note 99, at 24 (emphasis added).

¹⁰⁶ Robert Shepard, *Big Freshman Class Expected in Next Congress*, UPI, June 3, 1992, available in LEXIS, Nexis Library, CURRNT File (noting the concerns of House Speaker Thomas Foley and Minnesota Representative Vin Weber). Mr. Shepard gives an example of Representative Craig James, a Florida Republican, who decided to leave Congress after just two terms. In his resignation announcement, James prided himself on not having written any bad checks, nor taking foreign junkets or receiving any other perks. Unfortunately, "he also was unable to point to any significant achievements during his time in Congress." *Id.*

¹⁰⁷ Stephanie G. Larson, *The President and Congress in the Media*, THE ANNALS, Sept. 1988, at 64, 70 ("In separate studies of the House and Senate, the seniors, leaders, and policy experts were found to be the ones in the national press.")

instituted, if at all, nationwide. If term limits were enacted on a state-by-state basis, states instituting them would be at a severe disadvantage with not only the president, but also their sister states. If a constitutional amendment were passed, however, the entire legislative branch would be at a disadvantage relative to the chief executive. The loss of congressional power compared to that of the president is a factor under either method of establishing term limits. Therefore, term limits would reduce the power of those who depend on Congress to effectively represent their interests.

Finally, and related to the above points, the newer the congressional member, the more she could be swayed by opinions other than her own.¹⁰⁸ A novice legislator knows much less about Washington than one who has served for some length of time. So in addition to losing power in relation to the president, "temporary legislators may lose power to permanent Hill bureaucrats who are substantially less accountable to the voters."¹⁰⁹

The impact of weakened congressional clout and diminished congressional independence and expertise would affect all voters to some extent. This is because all voters would no longer benefit from their representatives' inroads to administrative agencies, their freedom from toeing the party line, and their ability to make the state or district's voice heard more effectively. Term limits would also disproportionately reduce minority influence in national politics, because, as this Comment will now argue, Congress, not the president, is the foremost advocate of minority interests in the federal government.¹¹⁰

¹⁰⁸ See Michael Lind, *A Radical Plan To Change American Politics*, THE ATLANTIC, Aug. 1992, at 73-74 ("In a capital city in which expertise is power, the frequent circulation of amateur legislators would only increase the relative influence of the permanent congressional staff, the federal bureaucracy, and the entrenched Washington establishment of lobbyists and insiders.").

¹⁰⁹ AMERICAN ENTER. INST., *supra* note 99, at 25.

¹¹⁰ Granted, President Clinton did support calls by homosexuals for improved rights within the military. Also, Presidents Jimmy Carter and Lyndon Johnson are prime examples of presidents who supported minority rights. These presidents' terms, however, are separated by several years. Congress, however, can serve as a more consistent advocate of minority rights, therefore saving minorities from having to wait every five to ten years for someone to support their interests.

III. CONGRESS: THE CHAMPION OF MINORITY INTERESTS

A. *The At-Large Nature of the Presidential Election Versus the Effect of Districting in Congressional Elections*

1. The Presidential Election Viewed as the Nation's Largest At-Large Election

Every elected official in the United States is put in office by the voters of the district she is to represent, but "*the Presidential slate is the only one elected nationwide.*"¹¹¹ To put it differently, the presidency represents the ultimate "at-large" election. Although some might argue that the electoral college is the body that the Constitution has entrusted with choosing the president,¹¹² this claim is more theoretical than factual. Voters are actually "voting for a group of . . . Electors pledged to vote for the listed candidates."¹¹³ Therefore, "a president in fact, though not in law, [is] popularly elected by the people."¹¹⁴

Having noted that the president is an official elected at-large, an examination of why officials elected at-large are less responsive to minority interests, as opposed to those elected in district-based elections, is in order. The best way to examine this phenomenon is to look at the effect of at-large versus district-based elections on minority influence in local politics.

2. Why District-Based, As Opposed to At-Large Elections, Are More Representative of Minorities

For minorities who seek to have a voice in national politics, the presidential election is not the most effective means of transmitting their voice to Washington. This is not due to any intentional discrimination, but instead to the nature of the at-large voting system. The following is an example:

Suppose . . . that black voters make up only one-fourth of the electorate in a city employing at-large elections, and they are willing to vote as a bloc for council candidates who seem genuinely willing to address the particular needs of the black population; the

¹¹¹ LISTON, *supra* note 53, at 38.

¹¹² See U.S. CONST. art. II, § 1, cl. 2, amended by U.S. CONST. amend. XII.

¹¹³ LISTON, *supra* note 53, at 37-38.

¹¹⁴ MEZEY, *supra* note 27, at 53.

great majority of whites, by contrast, will not vote for a black candidate. The black voters' candidates cannot win.¹¹⁵

Minority voters' candidates cannot win because their votes are diluted or canceled out by the votes of the majority. The situation that minorities find themselves in when it comes to presidential elections is exactly the same. According to the latest census figures, African-Americans currently make up 12% of the U.S. population and whites constitute 75% (the entire minority composition of the country is 25% of the population).¹¹⁶ If people vote in racial blocs (as will be shown shortly), the particular interests, concerns, and needs of African-Americans and other minorities will not normally be a top priority of a president elected at-large. Why is this so?

African-Americans rarely influence white candidates in at-large elections, be they for local or national office, for two related reasons. First, as implied above, in at-large districts "the preferences of black voters can be 'submerged in the larger pool of white vote[s],' votes that have traditionally reflected preferences contrary to those of black voters."¹¹⁷ Therefore, "the voting strength of [African-Americans and other minorities] is diminished or canceled out by the bloc vote of [the white] majority."¹¹⁸

Second, the local, and by analogy, the presidential candidate, when elected through an at-large system, may feel "free to disregard [the] needs and concerns [of minorities]."¹¹⁹ This complacency may occur because the official who would choose to disregard minority interests knows that her support has come primarily from white voters and concentrates on keeping those voters happy.¹²⁰

¹¹⁵ Bernard Grofman & Chandler Davidson, *Postscript: What is the Best Route to a Color-Blind Society?*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 76, at 300, 311.

¹¹⁶ See Gary Blonston, *Study Sees a More Crowded, Ethnically Diverse America*, *PHILA. INQUIRER*, Dec. 4, 1992, at A25.

¹¹⁷ Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 7-8 (1991) (quoting Peyton McCrary & J. Gerald Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 S.U. L. REV. 101, 103 (1989)).

¹¹⁸ Davidson, *supra* note 17, at 4; see also THOMAS CAVANAGH, *INSIDE BLACK AMERICA* 47 (1985). Cavanagh recounts that in the 1984 presidential election "black voters overwhelmingly supported Walter Mondale" and not his opponent, Ronald Reagan. *Id.* at 1. But "despite their widespread opposition to the performance and priorities of the administration of Ronald Reagan, they could not prevent his landslide reelection, given his popularity with the white electorate." *Id.*

¹¹⁹ Frank R. Parker, *Racial Gerrymandering and Reapportionment*, in *MINORITY VOTE DILUTION*, *supra* note 17, at 85, 86.

¹²⁰ See Edward J. Sebold, Note, *Applying Section 2 of the Voting Rights Act to Single-*

While the intent may be innocent enough, the result is exclusion.

It is also worth noting that several Supreme Court and lower federal court decisions have acknowledged the adverse effects of at-large systems on minority voting.¹²¹ Implicit in the holdings is

Member Offices, 88 MICH. L. REV. 2199, 2234 (1990) ("An official with majority support, especially white majority support in a racially polarized town, risks losing that backing if he embraces 'minority proposals which are at war with the majority view on the same question.'" (quoting Robert B. Washington, Jr., *Does the Constitution Guarantee Fair and Effective Representation to All Interest Groups Making Up the Electorate?*, 17 HOW. L.J. 91, 108 (1971))).

The rationale of Justice Powell's partial concurrence in the state legislative apportionment case of *Davis v. Bandemer*, 478 U.S. 109 (1986), is also true for candidates elected at-large:

It may be . . . that representatives will not "entirely ignore the interests" of opposition voters. . . . But it defies political reality to suppose that members of a losing party have as much political influence over . . . government as do members of the victorious party. Even the most conscientious [elected officials] do not disregard opportunities to reward persons or groups who were active supporters in their election campaigns.

Id. at 169-70.

Even when African-Americans are active in the campaigns of white candidates, the candidates sometimes feel free to ignore African-American concerns. The Lani Guinier nomination provides a clear illustration of such a phenomenon. Although most African-Americans and civil rights groups strongly supported her nomination, President Clinton apparently gave greater weight to the opinions of those calling for withdrawal of her nomination. The result, according to one commentator, was that: "African Americans, who helped usher Clinton into the White House, are wondering at the President's much-promoted pre-election commitment to aggressively protect civil rights and waiting to see which representative of our national community will be sacrificed next to assuage the cooling ardor of the so-called Reagan Democrats." Bates, *supra* note 46, at M5. An example of this in the last two presidential elections is the Democratic Party's treatment of Reverend Jesse Jackson. For Bill Clinton in the 1992 election,

[in] what his strategists view as a campaign turning point, Clinton directly challenged the leader of his party's liberal wing, Jesse Jackson. At a June 13 meeting of Jackson's National Rainbow Coalition, Clinton questioned the legitimacy of giving a forum to Sister Souljah, a rap singer who in a newspaper interview suggested blacks consider killing whites instead of each other.

Thomas B. Edsall, *The Special Interest Gambit; How Clinton is Changing the Democratic Discourse*, WASH. POST, Jan. 3, 1993, at C1.

Some blacks felt that Michael Dukakis insulted Jackson in the 1988 presidential election by not informing Jackson that he would not be the vice-presidential candidate before the news was released to the press. "[W]hen Governor Dukakis 'snubbed' Jesse Jackson, who learned from a reporter of his being passed over for the vice-presidency, blacks took affront." Guinier, *supra* note 72, at 416.

¹²¹ See *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986) (striking down at-large elections under Congress's "results test"); *Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (striking down a Georgia county's at-large system of electing commissioners on the grounds of circumstantial evidence of discriminatory intent); *White v. Regester*, 412

that district-based, as opposed to at-large elections, better protect minority interests. What about the possibilities of African-Americans' being a swing vote and thereby influencing at-large candidates? Some commentators say the swing vote theory does not operate well in fact.

3. The Swing Vote Theory

The argument could be made that if minorities vote as a bloc they could greatly affect at-large elections just by being a "swing vote"—the decisive marginal percentage in a close race.¹²² There are two problems with this theory, particularly as it applies to presidential elections. First, rarely are presidential elections close enough for minorities to have a swing vote effect.¹²³ Second, even if minorities cast the determinative votes, the indebted candidate must also remember "that white votes also 'made the difference,' because they, too, were necessary if not sufficient for victory."¹²⁴ Moreover, if more white votes were cast for the candidate than African-American votes, which, because of the size of the entire minority population in the United States will more

U.S. 755, (1973) (striking down at-large elections based on a theory of discriminatory effects); *Zimmer v. McKeithen*, 485 F.2d 1297, 1308-09 (5th Cir. 1973) (holding that a preference for at-large districts by state officials, and unresponsiveness of legislators to minority interests, *inter alia*, are criteria supporting a claim for minority vote dilution).

These cases are noted not to denigrate the United States' method of presidential election *per se*, but instead to point out the inherent defects of at-large elections versus district-based elections in the area of minority voting effectiveness.

¹²² Davidson, *supra* note 17, at 10.

¹²³ For example, in the 1980 presidential election Ronald Reagan beat Jimmy Carter by approximately eight million votes. See Rhodes Cook, *Reagan Buries Carter in a Landslide*, CONG. Q., Nov. 8, 1980, at 3296, 3299. In 1984 President Reagan accomplished another landslide victory over Walter Mondale taking 59% of the popular vote. See Rhodes Cook, *Landslide Victory by Reagan Underscores Democratic Ills*, CONG. Q., Nov. 10, 1984, at 2893, 2893-94 (stating that landslides occurred in almost one out of every three elections since records began being kept in 1824). Likewise, in the 1988 election George Bush defeated Michael Dukakis by approximately six million votes. See Rhodes Cook, *Bush Victory Fits 20-Year Presidential Pattern*, CONG. Q., Nov. 12, 1988, at 3241, 3245.

The 1992 presidential election, in which Bill Clinton defeated George Bush by approximately five million votes might be seen as an exception to this point. See Rhodes Cook, *Clinton Picks the GOP Lock On the Electoral College*, CONG. Q., Nov. 7, 1992, at 3548, 3552 (giving the final vote totals as: Clinton, 43,728,275; Bush, 38,167,416; and Ross Perot, 19,237,247). Considering that the race was a three-way contest, however, underscores that most election victories are by sizable margins.

¹²⁴ Davidson, *supra* note 17, at 10.

than likely be true,¹²⁵ "the post-election pressures from white constituents of a winner may be strong enough to minimize or nullify minority pressure on him."¹²⁶

What is more important, however, is that looking at minority voting strength as a factor resting on being a swing constituency misses the point. The swing vote candidate is not necessarily synonymous with a candidate who is the choice of minorities. Minorities do not seek to be the swing vote to elect someone else's candidate;

they seek to share power through the ability to choose their own representatives They want the option of nominating, and being represented by, other black representatives. They are no longer satisfied with automatically choosing the Democratic candidate or with the ephemeral role of "the swing vote," in elections between two moderate-to-conservative white candidates. Black voters want, and need, aggressive advocates, not momentarily concerned opportunists.¹²⁷

This is not to say that the president never furthers minority interests. But it does illustrate that, under competing pressures, the president tends to consider the interests of the majority more than the minority. In fact, this may be the way the Framers of the Constitution intended for our government to work. Nevertheless, it means minorities must look elsewhere for primary representation of their interests. Congress fills that niche. The following section explains why.

4. Why Congress Represents Minority Interests

Congress is more representative of minority interests than the president for two primary reasons. First, there are more congressional seats available for minorities to influence. There is a difference between a single member office and a multi-member body just by virtue of the fact that if the candidate of one group of voters wins in a single member office, they have won everything. "[T]here is no such thing as a 'share' of a single-member office."¹²⁸ Contrast the federal legislature with the single-member situation. Congress is made up of the House of Representatives, which has 435 members,

¹²⁵ See Blonston, *supra* note 116.

¹²⁶ Davidson, *supra* note 17, at 10.

¹²⁷ Guinier, *supra* note 72, at 421-23 (footnotes omitted).

¹²⁸ Butts v. City of New York, 779 F.2d. 141, 148 (1985).

and the Senate, which has 100 members. Because these officials come from smaller political units, they provide voters with opportunities for participation and influence at the national level that large units do not.¹²⁹ As long as dilutionary voting tactics are not used, multi-member bodies can be more representative of disparate interests.¹³⁰

In addition, particularly in the House of Representatives, minorities can *secure* a share of representation. This is largely due to the Voting Rights Act of 1965 and its subsequent amendments, which allow districts to be drawn, under certain criteria, in such a way to ensure minority representation in Congress.¹³¹

B. *The Voting Rights Act Allows Voter Districts to
Be Drawn in a Manner to Ensure Minority
Representation in Congress*

1. The Voting Rights Act: An Overview

The Voting Rights Act (the "Act") was passed in 1965 primarily in response to the efforts of civil rights activists, and the pressure that President Lyndon Johnson put on Congress to end "the blight of racial discrimination in voting"¹³² in America in violation of the Fifteenth Amendment of the Constitution. At the time it was enacted, the Act "essentially targeted seven states of the old Confederacy that had systematically discriminated against blacks."¹³³ Its initial aim was to enable African-Americans to

¹²⁹ Cf. *Myers v. United States*, 272 U.S. 52 (1926).

The President is a representative of the people, just as the members of the Senate and of the House are, and it may be at some times, on some subjects, that the President, elected by all the people, *is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local and not country wide.*

Id. at 123 (emphasis added). The implication here is that the president may be a representative of the nation as a whole, but it is Congress that represents local interests in national politics.

¹³⁰ Types of voting requirements that have been found to be dilutionary are: at-large elections; run-off requirements (where candidates must garner a clear majority of the electorate, or face another election against the other top voter-getter(s)); anti-single-shot devices (preventing voters, with the option to choose more than one competing candidate for a multi-member body, from voting for only one candidate, in an attempt to weight their votes to ensure that candidate's election); exclusive slating groups; and gerrymandering. See Davidson, *supra* note 17, at 5-9.

¹³¹ 42 U.S.C. § 1973 (1988); see also *infra* note 164 and accompanying text.

¹³² *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

¹³³ Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representa-*

register and vote by ending unfair practices, such as literacy tests, which prevented them from exercising these rights.¹³⁴

Since 1965, the scope of the Act has expanded as a result of Supreme Court decisions, Congress acting on its own initiative, and Congress acting in response to Supreme Court rulings. For example, in *Allen v. State Board of Elections*,¹³⁵ the Supreme Court held that Section 5 of the Act not only protected the right to register and cast a vote, but also restricted states' discretion with regard to redistricting, changing from district-based to at-large elections, and altering municipal boundaries.¹³⁶ In 1975, the Act was expanded to include language minorities, in addition to racial minorities.¹³⁷ But the most significant expansion of the scope of the Voting Rights Act occurred when Congress responded to the Supreme Court's decision in *City of Mobile v. Bolden*.¹³⁸ Before examining that decision, however, it is first necessary to review two judicial rulings, one by the Supreme Court, one by the Fifth Circuit Court of Appeals, both delivered in 1973.

2. Critical Cases Interpreting the Voting Rights Act

In *White v. Regester*,¹³⁹ a Texas legislative redistricting case, the Supreme Court held that in order to successfully challenge a state's districting plan, minority plaintiffs would have to show that the plan did not give them an equal opportunity to nominate and elect candidates of their choice as compared to "other" residents in their district.¹⁴⁰ The Court held that "[b]ased on the totality of circumstances"—which in this case included historical, cultural, and economic factors—the multi-member districts¹⁴¹ at issue in the

tion, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 76, at 66, 73. The states were Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. See *Katzenbach*, 383 U.S. at 310.

¹³⁴ See Armand Derfner, *Vote Dilution and the Voting Rights Act*, in *MINORITY VOTE DILUTION*, *supra* note 17, at 145, 150.

¹³⁵ 393 U.S. 544 (1969).

¹³⁶ Derfner, *supra* note 134, at 150. Section 5 is the preclearance provision of the Voting Rights Act, requiring that all jurisdictions covered by the Section obtain pre-approval from the Attorney General for any proposed changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c (1988).

¹³⁷ See McDonald, *supra* note 133, at 73.

¹³⁸ 446 U.S. 55 (1980).

¹³⁹ 412 U.S. 755 (1973).

¹⁴⁰ See *id.* at 766.

¹⁴¹ A multi-member district is "a district from which more than one member of

case were unlawful.¹⁴² *White v. Regester*, therefore, established the "totality of circumstances" test. Unfortunately, the case failed to explicitly identify the standard by which judges could decide whether a voting system diluted minority votes.¹⁴³

The Fifth Circuit resolved this problem in *Zimmer v. McKeithen*.¹⁴⁴ *Zimmer* involved a challenge to the legality of a Louisiana plan to reapportion representation on local school boards and juries. In deciding the case, the Fifth Circuit summarized the Supreme Court's decision in *White* as holding that "access to the political process . . . was the barometer of dilution of minority voting strength."¹⁴⁵ Additionally, the *Zimmer* court announced eight factors which together would be evidence of unlawful minority vote dilution.¹⁴⁶ These factors were the standard for finding minority vote dilution until 1980, when the Supreme Court handed down its controversial decision in *Mobile v. Bolden*,¹⁴⁷ a class action suit contesting the constitutionality of Mobile, Alabama's at-large system of electing city commissioners.

In *Bolden*, a plurality held that the wording of Section 2 of the Voting Rights Act¹⁴⁸ "no more than elaborate[d] upon that of the Fifteenth Amendment, and . . . was intended to have an effect no

a legislative body is elected. For example, if the district elects three state legislators, then all voters residing in the district may cast their ballot for three candidates." THERNSTROM, *supra* note 72, at 304.

¹⁴² *White*, 412 U.S. at 769.

¹⁴³ See Davidson, *supra* note 76, at 32-33.

¹⁴⁴ 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.*, East Carroll Sch. Bd. v. Marshall, 464 U.S. 636 (1976).

¹⁴⁵ *Id.* at 1303.

¹⁴⁶ These factors include:

where a minority candidate can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to [minorities'] particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system. . . . Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors.

Id. at 1305 (footnotes omitted).

¹⁴⁷ 446 U.S. 55 (1980).

¹⁴⁸ At the time of the Court's decision, Section 2 of the Voting Rights Act read: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1970).

different from that of the Fifteenth Amendment itself."¹⁴⁹ According to the Court, the Fifteenth Amendment only prohibited intentional discrimination,¹⁵⁰ and to establish a Fourteenth Amendment equal protection claim the plaintiffs would have to prove an invidious purpose "to minimize or cancel out the voting potential of racial or ethnic minorities."¹⁵¹ Therefore, the Court set a very difficult to meet intent standard for constitutional challenges to voting practices.

Bolden had a devastating effect on voting rights cases. "Dilution cases came to a virtual standstill; existing cases were overturned and dismissed, while plans for new cases were abandoned."¹⁵² In response to *Bolden's* onerous requirement that plaintiffs demonstrate a discriminatory purpose, Congress in 1982 amended Section 2 to ban any practice that "results" in the abridgement of minority voting rights.¹⁵³ Congress also elevated the "totality of circumstances" language used in *White*, by codifying it in subsection (b) of Section 2.¹⁵⁴ According to the Senate Report, the amended Section 2 was

designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2[,] . . . [and to]

¹⁴⁹ *Bolden*, 446 U.S. at 60 (footnote omitted).

¹⁵⁰ *See id.* at 65.

¹⁵¹ *Id.* at 66.

¹⁵² Derfner, *supra* note 134, at 149.

¹⁵³ 42 U.S.C. § 1973(a) (1988) (emphasis added). The complete text of Section 2, as amended in 1982, states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.

¹⁵⁴ *Id.*

restore[] the legal standards . . . which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*. The amendment also add[ed] a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Register*.

This new subsection provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters.¹⁵⁵

The *Bolden* standard was laid to rest by the Supreme Court just two days after the amended Section 2 became law. In *Rogers v. Lodge*,¹⁵⁶ the Court held that at-large elections in Burke County, Georgia unconstitutionally diluted the vote of minority residents. Although the Court professed to apply the intent standard, in effect

¹⁵⁵ S. REP. NO. 417, 97th Cong., 2nd. Sess. 2 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 179 (footnotes omitted). The Senate Report described seven factors that could establish a section 2 violation:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07 (footnotes omitted).

The Senate Report also listed two additional factors which would be "probative" of a violation:

[W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29 (footnotes omitted). These factors stemmed from *White* and *Zimmer*. See *id.* at 28 n.113.

¹⁵⁶ 458 U.S. 613 (1982).

it returned to the totality of circumstances standard established in *White and Zimmer*.¹⁵⁷

Factually, *Rogers* and *Bolden* were quite similar.¹⁵⁸ The different outcomes have been attributed to the uproar caused by *Bolden*, Justice Sandra Day O'Connor's replacement of Justice Potter Stewart (who wrote the *Bolden* plurality opinion), and Chief Justice Warren Burger's changing sides on the issue in *Rogers*.¹⁵⁹ The Supreme Court, however, essentially sidestepped the statutory issue raised by the "results" language of the new Section 2 by focusing on the constitutional equal protection issue, and holding that discriminatory purpose could be inferred based on circumstantial evidence. The first time that the Supreme Court squarely addressed the amended Section 2's "results" test was in the 1986 case, *Thornburg v. Gingles*.¹⁶⁰

In *Gingles*, registered African-American voters challenged North Carolina's redistricting plan for seven state legislative districts. The Court established a three-part test to prove vote dilution:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district Second, the minority group must be able to show that it is politically cohesive Third, the minority must be able to demonstrate that the white majority votes sufficiently as a block to enable it . . . to defeat the minority's preferred candidate.¹⁶¹

The "*Gingles* test" resulted in two positive effects for minorities attempting to prove vote dilution. First, although it imposed the new hurdle of "geographical compactness" for establishing vote

¹⁵⁷ The Court stated:

[D]iscriminatory intent need not be proved by direct evidence. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Thus determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."

Id. at 618 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976) and *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

¹⁵⁸ In fact, Justice Powell in his dissent stated, "The District Court and Court of Appeals in this case based their findings of unconstitutional discrimination on the same factors held insufficient in *Mobile*." *Id.* at 628 (Powell, J., dissenting).

¹⁵⁹ See McDonald, *supra* note 133, at 68-69.

¹⁶⁰ 478 U.S. 30 (1986).

¹⁶¹ *Id.* at 50-51 (citations omitted).

dilution,¹⁶² the *Gingles* test greatly eased the plaintiff's burden of proof, by disposing of *Bolden's* intent standard and condensing the *Zimmer* factors.¹⁶³

Second, "*Gingles* has been interpreted as requiring jurisdictions in which voting is racially polarized to create, where possible, reasonably contiguous and compact minority-controlled districts so as to provide minorities an equal opportunity to participate in the political process."¹⁶⁴ This has resulted in an increase in the number of African-American congressional districts and the number of African-Americans in Congress.¹⁶⁵

¹⁶² See Davidson, *supra* note 76, at 41 & n.112.

¹⁶³ With the amendment of Section 2 came "streamlining and greater predictability of section 2 challenges," increasing the annual number of voting cases brought in federal court from 150 to 225. McDonald, *supra* note 133, at 71.

As a result of the increase in litigation or the threat of litigation, more and more jurisdictions have abandoned the discriminatory features of their election systems, particularly at-large voting. According to the Department of Justice, in the three years before 1982, fewer than 600 jurisdictions in the states covered by section 5 changed their method of election; 1,354 did so in the three years following the amendment of section 2.

Id. (footnote omitted)

¹⁶⁴ *Id.* at 78 (footnote omitted).

¹⁶⁵ For example:

[D]ue to the redrawing of congressional districts following the 1990 census and [the] amendments to the Voting Rights Act of 1965 that were passed in 1982, there were 13 new black congressional districts created in the United States Every single one elected a black member, so that the total number of [black] members of the United States House of Representatives [following the 1992 election] increased from . . . 26 to 39.

USIA Foreign Press Center Briefing: The African-American Community and the Clinton Administration, Federal News Service, Nov. 19, 1992, available in LEXIS, Nexis Library, CURRNT File (statement of David Bositis, Senior Research Fellow) [hereinafter *Press Briefing*].

Moreover, "[i]n 1970, there were approximately 1,500 black elected officials across the country; about 10 members of Congress. Now there are close to 8,000." *Id.*

Another commentator on the impact of the Voting Rights Act and the amended Section 2 has stated:

When the Voting Rights Act was enacted there were . . . fewer than 200 [black elected officials] nationwide. By January 1990 there were . . . 7,370 nationwide [A]s of the mid-1980s there were an estimated 3,360 elected officials of Latin American descent and 852 native Americans (in nontribal offices). The increase in minority officeholding can be traced to the operation of the Voting Rights Act as a whole Equally critical, however, has been the adoption of effective minority voting districts, many as a result of litigation or the threat of litigation under section 2.

McDonald, *supra* note 133, at 73-74 (footnotes omitted).

Although most voting rights activists praised the *Gingles* decision, it is not without its critics. Those critics claim that *Gingles* and the amended Section 2 set a standard that results in proportional representation for minorities in Congress. The claim warrants a closer examination.

3. Do *Gingles* and Section 2 of the Voting Rights Act Mandate Proportional Representation for Minorities in Congress?

It would be quite difficult for minorities to participate in the national political process without being represented in Congress. The *Gingles* test simply allows voter districts to be drawn in a manner to ensure some minority representation in Congress when minority groups meet its criteria. Some, however, have criticized the amended Section 2 and *Gingles* as guaranteeing proportional representation or affirmative action for minorities in the national legislature. Among the most notable of these critics is Abigail Thernstrom.¹⁶⁶

¹⁶⁶ See also WILL, *supra* note 5, at 42-49 (arguing that districts formed pursuant to Section 2 "produc[e]] perverse effects" and "are a disincentive for achieving a truly integrated society"). Columnist George Will is one of the most recent critics of Section 2, but his arguments are essentially the same as Thernstrom's, discussed in the text. See *infra* notes 167-73 and accompanying text. One of Will's contentions, however, is worth noting separately. In criticizing the unusual shapes of districts drawn under the amended Section 2 to include black voters, Will states: "These districts represent the unity of bad theory and deplorable practice. The theory is 'categorical representation.' The practice is gerrymandering." *Id.* at 47.

According to Black's Law Dictionary, gerrymandering is dividing a state "with such a geographical arrangement as to accomplish an ulterior or unlawful purpose." BLACK'S LAW DICTIONARY 687 (6th ed. 1990). It does not seem that Will is claiming that those who drew the districts acted illegally. Also, it seems odd that after decades of gerrymandering by those wishing to cancel out the votes of minorities by drawing contorted, duck-shaped districts, see *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (plaintiff's challenge to "legislation dividing a highly concentrated black population existing in one geographic unit . . . into two districts"), or excluding blacks *almost entirely* from districts, see *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (law passed by legislature of Alabama redistricting Tuskegee and thereby excluding almost all Blacks from the district found violative of Fifteenth Amendment), efforts to undo these harms by trying to include blacks in certain districts should be criticized.

Unfortunately, five justices on the Supreme Court, Justice O'Connor, Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas, seem to agree with Will, as illustrated by the Court's decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). *Shaw* involved a challenge by five white voters to two majority black districts created by North Carolina's General Assembly. The dispute reached the Supreme Court because the plaintiff's were appealing a three-judge District Court dismissal of their complaint for failure to state a claim. See *id.* at 2822. The voting districts were

Thernstrom claims that voting rights "has become another . . .

created as part of a reapportionment plan and attempts by the Assembly to revise the plan pursuant to Section 5 of the Voting Rights Act. *See id.* at 2820–22. For a discussion of Section 5, see *supra* note 136. The majority opinion by Justice O'Connor focused on the plaintiff's claim that due to the unusual shapes of the districts, particularly the "snake-like" District 12, the plan was an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Shaw*, 113 S. Ct. at 2821, 2824. The Court's description of the plaintiff's claim, and its holding, is worth citing to clarify the issue.

What [the] appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to *segregate the races for purposes of voting*, without regard for traditional districting principles and without sufficiently compelling justification. . . . [W]e conclude that appellants have stated a claim upon which relief can be granted under the Equal Protection Clause.

Id. at 2824 (emphasis added).

This author respectfully disagrees with the Court's opinion on two grounds. First the Court states that:

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

Id. at 2827 (citations omitted). As will be discussed, to a large extent race is still a significant factor in voting patterns. *See infra* note 187 and accompanying text. Recognizing this fact seems to fall short of being a stereotype.

Secondly, the Court concludes its opinion by stating: "*Racial gerrymandering*, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* at 2832 (emphasis added). Whites make up about 79% of North Carolina's voting age population, and under the reapportionment plan which was challenged would have been the voting majority in 10 of the state's 12 congressional districts. *See id.* at 2838 (White, J., dissenting). Under the same plan "the State . . . sent its *first* black representative *since Reconstruction* to the United States Congress . . ." *Id.* at 2834 (White, J., dissenting) (second emphasis added). Justice O'Connor's discussion of a "political system in which race no longer matters" is a hope that this author shares. In the instant case, however, it would appear that the only way to achieve that goal would be to submerge the concerns of a minority group within those of the majority, in effect only making the minority group's race no longer matter. One commentator raised a cogent question to be considered when analyzing this case, and any other case challenging irregular districts created to give minorities representatives: "Is it better to have some white voters in black districts with no influence . . . or is it better to have a whole class of people who have no influence across the board?" Linda P. Campbell, *Court Shows Voting Rights Act Contradictions*, CHI. TRIB., July 4, 1993, at 1C (quoting Binny Miller, Associate Professor of Law, Washington College of Law, The American University).

affirmative action issue, distinctive only in not being acknowledged as such."¹⁶⁷ Her central arguments pertaining to Section 2 are: (1) the sole aim of the Voting Rights Act of 1965 was "providing ballots for southern blacks;"¹⁶⁸ (2) the Voting Rights Act in its current form results in proportional representation for minorities;¹⁶⁹ and (3) the provisions of Section 2 as amended "inhibit political integration."¹⁷⁰ The first two arguments are considered in this subsection. The third is considered in the next subsection.

A more accurate evaluation of the Voting Rights Act is that it was enacted not only to give southern African-Americans the right to vote, but also to enforce the Fifteenth Amendment, which states that "[t]he right . . . to vote shall not be denied or abridged."¹⁷¹ It is worth restating that the power to make and amend laws is a power bestowed upon Congress by the Constitution.¹⁷² Similarly, Congress is constitutionally empowered to enforce the Fifteenth Amendment "by appropriate legislation."¹⁷³ As J. Morgan Kousser stated in his persuasive rebuttal of Thernstrom, "[N]othing in . . . law prohibits the originators of a policy from monitoring its success and changing the means of attaining their goals, or even those goals themselves, as they gain experience."¹⁷⁴

Addressing Thernstrom's second contention, that the Voting Rights Act results in proportional representation for minorities, the Voting Rights Act and *Gingles* do not seem to call for or result in proportionality in its strictest sense.¹⁷⁵ Proportionality in its strictest sense requires that "[a] group of voters receives the same proportion of the seats in the legislative body as the number of

¹⁶⁷ THERNSTROM, *supra* note 72, at 6.

¹⁶⁸ *Id.* at 11.

¹⁶⁹ *Id.* at 124. This is wrong in Thernstrom's view because it may lead to "political ethnicity [that] ultimately smothers democratic choice and threatens democratic institutions." *Id.* (footnotes omitted).

¹⁷⁰ *Id.* at 242.

¹⁷¹ U.S. CONST. amend. XV, § 1 (emphasis added); see *Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) ("[I]t is apparent that the language of Section 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of Section 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." (footnote omitted)), *lauded in* THERNSTROM, *supra* note 72, at 75.

¹⁷² See U.S. CONST. art. I, § 1.

¹⁷³ U.S. CONST. amend. XV, § 2.

¹⁷⁴ Kousser, *supra* note 104, at 173.

¹⁷⁵ In fact, subsection (b) of Section 2 specifically states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1988).

voters in the group of the total electorate."¹⁷⁶ African-Americans make up 12% of the United States population, and Hispanics 9%.¹⁷⁷ Under a proportional representation system they would comprise 12% and 9% of Congress, respectively. Currently African-Americans make up 9% of the House;¹⁷⁸ Hispanics comprise 4%.¹⁷⁹ This falls far short of proportionality.

Another critic of Section 2 and *Gingles*, Timothy G. O'Rourke, is probably more on point when he states that "[i]t would be more accurate to say that the operative standard is qualified proportional representation. So far the favored remedy in vote dilution litigation has been the creation, *to the extent feasible*, of single-member districts in which minority voters constitute a majority of the electorate."¹⁸⁰ O'Rourke concedes, however, that even when minority districts are drawn, there is no guarantee that minority candidates will win.¹⁸¹

Although the Voting Rights Act does operate to ensure minority representation in Congress (meaning that representatives who are the choice of minority groups are elected to Congress), it does not ensure that *a member of a minority group* will be placed in Congress. African-American voters in redrawn districts can vote for a white candidate or an African-American candidate, therefore, any charges of full-fledged proportionality or racial quotas do not seem to apply to the Voting Rights Act as amended or to *Gingles*.

Moreover, as Justice Sandra Day O'Connor noted in her concurrence in *Gingles*, "Any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large."¹⁸² Bruce Cain answers the proportionality claim best, however, when he notes that Section 2 and *Gingles* are

a relatively minor perturbation from a fundamentally majoritarian system. . . . [T]he . . . controversy focuses on a very small move-

¹⁷⁶ Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 384 (1981).

¹⁷⁷ See Blonston, *supra* note 116, at A25 (population figures based upon 1992 figures).

¹⁷⁸ See William M. Welch, *Minority Gains Fuel Power Plays in Congress*, L.A. TIMES, Dec. 13, 1992, at A12.

¹⁷⁹ See *id.*

¹⁸⁰ Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 76, at 85, 104 (emphasis added).

¹⁸¹ See *id.* at 105.

¹⁸² *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring) (emphasis added).

ment toward the proportional end of the spectrum from a point very near the majoritarian end. This may seem terribly important in the United States, but from the grander perspective of democratic theory, the proposed shift is not very great.¹⁸³

Finally, charges that Section 2 and *Gingles* promote racial separation and prevent racial coalition building¹⁸⁴ are erroneous for at least two reasons, discussed below.

4. Does Section 2 of the Voting Rights Act Promote Racial Division?

Implicit in this question is the belief that by helping minorities elect minority representatives to office¹⁸⁵ Section 2 makes racial problems worse, rather than better. This viewpoint is misguided for the following reasons.

First, the argument that Section 2 promotes racial separation seems to take issue with enabling districts to be established that allow minority groups to elect candidates of their choice, candidates that are usually minorities. But as Luis R. Fraga has stated:

¹⁸³ Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Colorblind Society?*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 76, at 261, 266.

¹⁸⁴ See THERNSTROM, *supra* note 72, at 187, 243 (noting that "[t]he heightened sense of group membership [stemming from the Voting Rights Act] works against that of common citizenship").

¹⁸⁵ Again, the reader should draw a distinction between a minority representative (i.e., someone who represents minorities), and a minority candidate or officeholder (i.e., any candidate who is a racial minority). See Evelyn E. Shockley, Note, *Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice*, 89 MICH. L. REV. 1038 (1991). Ms. Shockley articulates the cogent point that "the minority community's 'representative of choice' can only be a candidate who was sponsored by that community." *Id.* at 1061. She goes on to state: "The minority sponsorship approach does not deemphasize the importance of having minority candidates and elected officials. . . . The focus of section 2, however, must rest on empowering minority voters to put in representatives of any race who will, because they must, be active in pursuing minority objectives." *Id.* at 1063; see also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1103 n.115 (1991) ("Authentic [black] representatives need not be black as long as the source of their authority, legitimacy, and power base is the black community. White candidates elected from majority-black constituencies may therefore be considered 'black' representatives. Nevertheless, the term usually connotes a minority group member.").

Granted, when minorities have the opportunity to vote for minority candidates, they seem to choose them over whites. See *supra* note 165. But whites can make the same choice, for example, when a black candidate runs against a white candidate. Neither group would want a restriction on their ability to choose in such a situation and neither group should face such a restriction.

This argument . . . laments the structural changes that have led to greater representational equity for Latinos and African Americans. . . . The changes simply reflect already existing cleavages within the polity: the cleavages are not necessarily a function of the changes . . . Making it more difficult for Latino [and African-American] candidates to win office will not eliminate ethnic thinking at the voting booth.¹⁸⁶

Therefore, despite the provisions of the Voting Rights Act, "race is still a dynamic consideration in American politics, particularly as reflected in the strong continuing patterns of voting along racial lines. In contests where voters are given a racial choice, whites tend to vote white and blacks to vote black."¹⁸⁷ Moreover, Thernstrom herself concedes that "[t]here is no doubt that where 'racial politics . . . dominates the electoral process' and public office is largely reserved for whites, the method of voting should be restructured to promote minority officeholding. Safe black or Hispanic single-member districts hold white racism in check, limiting its influence."¹⁸⁸ Given the arguments presented by various commentators that race is still a factor in voting, Thernstrom's allowance

¹⁸⁶ Luis R. Fraga, *Latino Political Incorporation and the Voting Rights Act, in* CONTROVERSIES IN MINORITY VOTING, *supra* note 76, at 278, 279-80; *see also* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992). Professor Issacharoff takes an even more probing look at claims such as Thernstrom's and remarks:

Polarized voting is not just a result of historic antipathy or enforced ethnic divides, nor is it a construct of a misdirected voting rights case law seeking to enforce group-based identities and entitlements at the expense of either individual autonomy or broader communitarian values. Rather, much of this unfortunate voting pattern is the product of fundamentally different societal interests resulting from the basic differences in the socioeconomic means of blacks and whites. Under such circumstances, it would be extraordinary if there were not divergent voting patterns. The persistence and extremity of the polarized voting practices in community after community, despite substantial numbers of middle-class blacks and poor whites indicates that, beyond the divergent socioeconomic interests, there must also be a more fundamental racial antipathy at work as well.

Id. at 1879.

¹⁸⁷ McDonald, *supra* note 133, at 75; *see also* CAVANAGH, *supra* note 118, at 50 ("For blacks themselves to secure and retain office, they must generally rely on black voters."); Issacharoff, *supra* note 186, at 1888-89 ("The polarized voting evidence demonstrates that racial divides continue to dominate the electoral arena. . . . Race is the perfect cue: it is a simple call and it elicits intensely held beliefs and values. Race serves more than perhaps any other single issue in contemporary American life as a defining ideological bellwether.").

¹⁸⁸ THERNSTROM, *supra* note 72, at 238-39 (footnote omitted).

should prompt her to support the holding of *Gingles* and the law delineated in Section 2 of the Voting Rights Act.

Second, critics also claim that Section 2 causes racial division on the grounds that it gives African-American and Hispanic voters "unprecedented power to insist on methods of voting that will facilitate minority officeholding."¹⁸⁹ The implicit assumption here is that Section 2 prevents minority coalition building with other races to get minority representatives elected. This implicit assumption is erroneous. In fact, evidence indicates that the increase in minority representation stemming from Section 2 "has not itself created division but has resulted in greater political and social responsiveness to minority interests and the inclusion of minorities in decisionmaking."¹⁹⁰

It is worth noting, as a critic of proportionality has, that "[e]ven if black Americans . . . held [political offices in proportion to their percentage of the population] *they would be unable to implement their legislative goals without help*."¹⁹¹ Ensuring that minorities can participate in the political process does not prevent coalition building *after* the minority representative has taken office. It would

¹⁸⁹ *Id.* at 193. Thernstrom makes a related criticism that

[T]he proper test for electoral exclusion is the presence of legislative seats largely *reserved* for whites—not legislative seats *occupied disproportionately* by whites. Disproportionately low officeholding by minorities does not necessarily mean that considerations of race are controlling electoral outcomes, or that the legacy of past discrimination is distorting the entire political process. Whites . . . often represent blacks.

Id. at 225. Thernstrom's argument is one of "virtual" representation, meaning that minority interests can be represented by whites, and therefore, the call for actual representation of blacks or minorities by a black or minority candidate essentially results in proportional representation. See *id.* at 231.

Thirteen new majority black districts were created under Section 2 following the 1990 elections, all of which elected black candidates. See *Press Briefing, supra* note 165. Section 2 as amended only creates districts from which minorities can elect representatives of their choice, be they black or white. The fact that blacks then choose to elect black candidates to these offices should not be characterized as anything more than an exercise of choice. See Ronald Brownstein, *Minority Quotas In Elections?*, L.A. TIMES, Aug. 28, 1991, at A1, A14. Brownstein quotes a white Democratic congressman who represents a minority constituency as saying: "I do not believe you have to be of the exact same ethnic group to do a good job in representing that community. But, in the end, I think it's that community's choice." *Id.*

¹⁹⁰ McDonald, *supra* note 133, at 79. McDonald notes that a California study of 10 cities in the state found that just the fact of having minority members in government offices "tended to break down polarization and racial stereotyping." *Id.*; see also *infra* notes 192, 214, 249 and accompanying text.

¹⁹¹ Carol M. Swain, *Some Consequences of the Voting Rights Act*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 76, at 292, 295 (emphasis added).

seem, in fact, to enhance coalition building,¹⁹² especially if the elected official desires to solve her constituents' problems and to accomplish her goals. In addition, there is evidence that "facilitating minority officeholding" actually helps coalition building between legislators who are minorities and white voters.¹⁹³

The foregoing sections have laid the foundation for considering the central claim of this Comment, that term limits violate the Voting Rights Act. The vast administrative and quasi-legislative powers of the president are counterbalanced by the joint effect of Congress's inherent powers and expertise. Reducing the expertise and limited independence of Congress reduces its power in relation to the president. As will be argued in the next section, the result of term limitations will not only be to reduce the power of all voters but also to decrease the effectiveness of minority political participation. As will also be discussed below, this discriminatory outcome will occur even though minorities can replace their representatives who are ousted by term limits with other representatives of their choice.

IV. WHY CONGRESSIONAL TERM LIMITS SHOULD BE CONSTRUED AS VIOLATING SECTION 2 OF THE VOTING RIGHTS ACT

A. *An Examination of Lowe v. Kansas City Board of Election Commissioners*

One of the more recent cases to consider whether term limits violate Section 2 of the Voting Rights Act was *Lowe v. Kansas City Board of Election Commissioners*.¹⁹⁴ In *Lowe*, the plaintiffs challenged an amendment to Kansas City, Missouri's charter, which limited the term of city council members to eight consecutive years (i.e., two terms). Of the twelve member body, only four were eligible for reelection under the charter amendment. All four were

¹⁹² As noted by one author:

There are at least three potential reasons for this: first, representative bodies are collegial groups whose members need to work with each other on a daily basis; second, repeat voting is . . . likely to give rise to coalition building . . . ; and, third, legislative voting occurs in an institutional setting that formalizes debate and deliberation.

Issacharoff, *supra* note 186, at 1880 (footnotes omitted).

¹⁹³ See *infra* note 249 and accompanying text.

¹⁹⁴ 752 F. Supp. 897 (W.D. Mo. 1990).

white, while those unable to run again were white, African-American, and Hispanic.¹⁹⁵ As to the racial composition of the districts that could not reelect incumbent council members, three had "minority concentration[s] and only one district [was] primarily a white majority district."¹⁹⁶ The district court held "that the effect of the term limitation amendment cannot alone provide a legal basis, under the Constitution and the Voting Rights Act, for declaring it partially invalid."¹⁹⁷ A close examination of congressional intent in amending the Voting Rights Act, however, suggests that *Lowe* should have been decided in favor of the plaintiffs.

At the outset, the *Lowe* court stated that the "plaintiffs *principally* complain that they are being denied a full opportunity 'to elect representatives of their choice.'"¹⁹⁸ Since the plaintiffs claimed that the charter amendment violated Section 2 of the Voting Rights Act, their complaint should also have been construed as claiming that due to the charter amendment they had less opportunity to participate in the political process.¹⁹⁹ The distinction here, as it relates to term limits, is that a community electing a representative of its choice who lacks influence and experience may wind up with less of an opportunity to participate in the political process.

In response to the "principal" complaint, the *Lowe* court pronounced that

[t]he simple answer to the plaintiffs' contention is that *all* members of the Kansas City electorate are being deprived of the right to elect council members for more than two consecutive terms, and minority groups are therefore given no "less opportunity than other members of the electorate," as required for a finding of violation of the Act.²⁰⁰

The plaintiffs contended that the impact of the amendment, however, fell disproportionately on minority voters and minority candidates. The court dismissed this claim by stating:

¹⁹⁵ See *id.* at 899.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 901.

¹⁹⁸ *Id.* at 899 (emphasis added).

¹⁹⁹ Note that Section 2 provides relief for minorities who "*have less opportunity than other members of the electorate to participate in the political process* and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1988) (emphasis added). Under the Federal Rules of Civil Procedure "[a]ll pleadings shall be so construed as to do substantial justice." FED. R. CIV. P. 8(f).

²⁰⁰ *Lowe*, 752 F. Supp. at 899.

An incidental and temporary adverse impact of this nature seems never to have been considered the kind of voting strength dilution or abridgement of rights that falls within the intendment of the Act. . . . In the present situation it is only an accident of history that caused the currently less experienced council members to reside in the more prosperous, white First and Fourth Districts, and thus made them eligible for reelection.²⁰¹

The legislative history accompanying the 1982 amendments to the Voting Rights Act suggests that Congress had a different view than that of Judge Sachs. "[S]ection 2 remains the major statutory prohibition of all voting rights discrimination. *It also prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members.*"²⁰² Since the result of the amendment to the Kansas City charter was to deny primarily minorities an equal opportunity to elect candidates of their choice, the temporary nature of the result was irrelevant.²⁰³

The plaintiffs also contended that two of the council members represented poor minority districts and, therefore, the need for seniority and knowledge of the political system was much greater than in the more prosperous white districts "where governmental resources [were] less needed and the ability to recruit assistance from outside the Council [was] greater."²⁰⁴ The *Lowe* court admitted:

The argument [of the value of experienced legislators] has some plausibility, perhaps especially to someone, like myself, who has previously acknowledged to counsel his disapproval of legislative term limitations, as a matter of public policy. It does seem to me that a long-time council member has greater potential for effectively meeting the needs of his or her districts.²⁰⁵

²⁰¹ *Id.* at 899-900.

²⁰² S. REP. NO. 417, *supra* note 155, at 30, reprinted in 1982 U.S.C.A.N. at 207 (emphasis added).

²⁰³ Considering the "temporary adverse impact" here, a violation of Section 2 does not mean that the council candidates would be able to remain in office indefinitely. *They would only be able to remain in office as long as the voters continued to elect them to office.* One should also consider how temporary the effect of forcing out incumbents and replacing them with novices would be. If it takes longer for a minority council member to become as effective as a white candidate, the effect of the charter amendment reaches beyond the election. *See infra* note 211.

²⁰⁴ *Lowe*, 752 F. Supp. at 899.

²⁰⁵ *Id.* at 900.

The court discounted this part of the plaintiffs' claim, however, stating:

Any abridgement of the right to vote resulting from the charter amendment is not "on account of race or color," even if it may be claimed to impact most severely on the most needy and impoverished members of society. Though there is a correlation, I cannot believe that Congress meant the Act to protect impoverished or needy groups of voters, irrespective of race, or meant to allow poverty to serve as a racial identifier. . . .

. . . It would be strange to construe the Act to provide relief to minority-dominated districts simply because of the poverty theory, while conceding that poverty affords no grounds for relief unless there is minority dominance.²⁰⁶

Congress, however, considered several factors to be relevant to a claim under Section 2 of the Act as amended, among them:

[T]he extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process. . . . [and w]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. . . .

. . . .

. . . [T]he Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point in one way or the other.²⁰⁷

Although abridgments on account of race or color (which seems to mean intentional abridgments) qualify to establish a Section 2 claim, unintentional abridgments that have a discriminatory result also qualify.²⁰⁸ Given the fact that "blacks, as a poor and historically oppressed group, are in greater need of government sponsored

²⁰⁶ *Id.* at 900. There was a question whether one of the districts was composed of a majority of minorities, however, the charter amendment still could have been invalidated on the basis of its effect on the other two districts.

²⁰⁷ S. REP. NO. 417, *supra* note 155, at 29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07.

²⁰⁸ *See id.* at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205.

programs and solicitude”²⁰⁹ and in view of the language excerpted from the legislative history, it seems that Congress did intend to consider poverty together with its relation to race.

By removing the effective, experienced minority-representing council members, the minorities within those districts had less opportunity than other members of the electorate to participate in the political process. Thus, the charter amendment “minimize[d] . . . the voting strength and political effectiveness” of a minority group.²¹⁰ The *Lowe* court did not seem to consider that the group was claiming a voting rights violation in conjunction with its status as a minority group, and not merely on the basis of its impoverishment. The factor which brought them within the bounds of Section 2 was the *effects* of discrimination (i.e., poverty) which frustrated their ability to participate effectively in the political process, and a significant lack of responsiveness on the part of elected officials to their needs, as indicated by the fact that government resources were less needed in the white districts.²¹¹ Therefore, measured from the standpoint of effective participation in the political process, the plaintiffs in *Lowe* would seem to have had a valid Section 2 claim, which should have been resolved in their favor.

Although similar to *Lowe*, the implications of congressional term limits are much broader in scope and bear closer scrutiny. The implications raised at the federal level are not only ones of law, but also of fairness if one considers the obstacles minorities have faced in realizing effective voting rights.

²⁰⁹ Guinier, *supra* note 72, at 428-29; see also Issacharoff, *supra* note 186, at 1877 (“Roughly 30% to 40% of black Americans live at or below the federal poverty line and are dependent on government entitlement programs for some or all of their basic needs.” (footnotes omitted)).

²¹⁰ S. REP. NO. 417, *supra* note 155, at 28, reprinted in 1982 U.S.C.C.A.N. at 205.

²¹¹ Moreover, one could argue that there would be a violation of Section 2 even if all council members were elected at the same time. If it takes longer for minority members to establish the contacts needed to be as effective as white members, term limits would still abridge the voters’ ability to participate in the political process. See Neal R. Pierce, *Minorities Slowly Gain State Offices*, 23 NAT’L J. 33, 33 (1991) (“Minorities start as outsiders; they have to work harder than whites to become insiders.”).

B. An Examination of Congressional Term Limits

1. The Effect of Term Limits on Minority Seniority

Minorities have accomplished much in the area of electoral success since the Voting Rights Act was enacted in 1965.²¹² Not only have they elected African-Americans and other minorities to Congress, but also, due to the seniority system, these representatives have risen to key leadership positions in Congress. Although not intended as such when originally enacted, the seniority system removes the possibility of discriminatory barriers that would keep minority members of Congress from congressional leadership.²¹³ Two high visibility examples of the gains that minorities have made as a result of seniority are former Representative William Gray, a Pennsylvania Democrat, and Representative Ronald Dellums, a California Democrat.

During his tenure in office, Gray served on the House Appropriations Committee, a body "which controls federal purse strings."²¹⁴ Gray resigned from Congress in September of 1991

²¹² See *supra* note 165 and accompanying text.

²¹³ See MEZEY, *supra* note 27, at 70. Mezey states:

[A]t the end of [the nineteenth] century and the beginning of the twentieth, the forces of populism and progressivism that had attacked party organizations in general turned their attention to the task of dismantling many of the prerogatives of the congressional party leaders. *Most important was the formalizing after 1911 of the seniority system, by which committee chairmanships were automatically awarded to the majority party member with the longest tenure on the committee.* This development placed the committee chairs completely beyond the reach of party leaders; if the chairs were reelected, they would retain their committee posts regardless of the wishes of the leadership.

Id. (emphasis added).

²¹⁴ Camire & Bumsted, *supra* note 100. Gray also served as House majority whip (a position which made him the highest ranking African-American in Congress and placed him third in line to become speaker of the House) and chairman of the Budget Committee. See Elaine S. Povich, *Key Black Leader May Quit House*, CHI. TRIB., June 19, 1991, § 1, at 5. Although these two powerful posts are filled through election by the House membership, Gray could not have reached them without having a continuing relationship with his colleagues; a relationship allowing him to overcome any possible racial or regional distrust. See, e.g., Christopher Matthews, *House Democrats: You Can't Tell The Players Without a Program*, WASH. POST, May 28, 1989, at B7. Mr. Matthews states:

To win the Budget Committee chair, Gray assembled an unusual coalition. To fully understand this coalition, you should sit someday in the House gallery during a roll call. Back along the Democratic side of the

to head the United Negro College Fund.²¹⁵

Dellums took the reigns as chairman of the House Armed Services Committee during the first weeks of the Clinton administration.²¹⁶ He attained the position "after a 20-year apprenticeship. . . . [Now] he [is] the second most influential black in the defense arena, after [then] Joint Chief of Staff Chairman Colin Powell."²¹⁷

With the achievements of African-American elected officials come benefits for minorities. As noted previously, when a Representative, white or African-American, becomes a powerful member of Congress, benefits flow to her state.²¹⁸ There can be no doubt, for example, that Gray was a powerful House member who enabled "Pennsylvania to get its share of the goodies."²¹⁹ In addition to bringing jobs, projects, and federal programs for all members of the state, minorities in leadership positions can lead to "the appointment of more minorities to commissions, the increasing use of minority contractors, and a general increase in the number of programs oriented to minorities."²²⁰

main aisle is "Red Neck Row." This is where the "boll weevils" sit, hugging the partisan chalk mark. They are Southern Democrats, yellow-dog to the bone, but philosophically they vote and sit as close as possible to the Republicans. . . .

The other power center is at the opposite end of the Democratic side. This is the "Pennsylvania corner." Pro-labor, children of the Pennsylvania, Ohio and West Virginia working class, they are the classic party regulars. . . .

Bill Gray was elected chairman of the Budget Committee in 1984 and chairman of the Democratic caucus last year because he managed to build an alliance of these two corners of his party: the big-city regulars and the confederate irregulars.

Id.

²¹⁵ See Camire & Bumsted, *supra* note 100.

²¹⁶ See Leslie Phillips, *For Former Radical, Armed Services Job is Turn of the Tables*, USA TODAY, Jan. 27, 1993, at 4A.

²¹⁷ *Id.* Other prominent black congressional officials who "are moving up the seniority ladder" are Representative William L. Clay, a Missouri Democrat who heads the Post Office and Civil Service Committee, and Representative Louis Stokes, an Ohio Democrat who heads the House Ethics Committee. See Welch, *supra* note 178, at A12. Also, at the time of the printing of this Comment, Representative Charles Rangel was being considered "a strong contender" to replace Representative Dan Rostenkowski as chairman of the House Ways and Means Committee if Rostenkowski has to resign from the chairmanship due to the House post office scandal. See Lawrence M. O'Rourke, *Clinton Savors Day of Triumph*, SACRAMENTO BEE, Aug. 10, 1993, at A1; see also Feldman, *supra* note 8 (discussing the scandal).

²¹⁸ See Camire & Bumsted, *supra* note 100 and accompanying text.

²¹⁹ *Id.*

²²⁰ McDonald, *supra* note 133, at 79. It is also worth noting that one of

Even *Lowe* acknowledged that "a long-time council member generally has greater potential for effectively meeting the needs of his or her district."²²¹ It follows that a minority Congress member in a position of leadership in the House, or perhaps one day in the Senate, would be even more effective in meeting the needs of her constituents than one who is not in such a position of leadership.²²²

It also follows that term limits disproportionately impact minorities, particularly those who lag behind whites in the areas of education and income, who "[b]y virtue of their continuing status as a racially victimized and insular minority . . . still possess a disproportionately small share of political power."²²³ As one journalist has noted: "elective gains by African-Americans and Hispanics have been painfully slow."²²⁴ The problem with term limitations in relation to those who have made these gains is that "they might knock out minority legislators who've spent years patiently working their way up the seniority ladders."²²⁵ What is

Congressman Dellums's key priorities as head of the Armed Services Committee is to cut the military budget by "half the size of today's \$280 billion sum, with the savings earmarked for the nation's poorest citizens." Mark Thompson, *Pentagon Foe to Head Armed Services Panel*, PHILA. INQUIRER, Dec. 24, 1992, at A1. If he is successful, it is highly probable that some of that money will go to minority programs and jobs; probably more so than if a white was to take over that position with the same agenda. "Even a mildly sympathetic white official will not dependably consider black interests if that individual must also accommodate the more dominant views of white constituents." Guinier, *supra* note 72, at 429.

²²¹ *Lowe v. Kansas City Bd. of Comm'rs*, 752 F. Supp. 897, 900 (W.D. Mo. 1990)

²²² In fact, one commentator has implied that unless minorities in Congress reach positions of leadership, their effect in the legislature may be limited. Professor Pamela Karlan has stated:

Much of the academic discussion of minority voting rights is distorted by reliance on a model of legislative bodies that assumes all such bodies are the size of Congress or state legislatures, in which one member (out of 50 or 100 or 435) is unlikely to have much influence unless she chairs an important committee.

Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 216 (1989) (emphasis added).

²²³ Guinier, *supra* note 72, at 433.

²²⁴ Pierce, *supra* note 211, at 33.

²²⁵ *Id.* David Bositis, a senior research fellow at the Joint Center for Political and Economic Studies, has noted that due to the involvement of African-Americans and Hispanics in local and state politics their achievements

are now beginning to percolate upwards so that the national leadership of the Democratic Party in the United States House of Representatives is beginning to reflect these changes. . . . [W]hat has happened is in many ways a reflection of a pattern of change that has taken place now for 20 years in the Democratic Party.

important here is that knocking out these legislators also essentially cuts short the hopes and the gains minority voters have received due to choosing to reelect these legislators. Minorities on the brink of seeing their representatives in posts of power for the first time would lose that nascent influence. Part of the purpose of the 1982 amendments to the Voting Rights Act was to "insure that the *hard-won progress of the past is preserved* and that the effort to achieve full participation for all Americans in our democracy will continue in the future."²²⁶ Since term limits disproportionately impact minorities, such limits would seem to violate the spirit and letter of the law.

A question that should concern proponents of nationwide term limits is what would replace the seniority system, and how would such change affect minority representation? As columnist George Will recognized, the seniority system was instituted when members of Congress "rose against the power of a few House leaders—the Speaker and a few committee chairmen—to shape all members' career chances by dispensing or withholding the keys to power, such as choice committee assignments."²²⁷ In a system with nationwide term limits, tenure would not differentiate members from one another, and Congress would be left without a neutral standard for selecting its leadership.

Term limits could be devastating to minority seniority in Congress. But a greater concern is the consequent effect on the ability of minorities to participate in the political process.

Press Briefing, *supra* note 165.

²²⁶ S. REP. NO. 417, *supra* note 155, at 4, reprinted in 1982 U.S.C.C.A.N. at 181 (emphasis added).

²²⁷ WILL, *supra* note 5, at 91. The threat of term limits is that Congress will return to a situation where a few will determine the careers and influence of many. California Assembly Speaker Willie Brown makes a more serious claim. Brown, who began in the Assembly in 1964, will have to leave office in 1996 pursuant to California's term limiting Proposition 140. He says the measure "must be rescinded because 'black elected officials have been able to acquire and exercise power beyond their numbers based on the security of reelectability. Term limits will spike this technique of power acquisition.'" Pearl Stewart, *Term Limits Shake Up Black Politicians*, BLACK ENTERPRISE, June 1992, at 40.

2. The Effect of Term Limits on Minority Participation in the Political Process

Minority legislative power—exercised through representatives elected primarily by, and responsible to, minority constituencies—helps to protect minority interests against executive branch power. Upon hearing of the possible resignation of Gray, one political scientist stated: “He simply cannot do it. It is the most crucial time for policy for black America. To lose Bill Gray . . . would be a crucial blow in the midst of a vicious attack on blacks coming from the Reagan-Bush administrations.”²²⁸ The statement implied that minority representatives play an essential role in protecting minority rights. The more powerful they are, the more incisive is their role through the use of clout and coalition building.

For minorities and their representatives, clout is the means to counterbalance competing majority interests. Earlier, this Comment discussed clout and how it shapes the balance of power between Congress and the executive branch.²²⁹ In addition, clout is a countervailing force within Congress. In some instances, “[e]lecting representatives from majority-black, single-member districts may simply transfer the ‘discrete and insular minority’ problem from the polling place” to the legislative body.²³⁰ But seniority and expertise can enable minority representatives to surmount these problems.²³¹ Term limits would result in a reduction in minority influence in the political process.

Both clout and the ability to participate effectively in the political process are linked to longevity.²³² Although a purported argument in support of term limits is that they will unseat en-

²²⁸ *Vacating a Seat of Power*, ATLANTA J., June 24, 1991, at A12 (quoting political scientist Robert Starks).

²²⁹ See *supra* notes 100-02 and accompanying text.

²³⁰ Guinier, *supra* note 22, at 1434 (footnote omitted).

²³¹ Professor Guinier argues that “interest representation” (a concept which, among other aspects, “measures the impact of electoral or voting rules on the legislative representation of self-identified minority voters’ interests”) would be a more effective approach to minority political empowerment than focusing solely on the right of minorities to be present in legislatures. *Id.* at 1462, 1514. But she also notes that “the arguments for minority presence . . . may be plausible *where representatives with seniority and committee specialization* who are dependent on the minority community are enabled by formal structures to trade their votes on issues of indifference to that community for the support of other representatives on critical minority issues.” *Id.* at 1444 (emphasis added) (footnote omitted); see also *supra* note 222.

²³² See *supra* notes 97-110 and accompanying text.

trenched whites and allow minorities to move into those positions, this argument is not persuasive for three reasons.

First, if the district is a majority-white district, it is highly unlikely that the ousted incumbent will be replaced by a minority, especially given the reality of racial bloc voting.²³³ Second, if the district is a majority-minority district, the effect of term limits will simply be to unseat the incumbent minority representative, with no net gain in experience or influence.²³⁴ Third, as discussed earlier, the seniority system in Congress has served to allow a measure of predictability in the delegation of powerful committee positions.²³⁵ Term limits would certainly impede seniority gains of minorities (and whites) if instituted state by state. If instituted nationwide by a constitutional amendment, minorities might not be treated as fairly as they have under the seniority system.

The Voting Rights Act "contemplates the right to vote as the right to meaningful political participation and to an effective voice in government."²³⁶ The previous two subsections argue that, by disproportionately reducing the effectiveness of minority representatives, term limits result in minorities "having less opportunity than other members of the electorate to participate in the political process" in violation of Section 2 of the Voting Rights Act.²³⁷ An historical argument further supports the conclusion that congressional term limits are illegal.

3. Term Limits as Illegal from an Historical Viewpoint

According to the legislative history of the 1982 amendments to the Voting Rights Act, the purpose of the Act was "not only to correct an active history of discrimination, the denying to negroes of the right to register and vote, but also to deal with the accumula-

²³³ See *supra* note 187 and accompanying text.

²³⁴ Consider a newspaper article published soon after Bill Gray announced his resignation from Congress. It stated that the "fallout" of the majority whip's resignation was that "[t]he door has opened to more dynamic as well as younger future leaders in the House" and that "[t]he influence of black leaders within the House has diminished." Robert P. Hey, *Departing House Whip Gray to Leave Big Gap*, CHRISTIAN SCI. MONITOR, June 21, 1991, at 4. The same article quoted Norman Ornstein, a political scientist at the American Enterprise Institute: "I don't see anybody else [among African-American Representatives] who can move into that kind of leadership post right now." *Id.*

²³⁵ See *supra* note 213.

²³⁶ Guinier, *supra* note 185, at 1092-93 (footnotes omitted).

²³⁷ See *supra* notes 14, 153.

tion of discrimination. . . . The bill [is an attempt] to do something about accumulated wrongs and the continuance of the wrongs."²³⁸ Section 2 of the Act also states: "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" when determining if a practice or procedure violates the Act.²³⁹

In 1970, there were approximately ten African-Americans in the House of Representatives. Currently that number is thirty-nine.²⁴⁰ Sixteen of the African-Americans are newly elected, but of the sixteen, thirteen are from largely African-American districts that were created through reapportionment. That means only three replaced African-American incumbents.²⁴¹ The remaining twenty-six districts demonstrated that their incumbent African-American representatives remain their representatives of choice.

There can be little doubt that term limits would result in African-Americans having to choose another representative who is not their primary choice.²⁴² Even term limit advocate George Will admits that "[t]erm limits limit choices, and hence are an excision . . . from the sphere of civic freedom."²⁴³ Neither whites nor African-Americans should have their choice of representatives limited. But it should also be considered that for 200 years, whites have had the freedom to elect representatives of their choice. Conversely, even though blacks were ostensibly given the right to vote when the Fifteenth Amendment was passed in 1870, "[u]nfortunately for historical accuracy and for the health of our society[, this right has not been realized] for most of the century since passage of that amendment."²⁴⁴ Now, at a time when minorities are gaining

²³⁸ S. REP. NO. 417, *supra* note 155, at 5, *reprinted in* 1982 U.S.C.C.A.N at 182 (quoting Senator Jacob Javits).

²³⁹ 42 U.S.C. § 1973 (1988).

²⁴⁰ See *supra* note 165.

²⁴¹ See Ronald Smothers, *Black Caucus in Congress Gains in Diversity and Experience*, N.Y. TIMES, Nov. 10, 1992, at A17.

²⁴² Term limits enacted at the state level might also result in a violation of Section 5 of the Voting Rights Act in some states. See Robert Pear, *Curb on Atlanta Mayors in Doubt*, N.Y. TIMES, Dec. 18, 1980, at A24 (discussing that a term limitation provision adopted for Atlanta may have been unenforceable, because it was not precleared by the Attorney General or a federal judge as required by Section 5).

²⁴³ WILL, *supra* note 5, at 4.

²⁴⁴ Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 523 (1973). This article provides a thorough history of the barriers African-Americans have had to face in their quest for effective participation in the American political process.

electoral success, and reaping the benefits that the longevity of that success brings, term limits would result in an abridgment of their opportunity to participate in the political process and to elect representatives of their choosing.

Although term limits on their face may not seem discriminatory in an historical sense, they would result in "freezing discrimination under . . . *unconstitutional* prior [practices]." ²⁴⁵ It can be argued that if minorities had received the reality of equal voting rights since 1870, instead of the promise of the Fifteenth Amendment, the political landscape might be more representative of America's diversity. Justice Stevens recognized in his dissent in *Presley v. Etowah County Commission* ²⁴⁶ that "a few pages of history are far more illuminating than volumes of logic." ²⁴⁷ Moreover, as Justice Stevens aptly noted:

Changes from district voting to at-large voting, the gerrymandering of district boundary lines, and the replacement of an elected official with an appointed official, all share the characteristic of enhancing the power of the majority over a segment of the political community that might otherwise be adequately represented. A resolution that reallocates decisionmaking power by transferring authority from an elected district representative to an official, or a group, controlled by the majority, has the same potential for discrimination against the constituents in the disadvantaged districts. ²⁴⁸

A related point is worth noting. In order to end the historical, but continuing, phenomenon of racial block voting, whites need familiarity with African-American politicians in positions of power and public trust. Yet, in addition to limiting the choices of minorities who want to elect minority candidates, term limits also hamper the formation of coalitions between minority legislators and white voters. "Some minority candidates, particularly those who have previously held elective office or run with the advantages of

²⁴⁵ *United States v. Louisiana*, 225 F. Supp. 353, 395 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965). This was a case brought under the Civil Rights Act challenging Louisiana's requirement that all applicants for voting registration be able to give a "reasonable" interpretation of any section of the state or federal constitution. Since most of the applicants already registered were white, the effect of this apparently neutral law was to hinder the ability of African-Americans to register and vote. See *id.* at 380-81.

²⁴⁶ 112 S. Ct. 820 (1992) (Stevens, J., dissenting).

²⁴⁷ *Id.* at 832-33.

²⁴⁸ *Id.* at 840.

incumbency, have succeeded in winning a number of white crossover votes."²⁴⁹ Just as familiarity within the halls of Congress broke down racial barriers,²⁵⁰ so can familiarity at the electoral level.

Finally, and ironically, the process of state referenda to enact term limits seems to be a new slant on the type of bloc voting minority dilution issue that the 1982 amendments to the Voting Rights Act were intended to prevent. Bruce Cain has described this phenomenon as the "new Populism." He states:

[W]hile federal, state, and local legislative bodies are becoming more racially and ethnically representative, the electoral majority is reasserting its power by undercutting and constraining the power of representative government.

....

The critical voting rights feature of new populism is that the majority can do all this through the increased use of referendum, initiative, and recall. New Populism is most pronounced in California, but the trend toward direct democracy is also evident nationwide. Although the point has not been made very often, referendums and initiatives are essentially forms of at-large elections. *As such they tend to produce outcomes with a majoritarian skew.*²⁵¹

Yet, the emphasis of the Voting Rights Act is to prevent unfair electoral arrangements from diluting the voice of minorities that have been historically discriminated against.²⁵² Admittedly, the intent of term limit advocates is not to harm minorities, but rather to reform a Congress that has increasingly frustrated the electorate. Nonetheless, the amendments to Section 2 moot the issue of intent. A disempowering result is sufficient to establish a violation of the Act.

²⁴⁹ McDonald, *supra* note 133, at 76 (citing as an example former Congressman Mike Espy). In 1986, Espy became the first black elected to Congress from Mississippi since the Reconstruction era. The electoral success followed a reapportionment and the creation of a majority black district. Although garnering 52% of the vote overall, he received only 10% of the white vote. When he ran as an incumbent in 1988, he won reelection with 66% of the vote overall and 40% of the white vote. He has since been appointed Secretary of Agriculture in the Clinton administration. *See also* Guinier, *supra* note 185, at 1114 n.174 ("Black elected officials, by virtue of their status and tenure, tend to assuage white fears during their incumbency. The power of incumbency is supported by studies which suggest that black incumbents are in fact reelected with more white support.").

²⁵⁰ *See supra* note 214.

²⁵¹ Cain, *supra* note 183, at 273-74 (emphasis added).

²⁵² *See id.* at 273.

CONCLUSION

Although at first glance term limits may answer calls to make Congress more effective, for both whites and minorities this does not seem to be the case. Instead they would diminish the influence of Congress relative to the authority of the executive branch. Moreover, reducing the power of Congress would undermine minority influence in national politics by shortening the legislative longevity of their most effective government advocates. This result would appear to violate Section 2 of the Voting Rights Act.

But beyond the effect of term limits on presidential and congressional conflicts, the Voting Rights Act, as amended was intended to protect the hard-fought gains of minorities in electoral politics. Term limits would erase many of these gains to minorities, without promising any predictable, offsetting benefits. In their most favorable light, term limits seem to be unfair to minorities; in their least favorable light, they seem to contravene the legislative intent behind the Voting Rights Act and amended Section 2.

Minorities have only been able to effectively exercise the promise of the Fifteenth Amendment for a relatively short period of time, having run an historical gauntlet of attempts to circumvent it. Term limits would once again dilute the voice of minorities by diminishing their influence and the gains they have made in national politics.

Former President Ronald Reagan was once asked whether he believed a president should be able to run for a third term. He replied, "[T]he people ought to have a right to decide who their leadership would be."²⁵³ Those who have been denied that right for so long should not have it abridged just as they are beginning to enjoy the rich fruits of democracy.

²⁵³ *Heal the Lame Ducks*, L.A. TIMES, Sept. 30, 1985, pt. 2, at 4.