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SUBJECT: Constitutionality of Statutory "Term Limits" on State Elected Officials and Nebraska's Members of the U.S. House of Representatives and Senate.

REQUESTED BY: Senator Chris Beutler
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
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In the wake of the Nebraska Supreme Court's decision in ***Duggan v. Beermann***, 245 Neb. 907, ___ N.W.2d ___ (1994), declaring invalid on procedural grounds the electorate's approval of a constitutional amendment imposing term limits on various state elected officials and ballot access restrictions on Nebraska's members in the U.S. House of Representatives and the Senate, you ask whether the Nebraska Legislature may, by statute, constitutionally enact term limit and ballot access restrictions similar to those contained in the initiative measure invalidated by the Court's decision. For the reasons outlined below, we conclude that the Legislature may, as to certain state officials such as Secretary of State, State Auditor and Attorney General, constitutionally enact statutory term limits. The Legislature may also enact legislation placing ballot access restrictions on incumbents, including members of the Legislature, seeking reelection to state elected offices. In addition, we believe that the Legislature at least arguably is not

precluded from enacting legislation imposing ballot access restrictions on incumbents seeking reelection to the U.S. House of Representatives and Senate. The U. S. Supreme Court has agreed to decide this issue in a case involving ballot access restrictions imposed by the State of Arkansas.

1. Term Limits on State Elected Officials.

"It is quite generally considered that where the constitution lays down specific eligibility requirements for a particular constitutional office the constitutional specification in that regard is exclusive, and the legislature (except where expressly authorized to do so) has no power to require additional or different qualifications for such constitutional office." ***Labor's Educational and Political Club - Independent v. Danforth,*** 561 S.W.2d 339, 343 (Mo. 1977). ***Accord Oklahoma State Election Bd. v. Coats,*** 610 P.2d 776 (Okla. 1980); ***Whitney v. Bolin,*** 85 Ariz 44, 330 P.2d 1003 (1958). ***See generally*** Annot., Legislative Power to Prescribe Qualifications for or Conditions of Eligibility to Constitutional Office, 34 A.L.R.2d 155, 171 (1954). ***See also*** Annot., Construction and Effect of Constitutional or Statutory Provisions Disqualifying One for Public Office Because of Previous Tenure of Office, 59 A.L.R.2d 716, 720 (1958) ("[W]here the qualifications for office are stated by the constitution, the legislature cannot add to them or change them by statute."); 63A Am. Jur. 2d ***Public Officers and Employees*** § 37 (1984) ("The general rule is that where the constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are exclusive."). The Nebraska Supreme Court has recognized, albeit in dicta, its adherence to this general rule. ***State ex rel. Quinn v. Marsh,*** 141 Neb. 436, 439, 3 N.W.2d 892, 894 (1942) ("[I]t appears to be conceded, and it cannot be denied, that where the Constitution creates an office and enumerates the qualifications for eligibility to the office the legislature is without power to impose other conditions of eligibility."); ***State ex rel. Brazda v. Marsh,*** 141 Neb. 817, 830-31, 5 N.W.2d 206, 214 (1942) (noting the "rule almost universally recognized" that "when a state Constitution creates an office and names the qualifications of the incumbent, the legislature has no authority to prescribe additional qualifications or to remove any of the requirements provided for by the Constitution,. . . .").

We believe that, in accord with the general rule noted above, the Legislature may not constitutionally impose statutory term limits which would bar incumbent state elected officials from being reelected when the Constitution establishes the eligibility requirements for those offices. In this regard, we note that Neb. Const. art. III, § 8, which establishes the qualifications for persons to serve as legislators, provides, in part, that "[N]o person shall be eligible to the office of member of the Legislature unless on the date of the general election at which he is elected or on the date of his appointment he is a registered voter, has attained the age of twenty-one years and has resided within the

district from which he is elected for the term of one year next before his election,. . . ." In addition, Neb. Const. art. IV, § 2, provides that "[n]o person shall be eligible to the office of Governor, or Lieutenant Governor, who shall not have attained the age of thirty years, and who shall not have been for five years next preceding his election a resident and citizen of this state and a citizen of the United States."[1] As to these offices, or other constitutional offices for which specific eligibility requirements are provided in the Constitution, we do not believe that the Legislature may statutorily enact term limitations which alter the eligibility requirements in the Constitution by creating an absolute bar against election to such offices.

As to those state offices which the Constitution does not establish eligibility requirements for election, however, a different rule applies. "[W]here the constitution creates an office but does not prescribe any specific qualifications for eligibility to it, the legislature has power to prescribe qualifications for such constitutional office, at least where such qualifications are reasonable and do not conflict with those prescribed by the constitution for holding office generally." Annot., 34 A.L.R.2d, *supra*, at 174. The Nebraska Supreme Court applied this rule in *State ex rel. Quinn v. Marsh*, in which it held that, because the Constitution contained no provisions establishing eligibility for members of the State Railway Commission, the Legislature was not precluded from enacting a statute establishing a citizenship and minimum age requirement for eligibility to serve on the Commission, as such were found to be reasonable qualifications for service as a Commissioner. 141 Neb. at 443-48, 3 N.W.2d at 895-98. In *State ex rel. Brazda v. Marsh*, the Court concluded that, because there was "no constitutional or statutory provision requiring a stated period of residence in this state as a prerequisite to lawful candidacy for the office of secretary of state, none existe[d]. . . ." 141 Neb. at 832, 5 N.W.2d at 214. (emphasis added).

Thus, as to those constitutional offices for which no eligibility requirements are contained in the Constitution, there appears to be no impediment to the Legislature's enactment of reasonable statutory criteria establishing eligibility requirements for election and service. State courts have upheld the validity of

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[1] A specific limitation on the eligibility of an incumbent Governor to serve after having been elected to two terms is, of course, provided by Neb. Const. art. IV, § 1 ("The Governor shall be ineligible to the office of Governor for four years next after the expiration of two consecutive terms for which he was elected."). No similar restriction, however, is placed on the office of Lieutenant Governor. The Constitution also provides that the State Treasurer "shall be ineligible to the office of treasurer, for two years next after the expiration of two consecutive terms for which he was elected." Neb. Const. art. IV, § 3.

state constitutional amendments limiting the terms of state executive and legislative officials against challenges that such violate the First and Fourteenth Amendment of the U.S. Constitution. ***U.S. Term Limits, Inc. v. Hill***, 316 Ark. 251, 872 S.W.2d 349 (1994), ***cert. granted***, June 20, 1994 (No. 94-1456); ***Legislature of the State of California v. Eu***, 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (1991), ***cert. denied***, ___ U.S. ___, 112 S.Ct. 1292, 117 L.Ed.2d 516 (1992). As noted by the Arkansas Supreme Court in ***Hill***, "[i]ndividual states have limited the terms of their officeholders for decades,. . . . ." 316 Ark. at ___, 872 S.W.2d at 359. Addressing the validity of a state constitutional restriction on the ability of an incumbent governor to serve beyond two consecutive terms, the Supreme Court of Appeals of West Virginia stated:

> The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure.

State ex rel. Maloney v. McCartney, 223 S.E.2d 607, 611 (W. Va.), ***appeal dismissed*** 425 U.S. 946 (1976) (***citing Maddox v. Fortson***, 226 Ga. 71, 172 S.E.2d 595, ***cert. denied***, 397 U.S. 149 (1970).

The constitutionality of term limits on state elected officials is firmly established. Further, it is evident that the Legislature may establish eligibility requirements for state constitutional offices when the Constitution is silent as to such requirements, provided the requirements are not unreasonable. Therefore, we conclude that as to those constitutional offices for which the Constitution does not establish eligibility requirements, the Legislature may enact statutory term limitations on incumbents as a criteria for eligibility to election.[2]

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[2] As discussed in part 2. of this opinion, ***infra***, this does not necessarily mean that the Legislature may not enact legislation limiting ballot access to incumbent state officials seeking reelection after serving a specified number of terms. As noted below, a substantial argument can be made that ballot access restrictions imposed on incumbent officeholders do not add to or impose additional qualifications for office, but, rather, may be viewed as a legitimate regulation of the manner of conducting elections. The relevant distinction is between a statute making a person ineligible to be <u>elected</u> to an office, as opposed to legislation establishing the ability of a person seeking election to be listed on the official ballot as a candidate for the office. While the Legislature cannot constitutionally enact laws which absolutely bar certain incumbent state officials from reelection, it may be able to impose statutory ballot access restrictions on incumbents seeking reelection to state offices that have served a specified number of years or terms.

2. Ballot Access Restrictions on Federal Officeholders.

Your question also requires us to consider whether the Legislature, by statute, may enact the "term limitations" proposed under the failed Initiative with respect to Nebraska's incumbent members of the U.S. House of Representatives and Senate. It is important to note, however, that the Initiative approved by the voters did not impose a limit on the number of terms that incumbents holding these federal offices could serve; rather, the Initiative provided that, after having served a specified number of years in these offices, incumbents could not be listed on the official ballot for reelection.

Two recent decisions have declared unconstitutional state restrictions on ballot access imposed on incumbent U.S. Senators and Representatives in Congress. ***Thorsted v. Gregoire,*** 841 F. Supp. 1068 (W.D. Wash. 1994), ***appeal pending*** (Washington statute prohibiting ballot listing of incumbent members of U.S. House of Representatives or Senate after serving specified number of years in office); ***U.S. Term Limits v. Hill,*** 316 Ark. 251, 872 S.W.2d 349, ***cert. granted,*** June 20, 1994 (Arkansas constitutional amendment prohibiting ballot listing of persons elected to specified number of terms in the U.S. House of Representatives or Senate). In each instance, the courts held that the ballot access restrictions on incumbent U.S. Senators and Representatives in Congress imposed additional qualifications for these offices in violation of U.S. Const. art. I, §§ 2 and 3. ***Thorsted v. Gregoire,*** 841 F. Supp. at 1081; ***U.S. Term Limits, Inc. v. Hill,*** 316 Ark. at ___, 872 S.W.2d at 357 (plurality opinion). The conclusion reached by the plurality opinion in ***Hill*** was concurred in by two Justices in separate opinions. ***Id.*** at ___, 872 S.W.2d at 361, 363 (Brown, J., and Dudley, J., concurring in part and dissenting in part). Two Justices, writing separately, dissented from the holding that the ballot access requirements imposed on United States Senators and Representatives were unconstitutional. ***Id.*** at 367, 368 (Hays, J., and Cracraft, C.J., concurring in part and dissenting in part). Justice Hays was of the opinion that "the United States Constitution does not prohibit additional qualifications for senators and representatives", concluding that the language of the Qualifications Clauses of Article I "indicates the qualifications are to be the minimum requirements rather than the exclusive requirements." ***Id.*** at 367. Special Chief Justice Cracraft disagreed with the majority's holding, stating that, in his opinion, the ballot access limitations did not impose additional qualifications on incumbent congressional officeholders, as they did "not impose an absolute bar on incumbent succession." ***Id.*** at 368. He further concluded that the ballot access restrictions did not violate the First and Fourteenth Amendment. ***Id.*** Review of the Arkansas Supreme Court's decision has been sought and has been

granted in the United States Supreme Court.[3]

In spite of these decisions, we believe that a substantial argument may be made that state ballot access restrictions imposed on incumbent members of Congress do not create impermissible additional qualifications for the offices of U.S. Representative and Senator in contravention of U.S. Const. art. I, §§ 2 and 3. Rather, the argument can be made that ballot access restrictions of this nature are permissible under U.S. Const. art. I, § 4, which allows states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives,. . . ." *See Storer v. Brown,* 415 U.S. 724 (1974) (upholding California statute which provided that candidates could not file for office as independents if they had been registered as a member of a political party within one year preceding the primary election); *Joyner v. Moffard,* 706 F.2d 1523 (9th Cir.), *cert. denied,* 464 U.S. 1002 (1983) (upholding Arizona constitutional provision which limited incumbents, except in their final year in office, from filing for another office, state or federal).

In *Hopfmann v. Connolly,* 746 F.2d 97 (1st Cir. 1984), *vacated in part on other grounds,* 471 U.S. 459 (1985), the court considered whether a party rule that a candidate's name could not appear on the Democratic primary ballot for U.S. Senator unless the candidate received at least fifteen percent of the vote at the party's convention unlawfully added a qualification to the office of U.S. Senator beyond the citizenship, age, and residency requirements of U.S. Const. art. I, § 3. Rejecting this contention, the court stated:

> [T]he 15 percent rule does not add a qualification that precludes Hopfmann from obtaining the office of United States Senator. The rule merely adds a restriction on who may run in the Democratic party primary for statewide political office and potentially become a party nominee. The cases cited by plaintiffs to the effect that neither Congress nor the states can add to the constitutional qualifications for office are inapposite. *Cf. Powell v. McCormack,* 395 U.S. 486, 547, 89 S.Ct. 1944, 1977, 23 L.Ed.2d 491 (1969).
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> Unlike the additional requirements involved in the cases cited by plaintiffs, failure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an

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[3] In addition, the Nevada Supreme Court issued a writ of mandamus ordering the Nevada Secretary of State to remove from the ballot a proposed term limitation on Congressional members, relying, in part, on the unconstitutionality of such limits as violative of U.S. Const. art. I, §§ 2 and 3. *Stumpf v. Lau,* 839 P.2d 120 (Nev. 1992).

> independent, or as a write-in candidate. If he is elected and meets the requirements of Article I, Section 3, he will be qualified to take office. As the Wyoming Supreme Court stated in ***State v. Crane,*** [65 Wyo. 189] 197 P.2d 864, 871 (Wyo. 1948), the test to determine whether or not the "restriction" amounts to a "qualification" within the meaning of Article I, Section 3, is whether the candidate "could be elected if his name were written in by a sufficient number of electors."

746 F.2d at 102-03 (emphasis added).

In addition to the foregoing authority, the Nebraska Supreme Court's decision in ***State ex rel. O'Sullivan v. Swanson,*** 127 Neb. 806, 257 N.W. 255 (1934), supports the argument that ballot access provisions on incumbent federal officeholders do not impose impermissible additional qualifications for such offices. In ***Swanson,*** the relator filed under the primary laws as a candidate for Governor and the Secretary of State caused his name to be printed on the ballot as a candidate for that office at the statewide primary. The relator was defeated in the primary, and then sought to have his name placed on the ballot as a candidate nominated by petition for the office of United States Senator. The Secretary of State refused to do so, relying on a state statute providing that "[n]o candidate defeated at the primary election shall be permitted to file by petition in the general election next following." ***Id.*** at 807-08, 257 N.W. at 255. Relator challenged the validity of the statute as violative of U.S. Const. art. I, §§ 3 and 4. Rejecting this contention, the court stated: "Relator has all the qualifications for the office of senator. The state statute in no manner seeks to add other qualifications. It does not prevent him from being a candidate. It is not unconstitutional, as clearly appears from the decisions of the supreme court of the United States." ***Id.*** at 810, 257 N.W. at 256.

The constitutionality of state ballot access restrictions or actual "term limits" on incumbent members of the House of Representatives or Senate has not been definitively decided to date. Only the United States Supreme Court can provide a final answer to the question of the validity of such measures, and the Court, on June 20, 1994 agreed to consider the issue. While recognizing that some courts from other jurisdictions have found such provisions unconstitutional, we do not believe that the question is so clear that we would decline to defend a legislative enactment placing into statute ballot access restrictions similar to those contained in the Initiative Measure struck by the court in ***Duggan v. Beermann.*** We defended the constitutionality of these provisions in that case, and would defend the validity of any similar legislative enactment.

3. Conclusion.

In sum, we conclude that, with respect to state constitutional offices for which the Constitution does not establish specific eligibility requirements, the Legislature may enact statutes providing term limitations, provided such are construed as reasonable. As to those state offices for which the Constitution establishes specific eligibility requirements, the Legislature may not by statute enact term limit requirements. Such requirements would require a state constitutional amendment. The Legislature may also enact legislation placing ballot access restrictions on incumbents seeking reelection to state offices. Finally, while the power of the Legislature to impose ballot access restrictions on incumbent members of the U.S. House of Representatives and the Senate is not completely clear, we would defend any legislative enactment imposing such restrictions against constitutional challenge.

Very truly yours,

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