

CALIFORNIA INITIATIVE REVIEW

Proposition 93:

Term Limits and Legislative Reform Act.

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I. Executive Summary

Proposition 93, known as the “Term Limits and Legislative Reform Act,” would reduce the number of years that a person may serve in the California Legislature from 14 to 12. The measure would allow a person to serve up to 12 years in the Assembly, Senate or a combination of both. It would provide a “transition period” that would allow current members of the Legislature to serve a total of 12 consecutive years in the house in which they are currently serving, without regard to any prior service in another house. Therefore, if Proposition 93 passes, current legislators may be able to hold legislative office in California for longer than the 12-year limit.

The four primary purposes of Proposition 93 are: (1) to provide greater stability and expertise to the California Legislature’s policymaking process, (2) to reduce the number of years that new members may serve in the Legislature to prevent members from becoming entrenched and to promote the opportunity for others to serve, (3) to permit legislators to gain knowledge and expertise necessary to tackle the critical issues facing California, and (4) to afford current members of the Senate and the Assembly the same opportunity to serve 12 years in a single house as newly elected members and preserve existing law regarding uncompleted terms.

Proposition 93 would amend the California Legislature’s current term limits scheme, which was established by passage of Proposition 140 in 1990. Proposition 140 limited legislators to a total of 14 years of service, consisting of no more than 6 years in the Assembly (3 terms) and no more than 8 years in the Senate (2 terms).

In contrast to Proposition 140, which faced several constitutional challenges, no federal or state constitutional issues are apparent in regard to Proposition 93. However, U.S. Term Limits, an out-of-state non-profit organization, filed a lawsuit challenging the Attorney General’s Title and Summary for Proposition 93, claiming it violated the California Elections Code. The Superior Court of Sacramento County dismissed U.S. Term Limits’ Petition for a Writ of Mandate, and the Third Appellate District for the California Court of Appeals summarily dismissed the petition upon appeal.

Proposition 93 is an Initiative Constitutional Amendment. It would expressly amend the California Constitution by modifying Section 2 of Article IV and Section 7 of Article XX. If passed, Proposition 93 would have no direct fiscal effect on state or local governments, and all candidates elected to the Legislature in California’s November 2008 election will be subject to its term limits scheme.

II. The Law

A. Existing law

Until the passage of Proposition 140 in 1990, California did not limit the amount of terms its legislators could serve. Sasha Horwitz, *Termed Out: Reforming California’s Legislative Term Limits* 5 (Ctr. Govtl. Stud. 2007). It was not uncommon for California legislators to hold office for 20 years or more: over 50 legislators served for 20 years or more between 1904 and 1990. Alex Vasser & Shane Meyers, *Join California: Election History for the State of California*,

<http://www.joincalifornia.com/page/6> (accessed Jan. 12, 2008). But on November 6, 1990, Proposition 140, “The Political Reform Act of 1990,” passed, establishing term limits in California. Horwitz, *Termed Out* at 7. Proposition 140 established a 14-year maximum on an individual’s ability to serve in the Legislature and subsidiary maximums of 2 terms (8 years) in the Senate and 3 terms (6 years) in the Assembly. Cal. Const. art. IV, § 2. In October of 1991, the California Supreme Court held that Proposition 140 did not violate any state or federal right; it concluded that Proposition 140’s limitations on service extended over the lifetime of each affected officeholder, making them lifetime term limits instead of the consecutive term limits which had been adopted in some other states. *Legislature v. Eu*, 54 Cal.3d 492, 504 (1991).

B. Proposed Changes

Proposition 93 would amend the California Constitution by changing the maximum amount of time a person may serve in the Legislature from 14 years to 12 years. Legislative Analyst’s Office, Proposition 93, Limits on Legislators’ Terms in Office. Secretary of State, *California Official Voter Information Guide*, Proposition 93, § 4 (2007), <http://voterguide.sos.ca.gov/lang/eng.pdf>, (accessed January 7, 2008). Rather than limiting a legislator to 2 terms in the Senate (8 years) and 3 terms in the Assembly (6 years), Proposition 93 would allow a legislator to serve all 12 years in one house. *Id.* The measure would permit current members of the Legislature to serve a total of 12 consecutive years in the house in which they are currently serving, without regard to any prior service in the other house. *Id.* Accordingly, it is possible that Proposition 93 would allow some members to serve more than 14 years in the Legislature. However, Proposition 93’s 12-year limit would include any years a current member has already served in the house in which she is currently serving. *Id.*

C. Findings and Declarations

The rationales for abandoning California’s current term limits scheme and adopting Proposition 93’s new scheme are set out in Section 2 of the measure, entitled “Findings and Declarations.” *Id.* at § 2. An apparent theme throughout this section is the need to remediate the effects of Proposition 140, particularly increasing partisanship, the rapid turnover of legislators, and the constant campaign cycle. *Id.* These effects hinder legislators’ ability to gain the expertise necessary to formulate good public policy. *Id.* This section asserts that Proposition 93 will remediate some of the negative effects of the current term limits scheme. *Id.*

III. Drafting Issues

A. Pre-Election Challenges

The California Attorney General has the duty of issuing a title and summary for each qualifying initiative. Cal. Elec. Code Ann. § 9002 (West 2007). The Attorney General is required to give a “true and impartial statement” of the “purpose of the measure” in a way that “shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.” Cal. Elec. Code Ann. §9051. The title and summary shall include the “chief purpose and points of the proposed measure” and shall not exceed a total of 100 words. Cal. Elec. Code Ann. §9002.

The Attorney General’s Title and Summary for Proposition 93 is as follows:

Limits on Legislators' Terms in Office. Initiative Constitutional Amendment. Reduces the total amount of time a person may serve in the state legislature from 14 years to 12 years. Allows a person to serve a total of 12 years either in the Assembly, the Senate, or a combination of both. Provides a transition period to allow current members to serve a total of 12 consecutive years in the house in which they are currently serving, regardless of any prior service in another house. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: This measure would have no direct fiscal effect on state or local governments.

Initiative No. 07-0004, Amendment No. 1S, Cal. Atty. Gen. Title and Summary (Apr. 11, 2007).

In May of 2007, U.S. Term Limits filed a lawsuit alleging that the Attorney General's Title and Summary for Proposition 93 violated Elections Code §9051 because it is fundamentally inaccurate and misleading to the public. *Anderson v. Brown*, No. 07CS00534 (Cal. Super. Ct., Sacramento County May 2, 2007).

Challenges to the Attorney General's title and summary for an initiative are not uncommon, and the law in regard to these challenges is fairly settled. Generally, the Attorney General's title and summary for an initiative will be presumed accurate. *Amador Valley Joint Union High Sch. Dist. v. St. Bd. of Equalization*, 22 Cal. 3d 208, 243 (1978). However, the trial courts are empowered to examine the content of a ballot digest to determine if it fairly represents the measures it summarizes. *Brennan v. Bd. of Supervisors*, 125 Cal. App. 3d 87, 93 (1st Dist. 1981). The purpose behind preparing a title and summary for a ballot measure is to state its purpose and effect, not to reiterate selective fragments of public commentary and debate on the measure. *Lungren v. Super. Ct.*, 48 Cal. App. 4th 435, 442 (3rd Dist. 1996). The title and summary also serves to prevent inaccurate information from misleading the public. *Amador*, 22 Cal. 3d at 243. A title and summary, although technically imprecise, nonetheless may fairly represent an initiative and is not fatally defective. *Zaremborg v. Super. Ct.*, 115 Cal. App. 4th 111, 118 (1st Dist. 2004).

U.S. Term Limits took issue with several words used in the Attorney General's Title and Summary for Proposition 93, particularly the words "terms" and "reduces." Br. of Petr. at 8-10, *Anderson v. Brown*, No. 07CS00534 (May 14, 2007). U.S. Term Limits was offended by the use of the words "terms" and "reduces" because Proposition 93 would not necessarily reduce the number of terms that legislators would be able to serve. *Id.* at 10. While Proposition 93 reduces the number of years a person may serve in the Legislature from 14 to 12, it also allows a person to serve as many as 6 terms in the Assembly (12 years) or 3 terms in the Senate (12 years), which is actually more terms than allowed under the current term limits scheme. Proposition 93, §4.

U.S. Term Limits also attacked the Attorney General's Title and Summary for Proposition 93 on the grounds that that it mischaracterizes the measure's transition period, which U.S. Term Limits contended was actually an exception to the term limits scheme designed to benefit incumbents. Br. of Petr. at 11-12, *Anderson*, No. 07CS00534. U.S. Term Limits argued that the term transition period could easily be misinterpreted by voters in favor of term limits to signify a modification of the current term limits scheme rather than a move to a cap on years of service. *Id.* at 14.

U.S. Term Limits challenge to the Attorney General's Title and Summary for Proposition 93 was unsuccessful; the Superior Court of Sacramento County dismissed U.S. Term Limits' Petition for a Writ of Mandate, *Anderson*, No. 07CS00534, and the Third Appellate District for the California Court of Appeals summarily dismissed the petition upon appeal. *Anderson v. Super. Ct., Sacramento County*, No. C055847 (Cal. App. 3rd Dist. Jun., 5, 2007). U.S. Term Limits is not expected to pursue further appeal. Frank D. Russo, *Attempt to Change Title and Summary of Term Limits Initiative Summarily Rejected by California Court of Appeals*, http://www.californiaprogressreport.com/2007/06/attempt_to_chan.html (accessed Jan. 11, 2008).

On November 2, 2007, a concerned citizen, Thomas Cares, filed a lawsuit against California's Secretary of State challenging the Attorney General's Title and Summary for Proposition 93. *Cares v. Bowen*, No. 07CS01473 (Cal. Super. Ct., Sacramento County Nov. 2, 2007). Cares alleged that Proposition 93 would weaken the current term limits scheme and requested that the Secretary of State amend the Attorney General's Title and Summary for Proposition 93 to reflect the fact that the proposed changes would actually increase the total number of years a legislator could serve in either the Assembly or the Senate. Thomas Cares, *Outraged Citizen Files Lawsuit Over Prop 93's Illegally Manipulative Official Ballot Title and Summary*, <http://prop93truth.com> (accessed Jan. 11, 2008). Cares' request was denied on November 13, 2007. *Cares*, No. 07CS01473.

B. Severability

Proposition 93 contains the following severability clause: "The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." Proposition 93, § 6. In case a provision of Proposition 93 is invalidated, this clause directs a court to strike down the void portion and to give effect to the valid remainder.

However, the inclusion of a severability clause is not dispositive of whether severance is possible. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 821 (1989). The California Supreme Court has articulated three criteria to determine if severance is permissible: the invalid provision must be grammatically, functionally, and volitionally separable. *Gerken v. FPPC*, 6 Cal. 4th 707, 714 (1993). A provision is grammatically and functionally separable if the words of the provision are distinct, and the provision to be severed is capable of independent action. *People's Advoc., Inc. v. Super. Ct.*, 181 Cal. App. 3d 316, 331 (3rd Dist. 1986). A provision is volitionally separable if severing the provision would not change the initiative so dramatically that it would no longer be likely that the electorate would have passed the initiative lacking the severed provision. *Gerken*, 6 Cal. 4th at 715-716.

If severability becomes an issue in regard to Proposition 93, a court will likely apply the three-part test established in *Gerken*. *Id.* at 715. Proposition 93 contains seven distinct sections. Proposition 93. Sections 1-3 of the measure discuss the title, the findings and declarations, and the purpose and intent of Proposition 93, respectively. *Id.* at §§ 1-3. Because these sections do not substantively affect California law, they could be severed without affecting the remaining sections. Section 4 of the measure amends Section 2 of Article IV of the California Constitution,

and Section 5 amends Section 7 of Article XX. *Id.* at §§ 4-5. While grammatically capable of severance, neither of these sections may be severed from the measure because it would not function properly without them; these two sections are mutually dependent, and the absence of one would lead to a dysfunctional term limits scheme. Furthermore, these sections are not volitionally severable, as it is highly unlikely voters would approve Proposition 93 if they knew one of these sections was susceptible to a successful legal challenge. Section 6 of the measure contains the severability clause, and Section 7 addresses conflicting initiatives. *Id.* at §§ 6-7. While these measures substantively affect the measure in some particular instances, it is likely that they could be successfully severed from the measure. These clauses are grammatically and functionally severable, and they appear volitionally separable because it is unlikely that voters would change their position on the measure if they knew these two sections were susceptible to successful legal challenge.

IV. Constitutional Issues

A. Federal Constitution

In December of 1997, the United States Court of Appeals for the Ninth Circuit addressed the issue of the constitutionality of term limits, as initiated under Proposition 140, in *Bates v. Jones*, 131 F.3d 843 (1997). The court held that term limits did not impact appellants' right to vote because they did not impose any discriminatory restriction on the basis of party affiliation, the content of protected expression, or on the basis of race, gender, or religion. *Id.* at 847. Applying the court's holding to Proposition 93, it is likely the measure would survive judicial scrutiny, since it does not appear that the measure makes any distinction based on the content of any protected expression or any arbitrary factors such as race, religion, or gender.

The *Bates* court also held that "Proposition 140's minimal impact on the plaintiffs' rights is justified by the State's legitimate interests. As the Proposition itself states, a lack of term limits may create 'unfair incumbent advantages.'" *Id.* Legislators that hold office for many terms may obtain excessive power which may discourage other qualified candidates from running for office or may provide the incumbent legislator with an unfair advantage in winning reelection. In consideration of term limits, United States Supreme Court Justice Stevens opined:

Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents.

U.S. Term Limits v. Thornton, 514 U.S. 779, 837 (1995). The *Bates* court reasoned that passage of Proposition 140 signified California voters' belief that a lifetime term limit for elected state officials was the best way to make elections more competitive and open up the political process to new and varied candidates. 131 F.3d at 847 (1997). Similarly, if Proposition 93 passed and challenged based on the federal constitution, a court would likely find that Proposition 93's passage signified California voters' belief that the term limits scheme established by Proposition 140 required remediation in order to make elections more competitive and to open up the political process to a wider array of candidates.

In *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), the United States Supreme Court held that the constitutionality of a term limits scheme is determined by weighing the type and magnitude of the asserted injury to the right the plaintiff seeks to protect under the First and Fourteenth Amendments against the interests advanced by the State to justify those burdens. The rights that the plaintiffs sought to vindicate in *Bates* are similar to those that might arise in a challenge to Proposition 93, mainly the right to vote for the candidate of one's choice and the right of an incumbent to run for reelection. 131 F.3d at 847 (1997). The *Burdick* Court stated that "term limits on state officeholders is a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose." 504 U.S. at 433. In regard to incumbents, they may still pursue reelection until they are termed out, and they are not precluded from running for some other state office. Proposition 93 does not seek to limit political candidates by any "non-neutral" candidacy qualifications; it merely modifies the current term limits scheme, which has already survived judicial scrutiny.

Most important, the lifetime term limits do not constitute a discriminatory restriction. The current term limits scheme in California makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender. Cal. Const. art. IV, § 2. Nor is the current scheme one that "limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). Because Proposition 93 merely modifies the current term limit scheme, which has been determined to be a neutral candidacy restriction, it is unlikely the court will find that it violates the principals laid out in *Anderson* and *Burdick*.

Accordingly, Proposition 93 also does not appear to be in jeopardy from a challenge under the California Constitution.

B. California Constitution

Although "[t]he electors may amend the Constitution by initiative, a 'revision' of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification or by legislative submission of the measure to the voters." *Eu*, 54 Cal. 3d at 506 (citations omitted).

The California Constitution does not define the terms "amendment" or "revision," but the courts have developed some helpful guidelines for determining whether a modification is an amendment or revision. Courts will examine both the quantitative and qualitative effects of the measure on California's constitutional scheme, and substantial changes in either respect could amount to a revision. *Raven v. Deukmejian*, 52 Cal. 3d 336, 350 (1990).

The *Eu* Court, applying the test from *Raven*, determined that the current term limits scheme, established by Proposition 140, did not affect either the structure or the foundational powers of the Legislature. 54 Cal. 3d at 492. The Legislature remained free to enact whatever laws it, as a body, deemed appropriate. *Id.* at 509. The adoption of the current term limits scheme altered neither the content of those laws nor the process by which they were adopted. *Id.* No Legislative power was diminished or delegated to other persons or agencies, and the

relationships between the three governmental branches, and their respective powers, remained untouched. *Id.*

It is unlikely that the constitutional modifications that Proposition 93 commands will be determined a revision of the California Constitution because Proposition 93 merely changes the term limits set out by Proposition 140, which survived judicial review in *Eu*. Because none of Proposition 93's modifications of the California Constitution rise to the level of a qualitative revision, it is likely that the measure is properly identified as a constitutional amendment, rather than a revision.

V. Public Policy Considerations

A. Proponents

Proponents argue that Proposition 93 is necessary to stop the constant turnover in the Legislature that results from current term limits law. Bruce E. Cain, *Reform Term Limits – and Improve Them*, Sacramento Bee, (Mar. 25, 2007) (available at <http://www.sacbee.com/110/story/143165.html>). Proposition 93 would allow legislators to remain in a single house for a longer period of time but reduce the total number of years new members may potentially serve, thereby preventing entrenchment and simultaneously allowing members to develop their policymaking expertise and leadership skills. Proponents assert that Proposition 93 would slow down the perpetual campaign cycle, reduce partisanship, maintain stability and increase the collective expertise of the Legislature. *Yes on Prop 93*, http://www.termlimitsreform.com/index.php?option=com_content&task=blogcategory&id=13&Itemid=26 (accessed January 11, 2008).

Proponents also argue that Proposition 93 would encourage legislators to address long-term policy issues that are normally ignored, such as improving schools and fixing the prison system. *Id.* According to Proposition 93's proponents, the current term limits scheme encourages legislators to pursue policies which generate press attention beneficial to re-election campaigns instead. Cain, *supra*.

Proponents also believe that Proposition 93 would increase the institutional memory of the Legislature as well as legislative oversight over executive agencies. *Id.* They argue that if legislators are allowed to serve for a longer period of time, they will acquire more of the expertise that is required to effectively oversee other government entities. *Id.* For example, better understanding of the workings of the state's executive agencies might allow legislators the opportunity to reduce government waste and overall spending.

Further, proponents also argue that term limit reform would provide for more competitive electoral races, thereby reducing the advantages of incumbency. *Id.* In deciding whether to support term limits reforms, proponents encourage voters to consider whether such reforms would benefit California, rather than focusing on the personal motives of the legislators behind the measure. *Id.*

B. Opponents

Opponents argue that Proposition 93's primary purpose is to help current incumbent legislators remain in office, rather than modifying California's term limits scheme. U.S. Term Limits, *U.S. Term Limits Files Lawsuit Over Misleading and Biased Title and Summary for Perata/Nunez Initiative to Weaken Term Limits*, http://www.ustl.org/Press/Press_Releases/5-2-07PressRelease.pdf (accessed Jan. 11, 2008). In this regard, opponents especially take issue with two of Proposition 93's sponsors, Assembly Speaker Fabian Nunez and Senate President Pro Tem Don Perata, believing that Proposition 93's term limits scheme was designed to benefit them particularly. *Id.*

In addition, opponents allege that Proposition 93 misleads voters: rather than modifying the state's current term limits scheme, it replaces it with a maximum on years of service in the Legislature. Br. of Petr. at 14, *Anderson*, No. 07CS00534. Opponents point out that in some situations Proposition 93 would actually allow a legislator to serve substantially longer than under the current term limits scheme; the current scheme limits a legislator to 3 terms (6 years) in the Assembly and 2 terms (8 years) in the Senate, but Proposition 93's scheme would allow as many as 6 terms (12 years) in the Assembly or 3 terms (12 years) in the Senate. U.S. Term Limits, *supra*, http://www.ustl.org/Press/Press_Releases/5-2-07PressRelease.pdf (accessed Jan. 11, 2008); Cal. Const., art. IV, § 4; Proposition 93, §4.

Finally, opponents take issue with Proposition 93's transition period. They believe that this provision is merely a loophole designed to benefit incumbent legislators by prolonging the amount of time they are allowed to serve in the Legislature. U.S. Term Limits, *supra*, http://www.ustl.org/Press/Press_Releases/5-2-07PressRelease.pdf.

VI. Conclusion

Proposition 93 would amend the California Constitution to change the maximum number of years a legislator could serve from 14 to 12. The measure would allow a person to serve up to 12 years in the Assembly, Senate or a combination of both. It would provide a transition period that would allow current members of the Legislature to serve a total of 12 consecutive years in the house in which they are currently serving, without regard to any prior service in another house. The Attorney General's Title and Summary for Proposition 93 has already survived a legal challenge from U.S. Term Limits, and it does not appear that Proposition 93 will be susceptible to a successful challenge under either the California or Federal Constitution. Proponents argue that Proposition 93 will bring about better governance by allowing legislators to gain more expertise and to better address the long-term problems facing the state. Opponents believe that Proposition 93's primary purpose is to benefit incumbent legislators. The California voting public must decide for themselves if a change in its term limits scheme will better serve the interests of the state.