

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: U.S. TERM LIMITS, INC., ET AL., Petitioners v.
RAY THORNTON, ET AL. and WINSTON BRYANT,
ATTORNEY GENERAL OF ARKANSAS, Petitioner
v. BOBBIE E. HILL, ET AL.

CASE NO: No. 93-1456 and No. 93-1828

PLACE: Washington, D.C.

DATE: Tuesday, November 29, 1994

PAGES: 1-78

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 U.S. TERM LIMITS, INC., ET AL., :

4 Petitioners :

5 v. : No. 93-1456

6 RAY THORNTON, ET AL. :

7 and :

8 WINSTON BRYANT, ATTORNEY :

9 GENERAL OF ARKANSAS, :

10 Petitioner :

11 v. : No. 93-1828

12 BOBBIE E. HILL, ET AL. :

13 - - - - - X

14 Washington, D.C.

15 Tuesday, November 29, 1994

16 The above-entitled matter came on for oral

17 argument before the Supreme Court of the United States at

18 10:05 a.m.

19 APPEARANCES:

20 J. WINSTON BRYANT, ESQ., Attorney General of Arkansas,

21 Little Rock, Arkansas; on behalf of Petitioner

22 Bryant.

23 JOHN G. KESTER, ESQ., Washington, D.C.; on behalf of the

24 Petitioners Term Limits, et al.

25

1 APPEARANCES: (Continued)

2 LOUIS R. COHEN, ESQ., Washington, D.C.; on behalf of the
3 Respondents.

4 DREW S. DAYS, III, ESQ., Solicitor General, Department of
5 Justice, Washington, D.C.; on behalf of the United
6 States, as amicus curiae, supporting the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 93-1456, U.S. Term Limits, Inc., v. Ray
5 Thornton, 93-1828, Consolidated, Winston Bryant v. Bobbie
6 E. Hill.

7 General Bryant.

8 ORAL ARGUMENT OF J. WINSTON BRYANT

9 ON BEHALF OF PETITIONER BRYANT

10 GENERAL BRYANT: Thank you, Mr. Chief Justice
11 and may it please the Court:

12 The State of Arkansas is before this Court today
13 defending its constitutional authority to encourage
14 rotation in office of its congressional delegation.
15 Amendment 73, which would have accomplished that objective
16 was ruled unconstitutional by the Arkansas supreme court.

17 The court held that Amendment 73 amounted to a
18 qualification and, further, that the State of Arkansas
19 could not add additional qualifications to those listed in
20 Article I, sections 2 and 3. We disagree with that
21 ruling.

22 Amendment 73 is not a qualification, but even if
23 it is a qualification, the State of Arkansas has the
24 authority to add additional qualifications to those listed
25 in Article I, sections 2 and 3.

1 Our Founding Fathers envisioned a Congress of
2 citizen legislators who would serve awhile, return and mix
3 with the people, and not stay in office indefinitely, and
4 during the 18th and 19th Centuries, voluntary rotation was
5 a common practice.

6 During the 20th Century, we have seen a dramatic
7 increase in the number of long-term, entrenched
8 incumbents. Entrenched incumbency makes for an electoral
9 system that is less fair, less competitive, and less
10 representative.

11 Amendment 73 was adopted in 1992 by the people
12 of Arkansas overwhelmingly, by a 60 percent to 40 percent
13 majority.

14 Twenty-two States now have some form of term
15 limit proposals or ballot access initiatives on their
16 books. Thirty-seven States have term limits that limit
17 the terms of the executive branch officials of those
18 States or the legislative branch officials of those
19 States.

20 QUESTION: Is the theory that by this rotation
21 the policy that the legislators adopt will be different in
22 one system than in the other system?

23 That is to say, are there policy implications to
24 electing an incumbent as opposed to a nonincumbent?

25 GENERAL BRYANT: Yes, Your Honor, that is

1 correct.

2 That issue is not before this Court, however,
3 but the people of Arkansas, by Amendment 73, have decided
4 to encourage rotation in office to make the election
5 process more fair and more competitive.

6 QUESTION: Well, but you're explaining the
7 rationale for the limitation, and I'm asking if part of
8 that rationale is that rotated representatives will vote
9 differently than incumbents would have, would shape public
10 policy in a different way.

11 GENERAL BRYANT: Your Honor, they would be more
12 beholden to the people under the theory of Amendment 73
13 because they would not be career politicians. They would
14 be more responsive to the people.

15 QUESTION: So there would be a difference in the
16 kind and the shape and the policies of the legislation
17 that they would enact.

18 GENERAL BRYANT: There could be, Your Honor.

19 QUESTION: Well, is that the justification for
20 the rule, or isn't it?

21 GENERAL BRYANT: Yes, Your Honor. Yes, Your
22 Honor.

23 Amendment 73 provides for strict term limits for
24 certain State elected officials in Arkansas. It denies
25 ballot access to multiterm congressional incumbents, but

1 does allow those incumbents, after serving a maximum
2 number of terms allowed by Amendment 73, to run as a
3 write-in candidate.

4 QUESTION: But once they're denied the ballot
5 access, they're denied it for life, is that right?

6 GENERAL BRYANT: That is correct, Your Honor.

7 QUESTION: Doesn't the permanency of the denial
8 carry a suggestion of what we would normally refer to as a
9 qualification?

10 GENERAL BRYANT: No, Your Honor. The definition
11 of a ballot access proposal like Amendment 73 as opposed
12 to a qualification is put forth in our brief, and that is,
13 a qualification is something that absolutely prohibits a
14 candidate from serving even if elected.

15 QUESTION: Well, I realize that's your position,
16 but in any case, your position would take us beyond
17 Storer, wouldn't it?

18 GENERAL BRYANT: No, Your Honor.

19 QUESTION: Well, in Storer -- maybe my
20 recollection is wrong. In Storer, I thought there wasn't
21 a lifetime disqualification.

22 GENERAL BRYANT: That is correct, Your Honor.

23 QUESTION: I mean, if you -- you know, had been
24 party-affiliated within a certain period of time, you
25 couldn't be there as an independent, but the next election

1 was coming, and that was a new day. Isn't that right, in
2 Storer?

3 GENERAL BRYANT: That is correct, Your Honor.

4 QUESTION: So Storer didn't have that
5 implication of permanence which is in fact a feature of
6 the Arkansas system.

7 GENERAL BRYANT: That is correct, Your Honor,
8 but the State's position is that Amendment 73 is
9 consistent with Storer, the difference being that under
10 Amendment 73 a candidate can actually serve a couple of
11 terms in the Senate, or three terms in the House, so it
12 does not absolutely prohibit a candidate from serving.
13 After that candidate reaches a maximum number of terms,
14 then obviously that candidate is denied access to the
15 ballot.

16 QUESTION: General --

17 QUESTION: -- precedent, any case where a group
18 based on past experience, past lawful experience, has been
19 categorically hobbled in this way. It's not simply a
20 handicap in the race if the only access they have is as a
21 write-in, is it?

22 GENERAL BRYANT: Your Honor, to answer your
23 question, the State does not take the position that
24 Amendment 73 is an absolute handicap, because we're
25 dealing with multiterm incumbents who would have great

1 name recognition, resources available to them that
2 ordinary challenges would not have.

3 QUESTION: I'm trying to contrast a mere
4 handicap from a hobbling, and it seems to me this falls in
5 the latter category.

6 GENERAL BRYANT: No, Your Honor. The State's
7 position is that Amendment 73 will allow a candidate to
8 serve even if elected, and under that scenario, under that
9 definition that we put forth to this Court, would amount
10 to only a ballot access regulation.

11 QUESTION: Well, General Bryant, a good many
12 States have passed so-called term limit measures that just
13 disable a candidate from appearing on the ballot for a
14 short period of time, isn't that correct?

15 GENERAL BRYANT: That is correct, Your Honor.

16 QUESTION: And Arkansas has a very different
17 provision in that it extends for the rest of that
18 particular candidate's life.

19 GENERAL BRYANT: That is correct, Your Honor.

20 QUESTION: Do you think that there may well be,
21 even if you are correct that it is seen as a ballot access
22 measure, that there may be First Amendment issues at stake
23 here, the associational rights, for instance, of the
24 political party that might want to have the candidate on
25 the ballot as its candidate?

1 GENERAL BRYANT: Yes, Your Honor, there are --

2 QUESTION: And are those issues issues that were
3 resolved in the courts below?

4 GENERAL BRYANT: No, Your Honor.

5 QUESTION: So that would be open on remand, I
6 assume, even if we agreed with you it were a ballot access
7 measure?

8 GENERAL BRYANT: That is correct, Your Honor.
9 That is correct.

10 QUESTION: Those -- you say the First Amendment
11 issue were presented to the supreme court of Arkansas but
12 not decided by it.

13 GENERAL BRYANT: That is correct, Your Honor.
14 Amendment 73 is also consistent with this Court's
15 jurisprudence.

16 In *Burdick v. Takushi*, a case from Hawaii, in
17 that particular case, the State of Hawaii had adopted a
18 statutory scheme that allowed write-in voting to be
19 completely banned. In this --

20 QUESTION: Yes, and what about a State like
21 Hawaii that has no write-in voting allowed at all?

22 GENERAL BRYANT: Your Honor --

23 QUESTION: Would it become a qualification then?

24 GENERAL BRYANT: It would become a qualification
25 at that point, if there is no write-in provision, but even

1 assuming --

2 QUESTION: How is that? I'm not sure how that
3 makes it a qualification. It seems to me the test for
4 whether it's a qualification is whether, when a person has
5 been supposedly elected and reports to Congress, Congress
6 can sit in judgment and say, this person is not qualified.
7 Now, if that should happen, what disqualification would
8 there be?

9 GENERAL BRYANT: Your Honor, under that
10 scenario, Congress can consider the -- obviously can
11 consider under Article I, section 5, the qualifications,
12 and under the position of the State in this particular
13 case, a pure write-in, a pure term limits proposal --

14 QUESTION: Let's assume in Hawaii the person
15 gets on the ballot by mistake, or in Arkansas. An
16 incumbent who has no right to be on the ballot is put on
17 the ballot and gets elected, all right.

18 GENERAL BRYANT: If --

19 QUESTION: Reports to Congress. Now, could
20 Congress sit in judgment and exclude that person?

21 GENERAL BRYANT: Yes, Your Honor. Under
22 Article I, section 5, if the person were not properly
23 qualified, yes.

24 QUESTION: Well then it is a qualification in
25 Arkansas. Do you say that if somebody gets on the ballot

1 by mistake in Arkansas and is elected, Congress can
2 exclude that person?

3 GENERAL BRYANT: Your Honor, I was considering
4 it under a pure term limits proposal.

5 QUESTION: I'm not talking about --

6 GENERAL BRYANT: Under Amendment --

7 QUESTION: I'm talking about, Hawaii exclusion
8 from the ballot system. It's not a term limit proposal,
9 it's just exclusion from the ballot, but entirely. No
10 write-in allowed, either, and the Arkansas system.

11 GENERAL BRYANT: And under the Arkansas system,
12 Your Honor, the Congress could not consider the Amendment
13 73 proposal as a qualification under that scenario.

14 QUESTION: It seems to me they couldn't with
15 respect to Hawaii, either. Hawaii doesn't say you shall
16 not serve, it just says you shall not get on the ballot,
17 and people will not be able to vote for you.

18 GENERAL BRYANT: That is correct.

19 QUESTION: And if that happens, you're not
20 unqualified.

21 GENERAL BRYANT: That is correct, Your Honor.

22 QUESTION: Could I ask you -- you say that this
23 is not a qualification. Is it a time, place or manner
24 restriction?

25 GENERAL BRYANT: Yes, it is, Your Honor.

1 QUESTION: It is. Is there such a thing as
2 something that is neither the one nor the other, it is
3 neither a qualification nor a time, place and manner
4 restriction?

5 GENERAL BRYANT: Neither a qualifica -- no, Your
6 Honor.

7 QUESTION: It's either one or the other.

8 GENERAL BRYANT: It's either one --

9 QUESTION: Everything falls into one or the
10 other category.

11 GENERAL BRYANT: According to our --

12 QUESTION: Which category would a law providing
13 that you only count half the votes of a candidate fall?
14 Would that be a qualification or a time, place and manner?

15 (Laughter.)

16 QUESTION: Or maybe something different?

17 GENERAL BRYANT: That would probably fall under
18 time, place, and manner, Your Honor, but --

19 QUESTION: Time, place, and manner? Which of
20 the three? Is it time, place, or manner?

21 (Laughter.)

22 GENERAL BRYANT: It would be the manner.

23 QUESTION: The manner, okay.

24 GENERAL BRYANT: But, Your Honor, that would
25 have to undergo First and Fourteenth Amendment scrutiny if

1 that proposal were adopted by the State.

2 QUESTION: If it's time, place, and manner, this
3 means, of course, that the current Congress, composed
4 mainly of incumbents, can simply revise the Arkansas law,
5 right?

6 GENERAL BRYANT: That is correct, Your Honor.

7 QUESTION: And indeed, the current Congress
8 could revise those laws that don't provide for term
9 limitations or don't provide for exclusion from ballot
10 access to incumbents.

11 GENERAL BRYANT: Yes, Your Honor,

12 QUESTION: So in effect you could have the
13 Federal legislature doing something that discourages --
14 that discourages incumbency.

15 GENERAL BRYANT: Yes, Your Honor, under
16 Article 1, section 4.

17 QUESTION: What could the Federal legislature
18 do?

19 GENERAL BRYANT: The Federal legislature, Your
20 Honor, is given authority under Article I, section 4, to
21 override anything the States do in the area.

22 QUESTION: Yes, but are you suggesting that it
23 could do -- the Federal legislature could do anything more
24 than simply negate a State regulation?

25 GENERAL BRYANT: Yes, Your Honor.

1 QUESTION: And what would be the authority for
2 that?

3 GENERAL BRYANT: Article I, section 4 would give
4 Congress that authority, Your Honor.

5 QUESTION: To do more than just negate a State
6 regulation?

7 GENERAL BRYANT: Yes, Your Honor.

8 QUESTION: And what part of the language is it
9 of that section that --

10 GENERAL BRYANT: The term "manner," Your Honor,
11 under Article I, section 4, has a very broad, expansive
12 meaning, and during the ratification debates the States
13 were concerned about the fact that under Article I,
14 section 4, Congress was being given the authority which
15 the States concluded would allow Congress to override
16 anything the States did in the area.

17 The Article I, section 4 clause was sold on the
18 basis that Congress needed the authority or power to
19 preserve its -- the Union, if necessary, and so Article I,
20 section 4 has a -- is very broad in its meaning, and would
21 authorize Congress to adopt legislation in the area.

22 QUESTION: So that even though, perhaps, a State
23 hasn't acted, Congress could, by law, make regulations
24 governing the time, place, and manner?

25 GENERAL BRYANT: Yes, Your Honor, and in fact

1 Congress could override amendment 73 if Congress so
2 desired.

3 QUESTION: But what if Arkansas had made no
4 provision for term limits at all, could Congress step in
5 and make a provision for term limits?

6 GENERAL BRYANT: Yes, Your Honor, under
7 Article I, section 4, Congress could do that.

8 QUESTION: You've mentioned that there were
9 qualifications that don't come from the Constitution
10 itself.

11 You started out your argument by saying the
12 States could add qualifications. Now you've told us that
13 there are only two categories, there's qualifications, and
14 there's time, place, and manner, but you see two
15 categories of qualifications, I gather, because you've
16 told us that some come from the Constitution, and then
17 there are others the States can add.

18 So what's the category of qualifications, extra-
19 Constitution, that the State can add that are not time,
20 place, and manner regulations?

21 GENERAL BRYANT: Your Honor, the qualifications
22 that the States could add would all be time, place, and
23 manner under Article I, section 4. Also the State could,
24 if there are some enumerated -- if Article I, section 4
25 does not cover some particular areas, Amendment 10 would

1 allow the States to act in that particular area, but the
2 States have always added additional qualifications.

3 In fact, when the Constitution was adopted by
4 the States, the State of Virginia had a property
5 qualification as well as a residency requirement. James
6 Madison --

7 QUESTION: If you call those qualifications, can
8 the State override them?

9 GENERAL BRYANT: No, Your Honor.

10 QUESTION: So the --

11 GENERAL BRYANT: I'm sorry --

12 QUESTION: Pardon me, can the Congress override
13 them?

14 GENERAL BRYANT: Yes, Your Honor, the Congress
15 could under Article --

16 QUESTION: So anything the State adds as either
17 a qualification or a time, place, and manner can be
18 overridden by the Congress?

19 GENERAL BRYANT: Your Honor, the specific
20 provisions that can be overridden by Congress are the
21 Article I, section 4 grants of authority to the States
22 by --

23 QUESTION: Well, are there some qualifications
24 that the State can add, and I -- this was suggested by
25 Justice Ginsburg's question, that cannot be overridden by

1 the Congress?

2 GENERAL BRYANT: None comes to mind, Your Honor.

3 The States --

4 QUESTION: General Bryant --

5 QUESTION: Well, why --

6 QUESTION: -- the Congress can't impose any

7 qualifications, can it?

8 GENERAL BRYANT: Yes, Your Honor.

9 QUESTION: Oh.

10 GENERAL BRYANT: Congress can impose additional

11 qualifications.

12 QUESTION: What's the source for that? Where do

13 you find the authority for that?

14 GENERAL BRYANT: Article 1, section 4.

15 QUESTION: That doesn't talk about

16 qualifications. That talks about time, place, and manner.

17 GENERAL BRYANT: Yes, Your Honor, but under our

18 definition the Congress can add additional qualifications

19 based on Article 1, section 4 authority, and Congress has

20 done so since the very first Congress. In the very first

21 Congress --

22 QUESTION: You think Congress could pass a

23 statute saying every Senator must be at least 50 years

24 old?

25 GENERAL BRYANT: Congress could pass --

1 QUESTION: What's your answer?

2 GENERAL BRYANT: Yes. Yes, Your Honor, they
3 could pass such a statute sub -- of course, it would be
4 subject to First and Fifth Amendment.

5 QUESTION: Now, where do you get that? You
6 don't get that from the Tenth Amendment. Where does that
7 come from?

8 GENERAL BRYANT: That comes under Article I,
9 section 4 authority, Your Honor.

10 QUESTION: But that's time, place, and manner,
11 not qualifications. I thought you make a distinction
12 between the two. You make no distinction between time,
13 place, and manner and qualifications?

14 GENERAL BRYANT: Yes, we make a distinction,
15 Your Honor. The -- the narrow --

16 QUESTION: Well, you must be -- 50 has nothing
17 to do with time, place, and manner of elections at all.
18 It has to do purely with qualifications.

19 GENERAL BRYANT: The narrow issue before this
20 Court is whether or not Amendment 73 amounts to a ballot
21 access regulation. If it amounts to a qualification, the
22 States as well as Congress can add additional
23 qualifications to those listed in Article --

24 QUESTION: Well, I can understand why you argue
25 the States can on the basis of the Tenth Amendment. I

1 don't know where the Congress gets the power to do that.

2 GENERAL BRYANT: And that is under Article 1,
3 section 4, Your Honor.

4 QUESTION: But that doesn't relate to
5 qualifications, that relates to time, place, and manner.
6 Is there no qualification that is not a time, place, and
7 manner provision? Every qualification is a time, place,
8 and manner provision?

9 GENERAL BRYANT: Yes, Your Honor, that would be
10 consistent with the State's position.

11 QUESTION: Every qualification --

12 GENERAL BRYANT: Under that --

13 QUESTION: -- is a time, place, and manner
14 provision.

15 GENERAL BRYANT: Under that theory we advance.

16 QUESTION: How is the age qualification a time,
17 place, and manner? How would a qualification that every
18 elected Senator must have a college degree, how is that a
19 time, place, and manner qualification or condition?

20 GENERAL BRYANT: Oh, Your Honor, that is a time,
21 place, and manner because if the State of Arkansas or
22 Congress did that, that would be -- that is
23 constitutional, according to our position, under
24 Article I, section 4. However, it would have to pass
25 constitutional muster, and that is the test. Under the

1 ballot access --

2 QUESTION: That is a manner condition, as it
3 were?

4 GENERAL BRYANT: Yes, Your Honor. That could be
5 considered a manner condition under Article I, section 4.

6 QUESTION: Well, General Bryant, this is a very
7 remarkable proposition --

8 (Laughter.)

9 QUESTION: -- and -- does your argument depend
10 in any way on this most unusual interpretation?

11 (Laughter.)

12 GENERAL BRYANT: Your Honor, the State's
13 argument is that Amendment 73 amounts to a ballot access
14 regulation. That is the narrow issue that this Court can
15 reach. If Amendment 73 does in fact amount to a
16 qualification as determined by this Court, then it's the
17 State's position that the State of Arkansas can add
18 additional qualifications under Article I, section 4 to
19 those enumerated in the Constitution.

20 QUESTION: But what we're interested to know is,
21 does it follow from that that the Congress could not
22 override that qualification? Where does the Constitution
23 give the Congress authority to override qualifications?

24 GENERAL BRYANT: Because, Your Honor, that
25 qualification would be adopted under Article I, section 4.

1 QUESTION: Well, but then we're right back where
2 we're --

3 GENERAL BRYANT: Yes.

4 QUESTION: Let's assume that we tell you that
5 under the Constitution we think there are two things, two
6 semantic, two juridical categories, one qualifications and
7 the other time, place, and manner.

8 Now, if you say, and if you assume that we hold
9 that term limit is a qualification, we are exploring
10 whether or not the Congress could override that, and you
11 say, oh, well, they can go under section 4, but we've just
12 stipulated this is a qualification, and that doesn't apply
13 to section 4.

14 GENERAL BRYANT: Under that --

15 QUESTION: And the gravamen of the argument is
16 it would be very strange to allow Congress to override a
17 time, place, and manner regulation, but not to override a
18 greater restriction, which is a qualification, and you're
19 not answering that argument because you keep resorting to
20 Article I, section 4, but that's a very odd
21 interpretation.

22 GENERAL BRYANT: Your Honor, under that
23 scenario, then the States would have the authority under
24 Amendment 10. Congress would not have the authority under
25 your scenario to add additional qualifications.

1 QUESTION: On that assumption, may we put the
2 question directly that Justice Kennedy alluded to? Isn't
3 there something very odd in a scheme in which the -- we'll
4 say the comparatively less important conditions that fall
5 under time, place, and manner can be overridden by
6 Congress, and yet the presumably more fundamental
7 conditions known as qualifications would be left entirely
8 to the States? If they couldn't trust the States on time,
9 place, and manner, wouldn't it be odd if they trusted the
10 States on qualifications?

11 GENERAL BRYANT: That is correct, Your Honor.
12 Under the jurisprudence of this Court, ballot access
13 jurisprudence, the States can erect barriers or
14 limitations to limit the field of candidates, and so long
15 as that passes constitutional muster, then the States have
16 the authority to do that.

17 QUESTION: Or you might have responded that
18 perhaps they were willing to trust the Federal Congress
19 with respect to the relatively minor matters of time,
20 place, and manner --

21 (Laughter.)

22 QUESTION: -- but not willing to trust the
23 Federal Congress with respect to the greater matter of
24 qualifications. That's a possibility, isn't it?

25 GENERAL BRYANT: Yes, Your Honor.

1 (Laughter.)

2 QUESTION: Mr. Kester, we'll hear from you.

3 ORAL ARGUMENT OF JOHN G. KESTER

4 ON BEHALF OF THE PETITIONERS TERM LIMITS, ET AL.

5 MR. KESTER: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 I'd like to start out, I think, by
8 introducing --

9 QUESTION: Mr. Kester, do you adopt the same
10 argument as your predecessor here about everything is
11 either a qualification or a time, place, and manner?

12 MR. KESTER: No, not precisely, Justice
13 O'Connor. I think that the question that several members
14 of the Court have been putting really illuminates the
15 constitutional structure that we're talking about here,
16 and the argument that is being made by the opponents of
17 Amendment 73, first of all skipping over and pretending
18 that it's a legal incapacity when it's nothing of the
19 kind -- it's a less restrictive alternative that the State
20 has adopted, but skipping over that and accepting the
21 pretense that this is a limitation on service in the
22 Congress, you're then put to the task of fitting together
23 some provisions of the Constitution.

24 What does the Constitution say with respect to
25 the power of Congress to adopt, say, a term limits

1 provision and apply it to the States? I think the answer
2 to that has to begin by looking at the sources of power of
3 Congress and of the States, and they are very different.

4 Congress has power only insofar as it is granted
5 in the Constitution, and the only grant of power to
6 Congress to legislate in this area has to come from
7 Article I, section 4, or, I quickly amend, the Necessary
8 and Proper Clause, which is also part of Article I,
9 section 4, and nowadays section 5 of the Fifteenth
10 Amendment, which has received a very, very broad
11 interpretation, and I don't think that we need to address
12 that at this time, but we recognize that that's very
13 broad.

14 The sources of power of the State are very, very
15 different, and particularly when you have legislation, a
16 constitutional amendment that the people of Arkansas
17 adopted and imposed on themselves. They're not reaching
18 out -- this is not a State trying to regulate interstate
19 commerce in other States. This is a law which, if
20 anything, hurts the people of Arkansas.

21 QUESTION: Well, Mr. Kester, let me ask you
22 this, do you think Congress has the power under Article I,
23 section 4, to adopt precisely the kind of law that
24 Arkansas has applicable to all States?

25 MR. KESTER: No. My answer would be no, it does

1 not, for the following reason.

2 I would say, in the first instance, if you take
3 the words of Article I, section 4, "make or alter," and
4 say that those are of equal force, and I'm not sure that
5 you have to do that at all, I would say Congress has the
6 power to knock out any State law with respect to elections
7 that Congress doesn't like. It's very, very clear that
8 that's why Article I, section 4 was put in the
9 Constitution.

10 But once you have the law passed, once you have
11 the authority of Congress to do that exercise, that's not
12 the end of the exercise, that's just the beginning. This
13 Court pointed that out in Williams v. Rhodes. There may
14 be power there, but then, has the power been properly
15 exercised?

16 First of all, it would obviously be subject to
17 attack under the Fifth -- the equal protection aspects of
18 the Fifth Amendment, just like a Fourteenth Amendment
19 case, which is what this really is.

20 Secondly, you would have to test it under the
21 Tenth Amendment, because this Court recognized in cases
22 like New York v. United States, Gregory and Ashcroft, that
23 there is a certain core of State authority that really is
24 sacrosanct.

25 And finally --

1 QUESTION: More specifically, gives you the
2 power to override that State authority if it exists under
3 10. Section 4 says specifically that Congress can make or
4 alter such regulations.

5 MR. KESTER: Right, but we're talking now, as I
6 understood it, Justice Scalia, we're talking about
7 Congress just acting in the first instance, and I'm saying
8 the reason Congress could not do this just by itself in
9 the first instance, say we're going to pass a statute
10 imposing term limits, is furthermore that you have another
11 provision which we haven't talked about yet this morning,
12 and that's Article I, section 2, Clause 1, and that says
13 the people shall choose their representatives in the House
14 of Representatives. If Congress did that, Congress would
15 be acting diametrically opposed to what the people have
16 done. Now, this is all hypothetical.

17 QUESTION: Let me ask you about the Tenth
18 Amendment, before we get --

19 MR. KESTER: Surely.

20 QUESTION: -- too far away from that.

21 MR. KESTER: Surely.

22 QUESTION: If that is the source of the State's
23 power that you assert would justify this piece of
24 legislation, then I assume that the State could also say
25 that the State's electors shall not vote for a President

1 who, in addition to having the qualifications set forth in
2 Article II of the Constitution, has certain other
3 qualifications. Could the State do that?

4 MR. KESTER: Now we're talking about a different
5 provision of the Constitution. That's Article II.

6 QUESTION: Yes, we are --

7 MR. KESTER: Right.

8 QUESTION: -- but the Tenth Amendment hasn't
9 changed. It's still there.

10 MR. KESTER: Right, but I --

11 QUESTION: If they can add conditions to whom
12 its citizens may vote for for their representatives, why
13 may it not add conditions to the person for whom its
14 electors may vote for as President?

15 MR. KESTER: Justice Scalia, I would say that
16 the Tenth Amendment applies differently in different
17 situations, and you have to --

18 QUESTION: Oh, that's very convenient, but I
19 don't know why.

20 (Laughter.)

21 MR. KESTER: Because the question would be, in
22 your case of the presidential electors, it's like the case
23 of Williams v. Rhodes. Ohio came in there and said, we
24 have very broad authority on how we select presidential
25 electors, don't tell us how we do it, we'll decide that,

1 and this Court said, wait a second, there are other
2 provisions of the Constitution, and the Fourteenth
3 Amendment is generally sufficient.

4 The important thing is that the State's
5 authority draws on several sources, not just Article I,
6 section 4. It draws on the Tenth Amendment.

7 The States started out with the authority to do
8 this. They didn't have to be granted it at all. They
9 started it out. It was reserved. They also were the
10 people of the State, and remember, it's the people who
11 acted here. This was --

12 QUESTION: But the test of whatever the State
13 does, did I understand you to say that it could be
14 overridden by Congress, but Congress has to come second?

15 MR. KESTER: The Congress --

16 QUESTION: Whether the State is acting under the
17 Tenth Amendment, or whatever source.

18 MR. KESTER: I believe, Justice Ginsburg, that
19 the proper understanding of section 4 is that was the
20 check that the Framers intended to place on the States.
21 They were very worried about what kind of election laws
22 the States would pass.

23 QUESTION: Well then, time, place, and manner is
24 not a limitation, as you see it. It includes what one
25 might think of as time, place, and manner, plus

1 qualifications, including age 60 is the limit --

2 MR. KESTER: Any of those things which would be
3 Fourteenth Amendment issues, yes. Manner was a word that
4 essentially was unlimited, and that was why Article I,
5 section 4 was so controversial.

6 QUESTION: So we should forget all about the way
7 we use time, place, and manner in the context of the First
8 Amendment where it's a limited category of things that
9 don't go to the core of free expression, but here you say
10 it covers everything.

11 MR. KESTER: Here we're construing specific
12 language in the Constitution, and it's different, and the
13 power given to Congress was broad enough to do whatever
14 was necessary to keep the States from passing
15 inappropriate legislation.

16 QUESTION: But I don't see why it isn't also
17 broad enough to authorize Congress to act in the first
18 instance.

19 MR. KESTER: It is -- Justice Souter, in the
20 first instance, it may well be, but then Congress is
21 checked in a number of ways, and in some ways that the
22 State isn't, particularly if you look --

23 QUESTION: You mean by other provisions of
24 the --

25 MR. KESTER: By other provisions.

1 QUESTION: Yes.

2 MR. KESTER: And in particular, Article I,
3 section 2, Clause 1, which here is a source of the State's
4 power, an independent source of the State's power, but
5 when Congress acts, it becomes a restriction, if anything,
6 on Congress' power, because there you have Congress going
7 in and saying to the people of the State, you can't do
8 what you want.

9 QUESTION: Well, if that is a restriction, it
10 just negates -- it just negates section 4.

11 MR. KESTER: To that -- to that --

12 QUESTION: Whatever the people --

13 MR. KESTER: If --

14 QUESTION: -- do is okay, so -- right?

15 MR. KESTER: No. No, not at all, sir.

16 QUESTION: You can't possibly read it that
17 broadly, or it negates section 4.

18 MR. KESTER: No. In that particular case it
19 might, yes.

20 QUESTION: So long as the people of a State vote
21 for this time, place, and manner restriction, Congress
22 can't do anything about it.

23 MR. KESTER: We're -- no, no, no, no. I'm
24 sorry, I --

25 QUESTION: That's what I thought you were

1 saying.

2 MR. KESTER: I did not express myself clearly,
3 then.

4 QUESTION: Or I didn't understand clearly, I
5 guess.

6 MR. KESTER: Well, whatever --

7 (Laughter.)

8 MR. KESTER: Congress has power, I would urge
9 upon the Court, and I think that this is very, very clear
10 when you look at the history of Article I, section 4.
11 Congress has power granted there, controversial power -- a
12 lot of them didn't like it -- to go in and say, we don't
13 like your State election law. They don't even have to say
14 it's unconstitutional. All they have to say is, we --

15 QUESTION: May I ask this question to be sure I
16 understand your theory? I understand you're saying, if
17 it's a time, place, and manner regulation adopted by the
18 State, the Congress can modify it. Now, supposing it's a
19 qualification. There are two ways we can look at the
20 Arkansas law, and assume they take it to be a
21 qualification rather than a ballot access matter, could
22 Congress amend that?

23 MR. KESTER: Well, yes, I think they could,
24 because otherwise you're driven, and this is where some of
25 the argument --

1 QUESTION: But then you're adopting the Attorney
2 General's position that a manner includes a qualification.

3 MR. KESTER: What I'm saying is, yes, manner is
4 the broad word -- that's the hook --

5 QUESTION: Which includes qualifications?

6 MR. KESTER: Surely. It has to, because
7 otherwise as I believe Justice --

8 QUESTION: Well, it doesn't have to. One can
9 say qualifications are things like being over 50, and
10 manner things like where you hold your elections and the
11 like. One doesn't have to say that, but I can understand
12 that. But that's your view of the word manner.

13 MR. KESTER: Otherwise Article IV, the power of
14 Congress in Article IV would make no sense, because then
15 you'd be in a position, and this is where the Solicitor
16 General's argument leaves you, is saying that Congress
17 would have the power to override minor State laws but not
18 huge --

19 QUESTION: It would make no sense unless there
20 is a prohibition upon additional qualifications, in which
21 case it would make perfect sense.

22 MR. KESTER: And -- and --

23 QUESTION: It only would make no sense under
24 your theory of the Constitution.

25 (Laughter.)

1 MR. KESTER: And -- but I submit that my theory
2 of the Constitution, Justice Scalia, has historical
3 validity and makes sense when you --

4 QUESTION: Under your theory, Mr. Kester, could
5 Congress say that no person shall be a Senator who is not
6 over the age of 25 and have that the controlling
7 qualification?

8 MR. KESTER: I -- if Congress or the States
9 passed a law that was absolutely flat-out contrary to
10 those provisions in Article I, if they've made it contrary
11 to it, then that would be unconstitutional just on the
12 face of it.

13 QUESTION: How about saying no person over 50,
14 under 50, saying -- you know, Congress obviously was --
15 the Framers were concerned about age, 35, and you know,
16 we're also concerned about age. We think it should be 50.
17 Could that override the 35-year-old provision?

18 MR. KESTER: I think there you've got
19 legislation going right at the heart of provisions that
20 were put in the Constitution, and it could be that those
21 are minimum qualifications, or it could be that they could
22 be enhanced with respect to age or district residence.

23 QUESTION: So what's your answer, under your
24 theory?

25 MR. KESTER: My answer, sir, is that it would

1 never stand up under the Fifth Amendment, under Article I,
2 section 2. That --

3 QUESTION: But it could stand up under the
4 framework we're talking about now, Article I?

5 MR. KESTER: Possibly in the first instance, but
6 it hardly matters because it would so clearly violate
7 those other provisions.

8 QUESTION: Why would it violate those other
9 provisions? Perfectly reasonable to change the age from
10 35 to 40, 45. Why would that violate the Fifth Amendment?

11 MR. KESTER: Well, I think --

12 QUESTION: I just don't understand that.

13 MR. KESTER: Well --

14 QUESTION: We've held age is not a suspect
15 classification.

16 MR. KESTER: I think in that case it would be,
17 and in looking at it as a suspect --

18 QUESTION: Well, then the constitutional
19 provision is invalid, the 35-year thing is irrational
20 under your approach. I don't understand why 40 is any
21 more irrational than 35.

22 MR. KESTER: Well, it would have to be judged.
23 It would have to be judged under the Equal Protection part
24 of the Fifth Amendment.

25 QUESTION: And not under the Qualifications

1 Clause?

2 MR. KESTER: The Qualifications Clauses are
3 there -- if a law is enacted that this Court believes
4 contradicts those qualifications, that would be
5 unconstitutional.

6 QUESTION: No, it's just merely what I thought
7 was your basic position, that the State has every right to
8 impose additional qualifications if it wants to.

9 MR. KESTER: Yes.

10 QUESTION: And I don't know why 40 years is any
11 different than being an incumbent.

12 MR. KESTER: Oh, but my position is not that the
13 State can come in and impose any qualification it wants
14 to, it's that the State --

15 QUESTION: Well, any reasonable qualification.

16 MR. KESTER: Well, any qualification that
17 doesn't violate the other restrictions on the States, the
18 Fourteenth Amendment. I mean, this --

19 QUESTION: I just have to say, I don't see why
20 the 40-year thing would violate the Fourteenth or Fifth
21 Amendment.

22 MR. KESTER: I defer to your judgment on that,
23 but the analysis, Justice Stevens, would be an analysis --

24 QUESTION: Well, if the analysis takes you to
25 the conclusion it does not violate the Fourteenth, then

1 you'd have to face up to the question --

2 MR. KESTER: Yes.

3 QUESTION: -- whether they can have an
4 additional qualification, which is what I thought this
5 case was all about, but you seem to say they cannot have
6 certain additional qualifications.

7 MR. KESTER: No, I said -- I said if they have
8 one that's absolutely contradictory, but if it's not --

9 QUESTION: Well, why is 40 contradictory to 35?
10 It just supplements it --

11 MR. KESTER: I'll defer to Your Honor on that.

12 QUESTION: Mr. Kester, let's take an age -- you
13 can't run after the age of 70, instead of upping the age
14 from 35, a mandatory retirement. Wouldn't that get you
15 out of your Equal Protection problem?

16 MR. KESTER: Well, it would be very much like
17 Gregory and Ashcroft, wouldn't it, because that was
18 upheld, a mandatory retirement was held not to violate the
19 Fourteenth Amendment.

20 Basically --

21 QUESTION: So if that was the qualification,
22 nobody can run in this State after the age of 70, the
23 State could do that, and that would be a qualification --

24 MR. KESTER: The States have done things like
25 that for 200 years. That's our point.

1 The States at the beginning said, not only do
2 you have to be a resident of the State, you have to be a
3 resident of the district. Now, that's a supplementation,
4 that's a qualification.

5 QUESTION: There are States that have said you
6 can't run after the age of so-and-so for Congress?

7 MR. KESTER: Mm-hmm, and --

8 QUESTION: You said States have done that for
9 years, put --

10 MR. KESTER: Oh, not -- not that, but States
11 have added qualifications since the very beginning, and
12 incidentally, they called them time, place, and manner
13 regulations.

14 QUESTION: Thank you, Mr. Kester.

15 MR. KESTER: Thank you, Mr. Chief Justice.

16 QUESTION: Mr. Cohen, we'll hear from you.

17 ORAL ARGUMENT OF LOUIS R. COHEN

18 ON BEHALF OF THE RESPONDENTS

19 MR. COHEN: Thank you, Mr. Chief Justice, may it
20 please the Court:

21 My theory of the Constitution, which I think is
22 also Madison's and Hamilton's theory of the Constitution
23 on this point, is that the Constitution deals
24 comprehensively with the filling of the office of the
25 Congress that it created, that it prescribes fixed

1 qualifications that may not be supplemented by either
2 Congress or the States, and that it gives both the States
3 and Congress the power to set time, place, and manner
4 regulations so as to assure fair and orderly elections,
5 but that that is an essentially procedural power, leaving
6 the people at each election to choose whom they please to
7 govern them.

8 QUESTION: Why didn't they put it differently,
9 then, Mr. Cohen? The briefs here have been referring to
10 this as a qualifications clause. It's really not a
11 qualifications clause, it's a disqualifications clause.

12 They could have said, every person shall be
13 eligible to serve in the House of Representatives who
14 shall attain to the age of 25 years, shall have been 7
15 years a citizen of the United States, and shall not when
16 elected -- and shall be when elected an inhabitant of that
17 State in which he shall be chosen, a very easy way to say
18 it.

19 MR. COHEN: Well, of course --

20 QUESTION: But they took the circuitous route of
21 saying, no person shall be a representative who shall not
22 have attained the age of 25 years, been 7 -- in other
23 words, you can't, unless you have these conditions, but
24 that isn't to say that just because you meet these
25 conditions you are eligible. It does not say that, and

1 John Randolph --

2 MR. COHEN: I agree that the constitutional --

3 QUESTION: -- pointed this out in the first
4 congressional debate on the matter.

5 MR. COHEN: I agree that the constitutional text
6 doesn't resolve the issue because it phrases it that way.

7 One reason why it may phrase it that way is
8 because there are other disqualifications in the
9 Constitution itself, and there was contemplation, of
10 course, of further possible disqualifications, but when
11 Madison and Hamilton came to explain what the Constitution
12 did, when the House Committee on Elections in 1807 studied
13 the meaning of that clause, they concluded that the
14 intention was to make those qualifications exclusive.

15 QUESTION: Well, you say the House Committee on
16 Elections, Mr. Cohen. Was the House committee's view
17 accepted by the full House?

18 MR. COHEN: The full House didn't adopt the
19 report, but I think it did accept the House committee's
20 view. It voted to seat Congressman McCreary, and it voted
21 to seat Congressman McCreary after a point in the debate
22 when it becomes clear that the dissenter, Mr. Randolph of
23 Virginia, recognized that he was about to lose, and
24 diverted the House debate to a more neutral resolution.

25 QUESTION: Well, that's very speculative, isn't

1 it? I mean, couldn't the full House's result have been
2 also because some people thought that he was in fact a
3 resident of Baltimore, that he complied with the State
4 regulation?

5 MR. COHEN: We don't know --

6 QUESTION: We simply --

7 MR. COHEN: -- of course, why anyone voted. We
8 do know that the understanding at the time, the scholarly
9 understanding of what had been resolved in the McCreary
10 episode was that the --

11 QUESTION: Well, what -- how does the fact that
12 the scholarly understanding -- does that elevate what
13 actually happened into something different?

14 (Laughter.)

15 MR. COHEN: No, of course not. Of course not.
16 this Court reviewed this history in the Powell case
17 starting with the fact that on August 10, 1787, the
18 question that was being voted on on the floor of the
19 convention was whether to give Congress the power to add a
20 property qualification or to add other qualifications.

21 This Court said on that day the Court faced and
22 rejected the possibility that the legislature -- and it
23 was clearly talking about legislation, and not merely
24 about a judging power -- the legislature would have the
25 power to usurp the right of the people to return whom they

1 thought proper.

2 QUESTION: Well, now you're not talking about
3 the McCreary case.

4 MR. COHEN: Well, I'm -- I'm leading up to it.
5 The Court then went on --

6 QUESTION: We've only got 40 minutes.

7 MR. COHEN: Okay.

8 (Laughter.)

9 MR. COHEN: I will -- let me move on. But the
10 Court reviewed Hamilton's statement in the Federalist
11 Number 60 that the qualifications were unalterable by the
12 legislature, Madison's statement to the same effect in
13 Number 52, where he is clearly talking about State power
14 to add qualifications.

15 QUESTION: More clearly than Hamilton, isn't he?

16 MR. COHEN: Well, I think Hamilton, when he
17 referred to the legislature, was referring to Congress,
18 but I think Madison is talking about the States.

19 QUESTION: What was the -- do you remember the
20 phrase in 52? I can't remember the text that you're
21 referring to. You said it clearly refers to the States.

22 MR. COHEN: Well --

23 QUESTION: If it does, he was making a mistake,
24 wasn't he, because he also was excluding the States' power
25 to change the qualifications of electors --

1 MR. COHEN: No.

2 QUESTION: -- which it obviously could.

3 MR. COHEN: No. What he was doing in 52 was
4 explaining how the Constitution had fixed both the
5 qualifications for voters and the qualifications for the
6 elected. It fixed the qualifications for voters by
7 delegating that to the States subject to the most numerous
8 branch compromise requirement.

9 QUESTION: That's not much of a fixing. The
10 fact is, the States could change it so long as they were
11 willing to change it for their most numerous branch of the
12 legislature.

13 MR. COHEN: Madison uses the word "fixed" in the
14 Federalist Number 52 --

15 QUESTION: Why say it's a mistake?

16 MR. COHEN: -- in relation to -- in relation to
17 the State constitutional provisions on this point, and he
18 says that -- in effect that these are fixed because the
19 States and the people of the States won't allow changes in
20 State provisions for voting for the most numerous branch
21 of the State legislature, so we've dealt with that
22 problem.

23 I would like to move on to the State's principal
24 contention, which is, we didn't do that. We just barred
25 these people whom --

1 QUESTION: Before you do that --

2 MR. COHEN: -- we'd like to disqualify --

3 QUESTION: -- Mr. Cohen, may I ask whether in
4 your view we owe any kind of precedential respect to the
5 interpretation of history in Powell v. McCormack? We're
6 not dealing here with a new discovery by Professor Warren,
7 we're dealing with what has already gone over.

8 Mr. Kester has told us that -- that perhaps some
9 of the statements there, some of the conclusions weren't
10 quite right, that there was room for other
11 interpretations.

12 MR. COHEN: I think that Powell is a very
13 persuasive opinion, and the Court should find it
14 persuasive. I also think there is substantial additional
15 evidence on our side of this point that wasn't reviewed or
16 reached in Powell. I think --

17 QUESTION: Did Powell at this point purport to
18 go beyond the decision whether Congress or a House of
19 Congress could act? It seems to me that it did not --

20 MR. COHEN: It seems to me --

21 QUESTION: -- and it seems to me that that's the
22 limitation -- with the possible exception of your
23 reference to 52, which I'm not sure of, that seems to me
24 the problem with some of the, or at least the limitation
25 on the cites to the debate text and say, Federalist 60.

1 It's clearly referring, by legislature, to the
2 national legislature, and it seems to me that you're
3 supporting legislative history, as it were, doesn't take
4 you beyond the limitation on Congress.

5 MR. COHEN: The -- it seems to me that Powell
6 rests on the proposition that the qualifications were
7 fixed in the Constitution and could not be supplemented
8 legislatively.

9 QUESTION: Well, I think you're mistaken on
10 that, Mr. Cohen. The holding of Powell clearly has to be
11 that a single House of Congress cannot add to the
12 qualifications otherwise legitimately set.

13 MR. COHEN: Yes, but as this Court explained in
14 the Judge Nixon case, the basis for that holding was not
15 an aspect of the judging power as such, it was the fact
16 that the -- or that Article I, section 2, fixed
17 qualifications that could be applied.

18 There are two questions here. One is, vis-a-
19 vis Congress, are we talking only about a judging power,
20 or are we also talking about the power to legislate
21 additional qualifications? It seems to me every point in
22 argument that was made in Powell goes to the power to
23 legislate, not to the power to judge, although the
24 ultimate question was only whether Congress could judge.

25 QUESTION: And so the ultimate holding, wasn't

1 it?

2 MR. COHEN: The ultimate holding, I agree, but
3 the logical foundation was that, and it then seems to me
4 that the extension to the States is straightforward. In
5 the first place, some of the examples that the Court used
6 in Powell were State additions of qualifications, or
7 attempts by States to add qualifications.

8 QUESTION: But it can't possibly be
9 straightforward, because Congress would need to have been
10 given the power to make the alteration. That power would
11 have had to be found within the Constitution.

12 With respect to the States, that is not true.
13 With respect to the States you have the main thing that's
14 relied on here, the Tenth Amendment. There's nothing in
15 Powell about the Tenth Amendment, is there? We didn't
16 even consider the Tenth Amendment.

17 MR. COHEN: I agree that I need to go on to talk
18 about those points. I don't think that the Tenth
19 Amendment reserves --

20 QUESTION: We're going to have you do that, but
21 you're trying to not have to do it by saying --

22 MR. COHEN: No --

23 QUESTION: -- we've decided it --

24 MR. COHEN: No, no, no.

25 QUESTION: -- already in Powell.

1 MR. COHEN: No. I'm only saying that I think
2 Powell did dispose of additional qualifications. I don't
3 think the -- and I think that if you read the admittedly
4 not clear and dispositive constitutional text as a
5 preclusive list, there's simply no logical reason to think
6 that it is preclusive vis-a-vis Congress and not
7 preclusive vis-a-vis the States.

8 But I think this is not a Tenth Amendment case,
9 because the Constitution doesn't leave the States or
10 Congress the power to bar or to officially and materially
11 prefer some qualified candidates over others.

12 QUESTION: Well, Mr. Cohen, we have Storer, for
13 example, which certainly prevented a candidate from
14 appearing on a ballot at least for a period of time. We
15 did not treat that as a qualification, did we?

16 MR. COHEN: That's right. Storer --

17 QUESTION: And so in theory this provision may
18 not be a qualification at all.

19 MR. COHEN: No. The fact that Storer said that
20 the States have power to regulate access to the ballot in
21 order to provide for fair and orderly elections, or as in
22 that case, in order to preserve the integrity of the
23 various routes to the ballot so as to give people a
24 choice, doesn't mean that the States may impose ballot
25 access limitations based on place of birth or civil

1 profession or prior service in the State legislature or
2 prior service in Congress, or being under the age of 70.
3 The Constitution --

4 QUESTION: Those things, if you do it on those
5 bases it converts itself from a time, place, and manner
6 restriction to a qualification?

7 MR. COHEN: Yes. I think the --

8 QUESTION: If it's a qualification, I assume
9 that the House would sit in judgment of whether that
10 qualification was met.

11 MR. COHEN: I do not think that either the
12 States or Congress may add qualifications. I'm happy to
13 use the term qualification in the sense in which you
14 suggested earlier, Justice Scalia, which is qualifications
15 is something that --

16 QUESTION: You can't serve if you don't have it.

17 MR. COHEN: -- that says you can't serve if you
18 don't have it.

19 QUESTION: And that's not the case here.

20 MR. COHEN: That is not the case here, but the
21 State also may not keep off the ballot in order to
22 disadvantage somebody who lacks a substantive personal
23 characteristic because the Constitution leaves those
24 questions to the voters every second year.

25 QUESTION: Well, maybe, but certainly not

1 because the State is adding an additional qualification.
2 I mean, it may be bad, but not for the reason that it's
3 violating the presumably exclusive Qualifications Clause.

4 MR. COHEN: I will accept that with this
5 exception. I think the Arkansas supreme court was
6 justified in saying here this measure is impermissible for
7 essentially the same reason.

8 That is to say, the lawmakers of Arkansas, the
9 people, were told, and then they said in the measure that
10 they adopted, that the measure limited the terms of public
11 officials, and the Arkansas supreme court simply rejected
12 the argument that something that did that, that tried to
13 impose a qualification, if you will, could be saved on the
14 argument that it just might not achieve its stated purpose
15 because of a loophole, the write-in loophole that has no
16 significant history of working.

17 QUESTION: May I just go back to Storer for a
18 moment? Could you just state for me the criteria, the
19 standard on which you would have us distinguish the Storer
20 disability, we'll say, from this disability?

21 MR. COHEN: Yes. Storer involved a legitimate
22 time, place, and manner regulation designed to produce a
23 fair and orderly election with a manageable ballot so that
24 the people of California could choose by saying people who
25 want to run in a prim -- to be in a party in connection

1 with a particular election must run in that party's
2 primary and be the party's candidate. People who want to
3 run as independents must leave a party early enough to
4 assure the genuineness of their independence and the
5 nonfracturing of the party.

6 QUESTION: Orderly elections. It's orderly
7 elections that's --

8 MR. COHEN: It's orderly elections.

9 Now, it's quite different from -- it's -- if I
10 can use a metaphor, it's like the difference between
11 saying that someone must run in his assigned, qualifying
12 heat in order to get into the finals of the 100-yard dash,
13 and saying that somebody who won the medal last time must
14 start 50 yards behind the others because we want to pass
15 the medals around.

16 One involves procedural regulation that the
17 Constitution authorizes the States to do, and the other
18 involves a State substantive preference for one class of
19 candidates over another that I think is not part of the
20 entire scheme that is spelled out in some detail in the
21 Constitution.

22 QUESTION: You justify sore-loser statutes on
23 the basis that they are procedural.

24 MR. COHEN: Yes, and there's a good deal of, in
25 addition to text, legislative history that supports this

1 reading. If you read, particularly the Federalist 59 and
2 60.

3 Now, petitioners aren't very clear, to say the
4 least, about whether the State's supposed power here is --
5 is a power granted by the Time, Place, and Manner Clause
6 or by the Tenth Amendment. I suggest the reason that
7 they're not very clear is that neither argument works.

8 The Constitution explicitly gives Congress the
9 superior power to make election regulations or to alter
10 those of the States, but it plainly, in doing so, means to
11 limit the power of both the States and Congress to
12 procedural matters.

13 It seems to me that the argument that a State
14 can impose ballot access restrictions under some power
15 outside the Time, Place, and Manner Clause is answered in
16 the clause itself, which contains the phrase, "make or
17 alter," and incidentally, the primary reason for that
18 phrase was a fear that the States might not set up the
19 machinery for congressional elections at all, and so the
20 "make" part of the "make or alter" phrase is an important
21 part of it.

22 The convention deliberately gave Congress the
23 power to make or alter State regulations because Hamilton
24 said an exclusive power of regulating elections for the
25 national Government in the hands of the State legislatures

1 would leave the Union entirely at their mercy. That's the
2 Federalist Number 59.

3 QUESTION: Mr. Cohen, what is your view as to
4 whether something can be neither the one nor the other,
5 neither a qualification nor a time, place, and manner
6 restriction? Is there some --

7 MR. COHEN: I don't -- if you mean by that
8 something --

9 QUESTION: Some restriction that is --

10 MR. COHEN: -- permissible --

11 QUESTION: Something -- no, not permissible.

12 MR. COHEN: Well --

13 QUESTION: Something that -- whether it's
14 permissible or not, is there anything that does not fall
15 within one or the other category?

16 I gathered from your answer to my earlier
17 question that you thought that there wasn't. This might,
18 indeed, be it.

19 MR. COHEN: No, I think --

20 QUESTION: You say it's impermissible, but not
21 because it is technically a qualification.

22 MR. COHEN: That's right. That's right. I
23 think there can be --

24 QUESTION: But it's also not a time, place, and
25 manner.

1 MR. COHEN: That's right. That's right.

2 QUESTION: So it is a third something-or-other,
3 but an impermissible third --

4 MR. COHEN: That's right.

5 I think for a State to say, on the whole we
6 don't think people over 70 ought to continue to serve
7 unless their constituents really want them, and so we'll
8 keep them off the ballot, but if they can win by a write-
9 in that's okay. I think that is not a valid time, place,
10 and manner regulation.

11 I also would not urge that anyone call it a
12 qualification for the reason you point out, that it is
13 merely keeping someone off the ballot. I would then carve
14 out an exception for that point for the --

15 QUESTION: Are you abandoning the position of
16 the Arkansas supreme court that it was a qualification?

17 MR. COHEN: I think what -- I'm --

18 QUESTION: Yes or no.

19 MR. COHEN: I'm --

20 QUESTION: Because that was part of the
21 rationale of their decision.

22 MR. COHEN: I am -- I am reading -- if that's
23 the premise as to what it says, my answer's no. As to
24 what Arkansas said, my answer is yes, I disagree with
25 that.

1 QUESTION: You're conceding that this is not a
2 qualification in this case?

3 MR. COHEN: I am arguing that it was appropriate
4 for the Arkansas supreme court to say it does --

5 QUESTION: I understand that, but are you
6 conceding that it's not a qualification?

7 MR. COHEN: I'm willing to -- yes. Yes.

8 QUESTION: It's a rather major concession.

9 QUESTION: That's not, as I --

10 QUESTION: It's a very reasonable one,
11 Mr. Cohen.

12 (Laughter.)

13 QUESTION: That's not how I understood your
14 brief. Your first argument is the Constitution bars
15 States and Congress from adding to the qualifications for
16 service in Congress.

17 MR. COHEN: I think that's important, and I
18 don't think that I've made a significant concession. We
19 argue in the second section of the brief that whether
20 something is a qualification is not technically what's at
21 issue here. The Constitution bars adding qualifications.
22 It also bars doing essentially the same thing indirectly,
23 and I think that is the essence of what the Arkansas
24 supreme court held, that --

25 QUESTION: Well, but you begin with the major

1 premise that a qualification cannot be added.

2 MR. COHEN: Yes.

3 QUESTION: And then you say -- and then you say,
4 and this is so like a qualification that it must be
5 invalid. Is that --

6 MR. COHEN: Yes, but I also say -- but I also
7 say that even if it is not a qualification, it is
8 something that the States have no power to do, because the
9 States have, as Congress has, only the power that is
10 granted to them under the Time, Place, and Manner Clause,
11 and the Time, Place, and Manner Clause does not -- and the
12 Time, Place, and Manner Clause does not authorize States
13 to draw this kind of substantive distinction in the course
14 of setting procedures for elections.

15 QUESTION: I take it your position is, is that
16 the State can require, or the State can be forbidden from
17 requiring its officeholders to have the same
18 qualifications as its electors?

19 MR. COHEN: Yes. I think it's clear that the
20 Constitution gave the States power to determine the
21 qualifications of electors that it did not give to
22 determine the qualifications of officeholders, of Federal
23 officeholders.

24 QUESTION: So that a State could bar a felon
25 from voting but not for running for office?

1 MR. COHEN: Yes, because one is a matter of the
2 State's business, and the other is not, not for running
3 from office -- not for running from Federal office.

4 There was a period of time when I was qualified
5 to be President of the United States, but as a resident of
6 the District of Columbia I wasn't qualified to vote for
7 one.

8 QUESTION: Mr. Cohen, what about a law that just
9 prohibits ballot access for one election, for example?

10 MR. COHEN: I think --

11 QUESTION: Do you make exactly the same
12 argument? Do you make no distinction between such a law
13 and the one here? That is, a lifetime inability?

14 MR. COHEN: I make a distinction, but the
15 distinction I would draw is that it seems to me the
16 lifetime inability demonstrates the falsity of the
17 suggestion that this has something to do with incumbents.

18 I think that a bar for a single election would
19 run afoul of the same principle that I am asserting here,
20 which is, again, that the Constitution gave that choice to
21 the people every second year, and gave the States only a
22 limited and fundamentally procedural role.

23 Mr. Bryant says that all the examples of --

24 QUESTION: Well, I don't know what kind of a
25 line you end up with in examining Storer and knowing what

1 is time, place, and manner regulation and what isn't.
2 It's difficult for me to draw a clear line from what you
3 say.

4 MR. COHEN: Well, there may be some difficult
5 cases in drawing lines. In the speech area the Court had
6 to wrestle with whether a sound limitation on a rock band
7 was a time, place, and manner limitation or, as applied
8 to that band, a content limitation.

9 This is a clear case. This is an easy case.
10 The Court has -- the State has singled out people based on
11 a personal characteristic, and if they can do this under
12 the Time, Place, and Manner Clause, Congress could under
13 the Time, Place, and Manner Clause, it seems to me, keep
14 off the ballot for the Senate anybody who hasn't served in
15 the House, and so on.

16 The State has singled out for this burden people
17 based on a substantive qualification that does not relate,
18 a substantive characteristic that does not relate to the
19 election process or their compliance with reasonable
20 procedures established by the State under its power under
21 the Time, Place, and Manner Clause.

22 QUESTION: Mr. Cohen, maybe you think this is a
23 clear case. Some aspects of it at least I find very
24 close, where you have Thomas Jefferson and Joseph Story on
25 opposite sides of the issue, for example, whether the

1 States have any power to add qualifications. That's a
2 close case in my mind.

3 MR. COHEN: Story only -- I mean, Jefferson only
4 in one letter in 1814, but okay.

5 QUESTION: A letter he never retracted.

6 QUESTION: Story --

7 (Laughter.)

8 QUESTION: In any case, just posit -- posit that
9 I think on that question at least it's very hard and very
10 close, and in situations like that I am inclined to credit
11 the practice that has been engaged in from the time when
12 the Constitution was written, and there have, indeed, been
13 a considerable number of State additional qualifications,
14 I guess the most common being that in order to run for
15 office you have to be qualified as a voter, which brings
16 in all sorts of qualifications. You can't be a felon, and
17 so forth.

18 What is your response to that? In addition to
19 some property qualifications in Virginia, in the early
20 days.

21 MR. COHEN: I think actually, if you sort
22 through the lengthy appendices attached to the
23 petitioner's briefs, there's very little there.

24 The single, most telling episode is that in 1789
25 Pennsylvania calls a Constitutional Convention to

1 eliminate a difference between its constitution and the
2 Federal Constitution and conflicts, and repeals its term
3 limits for service in Congress while keeping them for
4 State officers.

5 The only property qualification that I'm aware
6 of is that Virginia had the word "freeholder." Other
7 States that had property qualifications for State offices
8 didn't impose them on -- for Federal officers.

9 QUESTION: District resident qualifications.

10 MR. COHEN: District resident qualifications
11 strike me as the kind of thing that somebody might -- they
12 certainly were imposed. They're the sort of thing that a
13 State might fall into in making the arrangements.

14 Under the Time, Place and Manner Clause they are
15 unconstitutional, as the Committee on Elections determined
16 in 1807 in the McCreary case and as several courts have
17 determined.

18 QUESTION: But there were quite a few of them,
19 and they persist. They're still out there, aren't they,
20 these horrible things?

21 MR. COHEN: It's possible that not every State
22 went back and read the annals to see the McCreary episode
23 and immediately repealed its statute.

24 I think they are, and would be held, and have
25 been held unconstitutional because the voters of a State

1 can, if they choose, pick candidates who come from another
2 district.

3 QUESTION: By what authority? You say they've
4 been held unconstitutional.

5 MR. COHEN: By several State and lower Federal
6 courts.

7 QUESTION: Recently, or --

8 MR. COHEN: Actually, yes, I think most of the
9 cases are fairly recent.

10 QUESTION: The Constitution gave the Federal
11 Government only delegated powers to govern people's lives
12 and activities, but it seems to me, again, that it dealt
13 comprehensively with filling the offices that the
14 Constitution itself created.

15 There's an overall design to give We, the
16 People, every 2 years the power to select who will
17 represent them in Congress, subject only to fixed
18 qualifications and reasonable, fundamentally procedural
19 regulations that the State has given power to adopt
20 subject to congressional supersession.

21 If now congressional term limits are not a fad
22 but are considered national judgment, the way to impose
23 them is in Article V.

24 QUESTION: Thank you, Mr. Cohen.

25 MR. COHEN: Thank you.

1 QUESTION: General Days, we'll hear from you.

2 ORAL ARGUMENT OF DREW S. DAYS, III

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE RESPONDENTS

5 GENERAL DAYS: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 I want to reinforce the extraordinary and
8 anomalous nature of petitioner's argument in terms of the
9 power of Congress. We think that a fair reading of Powell
10 v. McCormack and the Nixon case are that Congress may not
11 add to the textual qualifications set out in the
12 Constitution with respect to service in Congress.

13 QUESTION: You agree that was not the holding of
14 the Powell case.

15 GENERAL DAYS: I do, Mr. Chief Justice, but I
16 also want to underscore the fact that this Court, after an
17 exhaustive review of the preconstitutional -- the
18 constitutional convention, the ratification, and the post-
19 ratification history, concluded that those requirements
20 were fixed in the Constitution. I think that's the
21 reading of Powell and Nixon together.

22 QUESTION: That's dicta, is it not?

23 GENERAL DAYS: Yes, Mr. Chief Justice.

24 QUESTION: And we don't -- we are not bound by
25 dicta.

1 GENERAL DAYS: That is correct, but I think that
2 this case does not necessitate this Court's reviewing the
3 history that it found in Powell v. McCormack, and much of
4 the evidence that's been brought forward was addressed by
5 this Court here.

6 QUESTION: Well, how about the McCreary episode,
7 where now it appeared apparently to the Powell court that
8 the committee report had the same validity as another
9 committee report which was adopted by the full -- now it
10 appears this report was not adopted by the House. Doesn't
11 that cast some doubt on the historical abilities of the
12 Powell court?

13 GENERAL DAYS: Well, Mr. Chief Justice, that's
14 one piece, and I think my cocounsel is correct.

15 QUESTION: Well, falsus in uno, falsus in
16 omnibus.

17 (Laughter.)

18 GENERAL DAYS: Well, I -- Mr. Chief Justice, I
19 would be the last person to suggest that this Court was in
20 error when it reviewed the history in Powell v. McCormack.

21 QUESTION: We're all in big trouble if that
22 maxim is going to be applied, I must say.

23 (Laughter.)

24 GENERAL DAYS: Let's look at the argument that
25 the petitioners have put forward.

1 They seem to rely principally upon the times,
2 places, and manner provision, Article I, section 4, but we
3 have to remember that the power there is one shared
4 coextensively by Congress.

5 Where does that lead the petitioners with
6 respect to their arguments? If it is a qualification,
7 then the States may add, and the Congress may add. If
8 that's what they're relying upon, this creates an
9 interesting situation that I think Justice Scalia and
10 Justice Souter were alluding to.

11 That is, if the States can set qualifications,
12 then presumably, under Article I section 5, Congress can
13 judge those qualifications not against the constitutional,
14 textual qualifications, but the potentially myriad
15 qualifications that States could set up along the lines of
16 the ones that have been provided by Amendment 73.

17 If it is a manner, then the States may bar
18 access to the ballot, but Congress also may bar access to
19 the ballot, and it is not a power in Congress that has to
20 await action by the States. The term is "make or alter,"
21 which suggests that in the absence of any action by the
22 States, Congress on its own could impose the same types of
23 requirements that Amendment 73 imposes.

24 But we would suggest that this is not a manner.
25 This is not times, places, and manner. This is a

1 qualification. With due respect to my cocounsel, I think
2 it's unavoidable that this is a qualification.

3 Let me suggest why that is so. First of all,
4 the times, places, and manner requirement, as my cocounsel
5 has set out, was designed to ensure the fairness and the
6 efficiency and the accuracy of the legislative process,
7 the electoral process.

8 Justice Ginsburg, you pointed out that in our
9 First Amendment jurisprudence it is a procedural cast that
10 the Court has given to the concept of time, place, and
11 manner.

12 QUESTION: And I believe listed the language
13 from section 4.

14 GENERAL DAYS: Yes. I always wondered where
15 that came from, and now, with further study, I understand
16 that.

17 But how do we know it's a qualification as
18 opposed to a manner? Justice Souter, you asked that
19 question. I think Justice O'Connor also asked the
20 question, and I think the answer lies in the fact that
21 *Storer v. Brown* was focused on one election cycle.

22 That is, the burdens that were imposed upon the
23 would-be candidates in *Storer v. Brown* were based upon
24 their failure during the election cycle to do the types of
25 things that California law required. Our view is that any

1 burden placed on a candidate for Congress based upon
2 conduct that has not occurred during the election cycle in
3 question is a qualification.

4 QUESTION: If it's a qualification, Congress has
5 to be able to judge it. Now, let's assume that somebody
6 gets elected without complying with the qualification.
7 Somehow his name gets on the Arkansas ballot accidentally,
8 by a mistake or by some corrupt act, and he gets elected,
9 and he appears before the House, and the committee is to
10 judge his qualifications. Can they exclude him?

11 GENERAL DAYS: If Congress can rely only upon
12 the textual qualifications, then they cannot exclude him.

13 QUESTION: No, no, no, no, no. I mean, assuming
14 that this is a qualification, and a valid qualification.

15 GENERAL DAYS: Yes.

16 QUESTION: Assuming it's a qualification, and a
17 valid qualification, I don't see how any congressional
18 committee could possibly exclude him. He's entitled to
19 serve. He's been elected.

20 GENERAL DAYS: I agree with you, Justice,
21 Souter --

22 QUESTION: He is not --

23 GENERAL DAYS: -- that there would be no --

24 QUESTION: -- disabled from serving.

25 GENERAL DAYS: There would be no point of

1 reference. Congress, a House of Congress, could not,
2 under Article I, section 5, do very much at all. It
3 certainly could try, but I agree with you that they would
4 have no standard --

5 QUESTION: I suggest the reason is because it is
6 not a qualification. Arkansas has not said, this person
7 may not serve. It's simply said, this person may not run
8 for office and be listed on the ballot. If he
9 accidentally gets listed on the ballot, he may serve.

10 GENERAL DAYS: Justice Scalia, I --

11 QUESTION: That seems to me to say it's not a
12 qualification. It's something. Maybe you can argue, as
13 Mr. Cohen does, it has the same effect and therefore it's
14 bad --

15 GENERAL DAYS: Well, I do argue that --

16 QUESTION: -- but you're trying to argue that it
17 is itself a qualification, and that just flies --

18 GENERAL DAYS: It doesn't really make any
19 difference, Justice Scalia --

20 QUESTION: Okay. Well, I'll -- fine.

21 GENERAL DAYS: Because -- because --

22 QUESTION: That argument I can understand.

23 GENERAL DAYS: All right, fine.

24 (Laughter.)

25 GENERAL DAYS: Whatever that unidentified flying

1 object is that's neither a qualification nor a time,
2 place, and manner restriction is unconstitutional, because
3 States cannot derive from the constitution the power to
4 impose whatever we want to call it.

5 QUESTION: But if you make that argument, what
6 do you do about the Tenth Amendment, with these --

7 GENERAL DAYS: I would agree with my
8 cocounsel --

9 QUESTION: Why doesn't the Tenth Amendment
10 preserve the right of the States to use all the flying
11 objects it wants?

12 (Laughter.)

13 GENERAL DAYS: Justice Stevens, I think this
14 Court has made very clear that the Tenth Amendment
15 restates divisions of authority that are provided
16 elsewhere in the Constitution, and the very idea that the
17 Tenth Amendment could give the States the power somehow to
18 fill in the gaps with respect to the Federal structure
19 when we're talking about provisions that do not grant
20 Congress explicitly the power to address them, or deny to
21 the States explicit power to deal with them, that somehow
22 the Tenth Amendment provides that power.

23 I think if anything the Tenth Amendment is
24 reinforced by the times, places, and manner provision.
25 That might be viewed as something that the Tenth Amendment

1 reinforces, or vice versa, but I don't see how the Tenth
2 Amendment could come into place under these circumstances.
3 It is truly an anomalous reading of the Tenth Amendment
4 and this Court's jurisprudence.

5 I wanted to touch upon --

6 QUESTION: Before you leave that --

7 GENERAL DAYS: Yes, Justice Breyer.

8 QUESTION: -- could I go back to what I think is
9 Justice O'Connor's question, which is, I take that your
10 basic position is that no additional qualifications can be
11 provided by States.

12 GENERAL DAYS: That is correct.

13 QUESTION: All right. It says they shall choose
14 whoever they want, the Constitution, subject to certain
15 listed disqualifications.

16 GENERAL DAYS: That is correct.

17 QUESTION: Birth would be no good, property
18 would be no good, being -- service in the legislature
19 would be no good, term limits would be no good, and being
20 a pre -- and being a member of a political party such as
21 being chosen by the Democrats or Republicans would be no
22 good.

23 GENERAL DAYS: That's correct.

24 QUESTION: Right. All right. But then in
25 Storer, I take it it's okay to, through this back door,

1 insist on one of the qualifications, namely, being chosen
2 by the party.

3 GENERAL DAYS: Yes.

4 QUESTION: But why, then, isn't it okay to
5 insist on this other one, namely the term limits one.

6 GENERAL DAYS: Well, as I indicated, Justice
7 Breyer, I think --

8 QUESTION: That -- I mean you -- I just want to
9 get a very clear --

10 GENERAL DAYS: Well, there's a temporal quality
11 here. The requirement with respect to being a member of
12 the party, or if you wanted to run as an independent, not
13 being a member of a party, is related to the integrity of
14 the electoral process, and it focuses on that election
15 cycle.

16 The people who were disqualified in Storer can,
17 in the next election cycle, prepare themselves to qualify
18 according to the rules of California. Under Amendment 73,
19 once a Member of Congress has served three terms in the
20 House of Representatives or two terms in the Senate, there
21 is nothing that that person can do to conform his or her
22 behavior.

23 QUESTION: Well, would your answer be different,
24 then, in a State which has just adopted a one-time
25 interruption of the ballot access, as some have?

1 GENERAL DAYS: It would not be different --

2 QUESTION: I didn't think you were relying on
3 that distinction.

4 GENERAL DAYS: I'm not. You asked about the
5 lifetime disqualification. I don't think it makes any
6 difference whether it's for a few years, or a lifetime
7 disqualification. It still --

8 QUESTION: That's what you were just arguing in
9 response to Justice Scalia.

10 GENERAL DAYS: I didn't understand myself to be
11 responding in that fashion. I --

12 QUESTION: Don't you also, or wouldn't you also
13 in that case accept the point that Mr. Cohen made, that
14 there was a justification in Storer based on a demand for
15 orderly election procedure, and that compliments the point
16 that you've also made about the significance of the
17 permanence of the disqualification in this case?

18 GENERAL DAYS: Yes, exactly. Exactly so.

19 QUESTION: I take it you did not mean to concede
20 that a State could say you have to be a Republican, or you
21 have to be a Democrat, that you could be an independent --

22 GENERAL DAYS: Well, that --

23 QUESTION: -- you have to be independent early
24 enough to make it persuasive.

25 GENERAL DAYS: That's right. I mean, the

1 requirements, what obviously you want to file under those
2 circumstances, are First and Fourteenth Amendment
3 criteria, so I was not suggesting that they would fly
4 under those circumstances.

5 I just wanted to address a couple of other
6 points that were raised during the argument, and that is
7 that Justice Scalia, you talked about the disqualification
8 clause.

9 This Court in Powell canvassed the history of
10 that particular formulation and locution, and I think what
11 the Court concluded was, it was done by the Committee of
12 Style, and the Committee of Style had no authority to
13 change the substance, and indeed, during that period it
14 was quite often the case that alternative formulations
15 were used that had no substantive significance.

16 QUESTION: Did people who voted for this
17 Constitution know that?

18 GENERAL DAYS: I'm sure some of them did.

19 QUESTION: I mean --

20 GENERAL DAYS: They were a very learned bunch.

21 (Laughter.)

22 QUESTION: -- I don't care what the committee
23 said and what the committee changed. I mean, it was the
24 Constitution as written that was promulgated to the
25 people, and they adopted it, reading it as it was written.

1 I don't think they knew what happened in the Committee of
2 Style.

3 GENERAL DAYS: That's certainly --

4 QUESTION: Or, you know, I'm not sure that we
5 do. I mean, we're taking James Madison's word for it all,
6 I guess.

7 (Laughter.)

8 GENERAL DAYS: Well, he's a fairly credible
9 source --

10 QUESTION: We could do worse, couldn't we?

11 GENERAL DAYS: -- Mr. Justice Scalia.

12 (Laughter.)

13 GENERAL DAYS: We could do worse, I think,
14 Justice Souter, was your point.

15 Chief Justice Rehnquist, you asked about
16 residency requirements, and Justice Scalia, you asked
17 about various limitations. There have been some recent
18 decisions, one in 1968, Exon v. Tiemann in the District of
19 Nebraska, where residency requirements were struck down.
20 This was also the case in Chavez v. Evans in 1968 in New
21 Mexico, where the courts concluded that States did not
22 have the power to impose those types of restrictions.

23 Mr. Chief Justice, and the other members of the
24 Court, Amendment 73 is unconstitutional. It is not a
25 qualification in the sense that if it is a qualification

1 it violates the Constitution, and it does not fit into the
2 time, place, or manner powers granted to States under the
3 Constitution.

4 It seems to me that if what Arkansas is done
5 here can be done not only by other States but by Congress,
6 we have closed the door that Madison had in mind that
7 would be open to merit of every description with respect
8 to service in the United States Congress.

9 We urge this Court to affirm the judgment below.

10 Thank you very much.

11 QUESTION: Thank you, General Days.

12 Mr. Bryant, you have 7 minutes remaining --
13 General Bryant.

14 REBUTTAL ARGUMENT OF J. WINSTON BRYANT

15 ON BEHALF OF PETITIONER BRYANT

16 GENERAL BRYANT: Thank you.

17 QUESTION: General Bryant, before you start, how
18 many terms did Senator McLellan serve?

19 GENERAL BRYANT: The Honorable Senator McLellan
20 served at least five terms, and was probably into his
21 sixth term.

22 QUESTION: Thank you.

23 GENERAL BRYANT: Two points, Your Honor. First
24 is the Respondents -- Mr. Cohen has conceded that
25 Amendment 73 does not amount to a qualification.

1 Under that scenario, it is the State's position,
2 as I originally stated, that Amendment 73 is a ballot
3 access regulation clearly permissible under Article I,
4 section 4 of the Constitution, and the Arkansas court held
5 that Amendment 73 was, in fact, a qualification. Under
6 that scenario, we request the Court -- this Court to
7 reverse the Arkansas court and remand --

8 QUESTION: But if it were a qualification, then
9 would you lose?

10 GENERAL BRYANT: No, Your Honor.

11 QUESTION: But why, if we're thinking on
12 qualification, I take it if the States can pass
13 qualification such as the one at issue, they also could
14 pass qualifications setting requirements of birth, or
15 property, or previous service in the State legislature, or
16 add on to the list almost indefinitely, and why should we
17 think that the Constitution, particularly with Hamilton
18 and Madison, intended to give the States the power to
19 create that kind of Congress?

20 GENERAL BRYANT: Your Honor, under your
21 scenario, Article -- the States can add additional
22 qualifications. That is our position. Any qualifications
23 added, of course, would be subject to First and Fourteenth
24 Amendment scrutiny, so any scenario that the State came up
25 with that violated the First and Fourteenth Amendment

1 would, in fact, not pass constitutional muster.

2 The Tenth Amendment gives the States the
3 authority to adopt additional qualifications, and as has
4 already been pointed out here, the States, all the States
5 in this Union have a number of qualifications on their
6 books.

7 Arkansas requires a candidate for Congress to be
8 a registered voter. A registered voter cannot be a felon
9 or a mental incompetent. Arkansas -- the Arkansas
10 constitution prohibits a Senator who is appointed from
11 running for reelection, so Arkansas has a number of laws
12 on its books, both statutory and constitutional, that
13 amount to qualifications under the Respondent's theory,
14 and if qualifications --

15 QUESTION: But my question actually was why
16 would Hamilton or Madison, who, after all, were writing
17 before the Fourteenth Amendment was passed, think that it
18 was possible that this Constitution would permit
19 qualifications for the Congress based upon birth or
20 property, and why would we today think that a State could
21 pass a rule saying to be in Congress you have to be a
22 previous member of the State legislature, for example?

23 GENERAL BRYANT: Your Honor, our position is
24 that Madison and Hamilton did not preclude the State from
25 adding additional qualifications under the Tenth

1 Amendment.

2 QUESTION: So therefore Hamilton and Madison,
3 when they wrote the Federalists and said to the people,
4 don't worry about creating a Government of birth or
5 property, that they were wrong in that?

6 GENERAL BRYANT: Your Honor, no, Your Honor,
7 because under the State's position any qualification that
8 went to the point you suggested would be unconstitutional
9 under the First and Fourteenth Amendments.

10 QUESTION: This was before --

11 GENERAL BRYANT: Yes --

12 QUESTION: I guess that Madison and Hamilton and
13 the people they were writing for weren't worried about
14 their State legislatures. They felt that their State
15 legislatures were responsive to the people.

16 They were worried about whether this new animal
17 that was being created would be responsive to the people,
18 and they weren't about to give it vast powers to impose
19 qualifications that their own people didn't like. That's
20 the only explanation for the fact that in all of this
21 discussion there's no -- in the debates there's no
22 categorical mention about this issue about the States
23 adding qualifications.

24 They weren't worried about the States. The
25 States were the people as far as they were concerned.

1 Isn't that the response to why --

2 GENERAL BRYANT: Yes, Your --

3 QUESTION: -- Madison and Hamilton --

4 GENERAL BRYANT: Yes. Yes, Your Honor, that is
5 correct.

6 (Laughter.)

7 QUESTION: Are you aware of any case in which we
8 have said that a State may impose a burden or restriction
9 by reason of the fact that someone has previously
10 exercised a Federal right or privilege?

11 GENERAL BRYANT: I'm not sure I follow the
12 question, Your Honor.

13 QUESTION: Are you aware of any case in which we
14 have said that a State may impose a burden or restriction
15 on a person by reason of his or her having exercised a
16 Federal right or privilege?

17 GENERAL BRYANT: If I understand your question,
18 Your Honor, yes, I think the Storer case fit that, I think
19 the Burdick case fit that, and the test in those cases,
20 those cases stood for the proposition that a State can't
21 add additional qualifications or barriers --

22 QUESTION: What was the addition -- what was the
23 Federal right or privilege exercised in Storer, which was
24 someone who had signed up as a member of a party and
25 didn't quit early enough?

1 GENERAL BRYANT: Your Honor, in Storer, the
2 Federal right or privilege would have been the candidate
3 attempting to run for Congress as an independent
4 candidate, but was precluded from doing so by California
5 law, and in that particular instance, the State had
6 erected a barrier, but by the same token under the First
7 and Fourteenth Amendment analysis, the State -- that
8 barrier passed constitutional muster, and we submit that
9 Amendment 73 falls in that category and is clearly
10 authorized --

11 QUESTION: It's the most temporal of
12 limitations, though. It's kind of like you have to be
13 living in a State a certain amount of time before you can
14 get a divorce. It was -- it's very transient.

15 GENERAL BRYANT: I'm -- if I understand your
16 question correctly, those prohibitions were temporary in
17 that the candidate could run subsequently, but by the same
18 token, Amendment 73 allows a candidate to serve for a
19 certain number of terms before Amendment 73 comes into
20 effect.

21 QUESTION: Thank you, General Bryant.

22 GENERAL BRYANT: Thank you.

23 CHIEF JUSTICE REHNQUIST: The case is submitted.

24 (Whereupon, at 11:35 a.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

U.S. TERM LIMITS, INC., ET AL., Petitioners v. RAY THORNTON, ET AL. and WINSTON BRYANT, ATTORNEY GENERAL OF ARKANSAS, Petitioner v. BOBBIE E. HILL, ET AL.

CASE NO.:93-1456 and 93-1828

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)