

2006 Colorado Ballot Initiative Forum for Teachers and Students



Use the Colorado Blue Book, pages 7 and 29-30. Visit the websites listed below and select the best arguments for and against Amendment 40.

Support of term limits for appellate judges: <http://www.limitthejudges.com/>

Opposition to term limits for appellate judges: <http://www.protectcoloradocourts.org/>

EXCERPTED FROM: LIMIT THE JUDGES

www.limitthejudges.com

Six Reasons to Limit the Judges

1. Rotation in office is an important check against the abuse of power in our system of limited government and consent of the governed. Colorado voters have mandated such rotation for the executive and legislative branches of state government by enacting term limits. This amendment completes the balance by mandating it for the judicial branch.
2. Many citizens are concerned about the abuse of power by state judges presuming to rewrite the constitution and laws in such areas as leniency to convicted murderers, invading property rights, infringing religious freedom, and redefining marriage. This amendment increases the accountability of unelected judges to our elected governor in cooperation with the merit nominating process.
3. Removal of deficient judges by existing provisions is minimal to nil. Fewer than 1% of judges are dismissed by the voters in retention elections. Recall and impeachment of judges have not been utilized in living memory. Instead of judges thus holding virtual life tenure (to age 72), this amendment would limit them to 10 years and up or out.
4. Retention elections currently work better for district judges at 4-year intervals than for Appeals judges at 8-year intervals or Supreme Court justices at 10-year intervals. This amendment would standardize the length of terms at 4 years for all court levels.
5. This amendment would not politicize our courts, since it neither weakens the merit appointment process nor allows for easier "firing" of an unpopular judge -- it merely rotates the incumbent judges a little more often. Nor would it cause a shortage of qualified applicants; who believes there are too few career-minded lawyers in America today?
6. Judicial independence in balance with accountability to the people -- who are the source of all political power in our republic -- can be improved by giving judges a term limit like other public officials, but making it a longer span of years than what is allowed for any others. This amendment would give Colorado a better, fairer court system.

<http://www.limitthejudges.com/>

'Ten Years and Out' The case for term limits for judges.

BY JOHN ANDREWS

Wall Street Journal, *August 10, 2006*

DENVER--Americans' concern with a court system out of control has simmered for decades, never coming to a boil. The perennial frustration with judges rewriting the laws and the Constitution is like Mark Twain's comment on the weather--everybody talks about it but nobody does anything about it. That may be about to change in Colorado, if voters pass judicial term limits this fall.

Coloradans have long favored the principle that rotation in office can help curb the abuse of power. The state, along with Oklahoma, led the nation in 1990 by imposing term limits on the legislative and executive branches of state government; citizen initiatives later extended the limits to most local officials and to our congressional delegation--though the latter was struck down by the U.S. Supreme Court.

Judicial term limits have not met a great deal of legislative success. Provisions instituting them for judges were part of an omnibus judicial reform that I was unable to get past a Republican state Senate in 1999 and 2004. Impeachment proceedings against a constitution-flouting judge also failed in a Republican House in 2004. And a proposal for recall of judges was killed by the Democratic Senate last year.

But this year, reformers have gathered petitions with about 108,000 signatures, and recently set up a November 2006 vote on "10 years and out" for justices of the Colorado Supreme Court and judges of the Court of Appeals. The ballot initiative will almost certainly be certified in the coming days.

The petition drive was fueled by outrage at a blatantly political June 12 ruling of the state Supreme Court--relying on a technicality, the Court threw off the ballot a popular immigration-reform proposal. Other hot buttons include the justices' leniency to murderers in last year's Harlan and Auman cases; a judge in a custody dispute who restricted where Cheryl Clark could take her daughter to church, lest the child be exposed to "homophobia"; a 2003 decision favoring the teacher unions, snaring poor kids in bad schools; and the Taylor Ranch case, trampling property rights.

The last, *Lobato v. Taylor*, a property-claims ruling by the Colorado Supreme Court in 2002, is less notorious than *Kelo*, but its disruptive effect in clouding all Colorado land titles cannot be overstated. "We risk injustice elsewhere," a dissenting opinion warned, by accepting the plaintiffs' radical theory of "communal rights" as superior to "the sanctity of private property predictability and clarity of law." But the Democratic-dominated court did just that. With its requirement for notification of all potential claimants under old Spanish land grants (dating to 1863) in order to perfect a title, *Lobato* invites mischief across all 103,598 square miles of Colorado. Property-owners will hear a lot about this threat in coming weeks.

Up to 1965, Colorado was one of the many states that elected all their judges in partisan campaigns. We've since been on the so-called "Missouri merit" plan, where the governor appoints judges from a slate prepared by a nominating commission. Judges then face periodic retention elections, with "retain" or "do not retain" recommendations from a judicial performance commission. It sounds good, but fewer than 1% of all judges ever get dismissed by voters, leading to virtual life tenure with little accountability.

Our ballot issue, "Limit the Judges," would reduce the retention cycle to four years (after an appointee's first provisional term, which can be as short as two years), and cap total service at three terms, about 10

years or a bit longer depending on date of appointment. It applies only to Supreme Court justices, whose current retention cycle is 10 years, and Appeals Court judges, now on an eight-year cycle. District judges' terms are not affected.

This modest proposal has infuriated the bench and bar--aided and abetted, of course, by the media--who characterize it as radical, reckless, an assault on judicial independence and a dangerous politicizing of the courts.

It is none of those. We don't go back to elected judges, or change the merit selection process. We don't make it easier to remove a miscreant--or even merely unpopular--judge. We may not even shorten the average length of appellate court tenure, which is only about eight years now. All we seek to do is to balance the requirement for rotation in office, so it applies to all three branches of state government from now on. Why should the potential abuse of power or self-serving entrenchment by state senators, representatives, the governor and other elected executives be checked by a term limit, while the activism of the judiciary is not subjected to the same?

The judicial term limit plan has an additional provision, if the reform is approved this year, that would eject at the end of 2008 any incumbents on the two high courts who have already served 10 years or more. Limit the Judges, then, functions not only as a constitutional amendment but also a referendum on the performance of our robed policy makers.

Five of the seven state Supreme Court justices, all mostly liberal, would be gone in two years if the measure passes; likewise seven of 15 Appeals Court judges. The Colorado Bar Association bemoans a cumulative loss of 185 years' experience on the bench, but that argument may prove no more persuasive to voters in relation to the judicial branch than when it was previously deployed in vain for the legislative branch.

In my experience, term limits have helped make Colorado's legislature more respectful of the plain language of the constitution and more responsive to the sovereign will of the people. I believe term limits can yield similar benefits in our court system.

Robert Nagel, a law professor at the University of Colorado, argues that the imperial judiciary is self-stoking; that is, the legal system, by its very design, inexorably tends toward excess because it is sealed off from democratic forces. He recommends devising "other political checks" on the runaway courts. Colorado's judicial term limits, it seems to me, are a good start.

Mr. Andrews is chairman of the Limit the Judges campaign and former president of the Colorado Senate from 2003 to 2005.

Judicial evaluations appear too lenient

Rocky Mountain News, August 21, 2006

Suppose you had a case pending before the Colorado Court of Appeals. Would you be pleased to learn that the state commission on judicial performance had said of one of the judges considering your case, "Although the commission recommends that Judge (Jose) Márquez be retained, several commissioners were disappointed with the variable quality of some of his opinions and sporadic departures from controlling law, especially given the length of time he has been on the bench"?

Probably not. The work of the commissions that evaluate judges standing for retention is important, yet those panels - one for state Supreme Court and Court of Appeals judges, and one for each of the state's 22 judicial districts - nearly always recommend retention. This year, they did for all of the 108 judges who will face retention elections in November.

In addition, nearly all of the recommendations are unanimous. And following along, voters nearly always favor retention.

That is all the more reason why voters should pay attention to the judges who draw any negative votes at all. The commission vote on Marquez was 6-4, while the other four appeals court judges on the ballot were all 10-0.

To be sure, some judges reportedly leave the bench rather than try to ride out an unfavorable review, so the commissions do have greater benefit than is apparent on the surface. Yet a few of the remaining cases are still puzzling.

Of El Paso County Judge Barney Iuppa, the Fourth District commission said, "Notwithstanding the commission's recommendation that Judge Iuppa be retained, the commission is concerned with Judge Iuppa's courtroom demeanor. Many survey responses from attorneys noted Judge Iuppa was moody and rude at times." The vote on Iuppa was 9-1 in favor.

The 18th District commission said of Lincoln County Judge Truston Lee Fisher, "The commission is most concerned with Judge Fisher regarding his angry outbursts in the courtroom and toward his staff. The commission had addressed this concern with Judge Fisher four years ago." But nobody was concerned enough to vote no.

One member of the 20th District commission, the report said, "felt very strongly that Judge (Carol) Glowinsky, at times, does not follow the law, but clouds her decisions with interpretations." The commission vote was nine in favor and one "no opinion."

The commissions calculate a grade for judges based on the responses from attorneys who have appeared before them. The average is 3.4 (of a possible 4.0) and almost all the scores are very close to that figure. Just eight judges scored below 3.0. Only three drew any negative votes. Surely there ought to be more.

EXCERPTED FROM: PROTECT OUR COURTS

www.protectcoloradocourts.org

Amendment 40: Read Between the Lines

The Ballot Question:

Shall there be an amendment to the Colorado constitution concerning term limits for appellate court judges, and, in connection therewith, reducing the terms of office for justices of the supreme court and judges of the court of appeals to four years, requiring appellate judges serving as of January 1, 2007, to stand for retention at the next general election, if eligible for another term, prohibiting an appellate judge from serving more than three terms, specifying that a provisional term constitutes a full term, and making any appellate judge who has served ten or more years at one court level ineligible for another term at that level?

Permanently added to the constitution

That means 5 of 7 Supreme Court justices and 7 of 19 Court of Appeals judges will be forced to leave the bench all at once.

There is no plan for keeping courts operating efficiently despite drastic plans to force out nearly half of Colorado's highest judges. This will create a massive backlog with serious consequences for individuals and businesses across our state.

This bad idea brings partisan politics into the courtroom by allowing future governors to replace the majority of judges on Colorado's highest courts all at the same time – stacking the deck with individuals who share their views, be they conservative or liberal, Republican or Democrat.

This pushes out good judges for no reason. Colorado judges are already subject to performance evaluations by non-partisan commissions, mandatory retirement, discipline and retention votes by the people. If this passes, any judge who has served more than 10 years would be forced out of office, without any reason.

Judicial term limits ripped

DenverPost.com. Howard Pankratz

Ex-governors, Owens slam idea. A leading supporter of Amendment 40 dismisses critics from both parties as “political insiders.”

Colorado’s three living former governors and its current chief executive say they oppose a November ballot initiative that would term-limit state Supreme Court justices and Court of Appeals judges.

In what one former governor called an unprecedented bipartisan appeal, the leaders asked voters Monday to reject Amendment 40, which would force nearly half of the judges and justices off the state’s appellate courts.

“Let me just say it in one word. This is a terrible amendment. This is not just a bad idea, it is a terrible amendment,” said former Democratic Gov. Roy Romer. “The system we have in Colorado is one of the best in the nation in terms of the checks and balances of how a judge is chosen. It’s a very good system.” Joining Romer at a news conference in the state Capitol were former Democratic Gov. Dick Lamm and two Republicans, Colorado Attorney General John Suthers and House Minority Leader Mike May. Suthers said he spoke for himself and GOP Gov. Bill Owens. May said he spoke for himself and John Vanderhoof, a Republican governor from 1973 to 1975.

John Andrews, a former Colorado Senate president and chairman of the group pushing Amendment 40, said the gathering was a “group of political insiders and lawyers claiming we don’t need any additional checks and balances on political insiders and lawyers.

“The political establishment rallies around a discredited status quo. No surprise there,” he said.

Amendment 40 would allow the justices and Court of Appeals judges to remain on the bench a maximum of 10 years. It would make the justices face a retention vote every four years, instead of every 10. The amendment would also make the appeals court judges face a retention vote every four years instead of every eight.

May said he believes the initiative strikes at American democracy. “I think it is particularly important for those of us who call ourselves conservative Republicans, who have a tradition of respect for the Constitution and the founding fathers, ... not to vote for an amendment that undermines the very doctrine that we hold dear to us,” May said.

Suthers said he has not hesitated to criticize certain court decisions, but Amendment 40 would hurt “the quality, the independence and impartiality of our appellate courts. “I have concluded that it does nothing to enhance judicial accountability and would ... undermine judicial independence,” Suthers said. “Both so-called conservative judges and liberal judges would be subject to term limits. Bad judges might be off the bench sooner but so would good judges.”

Amendment supporters say term limits are necessary because they will increase accountability of the judges and limit abuses of power in the judiciary, according to the Limit the Judges website.

In their statements, Owens and Vanderhoof criticized the amendment, Owens saying it would seriously impair doing business in Colorado and Vanderhoof calling the amendment a “giant step backward. The proposed constitutional amendment puts partisan politics right back into Colorado’s courts.”

Lamm said the most important fact was that all of Colorado's living former governors and the current governor are "unanimous that this is a bad idea. " "You do not want to vote for something where you are going ... to take (out) five of your seven sitting Supreme Court justices and seven out of your 19 appellate court justices," Lamm said. "Institutions need continuity."

Amendment 40 a terrible idea. Judicial term limits don't solve any problems

Rocky Mountain News, September 27, 2006

Amendment 40, which would impose term limits on Colorado's appellate judges, is an easy call. We urge its defeat.

The amendment would force five of the seven Supreme Court justices, and seven of the 19 intermediate Court of Appeals judges, from the bench in January 2009. That would give an extraordinary power of appointment to the next governor.

The initiative is being pushed by former state Senate President John Andrews. He is unhappy with several recent court decisions but denies that pique is driving the initiative. If that's the case, however, it's hard to understand why he thinks a new set of judges would be any more likely to issue rulings more congenial to his views.

The state court system, while hardly perfect, has been functioning well for 40 years in its current incarnation and the amendment wouldn't improve it.

What the initiative would do is needlessly shorten the terms currently served by appellate judges. Supreme Court justices, who now serve two years before facing a statewide retention vote followed by a vote every 10 years thereafter, would be limited to the provisional two-year term plus two four-year stints.

So would judges on the Court of Appeals, who now face retention votes every eight years after the initial two-year period.

Although the current eight- and 10-year terms are theoretically unlimited, in fact the state Constitution already imposes a very real term limit: All judges must retire at 72. Since only mature lawyers and lower court judges are generally picked for the appellate benches, they don't get to hang on forever like some federal judges, who enjoy lifetime appointments.

Most appellate judges don't serve that long anyway. A Colorado Supreme Court justice makes \$123,000 a year and appellate judges about \$118,000. Not starvation wages, to be sure, but most could make more in private practice. They become judges in part as an act of public service. A court study has shown that the average term for a justice is 8.69 years and for an appellate judge 7.57 years, slightly under the proposed limits.

Unlike Colorado's original term limits law, which upon passage gave elected state officials eight more years no matter how long they'd already served, this measure is retroactive.

It would require appellate judges who have already served 10 years or more to leave the bench in January 2009 and require those eligible to serve another term to appear on the November 2008 ballot for retention. And that's even if they'd previously been approved for a longer term.

It could be worse. At least Andrews isn't trying to restore the direct election of judges. That went away in the 1960s, and the current system works better. It doesn't, as proponents claim, take all the politics out of judge selection, but at least it minimizes it.

Vote no on Amendment 40.