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OPINION

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Activists Seek To End Run Federal Courts on ERA Revival

Aim is to get United States archivist to declare the amendment ratified despite deadline having passed long ago.

Editor-in-Chief



Gloria Steinem of the National Organization for Women at an Equal Rights Amendment rally at Washington on July 4, 1981. AP/Scott Applewhite, file



DOUGLAS JOHNSON

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There is an extraordinary constitutional theory now circulating among millions of Americans, propagated by well-funded advocacy groups, many elected officials, and even some publications such as the New York Times, the Atlantic, and NPR.

The claim is that it would require only a single phone call from President Biden to the Archivist of the United States

to forever enshrine the Equal Rights Amendment into the U.S. Constitution. Didn't the ERA famously fail to win ratification, a long time ago?

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Well, yes. Congress did approve the ERA in 1972, but it garnered the required two-thirds votes in Congress only after proponents accepted a ratification deadline of seven years. The deadline expired March 22, 1979, without the required 38 state ratifications. Only 35 states ratified, and of those, four rescinded before the deadline.

However, ERA advocates much later concocted novel claims that the deadline and rescissions were unconstitutional, or at least subject to retroactive nullification by Congress. Such claims lack any judicial support, but in 2017-2020 three state legislatures (Nevada, Illinois, and Virginia) lent their weight to the scheme, and the activists claimed that put ERA over the 38-state threshold.

The Archivist of the United States, David Ferriero, appointed by President Obama, declined to recognize the sham ratifications. He acted on the basis of a Justice Department analysis recognizing that the ERA had expired in 1979. So the "late-ratifying" states sued him.

In 2021, a United States district judge, Rudolph Contreras, also an Obama appointee, ruled that the deadline was valid and that it would have been "absurd" for the Archivist to disregard it. On September 28, a three-judge panel of the District of Columbia Circuit of the U.S. Court of Appeals will hear oral arguments from pro-ERA states, anti-ERA states, and the Justice Department, regarding the validity of the deadline and the rescissions.

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The appeals court has a Democrat-appointed majority, yet it is unlikely that it will embrace the wholly untenable legal claims of the ERA-revivalist sect. “Every time the issue has been litigated in federal court...the pro-ERA side has lost, no matter whether the judge was appointed by a Democrat or Republican,” [the Washington Post Fact Checker observed](#). the *Washington Post* Fact Checker observed.

ERA advocates know this. So, groups such as the ERA Coalition, League of Women Voters, and Equal Means Equal now are stepping up on-line campaigns, urging grassroots supporters to demand that President Biden phone the Archivist (currently, on an acting basis, Debra Steidel Wall) and order her to ignore Judge Contreras’ ruling and simply certify the ERA as part of the Constitution.

This “one signature away” campaign has been vocally supported by such members of Congress as Congresswoman Carolyn Maloney, who chairs the committee with direct oversight authority over the National Archives. Mrs. Maloney publicly lambasted Mr. Ferriero for not certifying the ERA prior to his retirement on April 30. The *Washington Post* Fact Checker awarded Maloney “Four Pinocchios” for her claims that the Archivist has the authority to make the ERA part of the Constitution.

Mrs. Maloney [told The Atlantic](#) that a commitment to certify the ERA should be a “litmus test” for the selection of Mr. Ferriero’s successor– a requirement for which Senator Blumenthal expressed sympathy.

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statute creating the office of Archivist (44 U.S.C. § 2103) states, “The Archivist shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist.” Ms. Wall on August 24 called the National Archives “a uniquely and fiercely non-political government agency.”

On August 3, President Biden nominated a political scientist and historian, Colleen Joy Shogan, as the next Archivist. During Dr. Shogan’s upcoming Senate confirmation process, it seems likely that senators will ask whether she will reiterate Mr. Ferriero’s public commitment to certify the ERA only if so “directed by a final court order” and will ignore any extra-legal directives to the contrary.

ERA revivalists also are pressing Senator Schumer, the majority leader, to hold a Senate vote this month on a measure purporting to retroactively “remove” the ERA’s ratification deadline. This measure will fail. Even were it to pass, it would be legally hollow, an exercise in political theatrics. The current Congress has no more power to amend a long-expired amendment proposal than it has to now override a veto by President Reagan.

The late Justice Ruth Bader Ginsburg, for decades a champion of the ERA, in 2020 publicly advised other ERA supporters to start over, because it is “long after the deadline passed” and “a number of states have withdrawn their ratification.” Rather than heed her words, ERA-revival activists now rely on broad dissemination of legal fantasies, and raw political pressure, in an attempt to roll

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