THE EQUAL RIGHTS AMENDMENT

The Pro-Abortion Movement's Constitutional Stealth Missile

During 2021, many groups and political figures who champion "abortion rights" will intensify their ongoing campaign to air-drop into the U.S. Constitution a provision that they believe, and pro-lifers fear, could be used to entrench and expand a constitutional "right" to abortion — the Equal Rights Amendment (ERA).

This battle will involve all three branches of the federal government.

● The Biden-Harris Administration is expected to assert that the ERA — submitted to the states by Congress in 1972 with a seven-year ratification deadline — has been ratified and is already part of the Constitution, *or* that Congress can make it so with a resolution passed by simple majority votes. Either of those positions would contradict not only the legal position of the Justice Department under the Trump-Pence Administration (and legal positions taken by earlier administrations), but also much past constitutional amendment history, long-past Supreme Court rulings, and even 2020 statements by the late Justice Ruth Bader Ginsburg.

● A federal judge in Washington, D.C., is already considering a lawsuit filed by the Democratic attorneys general of Virginia, Illinois, and Nevada, who insist that the ERA is already part of the Constitution (*Virginia v. Ferriero*). The Democratic attorneys general claims have been contested not only by the Justice Department (which may soon modify that stance), but by five anti-ERA states. Whatever action this judge takes, the constitutional disputes surrounding the ERA's status are likely to reach higher courts during the next year or two, and may ultimately be decided by the U.S. Supreme Court.

● In an attempt to influence the courts, during 2021, the House of Representatives is likely to pass an unconstitutional resolution that, by simple majority vote, purports to remove the 1979 ratification deadline. For the first time, that measure is also likely to come to the floor of the U.S. Senate, with the outcome not entirely predictable.

"The ERA is a stealth missile with a legal warhead that could be used to attack any federal, state, or local law or policy that in any way limits abortion — abortion in the final months, partial-birth abortion, abortions on minors, government funding of abortion, and conscience-protection laws," said Douglas D. Johnson, who directed National Right to Life's ERA-related efforts during his years as the organization's Federal Legislative Director (1981-2016), and who continues to do so today as National Right to Life Senior Policy Advisor. "Pro-abortion advocates failed under the constitutional amendment process provided in Article V of the Constitution — the ERA expired unratified over 40 years ago — so now they are attempting to achieve their goal by brazenly political means, hoping to cow the courts into ignoring the flimsiness of their constitutional claims."

The ERA-Abortion Connection

National Right to Life has opposed the ERA for decades, recognizing that the ERA language proposed by Congress in 1972 could and likely would be construed to invalidate virtually all limitations on abortion, and to require government funding of abortion. In decades past such objections were often publicly rejected by ERA advocates, who often derided assertions of an ERA-abortion link as a "scare tactic" and even "a big lie." But in recent years, an increasing number of prominent pro-abortion advocates have dropped that pretext, and now openly proclaim that the ERA is needed precisely to reinforce and expand "abortion rights."

For example, in a national alert sent out on March 13, 2019, NARAL Pro-Choice America asserted that "the ERA would reinforce the constitutional right to abortion . . . [it] would require judges to strike down anti-abortion laws . . ."

The National Organization for Women has circulated a monograph on the ERA that makes numerous sweeping claims about its hoped-for pro-abortion legal effects — stating, for example, that "an ERA — properly interpreted — could negate the hundreds of laws that have been passed restricting access to abortion care . . ."

The Associated Press on January 1, 2020 reported that Emily Martin, general counsel for the National Women's Law Center, "affirmed that abortion access is a key issue for many ERA supporters; she said adding the amendment to the Constitution would enable courts to rule that restrictions on abortion 'perpetuate gender inequality.'"

David Crary, a national AP reporter, wrote in a January 21, 2020 story, "Another subplot in this year's abortion drama involves the Equal Rights Amendment.... Abortion-rights supporters are eager to nullify the [ERA ratification] deadline and get the amendment ratified so it could be used to overturn state laws restricting abortion."

Pete Williams of *NBC News* reported (January 30, 2020), "Three states urged a federal judge Thursday to declare that the proposed Equal Rights Amendment is now part of the U.S. Constitution...The ERA has been embraced by advocates of abortion rights. NARAL Pro-Choice America has said it would 'reinforce the constitutional right to abortion' and 'require judges to strike down anti-abortion laws.' Abortion opponents agree... 'It would nullify any federal or state restrictions, even on partial-birth or 3rd-trimester abortions,' [said] National Right to Life."

The Daily Beast reported that Jennifer Weiss-Wolf, vice president of the Brennan Center for Justice), said: "Both the basis of the privacy argument and even the technical, technological underpinnings of [*Roe*] always seemed likely to expire." … "Technology was always going to move us to a place where the trimester framework didn't make sense." … "If you were rooted in an equality argument, those things would not matter."

[A factsheet containing many such recent quotes from prominent pro-abortion groups, footnoted, may be accessed here:
www.nrlc.org/uploads/era/ERA-AbortionQuotesheet3-5-20.pdf

Moreover, ERAs to state constitutions that are virtually identical to the proposed federal ERA actually have been used as powerful pro-abortion legal weapons. For example, the New Mexico Supreme Court in 1998 unanimously struck down a state law restricting public funding of elective abortions, entirely on the basis of the state ERA, in a lawsuit brought by affiliates of Planned Parenthood and NARAL. At this writing, the Women's Law Project, in alliance with Planned Parenthood, is advancing a lawsuit in the Pennsylvania courts arguing that a limitation on state funding of elective abortion violates the state ERA. The groups have asserted that a 1986 state supreme court decision that held otherwise should be overturned as "contrary to a modern understanding" of ERA.

In 1983 and since, National Right to Life has said it will strongly oppose any federal ERA, unless an "abortion-neutralization" amendment is added, which would state: "Nothing in this Article [the ERA] shall be construed to grant, secure, or deny any right relating to abortion or the funding thereof." ERA proponents have vehemently rejected such a modification to any "start over" ERA.

In 2021, National Right to Life will again express to members of Congress the position it conveyed in an early 2020 letter: "In our communications with our members, supporters, and affiliates nationwide, a vote in favor of this resolution [purporting to remove the ratification deadline in the 1972 ERA resolution] will be accurately characterized as a vote in favor of inserting language into the U.S. Constitution that could invalidate any limits whatsoever on abortion, including late abortions, and to require government funding of abortion."

Short History of the 1972 ERA

Various versions of the Equal Rights Amendment were considered in Congress for decades before one finally won the necessary two-thirds approval in the House and Senate in 1972 — but only after proponents had reluctantly accepted a seven-year ratification deadline. The deadline — as for every constitutional amendment proposed since 1960, including four that were adopted — was placed in the Proposing Clause (which is not a "preamble," but a constitutionally required element of a constitutional amendment submission).

As the March 1979 deadline approached, the ERA was three states short of the required 38 state ratifications — and five of the states that had ratified during an initial rush had rescinded their ratifications. In 1978, Congress passed a resolution – by simple majority votes – that purported to extend the deadline for 39 months. Many members of Congress, and many constitutional experts, criticized the deadline extension as clearly unconstitutional. The only federal court to consider the matter later ruled that the deadline extension was unconstitutional

(and that rescissions were valid), but no additional states ratified during the 39-month pseudo-extension, so in 1982 the Supreme Court declared that the entire controversy was moot. The 1972 ERA was dead.

In 1983, the top priority of the Democratic majority leadership of the U.S. House of Representatives, recognizing that the 1972 ERA was dead, made restarting the constitutional amendment process a top priority. They were stunned when the start-over ERA (identical in language to the 1972 ERA) went down in defeat on the House floor on November 15, 1983, in large part because of opposition from National Right to Life and other pro-life groups.

However, in 1992, the Justice Department issued an opinion that the "Congressional Pay Amendment" (CPA) had been ratified, even though the final ratifying state legislatures adopted their ratification resolutions 203 years after Congress had submitted the proposal to the states. Both houses of Congress passed resolutions stating the same conclusion. However, no court has ever reviewed the question, or ruled that this so-called "27th Amendment" is actually part of the Constitution.

Even if the CPA was indeed validly ratified in 1992, it has little relevance to the ERA, since the CPA had no deadline attached, and no state had rescinded its ratification. Still, ERA advocates seized on the claimed ratification of the CPA to concoct what they called the "three-state theory," which asserted that the 1972 ERA was still a candidate for ratification. Beginning in 1994, "ratification" resolutions were proposed repeatedly in legislatures in the 15 states that had never ratified the ERA. From 1994 through 2016, none of those attempts was successful – with pro-life opposition in many instances decisive. Finally, in 2017, the Nevada legislature adopted such a "ratification," followed by Illinois in 2018 and Virginia in January 2020.

THE EXECUTIVE BRANCH:
What Occurred in 2020, and What Is Ahead

When the Second Session of the 116th Congress convened on January 3, 2020, ERA proponents claimed that they needed "just one more state" in order for the ERA to become part of the Constitution. This claim, while widely accepted at face value by the news media, actually was very dubious.

Under a federal statute, when a state legislature ratifies a proposed constitutional amendment that is validly before it, the state sends notification of that action to the Archivist of the United States, an official nominated by the president and confirmed by the U.S. Senate. When the Archivist receives 38 valid ratifications, he publishes the amendment, which is merely a formal notification that the new text has been added to the Constitution.

However, in the case of the ERA, the documents that had been submitted by Nevada and Illinois purported to ratify a proposal that, by its own explicit terms, had expired in 1979.

Moreover, five of the states that had ratified had formally rescinded their ratifications, and all had done so before that 1979 deadline.

Faced with those impending legal issues, the Archivist in 2019 sought guidance from the Department of Justice Office of Legal Counsel (OLC), which advises the entire Executive Branch on major legal issues (just as a predecessor Archivist had done, faced with a different set of ratification issues in 1992 with respect to the Congressional Pay Amendment).

On January 6, 2020, the OLC issued a 38-page legal memo that Congress had power to include a deadline in a constitutional amendment resolution before submitting it to the states, and that the ERA had expired unratified in 1979. The opinion held that neither state legislatures nor Congress have power to resurrect an expired amendment, and once Congress submits a constitutional amendment proposal to the states, its role has ended — it may not retroactively modify that proposal, the opinion argued. Taking note of proposals in Congress that purported to retroactively "remove" the deadline, the OLC opinion said that a later Congress lacks the power to act retroactively in this manner, just as the current Congress lacks the power to override a veto by President Carter.

The Archivist announced that he would "abide by the OLC opinion, unless otherwise directed by a final court order."

On January 15, 2020, the Virginia legislature approved a pseudo-ratification resolution, and ERA advocates loudly proclaimed that this meant that all requirements for ratification of the ERA had been met — a claim that was, again, uncritically accepted and amplified by many organs of the news media, despite its dubious factual foundation.


BIDEN HARRIS

THE BIDEN AGENDA FOR WOMEN

As President, Biden will work with advocates across the country to pass the Equal Rights Amendment (ERA) so women's rights are once and for all explicitly enshrined in our Constitution. Biden co-sponsored the ERA nine times. As President, he will work with advocates across the country to enshrine gender equality in our Constitution. Now that Virginia has become the 38th state to ratify the ERA, Biden will proudly advocate for Congress to recognize that 3/4th of states have ratified the amendment and take action so our Constitution makes clear that any government-related discrimination against women is unconstitutional.

January 15, 2021 screenshot from www.joebiden.com/womens-agenda

After January 20, 2021, the legal position of the Executive Branch will undergo a marked shift. In 2020, the Biden-Harris campaign said that if elected, "Biden will proudly advocate for Congress to recognize that 3/4 of states have ratified the amendment and take action so our Constitution [includes ERA]." This statement is somewhat ambiguous as to which of the two conflicting "ERA is alive" legal theories the Biden Administration will formally embrace. (Is the ERA already part of the Constitution, because deadlines are

unconstitutional? Or is the ERA not yet part of the Constitution, but can be made so through a retroactive legislative exercise in Congress?) At a minimum, it guarantees that the Biden-Harris Administration will endorse a congressional resolution that purports to "remove" the deadline — and to do so without the two-thirds votes that are always required when Congress exercises its constitutional amendment authority under Article V of the Constitution.

THE JUDICIAL BRANCH: What Occurred in 2020, and What Is Ahead

Even before the Virginia legislature adopted its pseudo-ratification measure on January 15, 2020, federal lawsuits had been filed by both ERA opponents (in Alabama) and supporters (in Massachusetts). However, those two actions eventually were dismissed by federal district judges on procedural grounds (although either or both might be revived in the future).

The main and ongoing ERA-related litigation is a lawsuit (*Virginia v. Ferriero*) filed against the Archivist on January 30, 2020, by the attorneys general of Virginia, Illinois, and Nevada, in the federal district court in the District of Columbia, which was assigned to Judge Rudolph Contreras, an appointee of President Obama. The claim of the three Democratic attorneys general is that Article V of the Constitution, which governs constitutional amendments, does not mention deadlines, and that the deadline that Congress included in the 1972 ERA resolution was therefore unconstitutional. They also assert that rescissions are not allowed. Under this theory, once Congress proposes a constitutional amendment, that proposal must remain available for ratification forever, yet no state may ever change its mind and withdraw its approval.

Judge Contreras has allowed attorneys general of five "anti-ERA" states (AL, LA, NE, SD, TN) to become "intervenor-defendants" in the case. Three of these intervening states (NE, SD, TN) had rescinded their ratifications. The intervening states argue that the ratification deadline was valid and immutable; that rescissions were valid; and that even without an explicit deadline, there is an implicit requirement that a constitutional amendment be ratified within a reasonable period of time (this last position finding support in two early 20th century Supreme Court opinions).

Throughout 2020, the Justice Department has defended the position that the 1979 ERA deadline was valid. The Justice Department has not taken a position on rescissions; if the ERA died in 1979, then it is long dead with or without the five rescissions. (If, however, the courts were to ultimately decide that the deadline was unconstitutional, or that it could be retroactively changed by Congress, then the courts would also have to confront the rescissions issue as well. While it has been little noted by news media, claims by ERA advocates that rescissions are unconstitutional are inconsistent with positions advocated by various Democratic-aligned interest groups, such as labor unions, in closely related contexts.)

In *Virginia v. Ferriero*, on June 29, 2020, four law professors (Erwin Chemerinsky, Noah Feldman, Reva Siegel, and Julie C. Suk) filed a friend-of-the-court brief "in support of neither party," which advanced a legal theory different from that argued by the Democratic attorneys general. The professors argued that Congress is the body that should resolve "disagreements" about ratification, that Congress could change the deadline, that the status of the ERA is a "political question," and that the courts should stand aside, at least at this stage.

Regardless of how Judge Contreras rules regarding the validity of the deadline, the validity of rescissions, and/or the role of Congress (if any) to decide such matters by simple majorities, it is likely that higher courts, and ultimately the U.S. Supreme Court, will have opportunity to come to grips with and resolve these issues. At this writing (January 15, 2021), the case has been thoroughly briefed, but oral arguments have not yet been scheduled, and it is not clear how soon a ruling may be handed down.

THE LEGISLATIVE BRANCH: What Occurred in 2020, and What Is Ahead

After the Virginia legislature adopted its ERA "ratification" resolution on January 15, 2020, the Democratic leadership of the U.S. House of Representatives announced that it would quickly take up a resolution purporting to remove the ratification deadline retroactively (H.J. Res. 79).

However, on February 10, 2020, advocates for the deadlines-don't-matter campaign hit a serious bump. Justice Ruth Bader Ginsburg, long a champion of the ERA, was asked about the issue at a public event at Georgetown University Law Center. Justice Ginsburg gave a response that implicitly recognized the validity of both the deadline and the power of states to rescind:

Judge M. Margaret McKeown: "Leaving aside whether any deadlines could be extended, what's your prognosis on when we will get an Equal Rights Amendment on the federal level?"

Justice Ruth Bader Ginsburg: "I would like to see a new beginning. I'd like it to start over. There's too much controversy about latecomers — Virginia, long after the deadline passed. Plus, a number of states have withdrawn their ratification. So, if you count a latecomer on the plus side, how can you disregard states that said, 'We've changed our minds'?"

-February 10, 2020 remarks at Georgetown University Law Center

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Despite Justice Ginsburg's admonition, on February 13, 2020, the House of Representatives passed H.J. Res. 79, purporting to remove the ratification deadline. The measure passed by a vote of 232-183 — with all voting Democrats in support, but only five out of 187 voting Republicans. Subsequently, the measure was referred to the Senate Judiciary Committee, which took no action on it. Therefore, the pro-ERA side must begin again in the new 117th Congress, which convened on January 3, 2021.

At this writing (January 15, 2021), Congresswoman Jacki Speier (D-Calif.) has indicated that she will soon introduce a "deadline removal" resolution identical to H.J. Res. 79. There is little doubt that it will pass the House again, at a time of the Democratic leadership's choosing. Its prospects in the U.S. Senate are far cloudier.

As of January 20, 2021, the U.S. Senate will have a bare Democratic majority (with the tie-breaking vote of Vice President Kamala Harris). This makes it likely that the "deadline removal" measure will reach the Senate floor sometime during the 117th Congress. But in view of its manifest constitutional defects, and the heavy pro-abortion cargo that the underlying ERA text carries (as discussed above), its approval by the Senate is far from a foregone conclusion.

It should be noted the level of support for the ERA in the House of Representatives has dropped precipitously over a period of decades, and is likely to drop even further on the next go-around:

– House approval of ERA resolution, Oct. 12, 1971: 354-24 (94% of voting members)

– House failure to approve identical start-over ERA, Nov. 15, 1983: 278-147 (65% of voting members, short of two-thirds)

– House approval of purported "deadline removal" resolution, Feb. 13, 2020: 232-183 (56% of voting members)

Additional Resources

Additional historic documentation on the ERA-abortion connection can be found on the National Right to Life website archive at www.nrlc.org/federal/era

National Right to Life Senior Policy Advisor Douglas D. Johnson has been extensively involved in the legislative and legal disputes surrounding the Equal Rights Amendment since 1983. He can be reached through the National Right to Life Media Relations Department at 202-626-8825, mediarelations@nrlc.org

@ERANoShortcuts is a recommended Twitter account dedicated exclusively to tracking legal and political developments pertaining to the federal Equal Rights Amendment, and to challenging misinformation about the history of these matters.