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The ERA and the U.S. archivist: Anatomy of a false claim

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"When he [David Ferriero] first became the archivist, I wrote to him about the ERA and that it was his job to certify it. He wrote me back — I have got the letter — saying he supports the ERA and that he would do it."

— Rep. Carolyn B. Maloney (D-N.Y.), in remarks during a virtual news conference on the Equal Rights Amendment, Jan. 27

The battle over the Equal Rights Amendment has had many twists and turns since Congress first passed it and it was sent to the states 50 years ago for ratification. For proponents such as Maloney, the issue is a simple one — 38 states have ratified the amendment, most recently Virginia in 2020, and so now it is already part of the Constitution. All that is needed, advocates say, is for Ferriero — the U.S. archivist and chief administrator of the National Archives and Records Administration (NARA) since 2009 — to acknowledge that fact.

"He says he believes in the ERA. Well, if you believe in it, just certify it. He's the one holding it back," Maloney said at a news conference sponsored by the ERA Coalition. "And it's a technicality. Equality is not a technicality. Equality is a right. We have met every single requirement that was put forward. There were only two in the Constitution. One was that you had to have two-thirds of Congress; we had more than two-thirds of Congress when we passed it. And that 38 states needed to ratify it. We've done that!"

But it's not so simple. The letter referenced by Maloney — who heads the House committee that oversees NARA — indicates no support by the archivist for the ERA. Moreover, every time the issue has been litigated in federal court, most recently in 2021, the pro-ERA side has lost, no matter whether the judge was appointed by a Democrat or Republican.

The Facts

Article V of the Constitution lays out the process for adding an amendment to the Constitution. Two-thirds of each house in Congress must approve the amendment, and then three-fourths of the states must ratify it. But the process is open to interpretation. As a recent Columbia Law School article by David Pozen and Thomas P. Schmidt detailed, many amendments have been adopted without strictly following the rules.

A big question surrounding the ERA is whether Congress can set a time limit for ratification. The Constitution is silent on the issue. In 1992, an amendment regarding congressional pay was certified by the archivist as having met the three-fourths threshold even though it had been sent to the states for ratification almost two centuries earlier. That amendment had no apparent time limit. But starting in 1917, Congress began adding ratification deadlines to virtually all proposed amendments — and the ERA had a time limit of seven years. When that expired, Congress (by a simple majority vote) tacked on another three years. But the ratification count stayed stalled at 35 states, and the ERA's deadline expired in 1982.

Complicating matters, five states between 1973 and 1979 voted to rescind their ratification of the ERA. There is no provision in the Constitution that allows a state to do that. So legal experts are divided on whether those ratifications should be counted.

In 2012, after a request from Maloney for an "official record," Ferriero wrote the letter that she referenced in the news conference. Contrary to her claim, Ferriero makes no mention of supporting the ERA. But his language gave ERA supporters some hope.

Ferriero directed Maloney to NARA's website, which said congressional action is not needed to certify the adding of an amendment. Moreover, he wrote, "a later rescission of a state's ratification is not accepted as valid"; however, he attached a list of states that noted five "purported" rescissions. Once 38 state ratifications are received, he said, an amendment "becomes part of the constitution and cannot be rescinded" unless a new amendment was added to abolish it. (Note: The current version of the website does not have such definitive language on state rescissions.)

ERA supporters pressed to win ratification in the last three states, starting with Nevada in 2017 and Illinois in 2018. In 2020, Virginia became the 38th state to ratify the ERA.

As the state ratifications neared 38 during the Trump administration, Ferriero sought guidance from the Justice Department on how to deal with the unexpected situation. The Office of Legal Counsel, in a January 2020 opinion, said Congress had the "constitutional authority" to impose a deadline, though it was more skeptical that Congress could extend it. In any case, the OLC said, the ERA died with the deadline's expiration in 1982. Congress could not now short-circuit the amendment process, and instead the whole process would need to start over, the OLC said.

With that analysis in hand, Ferriero did not certify that the ERA had achieved ratification. In 2020, he was sued by two pro-ERA groups in Massachusetts and by the states of Nevada, Illinois and Virginia. He was also sued in 2019 by several states that had rescinded ratification, but that was quickly settled by the Trump Justice Department because there was no disagreement that the deadline had passed.

Before we delve into these cases, there was a 1981 case, *Idaho v. Freeman*, that previously considered the extension of the amendment's ratification deadline. Idaho, which had rescinded its ratification, objected to the extension of the deadline by only a majority vote. U.S. District Judge Marion Callister, who had been appointed by President Gerald Ford, ruled that the extension was "an unconstitutional exercise of congressional authority" because a two-thirds vote is required whenever Congress exercises its powers under Article V.

Callister said Congress is under no obligation to set a time limit on the ratification process. But once it does, he wrote, "Congress is not at liberty to change it."

The judge also looked favorably on Idaho's rescission because it had taken place before full ratification was achieved.

The Supreme Court stayed Callister's ruling and was prepared to review the case. But after the 1982 deadline passed without the necessary votes for ratification of the ERA, the high court then declared the case moot and ordered it dismissed. Without saying so directly, the Supreme Court appeared to accept that the deadline was valid.

The 2020 Massachusetts case, heard by U.S. District Judge Denise J. Casper, an appointee of President Barack Obama, did not progress far. The supporters of the ERA argued the ratification deadline was unconstitutional, but Casper dismissed the case, saying the plaintiffs — two pro-ERA groups and an individual — did not have legal standing to bring a claim. The advocates sought both a direct hearing in the Supreme Court, which was denied, and a ruling in the U.S. Court of Appeals for the 1st Circuit, which in 2021 unanimously upheld Casper's opinion.

Meanwhile, U.S. District Judge Rudolph Contreras, also an Obama appointee, heard the lawsuit filed by the three late-ratification states. In 2021, he dismissed the case. Not only did the states lack standing to sue, but "even if plaintiffs had standing, Congress set deadlines for ratifying the ERA that expired long ago," he wrote.

The Contreras opinion is interesting because he evaluated many of the arguments made by ERA supporters, such as Maloney, and found them wanting. For one, he rejected the idea that the archivist could wave a wand and declare that the ERA had passed: "The Archivist's publication and certification of an amendment are formalities with no legal effect."

Second, he found the ratification deadline in the ERA to be valid and that it would be "absurd" for the archivist to ignore it.

Contreras pointed out that the ratification deadline emerged as part of the congressional dealmaking to win two-thirds majority support in both the House and Senate. He also determined that because the Supreme Court had vacated the 1981 ruling after the deadline expired, the court "appeared to tacitly acknowledge that the ERA's ratification deadline was effective." He noted that the National Organization for Women had opposed such a step: "To reach that conclusion, the Court must have assumed that the ERA's deadline barred further ratifications — as the respondents warned a mootness ruling would imply."

Despite pressure from ERA advocates, the Biden administration has not rescinded the Trump Office of Legal Counsel ruling. Instead, on Jan. 26, the OLC issued a brief memo that quibbled with one part — whether Congress had the authority to modify the ERA's deadline — but otherwise made it clear that it would maintain the Trump position in court. "The ERA is not a part of the United States Constitution and the archivist of the United States may not certify it as such," the memo said, restating the Trump administration's conclusion. But, it added, "nothing in the opinion stands as an obstacle to Congress's ability to act" on its own.

During the 2020 presidential campaign, a Biden campaign statement had said "Biden will proudly advocate for Congress to recognize that 3/4 of states have ratified the amendment." On Jan. 27, he called on Congress to pass a resolution recognizing ratification of the ERA. But advocates think he has not done enough.

"The Constitution prescribes no role for the president to decide whether an amendment to the Constitution has been adopted," a White House official said in a statement to The Fact Checker. "The role of the archivist is a matter subject to litigation, and we would defer to the Justice Department on such issues. Most importantly, the president is calling on Congress to act immediately to express the will of the people that the principle of gender equality belongs definitively enshrined in the Constitution — and there is nothing standing in Congress's way from doing so."

The Contreras ruling has been appealed and will be heard by the U.S. Court of Appeals for the D.C. Circuit this year. But Wendy Murphy, who filed the Massachusetts lawsuit and teaches at New England Law-Boston, said the prospects are grim, especially because the Biden administration has not reversed course from Trump's position.

"The D.C. case will not succeed," she said. "Their standing argument is much worse than mine was. And Contreras's ruling was brutal, but why would a more conservative appellate court reverse him?" She said she is planning new lawsuits in state courts, hoping to replicate the state-led strategy that proved successful for the nationwide adoption of same-sex marriage.

Pozen, the Columbia law professor, said courts have been reluctant to involve themselves in the amendment process, which accounts in part for the poor judicial record for ERA supporters. His article says it would be "odd" to think a president could decide that an amendment was adopted and "odder still to think that such a role would be played by subordinate executive officers such as the archivist of the United States." That would leave Congress in the best position, among the three branches of government, to decide whether an amendment was adopted, the article said.

Pozen noted that Contreras punted on that question, writing in his opinion: "Congress has not tried to revive the ERA despite both deadlines' expirations, so the Court is not confronted with that difficult issue either."

The House in 2021, by a vote of 222 to 204, passed a resolution to eliminate the deadline, but a companion bill in the Senate has not received a vote. Lawmakers are now pushing a new resolution that would declare that the ERA has already met the requirements to be the 28th amendment.

The National Archives and Records Administration declined to comment because of the ongoing litigation. Maloney's staff sent us a legal analysis disputing the Trump OLC opinion but, despite repeated requests, did not address why she claimed that Ferriero had written to her that he was a supporter of the ERA. "The archivist of the United States has a statutory duty to certify and publish the ERA once it has met all of the requirements for ratification, regardless of the archivist's personal views," Maloney's office said in a statement.

"The date that the ERA is supposed to go into effect is January 27, 2022, two years after the final state ratified," the statement added. "Given that this date just occurred, it is no surprise that there has not yet been any litigation seeking to enforce the amendment. We fully expect this issue to be litigated in the future."

The Pinocchio Test

Maloney is offering false hope about the archivist's role — and falsely putting words in Ferriero's mouth. His 2012 letter to her did not indicate support for the ERA. Moreover, two major court rulings have concluded that the ERA's ratification deadline, as set by Congress, has expired — a position embraced by both the Trump and Biden Justice Departments. The Supreme Court in 1982 also indicated support for the idea that the deadline has passed. At this point, pending further court or congressional action, it is simply wrong to claim that the ERA already has met constitutional muster and all that is needed is the approval of the archivist.

Four Pinocchios

(About our rating scale)