

(last updated 11/5/22)

The ERA: Where Are We Now?

By AJ Conroy, ERA Illinois

At the start of 2020, Virginia became the 38th state to ratify the Equal Rights Amendment. Notice of Virginia's ratification was promptly sent to the National Archivist for certification. This ministerial task comes from a federal statute. It's merely record-keeping. If you want to keep track of documents, ask a librarian. This routine process was used without fuss by Nevada, Illinois, and all the states that ratified the belated "Madison Amendment" in the 1990s.

But this routine, ministerial task is newly controversial. Just before Virginia's ratification put the Equal Rights Amendment over the Article V threshold, Alabama, South Dakota and Louisiana filed a lawsuit to prevent the Archivist from doing his job and declaring our new amendment. The Archivist deferred to advice by the Department of Justice, and announced that he would not certify the 28th Amendment without a court order— a reversal from past custom (see 27th Amendment) and the Archivist's prior public statements.

In response, Illinois, Nevada and Virginia filed a separate lawsuit to compel the Archivist to certify Virginia's ratification and declare the Equal Rights Amendment as added to the US Constitution. Again, this is a clerical task assigned to the Archivist by Congress, not an extra hurdle in the ratification process.

Alabama, South Dakota and Louisiana, along with Tennessee and Nebraska, asked to join or "intervene" in the Illinois et al. lawsuit. The Illinois lawsuit was dismissed by the lower federal court for lack of standing. The district court reasoned that there was no injury to the states. The matter is currently on appeal to the Court of Appeals for the DC Circuit. AAUW-Illinois joined others in filing an amicus brief in support of our Attorney General Raoul. Oral arguments were heard in September 2022. All parties wait for a decision.

In the interim, the Archivist retired. There is both an acting Archivist (Debra Steidel Wall) and a nominated Archivist, Colleen Shogan. During Dr. Shogan's confirmation hearing, the Biden appointee declared she would not publish the ERA. Her appointment is stalled by a deadlocked committee. Also in the interim, a lawsuit was filed by the group Equal Means Equal (filmmakers) and others. This suit and its appeals were eventually dismissed for lack of standing.

Complementing the litigation strategy is a concurrent legislative strategy to have Congress remove its artificial deadline. Good news! In March of 2021, the House of Representatives passed a resolution removing the Congressional ratification deadline. The Senate version (SJRes 1) has 51 sponsors. Despite having a simple majority, the measure is stuck with the filibuster. Undaunted, the House introduced HRes891 this year, a resolution which affirms the 28th Amendment is ratified,

similar to a resolution passed after the 27th's belated ratification. HRes891 needs only a simple majority in the House to pass.

The third strategy is pressuring the Biden-Harris Administration to fulfill its campaign promise to support the Equal Rights Amendment. Congress designated the Archivist to count and certify ratifications, but the Archivist deferred to the U.S. Department of Justice. Advocates hoped that the Biden Administration would revise this Trump Administration position. Instead, the Department of Justice continues to oppose the Equal Rights Amendment in court. As head of the Executive Branch, President Biden has made two statements supporting the Equal Rights Amendment and pointing to Congress as the responsible entity for its delay. The Archivist is a presidential appointee, as is the Attorney General.

What happens next?

There are several possibilities. Like so many things in recent history, nothing like this has happened before. The simplest outcome is for Biden to direct the acting Archivist to publish per the 1 USC 106b. There would still be lawsuits, but the posture of those lawsuits would change for the better. A second possibility is for the Senate to reform the filibuster for Congress to officially remove the time limit, after which the Archivist would publish. A third path is for the Court of Appeals to reverse the District Court, after which the Archivist would publish. Regardless, there will be litigation. Fear of lawsuits should not hinder progress. Certification by the Archivist is similar to publishing a new statute in that it provides notice. The ERA is ratified, but without publication, it is difficult for attorneys to use it in court. Think of an unrecorded deed. It transfers property, but without public notice, it can be hard to enforce.

What to do during this purgatory? ERA advocates should both call on the White House to publish, and on Congress to affirm the 28th Amendment (SJR1/HR891). Either way, we know that all the requirements of Article V have been met. Never before has an amendment been ratified by three-fourths of the states and not been eventually recognized as part of our US Constitution. This current uncertainty existed during Reconstruction, and after the suffrage amendment.

Our grandchildren will look back at this period and wonder how anyone doubted the ERA was not part of the US Constitution.

Stay up-to-date by following Facebook pages for ERA Coalition, VoteEqualityUS and ERA Illinois (@ERAIllinois).

DO ONE THING

Call your state representative about [HJRes94](#). Ask that they co-sponsor this resolution affirming the 28th Amendment. A quick link for their number: openstates.org