Why the ERA Is Duly Ratified as the 28th Amendment to the U.S. Constitution

Executive Summary

January 4, 2025

- The Equal Rights Amendment (ERA) is duly ratified as the 28th Amendment to the U.S. Constitution as of January 27, 2020 and has been in effect since January 27, 2022.
- The ERA has met the only two requirements in the Constitution's Article V for ratification as a constitutional amendment: passage by a two-thirds supermajority in both houses of Congress (March 22, 1972) and approval by three-fourths of the states (January 27, 2020, when Virginia became the 38th state to ratify it).
- According to 1 U.S.C. 106b, the law governing the constitutional amendment process, states send their ratification documents to the Archivist of the United States, who according to current practice conveys them to the Office of the Federal Register (OFR). If the documents are found to be in good order (meaning with facial legal sufficiency and an authenticating signature), the OFR Director acknowledges receipt and maintains custody of them.
- Upon receipt of the 38th state's documentation in good order, the Archivist is required to forthwith (meaning immediately, without delay) perform the ministerial duty (meaning with no option for exercising discretion or failing to act) of publishing in the *Federal Register* and the U.S. Statutes at Large an official notification that the amendment is duly ratified and certified as part of the Constitution.
- The Archivist is not empowered to make substantive determinations about the validity of state ratification actions, and the Archivist's certification of the facial legal sufficiency of ratification documents is final and conclusive.
- The expiration of a time limit for ratification in the proposing clause of an amendment (where Congress placed the ERA's original seven-year deadline, which was later extended to June 30, 1982) does not affect the intrinsic legal validity of state ratification documents in good order submitted to the Archivist after that date.
- In accordance with the constitutional precept that each new Congress has full legislative power and is not bound by the decisions of a previous Congress, combined with the 1939 *Coleman* v. *Miller* Supreme Court decision stating that the timeliness of a ratification is a political question for Congress and not the courts, Congress has the authority to change or remove an existing time limit in the proposing clause of an amendment without further judicial action.

- Article V grants no power of rescission to the states, and no state's withdrawal of its ratification of a constitutional amendment (as attempted with the 14th and 15th Amendments) has ever been accepted as valid.

- Archivist David Ferriero wrote in an October 25, 2012 letter to Representative Carolyn Maloney, lead sponsor of the ERA in the House of Representatives, "Once the process in 1 U.S.C. 106b is completed, the Amendment becomes part of the Constitution and cannot be rescinded. Another Constitutional Amendment would be needed to abolish the new Amendment."

- Despite controversy about the 27th Amendment's 203-year ratification period, Archivist Don Wilson certified its ratification on May 18, 1992, and it was published in the Federal Register on May 19. He said, "[I]f I don't certify and there are 38 states that have ratified, then I'm interpreting the Constitution beyond the ministerial function given to me by Congress, … [and] would be playing a role not delegated to me."

- Because the executive branch of government has no authorized role in the constitutional amendment process, communications to Archivist Ferriero from the Department of Justice's Office of Legal Counsel on January 6, 2020 in the Trump administration and on January 26, 2022 in the Biden administration, both citing the expiration of the ERA's deadline as the reason why its certification should not be published, have no authority to interfere with the ministerial duty of fully executing 1 U.S.C. 106b. Power to interrupt the execution of that law does not lie with the Archivist based on an unauthorized instruction.

- The failure of former Archivist Ferriero and current Archivist Colleen Shogan to publish a proclamation certifying that the Equal Rights Amendment is the 28th Amendment to the Constitution as of January 27, 2020 is a violation of law 1 U.S.C. 106b and a dereliction of duty.

- The President, through his Article II, Section 3 constitutional power to "take Care that the Laws be faithfully executed," has the executive authority and legal duty to require that 1 U.S.C. 106b is fully executed by ensuring that Archivist Shogan immediately performs the ministerial duty of certifying and publishing the ERA as the 28th Amendment to the Constitution. The exercise of his legal "take care" power and responsibility is not affected by the content of the law.

- Failure to invoke this executive power to ensure publication of certification that the ERA is duly ratified as of January 27, 2020 will continue to leave the ERA in legal limbo — ratified and in effect, but unpublished and unemployed in administrative, legislative, and judicial proceedings at all levels of government. Justice, the rule of law, and the President's constitutional responsibility all require immediate publication of the ERA.

Roberta W. Francis
ERA Education Consultant, Alice Paul Center for Gender Justice
Founding Chair, ERA Task Force, National Council of Women's Organizations
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