Part V.

ERA: Deadline and Next Steps

The process for ratifying an amendment to the U.S. Constitution is outlined in Article V. When an amendment is proposed and passed by Congress, Article V dictates it is valid "when ratified by the Legislatures of three fourths of the several States." Arizona will be the 38th necessary to fulfil this constitutional requirement.

When Congress first passed the ERA in 1972, they placed a deadline for ratification by the states in the preamble to the amendment. Some legal scholars question whether a deadline is constitutional at all. But, either way, a deadline put in place by Congress can be extended, or removed by Congress.

A. Deadline

There is no time limit set for ratification of amendments in Article V of the U.S. Constitution. Deadlines were only later introduced with the 18th Amendment (Prohibition), by Congress. At the time, since it was politically expedient, politicians wanted to pass the 18th Amendment. But, they did not want it to actually *get* ratified. Congress attached a seven-year deadline to prohibition as an attempted "poison pill." However, they underestimated its wild popularity and just over two years later it was ratified and became part of the Constitution.

Seven year deadlines then became a congressional trend, of sorts, and were imposed for all subsequent amendments after the 18th Amendment, with the exception of the 19th (suffrage). Thus, the original ERA ratification followed suit and the seven-year deadline was put in the preamble to the ERA, set originally to expire in 1979. Before that original deadline Congress put in passed, Congress chose to extend it to 1982, giving a total of ten years for the ratification process. The amendment fell just three states short of ratification in 1982.

Arguably, since Congress itself imposed the original ERA deadline and only included it in the preamble to the amendment (not the actual text that the states voted to ratify), Congress can simply vote to eliminate or extend the deadline again. It already did so once in 1978, and thus eliminating the deadline could incorporate the final states' ratifications and make the ERA part of our Constitution.

There are two bills currently pending in the U.S. Congress to eliminate the ERA deadline, sponsored by Representative Jackie Speier of California in the House, and Senator Cardin of Maryland in the Senate. These ERA deadline elimination bills could pass quickly, given the right conditions in Congress. The deadline elimination issue could also appear before the courts.

In the case *Dillon v. Gloss*,[1] the U.S. Supreme Court ruled that setting a time limit for the ratification process, is up to Congress. In a later case, *Coleman v. Miller*,[2] the Supreme Court left it to Congress to decide the reasonableness of the length of the ratification period. In fact, in *Miller*, four justices signed a concurring opinion stating that Congress has "sole and complete control over the amending process, subject to no judicial review."[3]

Before Nevada ratified the ERA, a white paper was produced by the Congressional Research Service exploring whether the deadline precluded the ERA from being added to the Constitution, among other issues.[4] This paper was updated after Illinois ratified in 2018. Both concluded that the issues are complex, but the existence of the original deadline does not *per se* invalidate contemporary ERA ratifications.[5]

On May 11, 2018 Virginia Attorney General Mark Herring weighed in on the deadline issue with a formal opinion. He said that regardless of what is going on in Congress, "… the lapse of the ERA's original and extended ratification periods has not disempowered the General Assembly from passing a ratifying resolution." His argument is bolstered by the fact that both Nevada (March 22, 2017) and Illinois (May 30, 2018) have ratified the ERA, exercising their state's right to ratify under Article V of the Constitution. Given that these two states have ratified well beyond the 1982 deadline, it is clear that Arizona can follow suit.

B. Next Steps

The process for what happens after an amendment is ratified by the requisite number of states is laid out in U.S. law. 1 U.S.C. § 106(b) that states as follows:

> Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States. Thus, pursuant to 1 U.S.C § 106(b), the National Archives

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[1] 256 U.S. 368 (1921).

[2] 307 U.S. 433 (1939).

[3] 307 U.S. 433 (1939) at 459 (Black J., concurring, joined by Roberts, Frankfurter, and Douglas, JJ.).

[4] Thomas H. Neale. "The Proposed Equal Rights Amendment: Contemporary Ratification Issues," *Congressional Research Service*, May 9, 2013.

[5] Thomas H. Neale. "The Proposed Equal Rights Amendment: Contemporary Ratification Issues," *Congressional Research Service*, July 18, 2018.

and Records Administration ("NARA") is responsible for implementing the state ratification process for amending the Constitution.

The Archivist has delegated many of the administrative aspects of this process to the Office of the Federal Register ("OFR"), who verifies and acknowledges the receipt of ratification documents and maintains custody of the documents until the amendment process is over (i.e., when it is adopted or fails).[6] As soon as the OFR verifies that it has received the requisite number of authenticated ratification documents (i.e., from 38 out of 50 states), the Archivist issues a formal proclamation certifying that the amendment, here the ERA, is valid and has become part of the Constitution.[7] The certification is then published in the Federal Register and U.S. Statutes at Large, and serves as official notice to the public that the amendment process has been completed.[8]

Congress may participate in a ceremonial signing of the certification or other ceremony as it has in the past, but the plain language of 1 U.S.C. § 106(b) indicates no further action by Congress is needed to affirm ratification of an amendment for it to be effective. Some argue the ERA will be effective and in full force as soon as the OFR verifies that it has received the 38th ratification, and is not contingent upon final certification by the National Archivist or any other federal official.[9]

NARA has not made any statement to date regarding its position on the validity of the continued state ratification process of the ERA. However, the agency has taken the position that ratification by three-fourths of the states is all that is required for an amendment to become a part of the Constitution, and no further acts are necessary on the part of Congress or otherwise. [10] For example, in response to an October 25, 2012

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[6] "Constitutional Amendment Process," www.archives.gov/federal-register/constitution (last accessed November 5, 2018); *see also* Research Department, Minnesota House of Representatives, "United States Constitutional Amendment Process," p. 3 (April 2016).

[7] *Id.*

[8] *Id.*

[9] *See* 1 U.S.C. § 106(b); *see also Dillon v. Gloss*, 256 U.S. 268, 376 (1921) (That the Secretary of State did not proclaim [the Eighteenth Amendment's] ratification until January 29, 1919, is not material, for the date of its consummation, and not that on which it is proclaimed, controls."); *United States ex rel. Widenmann v. Colby*, 49 App. D.C. 358, 360 (D.C. 1920) ("Moreover, even if the proclamation was canceled by order of this court, it would not affect the validity of the [Eighteenth] amendment. Its validity does not depend in any wise upon the proclamation. It is the approval of the requisite number of states, not the proclamation, that gives vitality to the amendment and makes it a part of the supreme law of the land."); Research Department, Minnesota House of Representatives, "United States Constitutional Amendment Process," p. 13 (April 2016); Modern Constitutional Law § 37:25 (3rd ed.).

[10] *See* "The National Archives' Role in Amending the Constitution," www.archives.gov/publications/prologue/2017/spring/historian-27-amendment" (last accessed November 5, 2018); *see also* "Constitutional Amendment Process," www.archives.gov/federal-register/constitution (last accessed November 5, 2018); www.equalrightsamendment.org/faq/ (last accessed November 5, 2018).

letter from Congressman Carolyn Maloney (NY), David Ferriero, who is still the current Archivist of the United States, wrote the following:

> NARA's [National Archives and Records Administration's] website page "The Constitutional Amendment Process" (www.archives.gov/federal-register/constitution) . . . states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution. It also states that [the U.S. Archivist's] certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state's ratification is not accepted as valid.
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> These statements are derived from 1 U.S.C. 106b . . . Under the authority granted by this state, once NARA receives at least 38 state ratifications of a proposed Constitutional Amendment, NARA published the amendment along with a certification of the ratifications and it becomes part of the Constitution without further action by Congress. 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.[11]

The most recent amendment (27th) was ratified in the early 1990s, 203 years after it was proposed, though it never had any deadline attached to it. While Congressional action is not required to certify an amendment in the constitutional process, the issue of deadline remains a relevant one in the case of the ERA. The Archivist may immediately certify the ERA, and if he does not the issue of deadline will then be resolved in likely a combination of the courts and/ or Congress. The imposition of a deadline by Congress in the preamble to the original ERA does not preclude its integration into the U.S. Constitution.

[11] www.equalrightsamendment.org/faq/ (last accessed November 5, 2018).