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FAQ on the U.S. Archivist and the future of the Equal Rights Amendment

On Wednesday, September 21, 2022, the Senate will hold hearings on the nomination of Colleen Shogan as the new Archivist of the United States. This FAQ offers a short primer on what the Archivist does, her official role in the finalization of proposed amendments to the U.S. Constitution, including the Equal Rights Amendment (ERA), and the impact of Archivist action on the validity of the ERA.

What does the Archivist do?

The Archivist, a congressionally created role, is the chief administrator of the National Archives and Record Administration (NARA) responsible for the process of the certification and publication of amendments to the U.S. Constitution. There is nothing in the Constitution that mentions a role for the Archivist in the constitutional amendment process.

NARA is a federal agency within the Executive Branch. The Archivist is appointed by the President and confirmed by the Senate.

What role does the Archivist play in the ratification of constitutional amendments?

Congress gave the Archivist the responsibility to certify each state ratification of a proposed amendment and, once 38 states have ratified, publish the amendment in the Constitution. The legal meaning of Archivist publication of a new constitutional amendment is unclear. By the terms of Article V of the Constitution itself, an amendment becomes valid upon ratification by the 38th state. As a technical legal matter, Archivist publication merely confirms the completion of the constitutionally mandated ratification process and is not necessary to render the amendment valid. That said, this is a matter of some debate among legal scholars and the Supreme Court has not ruled on the issue.

How does this relate to the Equal Rights Amendment?

The federal ERA has cleared all of the constitutional requirements for an amendment to the Constitution: approval by 2/3 of both houses of Congress and ratification by 38 state legislatures. For that reason, some supporters of the ERA have demanded that the Archivist formally publish the ERA as the 28th Amendment to the Constitution.

Yet political and legal efforts to finalize ERA ratification face significant hurdles. The main obstacle is the seven-year time limit for state ratification that Congress originally included in the preamble of the resolution approving the ERA. The deadline expired in 1979 and, even after a three-year extension, the amendment needed three additional state ratifications to meet constitutional requirements. After the expiration of the congressionally created deadline for state ratification in 1982, three more states voted to ratify the ERA: Nevada in 2017, Illinois in 2018, and Virginia in 2020. A measure to lift the congressional deadline on ratification of the ERA passed the House of Representatives in 2020 and 2021, and is pending in the U.S. Senate.

In anticipation of Virginia becoming the 38th state needed to ratify the ERA in 2020, the Office of Legal Counsel (OLC, a division of the Justice Department) under Attorney General William Barr issued a memo concluding that the ERA was no longer valid due to the expiration of the deadline, and, as such, the three most recent state ratifications had no legal effect. The memo also concluded that Congress lacked the authority to retroactively repeal the ratification deadline.

Following the 2020 OLC legal interpretation, then-Archivist David Ferriero refused to certify Virginia's ratification of the ERA, and has stated publicly that he would not act until he received additional instructions from the DOJ and the Executive Branch on the matter.

What is the current position of the DOJ and OLC on the ERA?

In 2021, the ERA Project at Columbia Law School submitted a letter to Congresswoman Carolyn Maloney's office containing a legal analysis by prominent constitutional law scholars of the 2020 OLC memo and why its legal conclusions were erroneous. This legal analysis was circulated within Congress and the White House, and resulted in the OLC issuing a new legal interpretation in 2021, clarifying and neutralizing the previous 2020 memo by stating that Congress has the authority to act and is in the best position to do so.

President Biden has not ordered the Archivist to certify and publish the ERA, nor has he issued a statement regarding his position on the current status of the ERA.

What is needed to get the ERA finally ratified?

Congress is in the best position to clarify the ERA's lingering legal issues. As Congress takes steps to remove the original deadline, the President can remove a meaningful barrier to the ERA by directing the Archivist to certify Virginia's ratification and publish the ERA.

The constitutional amendment process is not straightforward or clear, and research has shown a different path to final ratification for each of the Constitution's amendments.

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The Equal Rights Amendment (ERA) Project is a law and policy think tank that develops academically rigorous research, policy papers, expert guidance, and strategic leadership on the ERA to the U.S. Constitution, and on the role that the ERA can play in advancing the larger cause of gender-based justice. Our mission is to develop a modern intersectional and substantive equality framework for a new constitutionalism based on the ERA. Our thought leadership on sex-based inequality helps inform the work of advocates, lawmakers, and the media to strengthen protections against sex discrimination nationally and locally.