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NEVADA FINALLY RATIFIED THE EQUAL RIGHTS AMENDMENT. NOW WHAT?

BY SHEA BACKUS, ESQ.

On March 22, 2017, 45 years to the day after Congress passed the Equal Rights Amendment (ERA) and sent it to the states for ratification, Nevada ratified the proposed amendment. The ERA provides that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

Primary sponsors Senators Pat Spearman, Nicole Cannizzaro, Julia Ratti and Joyce Woodhouse, along with seven other senators and 17 assemblywomen and assemblymen co-sponsoring it, introduced Senate Joint Resolution No. 2 (SJR2), proposing to ratify the ERA on February 13, 2017. When Spearman introduced SJR2 to committee, she cited Justice Ruth Bader Ginsburg's 1978 Harvard Women's Law Journal article providing "[w]ith the equal rights amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred."[1]

During hearings on ratifying the ERA, numerous proponent speakers testified that it was long overdue, while opponents took issue with congressional deadlines for ratification and the impact on other laws by an amendment providing for equal rights premised upon sex (e.g. military draft, abortion, social security benefits, marriage). In response to ERA opponents, Senator Kelvin Atkinson testified that "women in combat, … marriage equality and abortion issues are settled" and "women deserve the same rights, now."

Although Nevada became the 36th state to ratify the ERA, it did so well after Congress' June 30, 1982, deadline for ratification.

In accordance with Article V, governing amendments to the U.S. Constitution, two-thirds of both houses of Congress found equal protections premised upon sex necessary and proposed the ERA; thus, requiring three-quarters of the states to ratify the ERA in order for it to become a valid part of the Constitution. Article V does not provide for any time constraints for ratification. Instead, Congress commenced setting ratification deadlines within the last hundred years.

When the 92nd Congress passed the ERA, the proposed amendment required three-fourths of the states to ratify it within seven years. Thirty-five of the required 38 states approved the amendment within that time. ERA supporters encouraged the 95th Congress to extend the deadline to June 30, 1982. This was done by a majority, as proponents could not generate two-thirds approval from both houses of Congress. Instead of additional states ratifying the ERA, five states rescinded their earlier ratification.

Congress' seven-year deadline was pursuant to contemporary practice. Congress had set this deadline for every amendment since the 18th Amendment for Prohibition, passed by Congress at the end of 1917, with the exception of the 19th Amendment, granting women the right to vote, proposed by Congress on June 4, 1919. Despite the more recent amendments carrying timelines, the 27th Amendment for Congressional Pay took more than 202 years to be ratified by the requisite number of states. Only eight states initially ratified the Congressional Pay Amendment within seven years of its passage by Congress.

The U.S. Supreme Court has held that Congress, in proposing an amendment, may fix a reasonable window of time for ratification.[2] In Coleman v. Miller, 307 U.S. 433 (1939), the court later provided that "Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its

proposal of the amendment had lost its vitality prior to the required ratifications," and that "the state officials should not be restrained from certifying to the Secretary of State the adoption of the legislature … of the resolution of ratification."

In addition to setting forth the resolution proposed by the 92nd Congress, including deadlines for ratification, SJR2 addressed the 202 years it took for the 27th Amendment to be ratified. Further, SJR2 cited Coleman and provided that the ERA "is meaningful and and needed as part of the Constitution of the United States and that the present political, social and economic conditions demonstrate that constitutional equality for women and men continues to be a timely issue in the United States."

Although 36 states have now ratified the ERA, there remain five states[3] that have attempted to rescind their respective ratification. A lawsuit ensued to challenge Idaho's act of rescinding its prior ratification. The state of Arizona and intervening legislatures from the state of Washington joined in this suit, seeking declaratory relief as to the constitutionality of Congress' act of extending the seven-year deadline for ratification. The U.S. District Court for Idaho found that it was not proper for the court to review the procedure for Idaho's rescission of its ratification, because the proper certification had already been sent to the national government by the state. Further, the court held that Congress' extension of the deadline by a mere majority violated its authority under Article V. The Supreme Court vacated the district court's judgment and remanded the matter to the court, with instructions to dismiss the complaint as being moot.[4]

In an effort to pass the ERA, the 115th Congress (2017-2018) has presented two different types of ERA legislation: traditional legislation to propose an amendment, and bills to eliminate the timeline for the ERA to be ratified.[5] While the bills were introduced last January, they remain in committee as of October 2017, with representatives and senators continuing to be added as co-sponsors.

While Nevada did not serve as the 38th state to ratify the ERA, there remain ongoing issues with the timeframe for ratification, uncertainties regarding five states' efforts to rescind their ratification and possible Congressional bills that could provide a pathway to making the ERA a part of the U.S. Constitution. Nevada could follow at least 12 other states that have state constitutional protections for equal rights pertaining to one's sex.[6] In the interim, the current U.S. Supreme Court caselaw interprets the 14th Amendment's Equal Protection Clause to serve as a de facto ERA, providing for equal protections under the law premised upon one's sex.[7] NL

Nancy Ayala, Alison Brasier, Shea Backus, Sen. Nicole Canizzaro and Tacy Geesaman on March 20, 2017, following the Assembly's vote in favor of the ERA.

Shea Backus with Assemblyman James Ohrenschall, who introduced the resolution for ratification of ERA before the Assembly.

Women stand in front of the Nevada Legislature Building, surrounded by fliers in support of various bills–including the ERA.

1. Senate Joint Resolution 2: Ratifies the Equal Rights Amendment to the Constitution of the United States (BDR R-13) before Senate Committee on Legislative Operations and Elections, 79th Session 5 (Feb. 20, 2017) (statement of Senator Pat Spearman, SD 1 (citing Ruth Bader Ginsburg, The Equal Rights Amendment Is The Way, 1 Harv. Women's L.J. 19 (1978)).
2. *Dillon v. Gloss,* 256 U.S. 368, 375-376, 41 S.Ct. 510, 512 (1921).
3. Before the 1982 deadline, Nebraska, Tennessee, Idaho and Kentucky's legislatures voted to rescind their earlier ratifications. Kentucky's acting governor vetoed the rescinding resolution, despite the Constitution being silent as to whether a governor has veto power over a state's legislation ratifying a constitutional amendment. In 1979, South Dakota's ratification of the ERA made clear that its ratification would no longer be valid after March 22, 1979, the seven-year deadline.
4. *Idaho v. Freeman,* 529 F. Supp. 1107, 1114 (D. Idaho 1981), vacated by *Carmen v. Idaho,* 459 U.S. 809, 103 S. Ct. 22 (1982).
5. See S.J. Res. 5 & 6, 115th Cong. (2017); H.J. Res. 33 & 53, 115th Cong. (2017).
6. See Alaska Const., Art. I, § 3 (1972); Cal. Const., Art. I, § 8 (1879); Conn. Const., Art. I, § 20 (1984); Ill. Const., Art. 1, § 18 (1970); Iowa Const., Art. I, § 1 (1998); Md. Const., Dec. of Rights, Art. 46 (1972); Mass. Const., Part 1, Art. 1 (1976); Mont. Const., Art. II, § 4 (1973); Or. Const., Art. 1, § 46 (2014); Utah Const., Art. IV, § 1 (1896); Wyo. Const., Arts. I and VI (1890).
7. See e.g. *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251 (1971).

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