The Heritage Foundation Issue Bulletin

No. 31 | The Heritage Foundation • 513 C Street • N.E. • Washington, D.C. • 20002 • (202) 546-4400

July 27, 1978

ERA EXTENSION: UPDATE ON THE ARGUMENTS

STATUS

The proposed Equal Rights Amendment to the Constitution, sent to the states on March 22, 1972, is stalled three states short of the necessary three-fourths majority (thirty-eight states) needed for ratification. The seven-year time limit for ratification is due to expire March 22, 1979.

House Joint Resolution #638, providing for a seven-year extension for the ERA, was introduced on October 26, 1977, by Congresswoman Elizabeth Holtzman (D-N.Y.) and nineteen cosponsors. The Subcommittee on Civil and Constitutional Rights held hearings early in November, 1977, receiving testimony primarily from legal scholars. Opinions were divided about the conditions under which an extension would be constitutional, and the subcommittee took no action. Through May of 1978, no more states had ratified the amendment. New subcommittee hearings were convened at the end of May during which the subcommittee heard testimony primarily from political partisans and from state legislators. By a 4-3 vote, the subcommittee reported the bill favorably on June 5, 1978. Action in the parent Judiciary Committee was delayed as both proponents and opponents vied for a majority of the votes. However, on July 18, by a 19-15 vote, the committee approved H.J.Res. 638 after agreeing to a key amendment reducing the proposed ratification extension from seven years to three years, three months and eight days. That amendment, sponsored by Congressman Don Edwards (D-Cal.), and adopted 17-16, was a compromise necessary to win votes for the extension. An amendment sponsored by Congressman

Tom Railsback (R-Ill.) to allow states to rescind earlier ratifications was rejected 13-21. An earlier 23-8 vote on a procedural motion amounted to a committee decision against requiring a two-thirds floor vote, rather than a simple majority vote by the House and Senate. The bill is now pending in the Rules Committee.

In the Senate, Senator Birch Bayh (D-Ind.), along with twenty-nine cosponsors, has introduced an extension resolution, S. J. Res. 134. Hearings before the Subcommittee on the Constitution are scheduled for August 2, 3, and 4.

THE ARGUMENTS

Time for Debate

Compared to all other ratified constitutional amendments, the Equal Rights Amendment has been lingering before the states for an unprecedented time. It was sent to the states on March 22, 1972, and thus, has gone unratified for nearly six and one-half years. No previous amendment has ever taken four years to receive the required three-fourths approval of the states. Three amendments have taken more than three but less than four years. Of these, the Twenty-Second Amendment (1951), restricting the number of presidential terms to two provoked little controversy but suffered from indifference in the state legislatures. The Eleventh Amendment (1798) concerning the power of the federal judiciary, was highly controversial and was one of the major battles in the supremacy of the federal government/sovereignty of the states argument that raged for some seventy years until its resolution by the Civil War. The Sixteenth Amendment, ratified in 1913, established a national income tax. The controversy surrounding its ratification needs no explanation.

Even such controversial subjects as prohibition (the 18th Amendment), women's suffrage (the 19th), and 18-year-old suffrage (the 26th) had commanded a wide consensus by the time they became constitutionalized.

Proponents of the ERA and the ERA extension contend that more time is needed to debate the ERA and that it would be unthinkable to end consideration of an issue that has been before Congress for fifty years. (The ERA was first introduced in 1923.) A comparison with the Nineteenth Amendment is useful here. The idea of extending the franchise to women first came up as early as the 1840's. Support for the idea grew continuously until by 1920, women had gained the franchise or won state referenda in support of suffrage in twenty states. Ratification of the amendment took only one year and two months.

The ERA's history, on the other hand, has been stormy. Thirty of the thirty-five states that have approved the amendment did so within one year of its submission to the states. During the last five and one-half years, however, only five states have been added to the ratification list, and four of the previously ratifying states (Nebraska, Tennessee, Idaho, and Kentucky) have withdrawn their ratifications. And with a net gain of one state over this period, the ERA has been rejected (in committee or on the floor) nearly ninety times in the legislatures of the fifteen states that have never ratified. Despite the support of the last and the current President (along with their First Ladies) and the official endorsement of both political parties, it has been one year and a half since the last state, Indiana, approved the amendment (January 24, 1977). In addition, three states, Wisconsin, New York, and New Jersey, have rejected through referenda equal rights amendments to their state constitutions. During the most recent round of state legislature sessions, attorneys general of three states, Virginia, South Carolina, and Nevada, investigated the possibility of putting the ERA to an advisory referendum of the people. All decided that such a referendum would be unconstitutional. But, interestingly, ERA supporters opposed the idea unilaterally.

There were numerous unamimous, even voice, votes in the legislatures of the first thirty states that ratified. Most of these states had little, or no, substantive debate on the ERA. It would seem that since ERA advocates contend that more time is needed to debate the merits of the ERA, they would then be willing to allow all the states that passed the ERA, but never debated it, to reconsider their ratifications. (For a more detailed treatment of the ratification history of the ERA, as compared to all other amendments to the Constitution, see The Heritage Foundation's Backgrounder No. 42 of November 15, 1977: "The ERA: Is Seven Years Enough?")

The Seven Years

Congress first attached a seven-year time limitation to the Eighteenth Amendment. A reading of the Congressional Record of 1917 shows that one of the reasons for so doing was a concern that some amendments never ratified were still lingering from the nineteenth century. Members were wondering what would happen if these amendments suddenly received the necessary number of state ratifications. Opponents of the limitation thought that putting a limitation on a constitutional amendment was unconstitutional since the amendment clause of the Constitution, Article V, had no such provision. The argument eventually became a matter for the Supreme Court which rendered its decision, (Dillon v. Gloss) in 1920.

when the Secretary of State proclaims that ratification has been completed. (In 1920, the states reported their ratification to the Secretary of State who announced when the ratification process had been completed. Today, the head of the General Services Administration has this task.) Thus, if Congress chooses to ignore the problem of rescissions a political and constitutional crisis could erupt when (and if) the ERA receives three more state approvals. According to the court, the ratification would then be complete. Yet, more states may have taken back their approvals by that time.

Simple Majority Or Two-Thirds Vote?

Proponents of the extension contend that since H.J.Res. 638 and S.J.Res. 134 do not propose amendments to the Constitution, but merely change the time limit, only a simple majority is required for their passage. Since this is the first time that Congress has ever proposed changing the conditions under which a constitutional amendment is to be ratified, there are no guiding precedents.

The rules of both the Senate and the House state that, during congressional debate on a constitutional amendment, amendments to that amendment may be passed by a simple majority vote. Yet final passage, with all amendments, must follow the constitutionally prescribed two-thirds majority. Thus, everything relevant to the substance and circumstances of a constitutional amendment must receive the two-thirds approval of both houses of Congress. An extension would contradict this rule ex post facto.

Would the amendment have passed originally if ten years, three months had been designated as the time limit, and does changing the limitation invalidate the original congressional votes of passage? Professor Charles Black of the Yale University Law School, in testimony to the Subcommittee on Civil and Constitutional Rights, answered this question:

> It may easily happen, in any given case, that a vote for the original resolution is cast partly on the ground that, in the view of the caster of the vote, the time is suitably limited. If this is not possible then that must be because the limitation of time in the first instance was utterly meaningless--an impermissible assumption. It is impermissible to assume that this question of time never matters to anybody; if that were so, why put it in? It cannot therefore be assumed that the original would surely have passed

> by the requisite 2/3 majorities if the time had been longer. On a constitutional question of this kind one cannot afford to guess, as to a particular amendment, what might have happened; one must rather follow a procedure which would be always suitable and fair.

The rules of both the Senate and the House state that joint resolutions, except joint resolutions proposing amendments to the Constitution are submitted to the President for his signature. Thus, the extension resolution would have to be signed by President Carter. Yet, the President's signature would be an unconstitutional intrusion into the amendment process since Article V of the Constitution gives Congress sole authority over constitutional amendments. This is one of the oldest traditions in matters of the Constitution, upheld by the Supreme Court in Hollingworth v. Virginia in 1798.

The States That Have Already Ratified

Professor Jules B. Gerard, Professor of Law at Washington University, undertook a study to determine whether the ratifying states had ratified only the proposed amendment, not the time limit under which it was submitted and whether the time limit had played a major role in the ratification decisions of the states. He submitted his findings to members of the House Judiciary Committee in a letter dated June 14, 1978. Professor Gerard found that the time limit was "a material consideration" to the ratification decisions of twenty-four of the thirty-five states that have ratified the ERA thus far. In short, he found that: 1) ten of the ratifying states stated explicitly that their ratifications were conditioned upon the time limit; 2) eight states acted on the basis that the language of the congressional joint resolution (which includes the seven-year limit) was an essential part of what they were ratifying; 3) two states mentioned the time limit as a separate inducement persuading them to ratify; and 4) two states explicitly stated that what was submitted to them by the Congress for a vote was the joint resolution containing ERA, not ERA independent of the joint resolution. As a proof in the inverse, Professor Gerard pointed out that four states ratified the ERA without mentioning the time limit as an important consideration, thereby showing that states were capable of ratifying without considering the time limit as important.

The import of Professor Gerard's study seems to be similar to the point of Professor Black, that is, that it must be presumed (in lieu of knowledge to the contrary) that the votes of the state legislators in the twenty-four states were contingent on the seven-year time limit.

Both the Justice Department and the Congressional Research Service of the Library of Congress undertook, at Congressman Edwards' request, a rebuttal to Professor Gerard's study. They argued that since the seven-year time limit is not part of the amendment itself, it is therefore "dispensable language," and that states cannot impose conditions and reservations on ratifications of constitutional amendments. Yet, this seems a curious assertion considering that the Supreme Court, in Dillon vs. Gloss, upheld Congress' authority to impose conditions on the ratification procedure of constitutional amendments. Since it was Congress that imposed the condition of the seven-year limitation, surely the states were only accepting and affirming that congressional condition when they regarded it as a material consideration. Arguing that the seven-year limitation is "dispensable language," contradicts Congress' original intention and purpose for including the seven years. If the time limitation language is dispensable, why has there been previous unanimity that the limitation language of the 18th, 20th, 21st, and 22nd Amendments must forever remain in the Constitution even though such language uselessly clutters up the Constitution.

A Political Question or a Justiciable Question?

In Coleman v. Miller, the Supreme Court declared that the authority over constitutional amendments was "a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." Likewise, in Dillon v. Gloss, the Court upheld the seven-year limitation as a power of Congress "incident of its power to designate the mode of ratification." Yet, the question pertaining to the latter case was not so much a "political question" that the Court felt it unnecessary to hear the case.

Proponents of the extension are confident that the history of the amending clause, as practiced and interpreted, is an assurance that Congress has sole authority over matters pertaining to the ratification procedure of constitutional amendments. Yet, with the post-war activist Court the doctrine of "judicial self-restraint" in face of the "political questions" has certainly undergone change and development since the Coleman decision. The most obvious example is the area of apportionment. In Colgrove v. Green (1946), the Supreme Court decided not to compel reapportionment because such an issue was a political question. The Court decided not to intervene in partisan politics because it could not itself redistrict the state and because authority for dealing with such problems was vested by the Constitution in Congress. Yet, just sixteen years later, the Court completely reversed itself in Baker v. Carr. The Court held that the equitable apportionment of voters among districts from which

members of the state legislature are chosen is a justiciable, and not a political question; and that, when the apportionment is determined to be inequitable, the courts can provide relief.

As for standing in court, state legislators from both states that have ratified and states that have not ratified would seem to have sufficient "interest" in the issue to make a case for standing in court.

CONCLUSION

Even though Congress has thus far remained silent on whether to accept or reject rescissions, this has not deterred the states from acting on their own. As mentioned before, in the last five and one-half years, there have been only five ratifications but four rescissions. In many of the fifteen states that have never ratified, the annual ERA brouhaha dominates the entire legislative session. Recently, both the Speaker of the House and the President of the Senate of Arizona (one of the fifteen non-ratifiers) issued public statements that they would take any extension resolution to court. In addition, the House of the Illinois legislature (which has approved the ERA in past years) passed a resolution by an overwhelming majority asking the Congress not to extend the deadline because it has been exhaustively considered and voted on for six years already.

Last year, the National Organization of Women (NOW) began a nation-wide secondary boycott against the fifteen states that have never ratified. In response, the attorneys general of Nevada, Louisiana, and Missouri have asked for court injunctions against NOW. For the past two years the ERA has been a widely divisive campaign issue in state legislature elections in the fifteen non-ratifying states. If the deadline is extended for an additional three and one-fourth years, as the House Judiciary Committee has suggested, the political turmoil across the country will assuredly increase. State defiance of the extension could produce court cases all across the country. A jealous concern for states' rights might provoke still more rescissions.

All of this is in contrast to the broad consensus and agreement that greeted the other twenty-six amendments that are now part of the Constitution. There has never been so much controversy surrounding the fundamental law of the land. However Congress eventually decides the issue, that decision will become the precedent for all future amendments to the Constitution.

Thomas Ascik
Policy Analyst