Testimony of Douglas Johnson

In Opposition to Senate Joint Resolution 1

Before the Judicial Proceedings Committee, Maryland State Senate

February 21, 2024

Executive Summary: *Regarding the ratification deadline for the federal Equal Rights Amendment, Senate Joint Resolution No. 1 ignores multiple federal court rulings, including a unanimous 2023 ruling by the U.S. Court of Appeals for the District of Columbia. Regarding rescissions, Senate Joint Resolution 1 contradicts a legal position formally embraced by unanimous votes of the Maryland Senate and Maryland House of Delegates in 2014.*

Mr. Chairman and members, my name is Douglas Johnson. I am a 40-year resident of Prince George's County. For even longer, I have intermittently written for diverse publications and platforms about developments in the courts and elsewhere pertaining to viability of the proposed 1972 Equal Rights Amendment (ERA),

THE DEADLINE

In Senate Joint Resolution 1 we find 32 "whereas" clauses, which can be distilled down to two major assertions. The first assertion is that the ERA proposed by Congress in 1972 has been ratified and should now be published as part of the Constitution, on grounds that the seven-year ratification deadline was constitutionally defective and is not binding, because the deadline appeared in what this measure calls the "preamble" (which is more properly referred to as the Proposing Clause, which is a required part of every constitutional amendment proposal submitted to the states by Congress).

It is striking, and revealing, that Senate Joint Resolution 1 makes no reference whatever to the outcomes of the many attempts by pro-ERA litigants, over the past 42 years, to find a federal court that would embrace one or another of various theories asserting that the 1972 ERA remains viable. They have run up an unbroken 42-year chain of defeats. As I have expounded in detail elsewhere, since

1982, pro-ERA litigants have presented 30 federal judges and justices with opportunities to take some action to advance or accept their claims regarding the deadline and other issues affecting the ERA's viability, but they have yet to win a single vote, from a single judge, on a single component of their collection of novel legal claims. By the way, from 2021 through 2023, the federal judges who ruled against ERA-revival legal claims were appointed by Democratic presidents by a 10 to 2 ratio. [1]

S.J. Res. 1 is silent even regarding the unanimous ruling by a three-judge panel of the U.S. Court of Appeals for the District of Columbia in *Illinois v. Ferriero*, issued on February 28, 2023, written by Judge Robert Wilkins (an appointee of President Obama). (*Illinois v. Ferreiro*, 60 F.4th 704, 713 (D.C. Cir. 2023)). The panel flatly rejected the pleas of Illinois and Nevada that the Archivist of the U.S. should be ordered to publish the ERA. The claim that a deadline in the Proposing Clause is not binding was squarely addressed, and crushed, by this unanimous panel, on page 25 of that ruling ("…if that were the case, then the specification of the mode of ratification in every amendment in our nation's history would also be inoperative" [!])[2] The panel upheld the dismissal of the pro-ERA lawsuit by U.S. District Judge Rudolph Contreras (also appointed by President Obama), who in a lengthy and tightly reasoned ruling, said twice that it would have been "absurd" for the Archivist to disregard the ratification deadline. (*Virginia v. Ferriero*, 525 F.Supp.3d 36, 40 (D.C. 2021)).

In the face of this judicial record, when Senate Joint Resolution 1 calls on "the Biden Administration" to publish the ERA as part of the Constitution, it calls for a lawless act. This resolution is, implicitly, an appeal to the President and other officials of the federal Executive Branch to ignore the law, and obey the politics. It is an appeal that the President, and those in lesser offices who have taken oaths to uphold the Constitution, ought to disregard. [3][4]

DOUBLETHINK ON RESCISSIONS

S.J. Res. 1 also asserts a second proposition: That states may never rescind a ratification, even before a deadline set by Congress. The authors find this assertion necessary for their purposes, because four state legislatures rescinded their ratifications of the ERA, before the seven-year deadline was reached on March 22,

1979. If those rescissions were valid, then when the ERA expired, it had been ratified by only 31 states, not 35.

But this assertion raises another issue for this body: In what cases are federal officials, or the public, to take your pronouncements on such matters seriously?

Ten years ago, a college student brought to the attention of a previous chairman of this committee, Senator Brian Frosh, that the Maryland General Assembly was one of only a handful of legislatures that had ratified the Corwin Amendment. The Corwin Amendment was a proposed constitutional amendment that would have forever forbidden Congress to interfere with "the domestic institutions" of any state, which everyone at the time clearly understood to refer to the institution of *slavery*. The Corwin Amendment contained no ratification deadline, so it was and is still available for ratification. [5]

Once Senator Frosh learned of this, he rightfully referred to the Corwin Amendment ratification resolution that Maryland had sent to Washington, D.C., as "a blot." He promptly authored a joint resolution, also numbered Senate Joint Resolution 1, that did one thing and one thing only: It *rescinded* Maryland's ratification of the Corwin Amendment. [6] I have attached Senator Frosh's resolution to my testimony.

The rescission resolution progressed through the General Assembly to much favorable coverage and commentary in the print and broadcast news media. It was approved by unanimous roll call votes in both houses. The text of the resolution required that it be transmitted to the Archivist of the United States, and presumably that was done, so the Archivist now holds it there in the file cabinet containing ratification-related documents for constitutional amendments that have not expired.

Personally, I take no position on whether recissions are properly allowed or not. But, if the assertion contained in Senator Kelly's joint resolution pending before you today is legally correct, that rescissions or ratifications are flatly unconstitutional, then this resolution ought to be amended to add an additional request that the Archivist return to this body the text of the rescission resolution on the Corwin Amendment, transmitted in 2014, since it must now be deemed to have been an unconstitutional exercise.

I hope that no member of the General Assembly believes that the rules for amending the federal Constitution should be regarded as a set of toggle switches that one can flip up or down, according to whether one regards a given constitutional amendment proposal as good or bad. If we are to be "a nation of laws, not men," that will not do. [6]

END NOTES

[1] "Federal Judges Scorn ERA-revival Legal Claims," by Douglas Johnson. March 18, 2021, updated February 20, 2024. https://www.nrlc.org/uploads/era/FederalJudgesScornERAResuscitation.pdf

[2] In *Illinois v. Ferriero* (February 28, 2023), the unanimous D.C. Circuit panel (Judges Wilkins, Rao, and Childs) said:

> Significantly, the States cite no persuasive authority suggesting that Congress is prohibited from placing the mode of ratification-- ratification either by convention or the state legislature--in the proposing clause of an amendment. At oral argument, the States conceded that Congress has placed the mode of ratification (ratification by legislature or ratification by convention) in the proposing clause of every constitutional amendment in the nation's history, Oral Arg. at 13:00--13:40; see 2020 OLC Opinion at 15 n.15 (collecting proposing resolutions), and the States further concede that Congress's specification of this aspect of the "mode" in the proposing clause does not invalidate any of those amendments. Id. If one aspect of the mode of ratification can be placed in the proposing clause, then why not also the ratification deadline? 8The States' argument that the proposing clause is akin to the inoperative prefatory clause in a bill is unpersuasive, not just because proposed constitutional amendments are not "ordinary cases of legislation," *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 n.* (1798), but also because if that were the case, then the specification of the mode of ratification in every amendment in our nation's history would also be inoperative. ((60 F.4th 704, 713 (D.C. Cir. 2023))

[3] On February 9, 2022, the *Washington Post Fact Checker* awarded a member of Congress “Four Pinocchios” (the maximum rating for deception) for claiming that the Archivist of the U.S. could and should unilaterally add the ERA to the U.S. Constitution. The *Fact Checker* stated:

> [E]very time the issue has been litigated in federal court, most recently in 2021, the pro-ERA side has lost, no matter whether the judge was appointed by a Democrat or Republican…. Moreover, two major court rulings have concluded that the ERA’s ratification deadline, as set by Congress, has expired -- a position embraced by both the Trump and Biden Justice Departments. The Supreme Court in 1982 also indicated support for the idea that the deadline has passed. (“The ERA and the U.S. archivist: Anatomy of a false claim,” *Washington Post*, February 9, 2022)

[4] S.J. Res. 1 also calls on *Congress* to affirm that the ERA is part of the Constitution. This is in effect an embrace of what is known as “congressional promulgation theory”—the notion that Congress, after the ratification process is over, gets to decide by majority vote whether or not a proposed amendment has been ratified. Congress has no such retroactive power. As U.S. District Judge Rudolph Contreras wrote in his 2021 ruling in *Virginia v. Ferriero* ((525 F.Supp.3d 36, 40 (D.C. 2021)):

> Commentators have widely panned the [congressional promulgation] theory as out of sync with the text of Article V, prior precedent, and historical practice.... Indeed, Plaintiffs and the Archivist both denounce the theory.” Contreras also wrote that “the effect of a ratification deadline is not the kind of question that ought to vary from political moment to political moment…Yet leaving the efficacy of ratification deadlines up to the political branches would do just that.

On the appeal of Judge Contreras’ ruling to the D.C. Circuit, during oral argument on September 28, 2022, Judge Robert Wilkins asked, “Why shouldn’t the Archivist just certify and publish [the ERA], and let Congress decide whether the deadline should be enforced...?” The senior lawyer from the Biden Administration Justice Department arguing on behalf of the Archivist, Deputy Assistant Attorney General Sarah Harrington, replied: “The Constitution doesn’t

contemplate any role for Congress at the back end. Congress proposes the amendment, it goes out into the world, and the states do what they're going to do." Harrington's answer could only be understood as dismissive of the "congressional promulgation" theory.

[5] An excellent, detailed article on the history of Maryland's ratification of the Corwin Amendment appeared in the *Baltimore Sun* on January 30, 2014: "Maryland lawmakers asked to revisit vote for slavery," by Timothy B. Wheeler. https://www.baltimoresun.com/2014/01/30/maryland-lawmakers-asked-to-revisit-vote-for-slavery

[6] After a series of whereas clauses, Sen. Frosh's Senate Joint Resolution 1 of 2014 contained two operative clauses. The first: "Resolved by the General Assembly of Maryland, that the State of Maryland rescinds its ratification of the Corwin Amendment to the United States Constitution." The second Resolved clause instructed that copies of the resolution should be transmitted to several congressional leaders and to the Archivist of the United States. The final designation of the measure was Joint Resolution 1, signed by the President of the Senate and the Speaker on May 5, 2014.

Joint Resolution 3

(Senate Joint Resolution 1)

A Senate Joint Resolution concerning

Rescission of Maryland's Ratification of the Corwin Amendment to the United States Constitution

FOR the purpose of rescinding Maryland's ratification of the Corwin Amendment to the United States Constitution.

WHEREAS, On February 27, 1861, in an attempt to avert the secession of Southern states, United States Representative Thomas Corwin of Ohio proposed an amendment to the United States Constitution that would prohibit the United States Constitution from being amended in a manner that authorizes Congress to abolish or interfere with the states' domestic institutions, including slavery; and

WHEREAS, On March 2, 1861, the Corwin Amendment passed the United States Congress and was submitted to the states for ratification; and

WHEREAS, With the enactment of Chapter 21 of the Acts of 1862, the General Assembly of Maryland ratified the Corwin Amendment; and

WHEREAS, The Corwin Amendment has not been ratified by three–fourths of the states and, therefore, is not part of the United States Constitution; and

WHEREAS, With the end of the Civil War and the ratification of the 13th Amendment to the United States Constitution, the purposes of the Corwin Amendment have become moot; now, therefore, be it

RESOLVED BY THE GENERAL ASSEMBLY OF MARYLAND, That the State of Maryland rescinds its ratification of the Corwin Amendment to the United States Constitution, viz:

"Article

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."; and be it further

RESOLVED, That the Governor of the State of Maryland is requested to forward authentic copies of this Resolution, under the Great Seal of the State of Maryland, to: ~~the Honorable John F. Kerry, Secretary of State of the United States,~~

~~2201 C Street, N.W., Washington, D.C. 20520~~ the Honorable Joseph R. Biden, Jr., Vice President of the United States, President of the United States Senate, Suite S–212, United States Capitol Building, Washington, D.C. 20510; the Honorable Harry Reid, Majority Leader, United States Senate, 528 Hart Senate Office Building, Washington, D.C. 20510; the Honorable John Boehner, Speaker of the House of Representatives of the United States, 1011 Longworth House Office Building, Washington, D.C. 20515; and ~~the Honorable Dan M. Tangherlini, Administrator of General Services of the United States, 1800 F Street, N.W., Washington, D.C. 20405~~ the Honorable David S. Ferriero, Archivist of the United States, National Archives and Records Administration, 709 Pennsylvania Avenue, N.W., Washington, D.C. 20408.

Signed by the President and the Speaker, May 5, 2014.