CAROLYN B. MALONEY, NEW YORK
CHAIRWOMAN

ONE HUNDRED SEVENTEENTH CONGRESS

JAMES COMER, KENTUCKY
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON OVERSIGHT AND REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
MAJORITY (202) 225–5051
MINORITY (202) 225–5074
https://oversight.house.gov

October 21, 2021

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Vice President Kamala Harris
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear President Biden and Vice President Harris:

I have proudly sponsored an Equal Rights Amendment (ERA) resolution in the House of Representatives during every session of Congress since 1997. We are now closer than ever before to enshrining equal rights for people of all genders in the Constitution. I know we stand united on this front, and I appreciate your strong support for the Equal Rights Amendment.[1] I write today to urge your Administration to take the necessary steps to rescind an erroneous legal memorandum from the previous Administration that is obstructing the adoption of the ERA.

As you know, last January, Virginia became the 38th and final state needed to ratify the ERA. Now that the Amendment has been ratified by the necessary three-fourths of states, the Archivist of the United States should immediately perform his legal duty under 1 U.S.C. § 106b to certify the ratifications of Nevada, Illinois, and Virginia and publish the ERA as the 28th Amendment to the Constitution.

Unfortunately, the Trump Administration issued an erroneous legal opinion in January 2020 that has blocked the completion of the certification process.[2] This opinion from the Office of Legal Counsel (OLC) was ostensibly written in response to a request for guidance from the National Archives and Records Administration (NARA).[3] However, the opinion went far beyond NARA's request, inserted the executive branch into a process the Constitution leaves to Congress and the states, and included a flawed legal analysis that misapplied precedent and wrongly concluded that the ERA had not met the requirements for certification and could not be

---

[1] The White House, *A Proclamation on Women's Equality Day* (Aug. 26, 2021) (online at www.whitehouse.gov/briefing-room/presidential-actions/2021/08/26/a-proclamation-on-womens-equality-day-2021/).

[2] Office of Legal Counsel, Department of Justice, *Ratification of the Equal Rights Amendment* (Jan. 6, 2020) (online at www.justice.gov/sites/default/files/opinions/attachments/2020/01/16/2020-01-06-ratif-era.pdf).

[3] Letter from General Counsel Gary M. Stern, National Archives and Records Administration, to Assistant Attorney General Steven A. Engel, Office of Legal Counsel, Department of Justice (Dec. 12, 2018) (online at www.archives.gov/files/press/press-releases/2020/olc-letter-re-era-ratification-12-12-2018.pdf).

revived. On January 8, 2020, NARA stated that it would "abide by the OLC opinion, unless otherwise directed by a final court order."[4] As a result, the ERA is at an unnecessary impasse.

I recently requested a legal analysis of the previous Administration's OLC memo from preeminent constitutional and legal scholars affiliated with Columbia Law School's ERA Project. That analysis, which is enclosed with this letter, concludes that the Trump OLC opinion "sought to advance a policy preference against the ERA," is "lacking a thoroughly reasoned understanding of precedent and Congressional power under the Constitution," and should be rescinded. The scholars explained:

> We respectfully submit that the 2020 OLC Memo should be withdrawn because it opines on matters that are outside the scope of the Archivist's request, is not consistent with the views of the current President, rests on erroneous interpretations of legal precedent, and directly contradicts previous OLC opinions.[5]

The scholars also explained not only that Congress has the "power to modify or remove time limits" for ratification but also that Congress's decision to include a time limit in the preamble of the ERA resolution, rather than in the text of the Amendment itself, suggests that the time limit "may be non-binding hortatory language that does not preclude further state ratifications after the expiration of that time limit."[6]

The scholars also noted that rescinding the previous Administration's OLC memo would be consistent with precedent, explaining:

> It has been common practice for the OLC to review legal opinions issued by a prior administration, and withdraw those opinions that are regarded as legally unsound and/or do not reflect the view of the current President with respect to important questions of law.[7]

Indeed, your Administration recently reversed a June 2019 opinion in which the Trump Administration's OLC concluded erroneously that the Ways and Means Committee lacked a "legitimate legislative purpose" to request the tax returns of former President Trump.[8]

---

[4] National Archives and Records Administration, *Press Release: NARA Press Statement on the Equal Rights Amendment* (Jan. 8, 2020) (online at www.archives.gov/press/press-releases-4).

[5] Letter from Professor Katherine Franke, Faculty Director, ERA Project, Columbia Law School, et al. to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Oct. 15, 2021) (online at https://gender-sexuality.law.columbia.edu/sites/default/files/content/Research%20and%20Papers/OLC%20Letter%20Final.pdf).

[6] *Id.*

[7] *Id.*

[8] Office of Legal Counsel, Department of Justice, *Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)* (July 30, 2021) (online at www.justice.gov/olc/file/1419111/download).

As Chairwoman of the Committee with jurisdiction over NARA, I urge the Administration to rescind the OLC opinion blocking the Archivist from fulfilling his statutory obligation to certify and publish the ERA. Such a legally flawed memo should not stand, especially given that, with Virginia's ratification of the Amendment, circumstances have changed significantly since the opinion was issued.

Ratifying the Equal Rights Amendment is the most consequential action we can take to ensure gender equality for all. Certifying and publishing the ERA must be done without delay and should not be stymied by an overreaching memo from the previous Administration that was based on a flawed legal analysis. As Chairwoman of the Oversight Committee, and as a woman whose equality under the law is still not reflected in my own Constitution, I thank you for your attention to this important matter.

Sincerely,

Carolyn B. Maloney
Chairwoman

Enclosure

cc: The Honorable James Comer, Ranking Member

Columbia Law School
THE ERA PROJECT

October 15, 2021

The Honorable Carolyn B. Maloney
Chair, Committee on Oversight and Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Maloney,

The Equal Rights Amendment Project at Columbia Law School ("ERA Project")[1] and the undersigned scholars submit this letter at the request of your office to provide legal analysis of the January 6, 2020 Department of Justice Office of Legal Counsel Memorandum to the National Archives and Records Administration on the Equal Rights Amendment ("2020 OLC Memo"). We respectfully submit that the 2020 OLC Memo should be withdrawn because it opines on matters that are outside the scope of the Archivist's request, is not consistent with the views of the current President, rests on erroneous interpretations of legal precedent, and directly contradicts previous OLC opinions. In addition, Congress, charged under Article V of the Constitution with the leading role in the Constitutional amendment process, is currently resolving the ERA's time limit issues with appropriate legislation.

The Equal Rights Amendment ("ERA"), which provides an explicit constitutional guarantee of sex equality, is vitally important and enjoys more public support than ever before in its nearly 100-year history.[2] Since the ERA was first introduced in Congress in 1923, women have won important advancements in gender equality, yet the resulting patchwork of protections has not delivered on the promise of full substantive equality. As just one example, women bore the heaviest burden from the pandemic and economic crisis.[3] As our nation emerges from this upheaval, the urgency to complete

[1] The ERA Project is a law and policy think tank established in January 2021 to provide strategic leadership and rigorous legal analysis on the Equal Rights Amendment (ERA) to the U.S. Constitution, and to develop academic, legal, and policy expertise to support efforts to expand protections for gender-based equality and justice.
[2] The Associated Press-NORC Center for Public Affairs Research. (2020). *AP-NORC Poll: Most Americans Support the Equal Rights Amendment, January 2020.* Retrieved from https://apnorc.org/projects/the-equal-rights-amendment-and-discrimination-against-women/.
[3] Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey, and Michèle Tertilt, *The Impact of Covid-19 on Gender Equality,* Covid Economics 4, 14 April 2020: 62-85 (April 14, 2020), https://faculty.wcas.northwestern.edu/~mdo738/research/Alon_Doepke_Olmstead-Rumsey_Tertilt_COVID_2020.pdf; Misty L. Heggeness, *Estimating the immediate impact of the COVID-19 Shock on Parental Attachment to the Labor Market and the Double Bind of Mothers*, Rev Econ Household (2020) 18:1053–1078 (October 24, 2020), https://link.springer.com/content/pdf/10.1007/s11150-020-09514-x.pdf; Misty L. Heggeness & Jason M. Fields, *Working Moms Bear Brunt of Huma Schooling While Working During COVID-19*, US Census Bureau (August 18, 2020), https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html.

the work of our founders by filling in a foundational gap in the Constitution is especially resonant, as is the duty to correct the mistakes of the past in our discriminatory laws and policies.

The 2020 OLC Memo goes beyond the scope of the Archivist's request.

The 2020 OLC Memo should be withdrawn because it goes beyond the role of the Executive Branch and the question posted in the Archivist's request.

In 2018, the Archivist sought guidance from the OLC on whether he would be expected to publish the ERA in the Constitution when the requisite number of states have ratified it.[4] Yet in response, the OLC issued an opinion which discussed at length in Section III on whether Congress may "revive" the ERA ratification process by passing a resolution to lift the ERA deadline, reaching far beyond the scope of the Archivist's question.[5] Section III is especially problematic because it inappropriately opines on events that, at the time, had not come to pass, and sought to advance a policy preference against the ERA without being asked and lacking a thoroughly reasoned understanding of precedent and Congressional power under the Constitution.

The 2020 OLC Memo contradicts the OLC's policy on best practices and President Biden's Statements on the ERA.

OLC guidelines for best practices state that its legal opinions should "reflect the institutional traditions and competencies" of the Executive Branch as well as "the objectives of the President" who currently holds the office.[6] The 2020 OLC Memo should be withdrawn because it interposes the Executive Branch into the amendment process in a manner that contradicts President Biden's stated commitment to the importance of the ERA and the proper role of Congress in the ratification process. According to the Biden Agenda for Women:

> As President, Biden will work with advocates across the country to pass the Equal Rights Amendment … so women's rights are once and for all explicitly enshrined in our Constitution. Biden co-sponsored the ERA nine times. As President, he will work with advocates across the country to enshrine gender equality in our Constitution.

---

[4] *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Gary M. Stern, General Counsel, National Archives and Records Administration (Dec. 12, 2018); *see also* Section 106b of Title I, United States Code, which establishes the responsibilities of the Archivist with respect to the publication and certification of amendments to the Constitution.

[5] Department of Justice Office of Legal Counsel, "Ratification of the Equal Rights Amendment: Memorandum for the General Counsel National Archives and Records Administration," Slip Op., Jan. 6, 2020, https://bit.ly/3rB6FBU.

[6] *See* Memorandum for Attorneys of the Office from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions,* at 2 (July 16, 2010), available at https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf.

> Now that Virginia has become the 38th state to ratify the ERA, **Biden will proudly advocate for Congress to recognize that 3/4th of states have ratified the amendment and take action so our Constitution makes clear that any government-related discrimination against women is unconstitutional**.[7]

The clear implication of President Biden's statement is that Congress is the appropriate branch to address ratification issues involving the ERA. This position is supported by the text and structure of the Constitution, historical practice, and Supreme Court precedent**.**

Resolutions Addressing the ERA Time Limit are Currently Before Congress, which has the Authority Under Article V to Steward the Constitutional Amendment Process.

Article V expressly assigns Congress (in proposing amendments) and the states (in ratifying amendments) authority over the Constitutional amendment process. By contrast, Article V designates no role for the Executive branch in the amendment process, nor has any President asserted the power—or has been understood to have the power—to approve or veto amendments proposed by Congress.[8]

While the text of Article V does not specify a dispute-resolution mechanism for issues arising in the ratification process, such as those involving the ERA, structural considerations further support the idea that Congress, as the most democratic branch of government, is best suited to resolve questions involving the amendment process.[9] Indeed, the Supreme Court has stated that Congress has the authority to "promulgate" or "proclaim" an amendment after its ratification.[10]

To this end, resolutions addressing the ERA time limit are currently before Congress. The House voted to lift the ERA time limit in each of its last two terms. *See* H.R.J. Res. 79, 116th Cong. (2020) and H.J. Res. 17, 117th Cong. (2021). A similar resolution, S.J. Res. 1, 117th Cong. (2021-2022) is in the Senate.

Congress Historically has Exercised Authority in the Amendment Ratification Process.

Both the authority granted to Congress by Article V and the textual and structural inference of executive non-involvement are supported by prior instances in which Congress has deliberated about—and effectively resolved—conflicts over prior ratification processes.[11] During the ratification of the 14th Amendment, for example, New Jersey and Ohio voted to rescind their previous ratifications of the amendment. Despite these actions, which are not explicitly anticipated by or addressed in Article

---

[7] *See The Biden Agenda for Women*, https://joebiden.com/womens-agenda/ (last visited June 14, 2021) (emphasis added and omitted).
[8] *Coleman v. Miller,* 307 U.S. 433 at 450 (1939).
[9] David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. (forthcoming Dec. 2021) (manuscript at 48-53), https://ssrn.com/abstract=3834066.
[10] *Coleman,* 307 U.S. 433 at 450.
[11] *Id.*

V, Congress nonetheless adopted a resolution declaring the final ratification of the 14th Amendment and included Ohio and New Jersey among the ratifying states. *See* Cong. Globe, 40th Cong., 2d Sess. 4296 (1868).

The ratification of the 27th Amendment similarly illustrates Congress's leading authority to resolve ambiguities or conflicts incident to the ratification process. The 27th Amendment, passed by the Congress in 1789, is one of the first amendments sent to the states and the most recent amendment adopted in the Constitution, 203 years later. This amendment, which regulates Congressional pay increases, did not have a deadline. While OLC issued an opinion about the validity of the Twenty-Seventh Amendment,[12] numerous members of Congress took pains "to reassert Congress's primacy in judging the validity of an amendment,"[13] and Congress in fact affirmed the amendment's ratification in 1992.[14]

In sum, historical precedent shows that Congress has, and has assumed, the preeminent role in the amendment process, and has fulfilled that role even in periods of partisan polarization.[15]

The 2020 OLC Memo Relies on Flawed Interpretations of Precedent.

The 2020 OLC Memo relies heavily on *Dillon v. Gloss,* 256 U.S. 368 (1921), as a basis for an opinion that the deadline for states to ratify the ERA expired in 1979, thus rendering later state ratifications a nullity. The Court in *Dillon* upheld a 7-year time limit included in the Prohibition Amendment, concluding that Article V implicitly gives Congress the authority to ensure that state ratifications are "sufficiently contemporaneous" in order to "reflect the will of the people[.]" *Id.* at 374-75. Yet, as the ratification of the 27th Amendment illustrates, contemporaneity is not a strict requirement for a Constitutional amendment. When asked by the Archivist for advice regarding the protracted ratification of the 27th Amendment, the OLC opined that there was no time limit on ratification, disregarding *Dillion's* comment about contemporaneity. Congressional Pay Amendment, 16 Op. O.L.C. 85, 97 (1992).

The approach of the 2020 OLC Memo is inconsistent with *Coleman v. Miller,* 307 U.S. 433 (1939). In *Coleman,* the Supreme Court held that questions regarding the ratification process of a proposed amendment and the "period within which ratification may be had" are political questions for Congress to resolve. *Id.* at 450, 452, 454.

What is more, the 2020 OLC Memo misreads *Dillon* as precluding later Congresses from modifying time limits to state ratification of proposed Constitutional amendments. While *Dillon* is silent on whether Congress can extend or remove a time limit, by the case's own reasoning, the authority of Congress to impose a time limit is "incident [to] its power" to determine the mode of

[12] 16 Op. O.L.C. 85, 97 (1992).
[13] *See* Pozen & Schmidt, *supra* note 4, (manuscript at 38).
[14] 138 CONG. REC. 11,654 (1992).
[15] *See id.*

ratification under Article V, thus Congress has the power to modify or remove time limits because doing so is incident to the power to make determinations on time limits in the first instance. *See* 256 U.S. at 375. The 2020 OLC Memo's conclusion that once Congress acts to impose a deadline, the deadline becomes a fixed period set in stone goes against not only the language of Article V, but also fundamental tenets of democratic rule, especially given the highly political nature of the issue of the ERA's ratification.

The 2020 OLC Memo's conclusion that Congress lacked the authority to extend the ERA time limit to 1982 is erroneous and contradicts previous OLC opinions. Indeed, the OLC has previously recognized the power of Congress to extend the ERA time limit. As the 7-year time limit approached, both the House and Senate Judiciary Committees held hearings on the validity of the extension of the time limit. Following the hearings, OLC opined that the Congressional extension of the time limit was constitutional, reasoning that Congress's power to impose a time limit includes the power to extend it while the state ratification process was under way.[16]

It bears mentioning that the language of the ERA time limit is distinguishable from that of the 18th Amendment at issue in *Dillon* in significant ways. The ERA time limit is written in the preamble proposing the amendment, whereas the 18th Amendment's deadline was written into the text of the amendment itself, suggesting a more binding character. *See* H.R.J. Res. 208, 92nd Cong. (1972). In addition, the text of the preamble to the ERA, which states that the ERA is valid "*when ratified* …within seven years" by 38 states, is less conditional than the 18th Amendment's language that the amendment is "*inoperative unless*" ratified by the required state legislatures. *Id.* (emphasis added), U.S. CONST. amend. XVIII, § 3 (repealed 1933) (emphasis added). These distinctions suggest that the time limit included in the preamble of the ERA may be non-binding hortatory language that does not preclude further state ratifications after the expiration of that time limit.[17]

Withdrawal of the 2020 OLC Memo is in Keeping with Customary Practice.

It has been customary practice for the OLC to review legal opinions issued by a prior administration, and withdraw those opinions that are regarded as legally unsound and/or do not reflect the view of the current President with respect to important questions of law.[18] As such, withdrawal

[16] *See Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 7–27 (1978).
[17] *See* Pozen & Schmidt, *supra* note 4, (manuscript at 42 & n.303).
[18] *See* Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009) (Nine OLC memos were withdrawn or superseded under the Obama administration which no longer represent the views of the Office); Opinions of the Attorney General of the United States, 33 Op. O.L.C. 402, 191 (2009) (Four OLC opinions on CIA Interrogations withdrawn under the Obama administration which no longer represent the views of the Office); Memorandum Opinion for the Attorney General from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, Statutory Rollback of Salary to permit Appointment of Member of Congress to Executive Office (May 20, 2009) (A 1987 OLC opinion on the ineligibility of sitting congressmen to assume a vacancy on the Supreme Court is withdrawn because it is not "in accord with prior interpretations [...] by the Department of Justice and has not consistently guided subsequent practice of the Executive Branch); Memorandum Opinion for the

of the 2020 OLC Memo would be entirely consistent with OLC precedent insofar as the 2020 Memo expresses policy preferences of the executive branch which goes beyond the scope of the Archivist's question, embraces an erroneous interpretation of legal precedent and conflicts with the current administration's stated support for the authority and responsibility of the Congress to resolve disputes about proposed amendments to the Constitution under Article V.

In conclusion, it is our view that the Office of Legal Counsel should withdraw the 2020 OLC Memo, while Congress, the branch charged under Article V with authority and responsibility for the ratification of Constitutional amendments, resolve the ERA's time limit issues, as it has already begun doing so with appropriate legislation.

Respectfully,

Katherine Franke
James L. Dohr Professor of Law
Faculty Director, ERA Project
Columbia Law University

David Pozen
Charles Keller Beekman Professor of Law
Columbia Law School

Erwin Chemerinsky
Dean, and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley, School of Law

Cary Franklin
McDonald/Wright Chair of Law, Faculty Director of the Williams Institute
UCLA School of Law

Melissa Murray

Solicitor Department of the Interior from M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, *Authority of the Department of the Interior to provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church* (Apr. 30, 2003) (A 1995 OLC opinion on grants to historic religious properties is withdrawn because it does not reflect OLC's "understanding of the law today."); Memorandum Opinion for the Solicitor Department of Labor and the General Counsel Department of Veterans Affairs from Walter Dellinger, Assistant Attorney General Office of Legal Counsel, *Reconsideration of Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities*, (May 23, 1994) (Withdrawing a previous opinion from the Carter administration that erred on the conclusion that the plain language of the Davis-Bacon Act bars its application to any lease contract, whether or not the lease contract also calls for construction of a public work or public building).

Frederick I. and Grace Stokes Professor of Law
New York University School of Law

(Institutional affiliation is provided for identification purposes only)