

April 7, 2021

Attorney General Merrick Garland
Office of the Attorney General
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington DC 20530

Dear Attorney General Garland:

Free Speech For People, Generation Ratify, and the other signatories listed below urge you to instruct the Department of Justice's Office of Legal Counsel to rescind its January 6, 2020 advisory opinion regarding the ratification of the Equal Rights Amendment, so that the Archivist of the United States may fulfill his ministerial duty to publish the Equal Rights Amendment with his certificate declaring that it has become part of the Constitution of the United States.

In the previous administration, the Department's Office of Legal Counsel ("OLC") opined that the ERA cannot be properly ratified because only 35 states ratified the ERA prior to the expiration of a seven-year ratification deadline referenced in the joint resolution proposing the amendment, and Congress has no authority to modify or eliminate that deadline.¹ However, this purported deadline was not included in the amendment passed by Congress and ratified by the states and, as such, provides no basis to nullify the ratification by three-fourths of the states and bar entry of the amendment into the Constitution.

Accordingly, and for the reasons explained more fully below, the 2020 OLC advisory opinion should be rescinded and the Archivist should publish and certify the ERA as a part of the Constitution.

Background

People in the United States currently do not have an explicit federal constitutional protection against discrimination on account of their sex. The ERA would correct this, by ensuring that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." In 1972, Congress by joint resolution proposed the ERA to the states. The preface to

¹ 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>.

the joint resolution purported to place a seven-year time limit on the ratification process. Thirty-five states ratified the amendment by 1977. By a majority vote in 1978, Congress extended the time period by three years, but no additional states ratified the ERA by 1982 and the process stalled. In recent years, the movement to ratify the ERA regained momentum. Nevada and Illinois ratified the amendment in 2017 and 2018 respectively. Then, on January 15, 2020, Virginia ratified the amendment, becoming the 38th state to do so.² This satisfied the two-part process of amending the Constitution, as laid out in Article V of the Constitution.

Yet for more than a year, the amendment has languished. The National Archivist is tasked with publishing new constitutional amendments and declaring their validity upon receiving formal instruments of ratification from three-fourths of the states. 1 U.S.C. § 106b. As the Archivist, David Ferriero, explained in 2012, in response to a request from Representative Carolyn Maloney regarding the ratification status of the ERA: “Under the authority granted by [1 U.S.C. § 106b], once [the National Archives] receives at least 38 state ratifications of a proposed Constitutional Amendment, [the National Archives] publishes the amendment along with a certification of the ratifications and it becomes part of the Constitution without further action by the Congress.”³ Now that 38 states have in fact ratified the ERA, however, in deference to the January 6, 2020 OLC advisory opinion issued under the prior administration, Mr. Ferriero has declined to fulfill this ministerial duty absent a court order.⁴

The 2020 OLC Advisory Opinion Should Be Rescinded

The Department of Justice is not, and should not be considered, a gatekeeper on the legal validity of an amendment. Article V expressly assigns the constitutional amendment process to Congress and the states, and the executive branch plays no role in the process of either proposing or ratifying amendments.⁵ The Archivist’s statutory role is purely ministerial. For this reason alone, the opinion should be withdrawn.

More importantly, the advisory opinion is legally erroneous. It incorrectly concluded that the purported seven-year deadline contained in the proposing resolution limited the ability of the states to ratify, even though no such limitation

² Although several state legislatures claim that they rescinded their ratification, rescission is not authorized by Article V. Indeed, although two states rescinded their ratification of the Fourteenth Amendment, Congress still adopted a concurrent resolution declaring it to be part of the Constitution. See *Coleman v. Miller*, 307 U.S. 344, 448-49 (1939).

³ Letter from David S. Ferriero to Carolyn Maloney (Oct. 25, 2012), available at <https://bit.ly/2ZkUa1m>.

⁴ U.S. National Archives and Record Administration, Press Release, Jan. 8, 2020, <http://bit.ly/3a8zaB6>.

⁵ For example, Congress does not present a proposed constitutional amendment to the president for signature.

was included in the amendment itself. Article V of the Constitution assigns Congress two specific roles in the constitutional amendment process: (1) to “propose Amendments to this Constitution”; and (2) to designate whether the “Mode of Ratification” will be through state legislatures or via conventions. “[I]n either case,” Article V specifies, such proposed amendments “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof” Nowhere in Article V nor in any other provision does the Constitution provide Congress with authority to impose a deadline on ratification or to otherwise alter the Article V’s unqualified command that an amendment proposed by Congress shall be a valid part of the Constitution “*when ratified*” by three fourths of the states.

Nonetheless, the 2020 OLC advisory opinion concluded that Congress had implicit authority to impose -- by resolution -- a deadline after which the proposed amendment would no longer become part of the Constitution even once ratified by three fourths of the states. OLC relied heavily on a one-hundred-year-old Supreme Court decision in *Dillon v. Gloss*, 256 U.S. 368 (1921), but that decision fails to support, let alone compel, the conclusion reached by OLC.

In *Dillon*, an accused bootlegger argued that the Eighteenth Amendment, which established Prohibition, was invalid because it contained a ratification deadline. Specifically, Section 3 of the Eighteenth Amendment provides: “This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution . . . within seven years from the date of the submission hereof to the States by the Congress.” There was no dispute that the Eighteenth Amendment had in fact been ratified by three fourths of the states prior to the seven-year deadline, rendering Section 3 moot, and the Court could certainly have rejected the argument on that ground alone. However, the Court went on to find that the deadline contained in the proposed amendment was valid because, although the Constitution contained “no express provision on the subject,” Congress had implied authority under Article V “to fix a definite period” for ratification. Because that period was set forth in the Amendment itself, the Court had no occasion to address and did not discuss the very different issue presented by the ERA: whether Congress could fix such a “definite period” by resolution with no deadline included in the proposed amendment itself.

With the Eighteenth Amendment, by incorporating the ratification deadline into the proposed amendment itself (a practice later followed with the Twentieth, Twenty-First, and Twenty-Second Amendments), Congress acted in a manner

consistent with Article V's express provision that a proposed amendment becomes a valid part of the Constitution "when ratified" by three-fourths of the states. Congress did not purport to alter that provision in Article V, but instead provided under the express terms of the amendment that if ratification occurs after the deadline, the amendment, by its own terms, becomes "inoperative." Put another way, as the 2020 OLC advisory opinion acknowledged, if three-fourths of the states ratified the amendment after the deadline and it "therefore became 'valid to all Intents and Purposes as Part of [the] Constitution,'" under Article V, "the amendment, by its own terms, would be legally inert." OLC Op. at 20.

The ERA, by contrast, contains no ratification deadline in the text of the amendment. Instead, Congress sought, quite literally, to modify Article V of the Constitution by resolution. Article V expressly provides that amendments proposed by Congress "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States." The ERA resolution purports to alter this provision by instead providing that the amendment "shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three fourths of the several States *within seven years from the date of its submission by Congress.*" (emphasis added). Thus, unlike the Eighteenth Amendment deadline upheld in *Dillon* -- which operated in a manner consistent with Article V -- the deadline in the ERA resolution impermissibly defies and seeks to modify Article V's "express provision on the subject."

The extra-constitutional deadline contained in the ERA resolution contrasts not only with the deadline incorporated in the Eighteenth Amendment (and Twentieth, Twenty-First, and Twenty-Second), but also with a provision in the ERA, delaying its effective date for "two years after the date of ratification." Unlike the purported ratification deadline, this effective date provision was contained in the Amendment itself (Section 3). As the 2020 OLC advisory opinion recognizes, because Article V provides that the amendment becomes part of the Constitution "when ratified," Congress could not have (validly) put the effective date in the resolution alone; "[i]ncluding the two-year delay in the amendment itself could be necessary to amend the effect that Article V would otherwise have on the amendment's effective date." OLC Op. at 22. The advisory opinion offers no explanation, however, as to why this precise reasoning does not apply to the purported ratification deadline. Just as Article V's clear language requires that any delay of the effective date must be spelled out in the amendment itself, that language likewise requires that any ratification deadline be spelled out in the amendment itself. Accordingly, because the ERA amendment language contains

no ratification deadline, the purported deadline in the resolution is invalid and unenforceable.

The 2020 OLC advisory opinion should also be rescinded because it reached the erroneous and inconsistent legal conclusion that Congress has no power to modify or eliminate the purported ratification deadline contained in the ERA resolution. However, if, despite the clear language of Article V, Congress did have the authority to impose a restriction on ratification in a joint resolution and outside of the text of the amendment itself, that authority would necessarily include the lesser authority to modify or eliminate that restriction by joint resolution. Further, the OLC's determination that, after submitting an amendment to the states, Congress becomes a mere bystander to the process is contrary to historical practice and Supreme Court precedent, both of which affirm Congress' continuing authority over the ratification process.

For these reasons, the Office of Legal Counsel should rescind the wrongly decided January 6, 2020 advisory opinion, and the Archivist should record and publish the ERA as the Twenty-Eighth Amendment.

Sincerely,

Courtney Hostetler, Senior Counsel
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On behalf of:

Free Speech For People
Generation Ratify
Engendered Collective
End Rape on Campus
Gen Z Girl Gang
DC Teens Action
The Greater Good Initiative
Not My Generation