

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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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.*

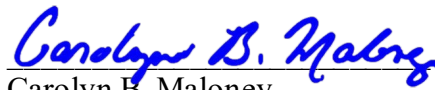
⁸ Office of Legal Counsel, Department of Justice, *Ways and Means Committee’s Request for the Former President’s Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)* (July 30, 2021) (online at www.justice.gov/olc/file/1419111/download).

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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