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Biden Administration Revises Federal Government Position on Validity of the Equal Rights Amendment

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Today the Department of Justice (DOJ) Office of Legal Counsel (OLC) released a new [opinion](#) on the ratification of the Equal Rights Amendment (ERA). This opinion revises a 2020 OLC [opinion](#) issued under the Trump administration that declared the ERA a dead letter.

When finally ratified, the ERA would provide a powerful Constitutional guarantee of sex equality. The ERA is straightforward, even simple, in its language: “*Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.*” Thirty-eight states have ratified the ERA, satisfying constitutional requirements for amendments. However, the validity of the last three state ratifications occurred after a congressionally imposed time limit, and therefore the ratification process is currently being debated in Congress and the courts. A joint resolution lifting the deadline was passed by the House of Representatives and has been introduced in the Senate. Meanwhile, several lawsuits have been filed by advocates supporting the ERA, arguing that the ERA is now a valid part of the Constitution notwithstanding the deadline.

This explainer provides a brief background, and describes the OLC opinion and its significance.

- The previous OLC opinion states that the congressionally-imposed deadline was binding and, upon its expiration, Congress did not have the power to remove or extend it. Therefore, the OLC concluded that the Archivist did not have the authority to certify Virginia’s ratification of the ERA in 2020.
- OLC’s new opinion does not withdraw the 2020 opinion, rather it states that part of that opinion was misplaced and that in the current OLC’s view the law does not provide “clear guidance” on the question of Congress’s power to lift the deadline. As such, it is now the position of the OLC that Congress may consider and pass the deadline lifting joint resolution.
- In so doing, the Biden administration has now cleared a path for Congress to consider and pass a joint resolution that would lift the deadline on final ratification of the ERA. The current deadline, now expired, was imposed by an earlier Congress. In our view, the OLC’s new position correctly reflects a reading of the Constitution that anticipates no role for the executive branch in the constitutional amendment process – rather, Article V of the Constitution leaves it to Congress and the people more generally to consider and ratify new amendments.

ERA PROJECT

- The new opinion does not instruct the Archivist to publish the ERA and suggests that the issue is properly before the federal courts and Congress.
- On October 21, 2021 the ERA Project provided an in-depth legal analysis to Chairwoman Carolyn Maloney’s office, at her request, urging that the DOJ withdraw the Trump Administration’s OLC opinion. We argued that it “embraces an erroneous interpretation of legal precedent” and “conflicts with ... the authority and responsibility of the Congress to resolve disputes about proposed amendments to the Constitution.” Signatories of our [letter](#) include the country’s most eminent constitutional law scholars.
- The position we took in our analysis is reflected in the OLC’s new opinion – that the status of the ERA (based on disputes over the legality of the time limits, Congress’s power to resolve the time limit issues, and the validity of states that have voted to revoke their previous ratifications of the ERA) should be left to Congress and the courts, not the executive branch.
- Our clear and careful legal analysis has been used by members of Congress to gain the attention of President Biden, Vice President Harris, Attorney General Garland, and Assistant Attorney General Schroeder, who heads the OLC. Our analysis continues to provide the legal authority for lawmakers in support of the ERA. Most recently, our analysis was featured in a [letter](#) submitted this week by Senators Richard Blumenthal, Amy Klobuchar, and Catherine Cortez Masto, and Representatives Carolyn Maloney and Jackie Speier to the OLC, urging that they withdraw their 2020 opinion.
- This new OLC ERA opinion is a significant victory for the advocacy strategy pursued by the ERA Project and our partners.

Founded in 2021, the [ERA Project](#) at Columbia Law School’s Center for Gender and Sexuality Law is a law and policy think tank that develops academically rigorous research, policy papers, expert guidance, and strategic leadership on the role of the Equal Rights Amendment (ERA) in advancing the larger cause of gender-based justice. The ERA Project does not engage in lobbying, but instead develops academic, legal and policy expertise to support efforts to expand protections for gender-based equality.

For more from the ERA Project, read our [policy briefs and legal explainers](#), [media mentions](#), [amicus brief submitted to Pennsylvania Supreme Court in Allegheny Reproductive Health Center v. Pennsylvania DHS](#), and [much more](#).