

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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March 22, 2022

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408

Dear Mr. Ferriero:

Today marks the 50th anniversary of congressional passage of the Equal Rights Amendment (ERA). On the anniversary of a historic step towards equality in our country, I am writing to share new legal analyses from leading constitutional experts Laurence Tribe and Senator Russ Feingold, which confirm the ERA is “currently a valid part of the United States Constitution,” and state that you, as Archivist of the United States, “can and should certify and publish the ERA as the 28th Amendment to the Constitution without delay.”¹

On March 22, 1972, following an overwhelming vote for passage in the House, the Senate nearly unanimously voted to send the ERA to states for ratification.² Over the intervening years, 38 states voted to ratify the ERA and enshrine gender equality in our constitution. In January 2022, exactly two years after the final state voted for ratification, all legal thresholds for constitutional amendment were met and you were required by statute to certify and publish the ERA as the 28th Amendment to the U.S. Constitution.³

The National Archives has previously taken the position that you are prevented from carrying out your statutory duty to certify and publish the ERA by a legal opinion issued in 2020

¹ Letter from Professor Laurence Tribe to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 22, 2022) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/ERA%2050th%20Anniversary%20%28Prof.%20Tribe%20Letter%29.pdf>); Letter from the Honorable Russ Feingold to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 21, 2022) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/ERA%2050th%20Anniversary%20%28Russ%20Feingold%20Letter%29.pdf>).

² United States Senate, *The Senate Passes the Equal Rights Amendment* (Mar. 22, 1972) (online at https://www.senate.gov/artandhistory/history/minute/Senate_passes_ERA.htm).

³ 1 U.S.C. § 106b.

by the Trump Administration's Office of Legal Counsel (OLC).⁴ Others have similarly held up the Trump OLC opinion as a legal barrier to completing your statutory duty.⁵

The Trump OLC opinion was a highly politicized, legally defective attempt to obstruct the ERA's path towards ratification.⁶ The Committee previously received an analysis from preeminent constitutional and legal scholars affiliated with Columbia Law School's ERA Project, including Erwin Chemerinsky and Martha Minow, concluding that the Trump Administration's OLC opinion was based on a faulty legal analysis and should be withdrawn. The analysis found that the OLC opinion "sought to advance a policy preference against the ERA," and was "lacking a thoroughly reasoned understanding of precedent and Congressional power under the Constitution."⁷

On January 27, 2022, the OLC issued a new opinion acknowledging flaws in the Trump-era memo and clarifying that Congress—not the executive branch—is in control of amending the Constitution.⁸

The Committee on Oversight and Reform has now received additional legal analyses from preeminent constitutional experts Laurence Tribe and Senator Russ Feingold on the effect of this new OLC opinion on your statutory authority. In his analysis of the OLC opinion's impact on the ERA, Professor Tribe, the Carl M. Loeb University Professor Emeritus of Constitutional Law at Harvard Law School, concluded:

Based on the OLC's own updated opinion and the substantive misunderstandings central to the 2020 Opinion, the Archivist should not see the 2020 Opinion as a barrier to publishing the ERA as the Twenty-Eighth Amendment. If he is to decline to do so, he must provide a different justification altogether. In my view, none is available.⁹

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) ("NARA defers to the Department of Justice [DOJ] on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order.").

⁵ See Letter from Senators Rob Portman, Ron Johnson, and Mitt Romney, to the Honorable David S. Ferriero, Archivist of the United States (Feb. 8, 2022) (online at www.hsgac.senate.gov/imo/media/doc/2022-02-08%20Letter%20to%20Archivist%20re%20ERA.pdf).

⁶ Letter from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to the Honorable David S. Ferriero, Archivist of the United States (Oct. 21, 2021) (online at <https://oversight.house.gov/news/press-releases/ahead-of-hearing-on-equal-rights-amendment-chairwoman-maloney-urges-archivist>).

⁷ Letter from Columbia Law School ERA Project to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Jan. 8, 2022) (online at <https://gender-sexuality.law.columbia.edu/content/era-project-olc-letter>).

⁸ U.S. Department of Justice, Office of Legal Counsel, *Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment* (Jan. 26, 2022) (online at <https://www.justice.gov/olc/file/1466036/download>).

⁹ Letter from Professor Laurence Tribe to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 22, 2022) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/ERA%2050th%20Anniversary%20%28Prof.%20Tribe%20Letter%29.pdf>).

Former Senator Feingold, who previously served as Chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, and who is the current President of the American Constitution Society, stated: "The Archivist's very limited role in the amendment process, defined by federal statute, is widely understood to be 'ministerial' in nature and the text of Article V ascribes no role to the executive branch at all." Mr. Feingold concluded:

Congress, having passed the ERA by a two-thirds vote in both chambers and sent the proposed amendment to the states for ratification, has fulfilled its constitutional role. The Archivist can publish without further action from the executive branch or Congress.¹⁰

These analyses make clear that the ERA has satisfied all constitutional requirements for ratification and that no further action from Congress or the executive branch is needed for you to certify and publish the ERA as the 28th Amendment to the U.S. Constitution.

Professor Tribe wrote to the Committee:

My conclusion as a constitutional scholar is that the ERA is currently a valid part of the United States Constitution, that Congress should act concurrently to recognize it as such, and that even if Congress takes no such action the Archivist should publish it as the Twenty-Eighth Amendment.¹¹

Senator Feingold agreed, writing:

It is my opinion that the ERA has met all constitutional requirements and the Archivist can and should certify and publish the ERA as the 28th Amendment to the Constitution without delay.¹²

Women and people of all marginalized genders across the United States continue to experience discrimination on the basis of sex. The only way to ensure true and equal protection under the law is to cement the ERA into the U.S. Constitution. As Chairwoman of the Committee with jurisdiction over the National Archives, and as a woman whose rights under the law are still not fully reflected in our nation's founding document, I urge you to carry out your ministerial duty under the law without delay.

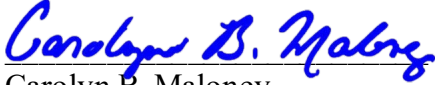
¹⁰ Letter from the Honorable Russ Feingold to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 21, 2022) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/ERA%2050th%20Anniversary%20%28Russ%20Feingold%20Letter%29.pdf>).

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The Honorable David S. Ferriero
Page 4

Sincerely,


Carolyn B. Maloney
Chairwoman

cc: The Honorable James Comer, Ranking Member