



**DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
950 PENNSYLVANIA AVE. NW,
WASHINGTON, DC 20530-0001**

January 27, 2020

Chandler Stern
General Counsel
Archivist of the United States

**RE: VALIDITY OF RATIFICATION OF THE PROPOSED EQUAL RIGHTS
AMENDMENT**

Mr. Stern,

This letter is in response to your letter of January 18th, 2020, in which you requested guidance from the Office of Legal Counsel of the Department of Justice as to the validity of the ratification of the proposed Equal Rights Amendment to the United States Constitution. As discussed below, it is the opinion of the OLC that the Amendment has not been properly ratified and should therefore not be certified.

I. Relevant Facts

On October 12, 1971, the United States House of Representatives approved the proposed Equal Rights Amendment (hereinafter “the ERA” or “the Amendment”) by the requisite supermajority; on March 22, 1972, the United States Senate did the same. In addition to the text of the Amendment, contained within the resolution to approve the Amendment was a provision reading:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That [sic] the following article is proposed as an amendment to the Constitution of the United States, which 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 state of its submission by the Congress.

Later that day, the Amendment was placed before the state legislatures with to be ratified by three-fourths (38) of the state legislatures. Under the language of the congressionally-approved resolution, the ratification of the states would have needed to be completed within seven years of that date.

By the time the seven-year deadline expired, only 35 states had ratified the Amendment. Furthermore, in the interim, four states had passed resolutions purporting to rescind their ratifications. In either case, an insufficient number of states had ratified the Amendment for ratification.

In October 1978, Congress voted to extend the deadline for ratification from March 22, 1979 until June 30, 1982. The validity of this course of action was hotly contested and resulted in a district court case, *Idaho v. Freeman*, declaring that Congress lacked the power to extend the ratification deadline. That case was ultimately stayed by the Supreme Court and declared moot after the extended deadline had passed, nullifying the legal effect of the district court's decision.

The states discussed above have since been swept into the dustbin of history. Their successor states have assumed their ratifications, leaving Dixie the last necessary state to ratify. This past year, the state of Dixie passed a resolution purporting to ratify the ERA.

II. Legal Analysis

It is the opinion of the Department of Justice that the Equal Rights Amendment has not been properly ratified.

The determinative issue is whether Congress can constitutionally impose a deadline on ratification by the states. Case law is clear that it can. In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Supreme Court stated that it “entertain[ed] no doubt” that Congress can “fix a definite period for the ratification” of an amendment. Likewise, in *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court held that Congress has the authority to determine whether, by lapse of time, a proposed constitutional amendment could lose its vitality. Though minor differences between *Coleman* and the instant case exist, the underlying principle remains the same. For example, in *Coleman* the question presented concerned whether an amendment submitted to

the states by the Congress without any specified deadline remained vital many years later; the Court held that the question was up to Congress to determine. Here, Congress has made that determination--it simply has done so in advance.

Given that Congress has the authority to impose a deadline for ratification, it is clear that the ERA has not been properly ratified. The original deadline, and even the contested “extended” deadline, for ratification has long passed--not by days or years, but by many decades. Legal questions such as whether Congress has authority to extend the deadline for ratification, or whether states can “rescind” ratification, are extraneous and have no impact on the finding that the relevant time period has lapsed and that Dixie’s putative ratification is of no effect.

In sum, if the American people wish to enshrine the text of the Equal Rights Amendment into our Constitution, the amendment process must begin anew.

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