

GARY C. PETERS, MICHIGAN, CHAIRMAN
THOMAS R. CARPER, DELAWARE
MAGGIE HASSAN, NEW HAMPSHIRE
KYRSTEN SINEMA, ARIZONA
JACKY ROSEN, NEVADA
ALEX PADILLA, CALIFORNIA
JON OSSOFF, GEORGIA
ROB PORTMAN, OHIO
RON JOHNSON, WISCONSIN
RAND PAUL, KENTUCKY
JAMES LANKFORD, OKLAHOMA
MITT ROMNEY, UTAH
RICK SCOTT, FLORIDA
JOSH HAWLEY, MISSOURI

DAVID M. WEINBERG, STAFF DIRECTOR
PAMELA THIESSEN, MINORITY STAFF DIRECTOR
LAURA W. KILBRIDE, CHIEF CLERK

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

February 8, 2022

The Honorable David Ferriero
Archivist of the United States
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

Dear Mr. Ferriero:

We write to seek your commitment that you will not certify the Equal Rights Amendment (ERA) as an amendment to the U.S. Constitution.

During a recent virtual press conference sponsored by the ERA Coalition on January 27, 2022, leaders of several advocacy groups, as well as two members of Congress, voiced calls for you to certify the ERA before your previously announced retirement in April 2022. Further, they suggested that you do so based on your personal support for the ERA. Congresswoman Carolyn Maloney, Chair of the House Committee on Oversight and Reform, which has oversight responsibility over the National Archives and Records Administration, said, “[Archivist Ferriero] told us how much he believed in the ERA, that he wanted to be the Archivist that would make it happen, to deliver it and do his ceremonial job and ratify it. So that's exactly what he should do. It is ridiculous he's holding this up.” Other members of Congress and activists echoed this call.

In an opinion dated January 6, 2020, however, the Department of Justice (DOJ) Office of Legal Counsel (OLC) advised you that the ERA, as submitted to state legislatures on March 22, 1972, had expired; the ERA Resolution subsequently was no longer pending before the States; and “the ERA’s adoption could not be certified under 1 U.S.C. § 106b” on the basis of any actions by state legislatures occurring after March 22, 1979. On January 8, 2020, the National Archives and Records Administration posted a press release stating, “NARA defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order.”

On January 26, 2022, OLC issued a second opinion dealing with the ERA, which *did not* withdraw the 2020 memorandum, but instead, observed that Congress is entitled to take a different view of these questions. The new OLC memo also noted that “the federal courts may soon determine or shed light upon several unsettled matters.” Thus, it seems that OLC, like NARA, is properly awaiting resolution of disputed ratification issues by the federal courts. You, too, have repeatedly shown

your respect for the authority of the courts on this matter; in early 2020, your office promised to give states opposing the ERA 45 days' notice before any certification, giving them time to seek an injunction in federal court.

The office of the Archivist of the United States, although filled by presidential appointment with the advice and consent of the Senate under 44 U.S. C. § 2103, has always been regarded as a nonpolitical office—indeed, the statute explicitly requires that “the Archivist shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications.” Your handling of the matter of the Equal Rights Amendment from 2020 to date has conformed to this expectation by making clear that you would respect the formal DOJ opinions on the matter.

In light of the calls for you to disregard your duty and certify the ERA, we write to ask for your commitment that you, and the acting Archivist who will take over in April, will not certify or publish the ERA, which failed to achieve ratification by the states and is no longer pending before them.

Sincerely,



Rob Portman
Ranking Member
Committee on Homeland Security
and Governmental Affairs



Senator Ron Johnson



Senator Mitt Romney