COMMONWEALTH of VIRGINIA

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The Honorable Richard H. Black
Member, Senate of Virginia
Post Office Box 3026
Leesburg, Virginia 20177

Dear Senator Black:

Issue Presented

You have requested that I "render a formal opinion on the following question: Would ratification of the ERA [Equal Rights Amendment] by the Virginia General Assembly have any legal effect?"

Background

Article V of the U.S. Constitution governs the process by which the Constitution can be amended. It provides, in relevant part:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . .[1]

The Equal Rights Amendment ("ERA") was first introduced in Congress in 1923,[2] but it was not until March 22, 1972 that two-thirds of Congress agreed to the proposal and submitted it to the States for

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[1] U.S. CONST. art. V.

[2] *See* S.J. Res. 21, 68th Cong., 65 CONG. REC. 150 (1923) (known at that time as the "Lucretia Mott Amendment").

their consideration.[3] Although the text had changed over the years,[4] the version submitted to the States read as follows:

> **Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> **Section 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> **Section 3.** This amendment shall take effect two years after the date of ratification.[5]

The proposing resolution to the amendment prescribed a seven-year period for ratification: "[T]he 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 date of its submission by the Congress."[6] By placing the seven-year limit in the proposing resolution rather than in the text of the amendment itself, Congress followed its practice for the Twenty-third through Twenty-sixth Amendments, all of which had been ratified within seven years.[7]

Between 1972 and March 22, 1979, thirty-five States ratified the ERA—three States short of the requisite three-fourths needed for adoption.[8] In 1978, following extensive debate and committee testimony, Congress extended the ratification deadline by approximately three years and three months.[9] Its legal justification for doing so relied in part on the location of the time limitation in the text of the proposing resolution, rather than the text of the amendment itself.[10] On June 30, 1982, the extended ratification period elapsed, without any additional State having ratified the amendment. On March 22, 2017, Nevada became the 36th State to ratify the ERA, the only other State to do so since 1982.[11]

The fourteen States that have never ratified the ERA are Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. Five other States have purported to rescind their votes ratifying the ERA: Nebraska (1973),

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[3] *See* H.R.J. Res. 208, 92d Cong., 86 Stat. 1523-1524 (1972). For a history of the ERA, see THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 2-11 (2014).

[4] NEALE, *supra* note 3, at 2.

[5] H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

[6] *Id.*

[7] NEALE, *supra* note 3, at 8-9. Previously, for the Eighteenth, Twentieth, Twenty-first, and Twenty-second Amendments, Congress had included time limitations in the text of the amendments themselves, but then changed its practice because including the limits in the text "cluttered up" the Constitution. *Id.* at 8.

[8] *Id.* at 9.

[9] *See* H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978) ("[N]otwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution 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 not later than June 30, 1982.").

[10] *See* 124 CONG. REC. 29,134 (1978) (incorporating the text of House Report No. 95-1405—Proposed Equal Rights Amendment Extension); 124 CONG. REC. 34,312 (1978) (statement of Sen. Harrison A. Williams Jr.).

[11] *See* S.J.R. 2, 79th Sess. (Nev. 2017).

Tennessee (1974), Idaho (1977), Kentucky (1978), and South Dakota (1979).[12] Although the Virginia General Assembly has never ratified the Equal Rights Amendment, the Senate of Virginia has passed a ratifying resolution at least five times, most recently in 2016.[13] Similar measures have been introduced in the House of Delegates,[14] but have not been considered.[15]

Applicable Law and Discussion

You ask whether ratification of the ERA by the General Assembly would have "any legal effect." In responding to your inquiry, I will assume that you do not question the General Assembly's power to vote on or pass joint resolutions expressing its sentiment on a variety of issues, including about whether a proposed amendment to the U.S. Constitution should be ratified.[16] Historically, the General Assembly has passed ratifying resolutions even after an amendment had become part of the Constitution—having already been ratified by the requisite number of States[17]—and after the ratification period prescribed for a proposed amendment had lapsed.[18] To the extent you question whether those resolutions have legal effect as official expressions of the will of the General Assembly, I cannot agree.

Rather, I take your question to be whether the General Assembly's passage of a resolution

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[12] NEALE, *supra* note 3, at 9 n.47.

[13] *See* S.J. Res. 1, 2016 Reg. Sess. (Va. 2016); S.J. Res. 216, 2015 Reg. Sess. (Va. 2015); S.J. Res. 78, 2014 Reg. Sess. (Va. 2014); S.J. Res. 130, 2012 Reg. Sess. (Va. 2012); S.J. Res. 357, 2011 Reg. Sess. (Va. 2011). In 2017 and 2018, the Senate failed to pass legislation. *See* S.J. Res. 4, 2018 Reg. Sess. (Va. 2018); S.J. Res. 221, 2017 Reg. Sess. (Va. 2017).

[14] *See* H.D.J. Res. 2, 2018 Reg. Sess. (Va. 2018); H.D.J. Res. 4, 2018 Reg. Sess. (Va. 2018); H.D.J. Res. 129, 2018 Reg. Sess. (Va. 2018); H.D.J. Res. 136, 2016 Reg. Sess. (Va. 2016); H.D.J. Res. 495, 2015 Reg. Sess. (Va. 2015); H.D.J. Res. 12, 2014 Reg. Sess. (Va. 2014); H.D.J. Res. 667, 2013 Reg. Sess. (Va. 2013); H.D.J. Res. 115, 2012 Reg. Sess. (Va. 2012); H.D.J. Res. 640, 2011 Reg. Sess. (Va. 2011).

[15] *See* Patricia Sullivan, *Virginia's hopes of ERA ratification go down in flames this year*, WASHINGTON POST, Feb. 9, 2018, https://www.washingtonpost.com/local/virginia-politics/virginias-hopes-of-era-ratification-go-down-in-flames-this-year/2018/02/09/7acfbf80-0dab-11e8-8890-372e2047c935_story.html?utm_term=.496774d9460c; Roberta W. Francis, NAT'L COUNCIL OF WOMEN'S ORGANIZATIONS, *The Equal Rights Amendment: Frequently Asked Questions* (May 2017) at 3 (indicating that "[i]n five of the six years between 2011 and 2016, the Virginia Senate passed a bill ratifying the Equal Rights Amendment, but the House of Delegates did not allow a companion bill to be released from committee"), http://www.equalrightsamendment.org/misc/faq.pdf; Markus Schmidt, *House panel refuses to ratify 1972 ERA; Va. remains 1 of 15 states that never accepted proposal*, RICHMOND TIMES-DISPATCH, Feb. 28, 2014, at A-09 ("Del. Mark L. Cole, R-Spotsylvania, chairman of the House Privileges and Elections Committee, . . . did not allow a similar House resolution . . . to be heard before his committee.").

[16] Separation-of-powers principles in the Constitution of Virginia prevent me from opining on the General Assembly's use of discretion or observance of its own rules in whether to exercise its power: "such a matter must be left to the judgment of the General Assembly alone." *See* 1977-1978 Op. Va. Att'y Gen. 31, 32.

[17] *See* H.D.J. Res. 44, 1952 Va. Acts ch. 173, at 183-84 (making Virginia the forty-first State to ratify the Nineteenth Amendment, thirty-two years after having rejected it and the Amendment having become part of the Constitution); S.J. Res. 32, 1971 Va. Acts, at 559-60 (making Virginia the fortieth State to ratify the Twenty-sixth Amendment).

[18] *See* S.J. Res. 140, 1977 Va. Acts, at 1609-10 (ratifying the Twenty-fourth Amendment despite the expiration of the seven-year limitation on consideration stipulated in the proposing resolution to the Amendment, which was also restated in the General Assembly's ratifying resolution). The Amendment had been submitted to the States in 1962 and ratified in 1964, and the ratification period had lapsed in 1969—eight years before the General Assembly passed a ratifying resolution. *See id.*

ratifying the ERA at this point could ever be treated as legally effective for purposes of determining whether the ERA has been ratified by the requisite number of States, given that the ERA's original ratification deadline lapsed in 1979 and an extended deadline lapsed in 1982. In light of Congress's significant control over the amendment process, I cannot conclude that it lacks the power to extend the period in which an amendment can be ratified and recognize a State's intervening ratifying resolution as legally effective for purposes of determining whether the ERA has been ratified.

Although the precise issue you raise has not been conclusively resolved, the historical evidence and case law demonstrate Congress's significant, even plenary, power over the amending process. In 1978, when Congress was debating and ultimately approved extending the original ERA deadline, the House Judiciary Committee found that the power-to-extend question was a matter of "first impression."[19] But after reviewing the limited historical and legal precedent and taking extensive testimony from numerous constitutional experts, the House Judiciary Committee concluded that "the period for an amendment's ratification lies exclusively within congressional control."[20] Both the full House and Senate debated Congress's power to extend the ERA's ratification deadline, but effectively resolved that issue when they agreed to a joint resolution setting a new deadline of June 30, 1982.[21]

As recognized by the constitutional scholars who testified before Congress and in the report of the House Judiciary Committee recommending extension, the limited Supreme Court precedent in this area suggests that Congress has authority to extend a ratification deadline. Two cases chiefly support that conclusion. In *Dillon v. Gloss*,[22] the Court turned away a challenge to the Eighteenth Amendment based on the fact that the text of the proposed amendment prescribed a time period of seven years for ratification by the States, the first amendment to contain such a limitation.[23] In ruling that Congress could set a definite period for ratification, the Court in *Dillon* emphasized two points: that the time period for ratification must be "within reasonable limits" so that ratification expresses the "sufficiently contemporaneous . . . will of the people," and that it was within Congress's authority to determine what period is reasonable.[24] It underscored that the "general terms" of Article V "leav[e] Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require."[25] Thus, in the Court's opinion, whether to fix a term of years for ratification was a matter for Congress, "as an incident of its power to designate the mode of ratification."[26]

Two decades after *Dillon*, in *Coleman v. Miller*,[27] the Court extended *Dillon*'s analysis and concluded that the reasonableness of the ratification period at issue there was a matter for Congress alone to decide. In 1924, Congress had submitted an amendment to the States, without a prescribed time limit, that prohibited the use of child labor. The Kansas legislature rejected the amendment in 1925 but when it reconsidered and passed the amendment in 1937, opponents sued, arguing that the time period had lapsed.

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[19] 124 CONG. REC. 29,133 (1978) (incorporating House Report No. 95-1405—Proposed Equal Rights Amendment Extension).

[20] *See* 124 CONG. REC. 29,134 (1978) (incorporating House Report No. 95-1405).

[21] *See* H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

[22] 256 U.S. 368 (1921).

[23] *Id.* at 371-72.

[24] *Id.* at 375-76.

[25] *Id.* at 376.

[26] *Id.*

[27] 307 U.S. 433 (1939).

The Court rejected the contention that "in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had."[28] Rather, "Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications."[29] The Court reasoned that the task of determining reasonableness would require an "appraisal of a great variety of relevant conditions, political, social, and economic"—conditions that "can hardly be said to be within the appropriate range of evidence receivable in a court of justice" but that are "appropriate for the consideration of the political departments of the Government."[30] Four justices signed a concurring opinion to express, in strong language, the even broader view that Congress has "sole and complete control over the amending process, subject to no judicial review."[31]

These cases figured prominently in the 1977 and 1978 congressional hearings on the proposed extension to the ERA deadline.[32] A number of scholars testified before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights on the various issues raised by the proposed extension, including the extent of congressional control over the amendment process in general. With a few exceptions, there was general consensus among the scholars that extending the ratification period was within Congress's power.[33] A representative of the Office of Legal Counsel agreed, reasoning that "the power of extension is reserved to the Congress, and reconsideration of the extension period is within the power of the Congress."[34] The scholars gave several reasons for that conclusion, including the location of the time limit in the proposing resolution rather than in the text of the amendment.[35] Later testimony by these and other scholars before the Senate Judiciary Committee's Subcommittee on the Constitution

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[28] *Id.* at 452.

[29] *Id.* at 456.

[30] *Id.* at 453-54.

[31] *Id.* at 459 (Black, J., concurring, joined by Roberts, Frankfurter, and Douglas, JJ.).

[32] *See Equal Rights Amendment Extension: Hearings on H.R.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. (1978) [hereinafter *House ERA Extension Hearings*].

[33] *Compare id.* at 115 (statement of William Van Alstyne, Professor, College of William & Mary, Marshall-Wythe School of Law) ("In brief, extension of the period by Congress is solely for Congress to determine . . . ."), *and id.* at 125-26 (testimony of Ruth Bader Ginsburg, then-Professor, Columbia Law School) ("Congress, as director under our constitutional scheme of the amendment process, is not locked into a 7-year period; 14, 16, 18 years would constitute a rational constitutional time period for ratification of the proposed equal rights amendment. The issue, then, is simply whether Congress may accomplish in two steps what it might have accomplished in one."), *with id.* at 112 (testimony of Erwin N. Griswold, former Solicitor General of the United States) ("I do not think that anyone can say with confidence that Congress has the power to make the change. It does seem to me that there are strong reasons why Congress should not undertake to exercise such a power.").

[34] *Id.* at 28 (testimony of John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Department of Justice).

[35] *See, e.g.*, *id.* at 6 (testimony of John M. Harmon); *id.* at 63 (statement of Thomas I. Emerson, Professor, Yale Law School); *id.* at 119 (statement of William Van Alstyne); *see also* 124 CONG. REC. 29,135 (1978) (incorporating House Report No. 95-1405, which acknowledged that, in the case of a proposed amendment on Congressional representation for the District of Columbia, a deadline was included in the body of the amendment because of "a recognition on the part of the committee that unless the language appeared in the body of the proposed amendment it may not be controlling on subsequent Congresses or on the State legislatures").

similarly supported Congress's power to extend the deadline.[36] Since then, no Supreme Court case has questioned Congress's authority over the amending process, including whether it can extend a ratification period and whether the lapse of the ratification period would make a difference.[37]

In light of the foregoing, I cannot conclude that Congress lacked the authority to extend the ratification deadline from 1979 to 1982, or—critical to your opinion request—that it would lack the authority to extend the deadline further if it chose to do so. Indeed, resolutions currently pending in both houses of Congress seek to accomplish just that; the proposed resolutions would remove the deadline for ratification of the ERA and treat States' ratifications as valid "whenever" they occur.[38]

Assuming that the ERA ratification deadline were again extended, the ratification of the Amendment may still be subject to a congressional judgment regarding whether it met the requirement of "contemporaneous consensus."[39] While some constitutional scholars who testified before the House of Representatives prior to the first extension of the ERA's ratification deadline doubted whether even fourteen years would satisfy that requirement,[40] the intervening ratification of the Twenty-seventh Amendment, governing congressional pay raises, serves as a notable counterexample. First proposed in 1789, that amendment was not ratified until 1992.[41]

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[36] *See, e.g.*, *Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 95th Cong. (1978), at 114 (testimony of Thomas I. Emerson, Professor, Yale Law School) ("The first issue is [the] power of Congress to extend the time for ratification of the equal rights amendment. I think there is very little doubt in the minds of most constitutional lawyers that Congress has such powers.").

[37] In 1981, the federal district court in Idaho ruled that whether Congress acted beyond its authority in extending the deadline was a justiciable question, and it proceeded to find that it had acted beyond its authority, but the Supreme Court vacated that decision as moot when the ERA's extended deadline lapsed. *See* Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), *vacated*, 459 U.S. 809 (1982).

[38] *See* S.J. Res. 5, 115th Cong. (2017) ("That notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by the legislatures of three-fourths of the several States."); H.R.J. Res. 53, 115th Cong. (2017) (same). I decline to speculate on the likelihood that these resolutions will pass or that Congress would otherwise act to recognize a State's ratification of the ERA as effective.

[39] *See* Dillon v. Gloss, 256 U.S. 368, 375 (1921) ("[R]atification scattered through a long series of years would not do."); *see also* JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 634 (4th ed. 1887) ("It is, therefore, possible, though hardly probable, that an amendment, once proposed, is always open to adoption by the non-acting or non-ratifying States. The better opinion would seem to be that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.").

[40] *See, e.g.*, *House ERA Extension Hearings*, *supra* note 32, at 153 (testimony of Erwin N. Griswold, former Solicitor General of the United States); *see also Dillon*, 256 U.S. at 375 (pronouncing as "quite untenable" the idea that amendments first proposed in 1789, 1810, and 1861 were still eligible for ratification).

[41] *See* Archivist of the U.S., U.S. Constitution, Amendment 27, 57 Fed. Reg. 21187, 21187-88 (May 19, 1992). "Although the Archivist was specifically authorized by the U.S. Code to publish the act of adoption and issue a certificate declaring the amendment to be adopted, many in Congress believed that, in light of the unusual circumstances surrounding the ratification, positive action by both houses was necessary to confirm the [amendment's] legitimacy." NEALE, *supra* note 3, at 18. Accordingly, both the Senate and House passed resolutions "declar[ing] the amendment to be duly ratified and part of the Constitution." *Id.* at 18-19 & 19 nn. 90-91

Conclusion

It is my opinion that the lapse of the ERA's original and extended ratification periods has not disempowered the General Assembly from passing a ratifying resolution. Given Congress's substantial power over the amending process, I cannot conclude that Congress would be powerless to extend or remove the ERA's ratification deadline and recognize as valid a State's intervening act of ratification. Indeed, legislation currently pending in Congress seeks to exercise that very power.

With kindest regards, I am,

Very truly yours,

Mark R. Herring

Mark R. Herring
Attorney General

(citing S. Con. Res. 120 and S. Res. 298, 138 CONG. REC. 11,869 (May 20, 1992); H. Con. Res. 320, 138 CONG. REC. 12,051 (May 20, 1992)).