

JMH:rmc

cc: Harmon
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Files
P.Wald, OLA

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: ERA: Power of the States to Rescind
Prior Ratification

Pat Wald told me, in connection with her testimony on the ERA extension, that Senator Hatch knows that you disagree with our opinion with respect to the power of the states to withdraw their prior ratification of the Amendment. You have some distinguished company on that point. Professor Charles Black has testified that if the ERA approval period is extended, then the states which ratified prior to the extension have the right to rescind their ratification. He cites no authority for his position.

There is no doubt the question is a close one and ultimately it will be for the Congress to decide, if the 38th state ever ratifies the ERA. We have concluded, based on the discussions at the Constitutional Convention and Madison's statements during the original ratification process, as well as the history surrounding the ratification of subsequent amendments, that the states have no power to withdraw a prior ratification. However, we are also of the opinion that a later Congress may take those attempted rescissions into account in determining whether the time period between approval by the first and the 38th states was such that there was a sufficiently contemporaneous vote of approval by three-fourths of the states to constitute valid ratification.

We discuss this question of rescission in the section beginning on page 28 of the attached opinion. While I am not certain that I can convince you, I would like you to see the line of authority and reasoning which convinced me.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Attachment

For Attachment - See Mr. Harmon's 11/1/77 testimony with 10/31/77 Memo addressed to Mr. Lipshutz