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January 24, 2019

The Honorable Cheryl C. Kagan
Maryland General Assembly
203 James Senate Office Bldg.
Annapolis, Maryland 21401

Dear Senator Kagan:

You asked for advice about the potential reach of an Article V Constitutional Convention of the States. You noted your “grave reservations that an Article V Convention may have unforeseen consequences” based on “the lack of formal convention rules, the potential for a runaway convention, and the possibility of unequal representation.” You asked for a legal assessment of a proposed Article V Convention. As discussed below, I cannot advise you with any legal certainty that your concerns are without merit. In fact, many legal scholars, including a former Maryland Attorney General, share your same concerns.

The federal constitution contains two routes by which constitutional amendments may be proposed: Congress may itself propose constitutional amendments by a two-thirds vote of both houses, or, if two-thirds of State legislatures ask for it, Congress must call a convention for the purpose of proposing amendments. U.S. Const. art. V. A survey of the research about an Article V Convention indicates that there is near universal agreement that Congress is required to call a convention if the necessary number of State legislatures ask for it. Moreover, “[m]ost scholars agree that applications proposing a specifically worded amendment would not meet the constitutional standard.”¹ At the same time, “[a] number of questions have been raised concerning the standard for a valid Article V Convention application.”²

Once an Article V Convention is called, which has never happened, numerous legal scholars have expressed reservations due to the number of unknowns about the process. Former Maryland Attorney General Stephen H. Sachs warned: “Amendment by convention has never been attempted and little is certain about the powers and prerogatives of such a convention. The basic problem is that there appears to be no

¹ Thomas H. Neale, Cong. Research Serv., RL44435, “The Article V Convention to Propose Constitutional Amendments: Current Developments” at 4 (2017).

² *Id.* at 4-5 (noting that there are questions about the permissible scope of state applications, the “shelf life” of an application, the ability to repeal or rescind an application, and the validity of self-cancellation provisions in the application).

effective way to limit the convention's scope once it is called.”³ In the 35 years since Attorney General Sachs wrote those words, the legal landscape about an Article V Convention is not any clearer and numerous commenters continue to urge states not to call for such because key questions about the process and scope are unresolved.

[T]hose recommending a convention should remain cautious because of the lack of precedent and the potential unknowns. Since the convention method has never been tested or used, it is impossible to say with certainty whether it would succeed or fail. The real takeaway is that no one knows or can know how a convention would play out until it finally happens--if ever. There are guideposts on what may or should happen, but until a convention is implemented, those guideposts will only serve as futile conjecture.⁴

In addition, legal scholar Walter Olson pointed to the following gaps in the language of Article V:

It says not a word expressly authorizing the states, Congress, or some combination of the two to confine the subject matter of a convention. It says not a word about whether Congress, in calculating whether the requisite 34 states have called for a convention, must (or must not) aggregate calls for a convention on, say, a balanced budget, with differently worded calls arising from related or perhaps even unrelated topics. It says not a word prescribing that the makeup of a convention, as many conservatives imagine, will be one-state-one-vote (as Alaska and Wyoming might hope) or whether states with larger populations should be given larger delegations (as California and New York would surely argue).⁵

³ Stephen H. Sachs, “Time To Retract: We Don’t Need a Constitutional Crisis,” *The Baltimore Sun*, Nov. 1, 1983 at A11 (calling for the legislature to rescind its petition for an Article V Convention to consider a balanced budget amendment). *See also*, Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 Ga. L. Rev. 1, 4 (1979) (finding unpersuasive the claim that a convention limited to a single narrow subject “won’t get out of hand”); Michael B. Rappaport, “Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them,” 96 Va. L. Rev. 1509, 1528-31 (2010) (“[a] runaway convention is not merely a theoretical possibility”); Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 Pac. L.J. 627, 635 (1979) (contending that “[h]owever democratic an Article V Convention might be in theory, such a convention would inevitably pose enormous risks of constitutional dislocation”).

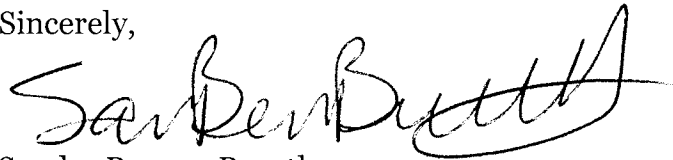
⁴ Vincent Pulignano, “A Known Unknown: The Call For An Article V Convention,” 67 Fla. L. Rev. Forum 151, 160 (2016).

⁵ Walter Olson, *The Wingnut Plot to Rewrite the Constitution*, Daily Beast (Jan. 12, 2016), <http://www.thedailybeast.com/articles/2016/01/12/the-wingnut-plot-to-rewrite-the-constitution.html>.

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In closing, as I stated at the outset, given the unchartered occurrence of an Article V Convention and the number of unanswered questions about the applicable process if one should ever be called by Congress, I cannot advise you with any legal certainty that your concerns are without merit.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra Benson Brantley". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Sandra Benson Brantley
Counsel to the General Assembly