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Maryland Should Protect the Constitution by Rescinding Past Calls for a Constitutional Convention

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Thank you for the opportunity to testify in support of SJR 2.

This is one of the worst times in our nation's history to call a constitutional convention. Opening the constitution to major changes would be folly at a time when the country is so deeply divided, when "fake news" and confusion are so prevalent, and when big corporations and other special interest groups have such a powerful influence over our political process. Maryland should not allow others to count it as supportive of taking such an ill-considered and dangerous step.

The Constitution is our country's founding governing document. It has served us well for over two centuries, and through many periods of great strain and discord. It is appropriate to consider amendments to the Constitution only with deep respect and deliberate care.

In our nation's history, when we have amended the Constitution, we have done so in only one way – that is, a supermajority of both houses of Congress has voted to propose a specific amendment to the states, and three-fourths of the states have ratified that specific amendment.

Although this process has served the country well, and protected the Constitution from wholesale changes, a number of interest groups and political figures are pressing hard to use an untested, much more dangerous method. That is for two-thirds of the states to petition Congress to call a new constitutional convention at which delegates would debate and propose amendments for the states to ratify. How this method would work in practice is not clear. How would delegates be chosen? What rules would govern their decision-making? Can their deliberations be restricted to certain topics? Who decides what is germane?

The truth is that no one knows for certain how these questions – or many other fundamental questions about the convention process – would be decided. It is impossible to predict, particularly given today's volatile, deeply divided, and strident political environment. There seems little question that a constitutional convention held today would be extremely contentious, highly politicized, and heavily influenced by special interests. There are no established ground rules.

A number of prominent jurists and legal scholars have warned that this sort of convention could open up the Constitution to radical and harmful changes. The late Justice Antonin Scalia said, "I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?" Former Chief Justice of the United States Warren Burger wrote in 1988:

> [T]here is no way to effectively limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the Convention to one amendment or one issue, but there is no way to assure that the Convention would obey. After a Convention is convened, it will be too late to stop the Convention if we don't like its agenda.

Similarly, one of the country's leading constitutional scholars, Laurence Tribe of Harvard, has said that calling a convention would be "putting the whole Constitution up for grabs." Another leading constitutional scholar, Erwin Chemerinsky – dean of the law school at the University of California, Irvine – wrote, "Because it never has happened, no one knows how the convention would operate. Would it be limited to considering specific proposals for change offered by the states or could it propose a whole new Constitution?" Matthew Spalding — the executive editor of the Heritage Foundation's guide to the Constitution — told lawmakers in Pennsylvania, "I do not believe that an Article V convention is the answer to our problems. The lack of precedent, extensive unknowns, and considerable risks of an Article V amendments convention should bring sober pause to advocates of constitutional reform contemplating this avenue."

Keep in mind that the only constitutional convention in U.S. history, in 1787, went far beyond its mandate. Charged with amending the Articles of Confederation to promote trade among the states, the convention instead wrote an entirely new governing document. A convention held today could set its own agenda, too.

Further, the 1787 convention ignored the ratification process under which it was established and created a new process, lowering the number of states needed to approve the new Constitution and removing Congress from the approval process. The states then ignored the pre-existing ratification procedures and adopted the Constitution under the new ratification procedures that the convention proposed.

Given these facts, it would be unwise to assume that ratification of the convention's proposals would necessarily require the approval of 38 states, as the Constitution currently specifies. For example, a convention might remove the states from the approval process entirely and propose a national referendum instead. Or it could follow the example of the 1787 convention and lower the required fraction of the states needed to approve its proposals from three-quarters to two-thirds.

Moreover, the Constitution provides for no authority above that of a constitutional convention, so it is not clear that the courts — or any other institution — could intervene.

Right now, advocates of a new constitutional convention are working in many states for a variety of resolutions calling on Congress to call such a convention. Many of these proponents of a convention want to radically alter the Constitution. One of the leading organizations involved in the convention push wants to terminate all federal taxes and to require super-majorities in the House and the Senate to put any new taxes in their place – among other drastic changes. The Governor of Texas, who is allied with this same group, has called for a convention to propose nine amendments, including one that would bar federal agencies from "creating federal law," undermining the federal government's ability to regulate the nation's food supply or potentially harmful drugs. The Governor also wants to "prohibit Congress from regulating activity that occurs wholly within one state," a change that would upend the authority Congress has used to ban racial discrimination in hotels and restaurants and regulate pollution generated in one state that can harm the residents of other states.

Senate Joint Resolution 2 is necessary because in its history Maryland passed resolutions calling for a constitutional convention, and has never rescinded these resolutions despite the dangers involved and even though many other states have rescinded previous calls for a convention.

The Constitution provides that Congress has the power to call a convention, so the authority to determine which resolutions "count" is up to Congress to decide. No one knows how they might decide to aggregate the existing state calls for a convention, or if they might choose to count a past Maryland resolution. At least one of the leading pro-convention organizations counts as "live" a resolution Maryland passed in the 1970s.

SJ2 would assure that a resolution Maryland adopted four decades ago, before nearly half of Marylanders were even born, does not add to the chances that the country's Constitution will be placed at risk in a highly contentious and unpredictable convention. I urge its passage, and further urge that you reject any new convention calls.

Thank you for your leadership on this issue.