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May 15, 2009

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

Re: House Bill 944 and Senate Bill 367, "Commission on the Establishment of a Maryland Women in Military Service Monument"

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 944 and Senate Bill 367, identical bills that propose to reestablish the Commission on the Establishment of a Maryland Women in Military Service Monument (hereinafter, the "Commission"). We write specially to highlight potential constitutional problems with the bills. Specifically, we are concerned that, given the new responsibilities of the reestablished Commission, having members of the General Assembly serve on the Commission could violate the separation of powers of Article 8 of the Maryland Declaration of Rights or cause a violation of the prohibition against plural office holding found in Article III, §11 of the State Constitution. It is our view, however, that by carefully limiting the Commission's exercise of its authority, these problems can be avoided.

The first Task Force on the Establishment of a Maryland Women Veterans Monument (hereinafter, "Task Force") was created by Chapter 556 of the Acts of 2005. That first iteration included among its members, two members of the state legislature: Senator Rona E. Kramer (who served as Co-Chair of the Task Force) and Delegate Joan Cadden. The principal charge to that first Task Force was to "*identify and recommend* the funding, design, construction, and placement of an appropriate monument dedicated to women from Maryland who served in the uniformed forces of the United States of

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America.” Ch. 556, Acts of 2005, §1(f) (emphasis added). The Task Force issued its report on December 31, 2005 and disbanded.¹

The second iteration was created by Chapter 281 of the Acts of 2006 and known as the Commission on the Establishment of a Maryland Women in Military Service Monument. Again, the Commission included two members of the General Assembly: Senator Katherine Klausmeier (who served as Chair) and Delegate Mary Ann Love. The principal charge to the Commission was identical: to “*identify and recommend* the funding, design, construction, and placement of an appropriate monument dedicated to women from Maryland who served in the uniformed forces of the United States of America.” Ch. 281, Acts of 2006, §1(f)(2) (emphasis added). The Commission issued its final report on March 3, 2008 and it too disbanded.²

The bills currently before you would reestablish the Commission and continue the work of the prior iterations. See Proposed MD. STATE GOV'T ANN. CODE, §9-8A-01(F)(1), (2) (referring to work of Task Force and prior Commission). Again, the bills propose that two members of the Commission be members of the General Assembly. See Proposed MD. STATE GOV'T ANN. CODE, §9-8A-01(B)(1), (2). The General Assembly went so far as to express its desire that the same persons who served on the prior Commission should be appointed to the new Commission. See HB 944, §2; SB 367, §2.³ In contrast to the prior iterations, however, this time the legislature has assigned greater powers to the Commission:

The Commission may enter into a written agreement or memorandum of understanding regarding the funding, design, construction, or placement of an appropriate monument with other government entities, including the federal government, a unit of State government, a county, or a municipality.

¹ Information on the Task Force, including its Final Report, may be reviewed at <http://www.msa.md.gov/msa/mdmanual/26excom/defunct/html/35womv.html> (last viewed May 12, 2009).

² Information on the original Commission, including its Interim Report, may be reviewed at <http://www.msa.md.gov/msa/mdmanual/26excom/defunct/html/35wommil.html> (last viewed May 12, 2009).

³ It is our view that these sections of the bills are an expression of the legislature's desire, but are not binding on your decisions of whom to appointment to the Commission.

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See Proposed MD. STATE GOV'T ANN. CODE, §9-8A-01(G). Thus, while the Task Force and prior Commission were purely advisory, the proposed new Commission has the power to enter into certain contracts on behalf of the State.

It is our concern that having legislative members of the Commission that is empowered to enter into binding executive branch contracts could implicate two separate but related state constitutional provisions: (1) the separation of powers of Article 8 of the Maryland Declaration of Rights; and (2) the prohibition against plural office holding by legislators found in Article III, §11 of the State Constitution.

Article 8 of the Maryland Declaration of Rights provides:

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

While the jurisprudence interpreting this provision has been described as "somewhat elastic" at the periphery, *see Schisler v. State*, 394 Md. 519, 558 (2006) (describing DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 19 (2006) (citing *Dept. of Natural Res. v. Linchester*, 274 Md. 211, 220 (1975))), this flexibility does not extend to the core functions of the respective branches of government. *Schisler*, 394 Md. at 558.

Article III, §11 of the Maryland Constitution provides that

No person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate.

MD. CONST., Art. III, §11.

The members of the Commission will not be paid for their services, merely reimbursed for their expenses. Thus, service on the Commission is not an "office of profit."⁴ To determine if service on the Commission constitutes an "office of ... trust,"

⁴ For precisely the same reasons, service by legislators on the Commission would not violate the prohibition on plural office holding found in Article 35 of the Maryland Declaration of Rights. That provision, which in pertinent part provides "[t]hat no person shall hold, at the

which will conflict with simultaneously being a legislator, courts employ a five factor test:

1. the position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional;
2. the incumbent performs an important public duty;
3. the position calls for the exercise of some portion of the sovereign power of the State;
4. the position has a definite term, for which a commission is issued, a bond required[,] and an oath required; [and]
5. the position is one of dignity and importance.

Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 439 (1967). Subsequent cases have minimized the importance of the fifth factor and emphasized that the third factor is the most important. See 64 *Opinions of the Attorney General* 255, 256 (Feb. 14, 1979) (discussing *Duncan v. Koustenis*, 260 Md. 98 (1970)). Moreover, even though the legislators who serve on the Commission will not be making decisions in their individual capacity, the Court of Appeals has also determined that an individual member of a board or commission can be an officeholder for purposes of Article 35. *Id.* (discussing *Howard County Comm'n v. Westphal*, 232 Md. 334 (1963)).

It is our concern that if the Commission enters into binding contracts on behalf of the State with either federal or local governments, it is performing a core executive branch function. We believe that it is not constitutionally permissible for legislators to be members of a Commission exercising such powers. Such an arrangement would violate the separation of powers because it is a core executive function that cannot be exercised by legislative branch officials either individually or as members of a commission.⁵

same time, more than one *office of profit*, created by the Constitution or Laws of this State." MD. CONST., Decl. of Rts., Art. 35 (emphasis added).

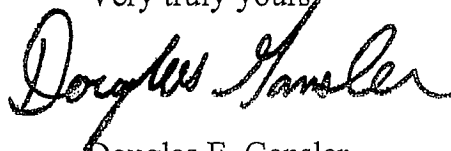
⁵ Of course, legislative branch officials may enter into contracts on behalf of the legislative branch while judicial officials enter contracts on behalf of the judiciary. The problem

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Moreover, because we believe that the power to enter into such contracts is an exercise of the sovereign power of the State, we believe that membership on the Commission will be found to be an "office of trust" that is incompatible with simultaneous service in the state legislature.

Therefore, we recommend that the powers of the Commission should be construed in a manner that avoids these potential constitutional pitfalls. The Commission should be instructed that it may not enter into binding contracts with federal or local governments. The Commission could still play an important role by advising and recommending the relevant state agencies, including perhaps the Department of Veterans Affairs and the Department of General Services, to enter into the relevant and appropriate contractual relationships. In this way, the constitutional incompatibility could be avoided.⁶

Very truly yours,

A handwritten signature in black ink, reading "Douglas F. Gansler". The signature is fluid and cursive, with the first name "Douglas" being more prominent and the last name "Gansler" following in a similar style.

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable Katherine Klausmeier
The Honorable Mary Ann Love
The Honorable John P. McDonough
Joseph C. Bryce
Karl Aro

here is that legislative officials might be part of a decision to enter contracts on behalf of the executive branch.

⁶ Alternatively, the President of the Senate and the Speaker of the House could simply decline to appoint the legislative members of the Commission. If the Commission had no legislative members, there would be nothing to prohibit it from exercising the full breadth of its statutory authority.