CONGRESSIONAL TESTIMONY

H.R. 51, "Washington, D.C. Admission Act"

Testimony before the
Committee on Oversight and Reform

United States House of Representatives

March 22, 2021

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Introduction

Good afternoon. My name is Zack Smith, and I appreciate the invitation to testify before the committee today.[1] The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

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I. The District of Columbia cannot be converted into our nation's 51st state without a constitutional amendment.

We are here today to answer one simple question: Does Congress have the power to transform our nation's seat of government, the District of Columbia, into our nation's 51st state, the "State of Washington, Douglass Commonwealth," by simple legislation? The answer is resoundingly no.

There are historical and practical reasons why converting the current District into a new state is a bad idea. More importantly, there are compelling reasons why doing so in this manner—via simple legislation—is unconstitutional.

While some of those who advocate for DC statehood in this manner characterize the objections I plan to discuss as "specious legal arguments,"[2] these objections are, in fact, based on the text and structure of the "supreme Law of the Land," our Constitution. They are not, as DC Mayor Muriel Bowser has said, "bad-faith arguments by people who really oppose statehood because they think it will mean two Democratic Senators."[3] That is nothing more and nothing less than an attempt to impugn the motives of anyone who opposes this legislation as being unconstitutional.

Obviously, politics has always played a role in the admission of new states into our union. New states have often been introduced and admitted in pairs, to balance different political considerations, and some of those who advocate for statehood today are motivated by the prospect of gaining two new solidly Democratic Senators and a Democratic Congressman. Some admitted as much in a recent *Washington Post Magazine* article.[4] That same article said that one of the main advocacy groups pushing

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[2] Susan E. Rice, *Washington, D.C., Deserves Statehood*, N.Y. TIMES (June 9, 2019), https://www.nytimes.com/2020/06/09/opinion/trump-military-washington-statehood.html.

[3] *H.R. 51, Washington, D.C. Admission Act: Hearing on H.R. 51 Before the H. Comm. On Oversight and Reform*, 116th Cong. (2019) (testimony of Muriel Bowser, Mayor of the District of Columbia), *available at* https://docs.house.gov/meetings/GO/GO00/20190919/109960/HHRG-116-GO00-Wstate-BowserM-20190919.pdf.

[4] Nora Caplan-Bricker, *Is D.C. Finally on the Brink of Statehood?*, WASH. POST. MAG. (Jan. 27, 2021), https://www.washingtonpost.com/magazine/2021/01/27/dc-statehood-activists/?arc404=true.

for DC statehood is being backed by progressive "national organizations . . . whose stalled policy agendas could advance with the help of senators from a new state."[5]

There have also been troubling allegations that race—or worse, racism[6]—has played a role in raising these historical, practical, and constitutional objections to the District of Columbia's becoming a state. But that is just not true. As a Justice Department Office of Legal Policy report issued during the Reagan Administration stated, "Statehood for the District of Columbia is not a racial issue. It is not a civil rights issue. It is a constitutional issue that goes to the very foundation of our federal union."[7]

The fact that District residents were not afforded a vote in Congress was controversial from the start, with objections being raised before the Constitution was even ratified, and those objections were vigorously renewed less than a year after the federal government officially took up residence in the District.

II. Former Washington, DC Mayor Walter E. Washington raised practical concerns about making the District a state, and former Delegate Walter Fauntroy raised constitutional concerns.

Even those who have been strong advocates for the District have raised practical and constitutional concerns related to the District's becoming a state. Former Mayor Walter E. Washington—the namesake of the District's Walter E. Washington Convention Center[8]—raised practical concerns about the District's becoming a state. When testifying before the House Committee on the Judiciary in 1975, Mayor Washington was asked directly by a member of that committee whether he would, "favor full statehood for the District of Columbia?" Mayor Washington's response was telling:

> Well, I think there are problems inherent in that, that I can see at this time . . . I think you've got the Federal presence here, let's deal with that. And, in order to get statehood you are going to either have to cut out an enclave, or in some way develop a configuration that is going to leave the Federal presence there. And you are going to have all kinds of

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[5] *Id.*; *see also* DC STATEHOOD SUPPORTERS, STATE OF WASHINGTON, D.C., https://statehood.dc.gov/page/dc-statehood-supporters (last visited March 18, 2021) (listing as supporters the ACLU, AFL-CIO, American Federation of Teachers, Greenpeace US, Human Rights Campaign, NORML, and Planned Parenthood Federation of America, among others).

[6] Cristina Marcos, *Democrat Accuses GOP of Opposing DC Statehood because of 'Race and Partisanship,'* THE HILL (Sept. 19, 2019), https://thehill.com/homenews/house/462248-democrat-accuses-gop-of-opposing-dc-statehood-because-of-race-and-partisanship?rl=1.

[7] OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA 50 (1987), *available at* https://www.ojp.gov/pdffiles1/Digitization/115093NCJRS.pdf [hereinafter *OLP Report on D.C. Statehood*].

[8] VENUE HISTORY, WALTER E. WASHINGTON CONVENTION CENTER, EVENTS DC, https://eventsdc.com/venue/walter-e-washington-convention-center/venue-history (last visited March 18, 2021) (noting that in 2007 the city government renamed the convention center in honor of the District's first Home Rule Mayor).

> problems with it because there are many people who think the Federal presence is simply Constitution Avenue, and Pennsylvania Avenue. But, you've got Walter Reed Hospital over here; and Anacostia, Bolling; you've got the forts and there is no way that you can see pulling those elements out that are really all around the city; the new home of the Vice President, the Naval Observatory. The city is basically ringed with old forts from the Civil War, and it's so physically, and economically and socially bound together that I would have problems with statehood in terms of exacting from it some enclaves, or little enclaves all around the city. Ultimately, it seems to me, that would erode the very fabric of the city itself, and the viability of the city. So, that's where I come from.[9]

Yet, the plan that Mayor Washington described—and opposed—is essentially what we are discussing here today with H.R. 51. Mayor Washington's cogent and valid concerns remain. In fact, they are many of the same ones that the Framers of our Constitution raised when discussing the need for a federal district where Congress could "exercise exclusive Legislation in all Cases whatsoever . . ."[10] Democratic Representative John Dingell (D-MI) opposed DC statehood on the grounds that Congress must retain federal jurisdiction in order to protect federal interests.[11]

But what about the objections based on the Constitution? Are these really bad-faith arguments? Delegate Eleanor Holmes Norton's immediate predecessor, Walter Fauntroy, didn't think so. In response to a resolution proposing voting representation in Congress for District residents, he said, "This resolution does not recommend statehood for the District of Columbia in order to achieve full voting representation—this would be in direct defiance of the prescriptions of the Founding Fathers."[12] He is exactly right. Even those who support DC statehood concede that "No extended search of the record is required to conclude that the Framers intended the district comprising the seat of government to be permanent and never meant for that district to become a state."[13]

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[9] *Representation of the District of Columbia in Congress: Hearings on H.J. Res. 280 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. 29 (1975).

[10] U.S. CONST. art. I, § 8, cl. 17.

[11] Kent Jenkins, Jr., *House Turns Down Statehood for D.C.*, WASH. POST (Nov. 22, 1993), https://www.washingtonpost.com/archive/politics/1993/11/22/house-turns-down-statehood-for-dc/93c04aac-5635-4c5e-899a-9584e2660650/.

[12] Walter Fauntroy, *Viewpoints: Voting Rights for D.C.*, BOARD OF TRADE NEWS (Jan. 1978), *reprinted in District of Columbia Representation in Congress: Hearings on S.J. 65 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 189 (1978).

[13] Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 163 (1991).

III. The historical reasons for securing full federal control over the seat of government, for preventing one state from having outsized influence on the federal government, and for the important symbolic value of having a national capital free from a single state's influence remain true today.

Some, such as Representative Jamie Raskin (D-MD), have said that "What made sense in 1800 . . . is insensible and indefensible today."[14] But in order to evaluate that claim, we have to ask: What were the prescriptions of the Founding Fathers? Why did they make them? And what form did their decision take?

We are all familiar with the infamous events of June 1783 when a group of disgruntled Continental soldiers surrounded the Continental Congress in Philadelphia, and Pennsylvania's governor refused to call out the militia to protect the members of Congress, who were then forced to flee Philadelphia and become itinerants for the next several years.[15] The physical safety and security of the federal government and its members were paramount to the Framers. Because of this incident, they did not want to depend on state or local authorities to provide protection for the federal government.

In recent years, there has been a lot of discussion about whether this rationale remains valid given the strength of the U.S. military and our nation's position as the world's preeminent superpower. In a juxtaposition likely unimaginable to the Framers, after the tragic events of January 6, 2021, Mayor Bowser claimed that DC must become a state so that she can exercise full authority over law enforcement officials and National Guard Troops in order to protect the federal government more effectively.[16] That is a laudable goal, but it doesn't take much imagination to envision a different mayor, in a different set of circumstances where the federal government and the local government disagree over necessary safety precautions, choosing a different course of action that ends up providing less protection.

We saw some of that last summer with the clashes outside of the White House and see some of it even now with the safety precautions surrounding the Capitol Complex. If the District of Columbia becomes a state, the federal government's ability to provide for the

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[14] Jamin B. Raskin, *Domination, Democracy, and The District: The Statehood Position,* 39 CATH. U. L. REV. 417, 424 (1990).

[15] 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 973 (Gov't Printing Office 1922) (1783) (recounting the events of June 1783); Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 311 (2008) (citation omitted) (noting that "Congress was forced to flee, first to Princeton, N.J., then to Annapolis, and ultimately to New York City"); *see also* Letter and Memorandum of Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Comm. on the District of Columbia (Dec. 13, 1963) , *reprinted in Home Rule, Hearings on H.R. 141 Before Subcomm. No. 6 of the House Comm. on the District of Columbia*, 88th Cong., 1st Sess. 341, 346 n. 13 (1964) (stating that the pre-Constitution Continental Congress led a "nomadic life" from 1774-1789 in which it "moved 10 times and met in 8 different cities and towns . . .").

[16] Justine Coleman, *Bowser Reiterates Call for DC Statehood After Capitol Riots*, THE HILL (Jan. 7, 2021, 1:14 PM EST), https://thehill.com/homenews/state-watch/533153-bowser-reiterates-call-for-dc-statehood-after-capitol-riots.

physical security of its officers, employees, and property may be severely hampered. Portions of the fencing that recently surrounded the Capitol Complex likely fell within the would-be territory of the new state, and even portions of the inaugural parade route likely fall within the territory of the new state.[17] As Delegate Norton recently wrote in a *National Review* op-ed encouraging the removal of the Capitol Hill fencing, "The nation's founders and the architects who designed the nation's capital did not place their Capitol at a distance from the people. They placed the Capitol in a neighborhood, which begins at the aptly named First Street—the first street beyond the Capitol at the entrance of the Capitol grounds itself."[18] Yet, under the current statehood plan advocated by Delegate Norton, that neighborhood would be permanently, and perhaps irrevocably, cut off from the Capitol.

But even more than the physical security of the capital, the Framers wanted to avoid any one state's creating "a dependence of the members of the general Government" on it.[19] In other words, they wanted to prevent any one state from having outsized influence on the operations of the federal government given its proximity to it. "The absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. Moreover, being a resident of the new capital city was viewed as compensation for this limitation. The fact that members would work, and generally reside, in the District gave the city sufficient attention in Congress."[20] Contrary to what many proponents of DC statehood are saying, and as the D.C. Circuit Court of Appeals has noted, "It is . . . fanciful to consider as 'politically powerless' a city whose residents include a high proportion of the officers of all three branches of the federal government, and their staffs."[21] But even everyday citizens of the District have readier access to all members of Congress and most executive branch officials—and with that access, an increased ability to influence the national debate—than do citizens in other parts of the country.

How many committee members on their way to this hearing today passed yard signs, banners, or even billboards advocating DC statehood? I certainly did. Nowhere else in the country would it be possible to reach so many members of Congress so easily. In many ways, this hearing today reflects that reality. Despite DC statehood being widely unpopular across the United States, this Committee held a similar hearing last year and

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[17] Memorandum from Eric D. Shaw, Director of New Columbia Statehood Comm'n, State of New Columbia Revised Boundaries 6 (Sept. 14, 2016), *available at* https://statehood.dc.gov/sites/default/files/dc/sites/statehood/publication/attachments/Revised-New-Columbia-Boundaries-Memo.pdf.

[18] Eleanor Holmes Norton, *Bring Down the Capitol Hill Fencing*, NATIONAL REVIEW (Mar. 15, 2021, 3:11 PM), https://www.nationalreview.com/2021/03/bring-down-the-capitol-hill-fencing/.

[19] THE FEDERALIST NO. 43.

[20] Turley, *Too Clever by Half, supra* note 15, at 332.

[21] United States v. Cohen, 733 F.2d 128, 135 (D.C. Cir. 1984).

the House of Representatives passed an almost identical bill to grant DC statehood. A little less than a year later, despite continuing unpopularity, here we are again.[22]

Even those who support DC statehood recognize and candidly admit the outsized influence their members in Congress would play given the newly created state's location. Representative Raskin has written that "representatives from [the new state] will carry with them many special advantages . . ." He noted that the local press corps doubles as the national press corps and that "the representatives from [the new state], likely living minutes from their offices, will theoretically devote more time to institutional and committee politics and less to constant travel back and forth across the country, increasing their importance and influence on Capitol Hill."[23] This is exactly the type of "awe or influence" that James Madison worried would be "dissatisfactory to the other members" of our nation.[24]

IV. Both Democratic and Republican Justice Departments have reached the same conclusion that DC statehood requires a constitutional amendment.

But even if we assume—only for the sake of argument—that statehood for DC is necessary or desirable, there is still the question of whether this method—statehood by legislation—is constitutional. The Justice Department during the Carter Administration thought not, saying "If [the original reasons for the creation of the District] have lost validity, the appropriate response would be to provide statehood for the District by constitutional amendment rather than to ignore the Framers' intentions."[25]

Attorney General Robert F. Kennedy had earlier arrived at the same conclusion. In a memo to a member of Congress serving on the House Committee on the District of Columbia, he said that Congress likely did not have authority under Article I, section 8, clause 17 to shrink the "federal district" to essentially the same size being discussed today. Specifically, Kennedy said that "A substantial argument can be made for the proposition that the Federal district was intended to be large enough to serve as the location of a capital city having substantial population."[26]

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[22] Jeffrey M. Jones, *Americans Reject D.C. Statehood*, GALLUP (July 15, 2019), https://news.gallup.com/poll/260129/americans-reject-statehood.aspx.

[23] Raskin, *The Statehood Position*, *supra* note 14, at 433.

[24] THE FEDERALIST NO. 43.

[25] *District of Colombia Representation in Congress: Hearings on S.J. 65 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 95th Cong., 2d Sess. 17 (statement of Assistant Attorney General John M. Harmon, Office of Legal Counsel).

[26] *Kennedy Memorandum, supra* note 15, at 343.

To that end, three main arguments put forward by statehood proponents must be addressed:

(1) that the Constitution specifies only a maximum size for the federal enclave (not more than 10 miles square) and no minimum size, which necessitates a discussion of Article I, section 8, clause 17 of the Constitution;

(2) that this same legislative process has previously been used 37 times in our nation's history to admit new states, which necessitates a discussion of Article IV, section 3 of the Constitution; and

(3) that the Twenty-Third Amendment does not necessarily need to be repealed before DC becomes a state, which necessitates a discussion of the Twenty-Third Amendment to the Constitution.

A. The fact that Congress has used its authority under Article IV, section 3 of the Constitution to admit 37 other states is constitutionally irrelevant. The District owes its existence to the fact that Congress exercised its authority under Article I, section 8, clause 17 of the Constitution to create it.

The District of Columbia owes its very existence to Article I, section 8, clause 17 of the Constitution, which says that "The Congress shall have Power To . . . exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . ."[27]

This same clause goes on to say that "The Congress shall have Power To . . . exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . ."[28] While the Constitution contemplated that Congress could, and should, exercise plenary authority over both, they are distinct provisions.

As Attorney General Kennedy said, "While Congress['s] power to legislate for the District is a continuing power, its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance or for retrocession."[29]

[27] U.S. CONST. art. I, § 8, cl. 17.

[28] *Id.*

[29] *Kennedy Memorandum, supra* note 15, at 345.

1. The prior retrocession of part of the District to Virginia should not be used as precedent.

But isn't there precedent for Congress doing just that: retrocessing a part of the District by simple legislation? There is. But as the Kennedy, Carter, and Reagan Justice Departments pointed out, this retrocession was controversial at the time, has remained so, and should not serve as a precedent for future actions because the Supreme Court has never ruled on its constitutionality.[30]

It is also factually distinct from the present situation in at least two respects: (1) It contained a much smaller percentage of the District (approximately one-third), which at the time was underdeveloped and would not have as big an impact on the effective control of the District (though Civil War experience called that assumption into question), and (2) the State of Virginia consented to the retrocession.

Later Houses of Representatives passed bills stating that the retrocession had been unconstitutional,[31] and as late as 1910, George Washington University Law Professor Hannis Taylor argued that such action was unconstitutional. President (and future Chief Justice) William Howard Taft also found retrocession problematic.[32] Fortunately, this particular retrocession is not before the committee today, and there's no need for the committee to revisit it now. All of this to say, this questionable action should not be used as justification for the proposal currently before the committee.

2. Maryland's consent is needed before a new state can be created from the land it donated to create the federal seat of government.

At a minimum, it seems obvious that Maryland's consent is needed here too. As Dr. Roger Pilon of the Cato Institute said when testifying before this committee the last time it considered H.R. 51, "Maryland did not cede the land for the purpose of creating a new state on its border."[33] It ceded the land so that Congress could establish a federal district to be the seat of government. "It would have been sheer political mischief if Congress and Maryland had agreed to the cession for the purpose of creating the District and then

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[30] *See* Phillips v. Payne, 92 U.S. 130 (1875) (declining to rule on the constitutionality of the retrocession).

[31] *OLP Report on D.C. Statehood*, *supra* note 7, at 20-21 n. 78 (stating that "in 1867 the House of Representatives passed a bill, by a vote of 111-28, repealing the 1846 Act on the stated ground that it was unconstitutional. The bill, however, was never reported out of the Senate Judiciary Committee").

[32] S. Doc. No. 61-286 (1910) (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846); *see also* Mark Richards, *The Debates over the Retrocession of the District of Columbia, 1801-2004,* WASH. HISTORY 1, 22-24 (Spring/Summer 2004).

[33] *H.R. 51, Washington, D.C. Admission Act: Hearing on H.R. 51 Before the H. Comm. On Oversight and Reform*, 116th Cong. (2019) (statement of Roger Pilon, Ph.D., J.D., B Kenneth Simon Chair in Constitutional Studies, Center for Constitutional Studies, Cato Institute), *available at* https://docs.house.gov/meetings/GO/GO00/20190919/109960/HHRG-116-GO00-Wstate-PilonR-20190919.pdf

Congress turned right around and carved out a separate state from that grant . . . Congress cannot do in two steps, simply from the passage of time, what it could not have done in one fell swoop initially."[34]

This makes sense given the provisions of Article IV, section 3 of the Constitution, which provides that "New States may be admitted by the Congress into this Union" and which, as noted by supporters of DC statehood, has been invoked 37 previous times.[35] However, this same constitutional provision goes on to say that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."[36]

Since Maryland donated the land for the purpose of creating the seat of the federal government, Maryland must consent to its use for another purpose—in this case, establishing a new state.

In any event, Article I, section 8, clause 17 of the Constitution makes clear that "Congress is here given exclusive jurisdiction over the district which was to 'become the seat of government of the United States,' not merely over the seat of government, wherever that might happen to be . . .[O]nce the cession was made and this 'district' became the seat of government, the authority of Congress over its size and location seems to have been exhausted."[37]

As John Harmon, Assistant Attorney General for the Office of Legal Counsel during the Carter administration stated when testifying before the Senate,

> We do not believe that the power of Congress vested by Article I, section 8, clause 17 of the Constitution to exercise plenary legislative jurisdiction over the District could be thus permanently abrogated by a simple majority vote of both Houses of Congress. That could only be accomplished, in our view, by a constitutional amendment.[38]

Moreover, as Roger Pilon has noted, the District "is a sui generis entity [one of a kind], expressly provided for by the Constitution, in clear contemplation of its becoming the seat of the new federal government, which it has been for well more than 200 years."[39]

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[34] *Id.*

[35] *See, e.g., Norton Introduces D.C. Statehood Bill with 2020 Original Cosponsors in 117th Congress, Beginning Today,* Press Release (Jan. 3, 2021), https://norton.house.gov/media-center/press-releases/norton-introduces-dc-statehood-bill-with-202-original-cosponsors-in.

[36] U.S. CONST. art. IV, § 3.

[37] *OLP Report on D.C. Statehood, supra* note 7, at 18.

[38] Statement of John M. Harmon, Office of Legal Counsel, *supra* note 25, at 17.

[39] Statement of Roger Pilon, *supra* note 33, at 7.

B. The Twenty-Third Amendment provides the most serious constitutional obstacle to the District becoming a state via simple legislation. At a minimum, the Twenty-Third Amendment must be repealed—via another constitutional amendment—prior to or simultaneously with the District's becoming a state. H.R. 51 does not adequately provide for that to happen.

That is not to say that residents of our nation's capital have no say in the national government. They do. And they achieved it by constitutional amendment. The Twenty-Third Amendment provides that "The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:" electors for President and Vice President equal to the number to which it would be entitled if it were a state, "but in no event more than the least populous State."[40]

The framers of this amendment, which was ratified in 1961, "specifically considered and rejected as unconstitutional any attempt to retrocede the District of Columbia to Maryland, or to grant it statehood."[41] Significantly, the House Committee report on the Twenty-Third Amendment stated,

> Apart from the serious constitutional question which would be involved . . . any attempted divestiture by the Congress of its exclusive authority over the District of Columbia by invocation of its powers to create new States would do violence to the basic constitutional principle which was adopted by the framers of the Constitution in 1787 when they made provision for carving out the 'seat of government' from the States and set it aside as a permanent Federal district.[42]

Robert F. Kennedy reiterated that the "argument that a Federal district constituting the seat of government is a permanent part of our constitutional system is substantially strengthened by the adoption of the 23d amendment."[43] He went on to list several ways in which the proposal then being considered, which would have legislatively retrocessed most of the District to Maryland with only a rump area similar to today's proposed National Capital Service Area left, was fundamentally inconsistent with the Twenty-Third Amendment. He said,

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[40] U.S. CONST. amend. XXIII.

[41] *OLP Report on D.C. Statehood, supra* note 7, at 22.

[42] *Granting Representation in the Electoral College to the District of Columbia*, H.R. Rep. No. 1698, 86th Cong., 2d Sess. 1, 2 (1960).

[44] *Kennedy Memorandum, supra* note 15, at 348.

> It is inconceivable that Congress would have proposed, or the States would have ratified, a constitutional amendment which would confer three electoral votes on a District of Columbia which has a population of 75 families or which had no population at all. It is equally inconceivable that Congress would have set in motion the cumbersome and arduous process of constitutional amendment, on a factual assumption which it anticipated might be utterly destroyed 3 years later.

This make sense and supports his position that ". . . a persuasive argument can be made that the adoption of the 23d amendment has given constitutional status to the existence of a federally owned 'District constituting the seat of government of the United States,' having a substantial area and population . . . so that a constitutional amendment repealing the 23d amendment would be required to abolish that district."[44]

Today's proponents of DC statehood clearly recognize that the existence of the Twenty-Third Amendment poses a serious constitutional problem. The current version of H.R. 51 calls for each chamber of Congress to give expedited consideration to a constitutional amendment to repeal the Twenty-Third Amendment. But there is no guarantee that it would move quickly through the chambers and no guarantee that it could quickly be ratified by the necessary 38 states—especially as legislatures around the country grapple with many crises.

As was true last time, H.R. 51 proposes a slapdash, convoluted, and constitutionally questionable workaround to this glaring problem. It is a grant-statehood-now, solve-problems-later approach that essentially requires states to allow residents of the newly created rump capital to cast absentee votes in their last state of domicile if they would otherwise be qualified to vote there were it not for the fact that they are currently living in the rump capital.[45] It also expresses the sense of Congress that states should waive registration requirements for these individuals, expedite processing of balloting materials for these individuals, and ensure that absentee ballots are mailed to these individuals at the earliest convenience.[46]

More troubling is H.R. 51's proposal for addressing the rump capital's Electoral College votes, currently allocated according to the Twenty-Third Amendment. The Twenty-Third Amendment provides that "The District constituting the seat of Government of the United States *shall* appoint in such manner as Congress may direct . . ." electors for President and Vice President. Congress's proposed solution in H.R. 51 is to have the new rump capital *fail* to appoint any such electors by simply striking the District of

[44] *Id.* at 351.

[45] This could be constitutionally problematic because Article I, section 2, clause 1 of the Constitution provides states with the authority to determine the qualifications of voters in their states. *See* U.S. CONST. art I, § 2, cl. 1.

[46] Washington, D.C. Admission Act, H.R. 51, 117th Cong. § 221 (2021).

Columbia from the definition of a state for purposes of choosing electors,[47] once again trying to do by simple legislation something that requires a constitutional amendment. It should be obvious to all that a legislative act of Congress cannot undo a constitutional amendment. Yet here we are.[48]

V. The practical problems with the District's becoming a state are manifold. Its population relative to other states has decreased over time. Nineteen cities currently have larger populations than the District. And the District would be 17 times smaller than the next smallest state, lacking resources found in almost every other state.

A few other practical considerations should also be noted. Advocates for DC statehood say the population of the District is larger than two states, Vermont and Wyoming, and thus large enough to justify the District's becoming a state.[49] But the population of the District relative to other states has actually been *decreasing* over time. When Attorney General Robert F. Kennedy offered his thoughts to Congress in 1960, he noted that the District's population at that time exceeded that of 11 states.[50] Currently, 19 cities have populations larger the District's.[51]

This highlights the fact that the newly created state would also be unique as our nation's only city-state and by far the smallest in size. Rhode Island, currently the smallest state with 1,045 square miles of land mass, would be approximately 17 times bigger than the new state, which would only have approximately 68 square miles of land mass. Because of its small size and status as a city, the proposed new state would lack many industries and amenities that are found in every other state.[52]

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[47] *Id.* at § 223.

[48] Attorney General Robert F. Kennedy also thought that such an approach might violate the Fifth Amendment's Due Process guarantees. *See Kennedy Memorandum, supra* note 15, at 351-52.

[49] WHY STATEHOOD FOR DC, STATE OF WASHINGTON, DC, https://statehood.dc.gov/page/why-statehood-dc (last visited March 18, 2021).

[50] *Kennedy Memorandum, supra* note 15, at 341 n. 1.

[51] According to information from the U.S. Census, as of July 2019, Washington DC is the 20th most populated city in the United States with 705,749 residents. The 19 cities that have a higher population than Washington, DC are New York City, New York, 8,336,817; Los Angeles, California, 3,979,576; Chicago, Illinois, 2,693,976; Houston, Texas, 2,320,268; Phoenix, Arizona, 1,680,992; Philadelphia, Pennsylvania, 1,584,064; San Antonio, Texas, 1,547,253; San Diego, California, 1,423,851; Dallas, Texas, 1,343,573; San Jose, California, 1,021,795; Austin, Texas, 978,908; Jacksonville, Florida, 911,507; Fort Worth, Texas, 909,585; Columbus, Ohio, 898,553; Charlotte, North Carolina, 885,708; San Francisco, California, 881,549; Indianapolis, Indiana, 876,384; Seattle, Washington, 753,675; and Denver, Colorado, 727,211. *See* U.S. CENSUS BUREAU, POPULATION DIVISION, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR INCORPORATED PLACES OF 50,000 OR MORE, RANKED BY JULY 1, 2019 POPULATION: APRIL 1, 2010 TO JULY 1, 2019 (2019).

[52] Mike Maciag, *The Most Underrepresented Industries in D.C.'s Economy,* D.C. POLICY CENTER (Dec. 13, 2017), https://www.dcpolicycenter.org/publications/underrepresented-industries-dc/.

Want to buy a car in the District? Good luck.[53] It would have no airport of its own, no port, and no significant manufacturing. It would have to rely on its neighbors to provide landfills for the garbage it generates[54] and to provide the power generation for the electricity it uses.[55] It would also have to continue to rely on the Army Corps of Engineers for its water supply. And, of course, many District residents rely directly, or indirectly, on the federal government for employment.

In advocating for a federal district, James Madison wrote that "the gradual accumulation of public improvements at the stationary residence of the Government, would be . . . too great a public pledge to be left in the hands of a single State."[56] This certainly remains true with District residents living only minutes from national monuments, world class museums and art galleries, and even a zoo, all provided for the nation as a whole.

VI. Proponents of DC statehood should not take a grant-statehood-now, work-out-the-details-later approach as proposed by H.R. 51.

There also are important funding gaps and practical questions that remain unresolved by H.R. 51. The federal government, for example, currently pays for DC's court system and the housing of DC's prisoners in federal prisons. This bill's solution is for the federal government to keep paying for these services—even after the District becomes a state—until the state figures out how to pay for them itself. No timetable is given, so the federal government will bear these costs for the foreseeable future.

Also, H.R. 51 renames the United States Court of Appeals for the D.C. Circuit, but fails to address its substantive jurisdiction. No other court of appeals with a particular geographic jurisdiction covers a single state. The D.C. Circuit would cover our nation's smallest state.

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[53] Michael A. Fletcher, *D.C. Losing Its Last Traditional Car Dealership with Ourisman Moving to Bethesda*, WASH. POST. (Nov. 6, 2014), https://www.washingtonpost.com/business/economy/the-last-place-to-buy-new-cars-in-dc-after-ourisman-volkswagen-moves-to-bethesda/2014/11/06/5199a38e-557a-11e4-892e-602188e70e9c_story.html.

[54] Neil Seldman, *Brief History of Solid Waste Management and Recycling in Washington, DC,* INSTITUTE FOR SELF-RELIANCE (Aug. 2, 2017) (noting that "DC's nonrecycled municipal solid waste is sent to incinerators and landfills in Virginia. The city's estimated 25,000 tons of recycled metal, glass, paper and plastic are sent to a Waste Management Inc. facility in Elkridge, MD . . ."), https://ilsr.org/brief-history-of-solid-waste-management-and-recycling-in-washington-dc/.

[55] DISTRICT OF COLUMBIA, U.S. ENERGY INFORMATION ADMINISTRATION (last visited March 18, 2021) (stating that "District of Columbia residents receive nearly all their electricity from power plants in surrounding states . . ."), https://www.eia.gov/state/analysis.php?sid=DC#:~:text=District%20of%20Columbia%20residents%20receive,or%20part%20of%2013%20states.

[56] THE FEDERALIST NO. 43.

Conclusion

What would be the effect of DC statehood on district residents and the nation as a whole?

Attorney General Robert F. Kennedy didn't have a crystal ball when he delivered his thoughts to Congress. But he didn't need one. He said that "the constitutional questions presented are substantial, that the uncertainties which they create could probably not be resolved without several years of litigation, and that these uncertainties could affect not only the validity of the proposed retrocession and of governmental actions affecting the retroceded area, but also the electoral system . . . and the outcome of a presidential election."[57] Why chance it? There are good reasons why the District should not become a state, but all doubt and legal uncertainty could be removed with the passage of a constitutional amendment.

We do no one—not our country, not District residents, not anyone else—any favors by taking unconstitutional short cuts—even in the pursuit of what some may believe to be laudatory goals. To paraphrase Sir Thomas More in *A Man for All Seasons*, if we cut down the Constitution now, where will we turn when we need its protections?[58]

[57] *Kennedy Memorandum, supra* note 15, at 352.

[58] *See* ROBERT BOLT, A MAN FOR ALL SEASONS (Vintage Int'l 1990) (1960) (Sir Thomas More explaining to William Roper the importance of adhering to legal procedures even in the pursuit of what may be perceived as worthwhile goals. After Roper said he would "cut down every law in England" to get the Devil, More said, "Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow them? Yes, I'd give the Devil the benefit of law, for my own safety's sake!").