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S. Hrg. 117–481

EXAMINING D.C. STATEHOOD

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

JUNE 22, 2021

Available via the World Wide Web: http://www.govinfo.gov

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Committee on Homeland Security and Governmental Affairs

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EXAMINING D.C. STATEHOOD

TUESDAY, JUNE 22, 2021

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., via Webex and in room SD–342, Dirksen Senate Office Building, Hon. Gary Peters, Chairman of the Committee, presiding.

Present: Senators Peters, Carper, Hassan, Sinema, Rosen, Padilla, Ossoff, Portman, Johnson, Lankford, Scott, and Hawley.

Also present: Delegate Eleanor Holmes Norton.

OPENING STATEMENT OF CHAIRMAN PETERS[1]

Chairman PETERS. The Committee will come to order. I would like to say thank you to our witnesses for joining us to examine legislation introduced by my colleague, Senator Tom Carper, to make the District of Columbia our nation's 51st State.

I would also like to extend a warm welcome to Washington, D.C.'s Delegate to the U.S. House of Representatives, Congresswoman Eleanor Holmes Norton, as well as former Senator, and also a former Chairman of this Committee, Joe Lieberman. Certainly Congresswoman Eleanor Holmes Norton, I appreciate your attendance here today, and I want to recognize your incredible leadership on this issue over many years, so it is wonderful to have you here before the Committee.

For decades, you both have, Senator Lieberman as well, served as strong advocates in the conversation to give D.C. residents an equal voice, and today, for the first time in nearly seven years, this Committee will continue that discussion and hear from the Mayor, policy, legal, and civil rights experts on how lawmakers can finally give D.C. residents the same representation in Congress as their fellow Americans.

This lack of representation for the residents of this city, which serves as a beacon of freedom and democracy around the world, is a stunning contradiction.

Since 1790, when President Washington signed into law the Permanent Seat of Government Act, D.C. has served as our Nation's Capital. D.C.'s more than 700,000 residents, many of whom have fought in our wars, paid Federal taxes, and served the American people in public service, have been denied an equal voice in the for-

[1] The prepared statement of Senator Peters appear in the Appendix on page 45.

mation of the very laws and decisions that govern them. This is unconscionable.

It is time to follow the lead of our colleagues in the House, pass the Washington D.C. Admission Act, which will finally ensure that D.C. residents have the full congressional representation and self-governance that they deserve, and that our democracy is built on.

Our nation's most defining principle is that our government's power is derived directly from the people. It is why we elect leaders to represent us in Congress, and every American should be entitled to the same representation in our democratic republic, no matter which part of our nation they live in.

When the founders first established a permanent seat of government at a site along the Potomac River, they could have never imagined it would become the large, vibrant, and diverse city that more than 700,000 Americans call home. While we may hear a number of questions raised about this issue today, I encourage all of my colleagues to stay focused on the core civil rights issue that we have an opportunity to address.

I look forward hearing from our witnesses and having a productive discussion today about making the District of Columbia our nation's 51st State.

With that I turn it over to Ranking Member Portman.

OPENING STATEMENT OF SENATOR PORTMAN[1]

Senator PORTMAN. Thank you, Chairman Peters, and thank you for our witnesses. We have a distinguished group here today, including Eleanor Holmes Norton, my Congresswoman when I am here in D.C., and Senator Joe Lieberman, who is back to this Committee, having served as its Chair and Ranking Member, and really was the heart and soul of this Committee when he was here. We are also going to hear from Mayor Bowser today. I appreciate her coming, and a good group of academics.

As you know, Mr. Chairman, I have both practical and constitutional concerns about making Washington, DC. its own State. Legally, Congress does not have the power to override the Constitution, and that is, to me, the most important issue here. D.C., of course, is the only place specifically created by the Constitution in Article 1 as the "seat of government," meaning, it has a special constitutional status completely different from any current or previous U.S. territory that eventually became a State through the Article 4 Admissions Clause.

Our framers gave us a limited Federal Government, one in which Congress only wields the power explicitly granted to it. Here, neither the District Clause nor the Admissions Clause provide Congress with the power to transform the "seat of government" into a new State. Moreover, D.C. has special constitutional status, of course, in the 23rd Amendment, which grants D.C. residents three electoral votes in Presidential elections. We cannot legislate over these constitutional provisions.

Further, when Maryland authorized the cession of nearly 60 miles of its territory to the Federal Government for the creation of the District of Columbia in 1788, it did so for the purpose that,

[1] The prepared statement of Senator Portman appears in the Appendix on page 46.

"Congress may fix upon and accept [the land] for the seat of government," When Congress formally accepted the land from Maryland by legislative act in 1790, we explained that the land was, "hereby accepted for the permanent seat of the government of the United States." Maryland gave up its land, and we accepted it, so that we could create an independent Federal Governmental district.

Making D.C. into a separate State violates the solemn compact we made over 200 years ago with Maryland, as well. By the way, we would be creating a State that by acreage comprises less than 6 percent of the next smallest State, Rhode Island. A better option, in my view, would be to retrocede a large portion of the District to Maryland. Retrocession is the preferable way to provide D.C. residents with voting representation in both chambers of Congress.

This issue has come up before. The States declined to ratify the D.C. Voting Rights Amendment (DCVRA) in the 1970s, which would have granted D.C. Congressional representation in both Houses of Congress and repealed the 23rd Amendment. Only 16 States ratified that amendment, 22 States short of the required two-thirds for adoption. Surveys today would demonstrate that the American people are still not interested in eliminating their capital district.

Again, Mr. Chairman, I appreciate the witnesses coming today, and I look forward to hearing their testimony.

Chairman PETERS. Thank you, Ranking Member Portman.

Before we turn it over to our distinguished guests and panel I want to give the lead sponsor of the Washington, D.C. Admission Act, the lead sponsor here in the Senate, Senator Tom Carper, an opportunity to address the Committee.

OPENING STATEMENT OF SENATOR CARPER[1]

Senator CARPER. Thank you so much, Mr. Chairman. Colleagues, I appreciate this opportunity. Let me welcome Joe Lieberman. Welcome back to your home, and thank you for your years of leadership. Welcome to another Yale grad, Eleanor Holmes Norton. A couple of teammates here. Great to see you both. Thank you for joining us today and for your leadership.

When Joe Lieberman left the Senate he handed off a piece of legislation to me, and it is the piece of legislation that is before us today.

When summer ends and school resumes this fall, millions of American schoolchildren will begin each day by repeating these words: "I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation, under God, with liberty and justice for all." One nation, under God, with liberty and justice for all.

We are a nation of many faiths—Protestant, Catholic, Jew, Muslim, Buddhist, Hindu, and others. Each of these six religions share at least one thing in common, each of them. They share this admonition to love our neighbors as ourselves and to treat other people the way we want to be treated.

[1] The prepared statement of Senator Carper appears in the Appendix on page 49.

The more than 700,000 citizens of the District of Columbia are our neighbors. They deserve to be treated as such by the rest of us in this country. They pay more on a per capita basis in Federal income taxes than any of the 50 States, yet they have no vote in the U.S. House of Representatives or the Senate. They serve in the U.S. Army (USA), the U.S. Navy (USN), the U.S. Air Force (USAF), the U.S. Marine Corps (USMC), the National Guard, yet they have no vote in the U.S. House of Representatives or the U.S. Senate.

The leader of every State is authorized to call up their National Guard in times of crisis, but we learned on January 6th that the elected leader of the District of Columbia has no such authority. The District of Columbia has earned an AA+ credit rating, higher than most other States, yet the Congress has to approve the District's budget.

Some of the finest judges serve on D.C. courts, but the Congress has to approve each one of them, and when the Federal budget shuts down because of a budget impasse, it creates turmoil, budget turmoil, for the District of Columbia. When the Congress fails to vote to confirm highly qualified judges for weeks, for months, and sometimes for years, justice is delayed and sometimes justice is denied.

Two hundred forty-five years ago, 13 colonies took on the mightiest nation on earth, England, because of unjust treatment. They found particularly galling the requirement to pay taxes without representation. Taxation without representation became the rallying cry that led to our Declaration of Independence and a war to achieve it. The people of the District of Columbia have no interest in waging a war for independence. They want to be treated fairly and justly.

We should do that, and we can start doing that by enacting legislation that has passed the House of Representatives and is the subject of today's hearing. That is the right thing to do, the right thing to do. It meets constitutional muster, it puts the District of Columbia on the very same path followed by all 37 States who entered the union since, I believe, 1791.

To paraphrase Mark Twain, "When it doubt, do what's right. You will amaze your friends and confound your foes." Let's do what is right. We start by treating our neighbors here in the District of Columbia the way we want to be treated.

By the way, I want to give you another quote that may come as a surprise. It did to me, and it might to you as well. Here is another quote. "The fact that more than half a million Americans live in the District of Columbia and are denied a single voting representative in Congress is clear an historic wrong and justice demands that it be addressed." I do not agree with our former Vice President, Mike Pence, on everything, but we certain agree on this one.

Thank you, Mr. Chairman.

Chairman PETERS. Thank you, Senator Carper, and thank you for your leadership on this issue over many years.

Before I introduce our witnesses, I want to give two very important guests an opportunity to provide remarks. Our first is Congresswoman Eleanor Holmes Norton, the delegate to the U.S. House of Representatives from the District of Columbia. Congress-

woman Holmes Norton has, without question, been the leading voice in this fight for statehood, as she has worked tirelessly—I think that is a good word to sum up your work, Congresswoman—tirelessly to provide her constituents with equal representation throughout her 15-term tenure in the Congress. She recently led the passage of the Washington D.C. Admission Act through the Congress earlier this year.

Welcome, Congresswoman. Again, thank you for your tireless leadership on this issue, and I speak for the entire Committee, we look forward to hearing your remarks.

STATEMENT OF THE HONORABLE ELEANOR HOLMES NORTON,[1] DELEGATE TO THE U.S. HOUSE OF REPRESENTATIVES FROM THE DISTRICT OF COLUMBIA

Ms. NORTON. Thank you very much Mr. Chairman.

Chairman Peters, on behalf of the 700,000 District of Columbia residents, including 30,000 veterans, I thank you for holding this hearing and for being an original co-sponsor of the District of Columbia statehood bill.

This hearing is of historic significance, because it is only the second Senate hearing on our D.C. statehood bill in the nation's history. In the last year, the House of Representatives has twice passed our D.C. statehood bill. In 1993, when I first came to the House of Representatives, I got the first-ever House vote on D.C. statehood, but the bill failed because the House had a very different composition then. Prior to last year, neither chamber of Congress had ever passed the D.C. statehood bill in the nation's history.

Senator Carper, I particularly thank you for sponsoring our D.C. statehood bill and for being a champion for D.C. in the Senate, where we have no representation. Following in the footsteps of Senator Joe Lieberman, under your leadership the D.C. statehood bill has 45 Senate co-sponsors, which is the greatest number of Senate co-sponsors of the bill in the nation's history.

President Biden strongly supports D.C. statehood, our D.C. statehood bill, and is the first President to put the full weight of the presidency behind the bill in the nation's history. 54 percent of the American people, more than half of the American people, support D.C. statehood. According to a recent, very detailed poll, this is the greatest support for D.C. statehood in the nation's history.

Congress has both the moral obligation and the constitutional authority to pass our D.C. statehood bill. The country was founded on the principles of no "taxation without representation" and consent of the government, but D.C. residents are taxed without representation and cannot consent to the laws under which they, as American citizens, must live.

The State of Washington, DC. would consist of 66 of the 68 square miles of the present-day Federal District. The Federal District would be two square miles, and Congress would retain control over it, as required by the Constitution. The D.C. statehood bill clearly complies with the Constitution, including the Admissions Clause, the District Clause, and the 23rd Amendment.

[1] The prepared statement of Ms. Norton appears in the Appendix on page 51.

Those who believe the bill is constitutional need only rely on the plain text of the Constitution. A group of very distinguished law professors and scholars from America's top law schools have sent a definitive analysis of the bill's constitutionality to the House and Senate leadership. You already have that, so I do not believe to ask that it be admitted to the record. The Admissions Clause gives Congress the authority to admit new States. All 37 new States were admitted by Congress, by majority vote. No State was admitted by constitutional amendment, and no State would have to consent to the admission of the State of Washington, DC.

The District laws gives Congress plenary authority over the Federal District and establishes a maximum size of the Federal District, 100 square miles. It does not establish a minimum size or a location of the Federal District. Congress reduced the size of the Federal District by 30 percent in 1846. The 23rd Amendment allows the Federal District to participate in the electoral college but does not establish a minimum size or location of the Federal District. Therefore, the bill complies with the 23rd Amendment. Nevertheless, the bill would repeal the enabling act for the 23rd Amendment, and the 23rd Amendment itself would be repealed quickly.

The Constitution does not establish any prerequisites for new States, but Congress generally has considered three: population and resources, support for statehood, and commitment to democracy. The State of Washington, DC. would meet all three. D.C.'s population is larger than the population of two States. D.C. pays more Federal taxes per capital—and I will repeat that one. The residents I represent pay more taxes per capita than any State, and pay more Federal taxes, right now, than 21 States.

D.C. Federal domestic product is larger than 17 States. In 2016, 86 percent of D.C. residents voted for statehood. D.C. residents have been petitioning for voting representation in the Congress and local autonomy for all of its 220 years of existence, from the moment this became the Capital of the United States.

Congress does have a choice. It can continue to exclude D.C. residents from the democratic process, forcing them to watch from the sidelines as Congress votes on Federal and D.C. laws and to treat them, in the words of Frederick Douglass, as "aliens, not citizens, but subjects," or it live up to our nation's founding principles and pass our D.C. statehood bill.

Again, Chairman Peters and Senator Carper, thank you for your leadership on this bill. I look forward to continuing to work with you and your colleagues to enact the D.C. statehood bill this Congress. Thank you again.

Chairman PETERS. Congresswoman Holmes Norton, thank you for your statement, and again, thank you for your leadership on this issue.

Our second guest is Senator Joe Lieberman, who represented Connecticut in the Senate for 24 years. Senator Lieberman served as both the Chairman and the Ranking Member of this very Committee. In 2012, he helped author the New Columbia Admissions Act, the first D.C. statehood bill to be introduced in the Senate in nearly 20 years.

Senator Lieberman, you may proceed with your statement.

STATEMENT OF THE HONORABLE JOSEPH LIEBERMAN,[1] FORMER UNITED STATES SENATOR FROM THE STATE OF CONNECTICUT

Senator LIEBERMAN. Thanks very much, Chairman Peters, Ranking Member Portman, and Members of the Committee for convening this hearing today and for giving me the honor of testifying. Delegate Norton, Mayor Bowser, and other distinguished witnesses, it is a pleasure to be with you here.

As Senator Carper alluded to, a few years ago, Delegate Norton and I were at law school together, and we have not aged at all since then. I will point out that we were lucky to go to Yale—the mascot at Yale is a bulldog, and I do not think anyone would argue with me if I said that Delegate Norton, on this particular issue and many others, has had the tenacity of a bulldog, occasionally the bark, and, if necessary, the bite. It is always good to be on her side.

A special thank you, talking about tenacity, to Senator Carper, my dear friend, for introducing and advocating this legislation, which really would right a wrong that has been done for too long to the residents of the District of Columbia.

I am honored, really personally, to have the opportunity to return to this Committee, in this room, where I spent so many of the best, most productive days of my 24 years in the U.S. Senate, in large part because I was privileged to work, in bipartisan partnership, with the leading Republicans on the Committee during that time, first Fred Thompson of Tennessee, and then for more than a decade, Susan Collins of Maine.

I hope that the spirit of bipartisanship, which has been part of this Committee's history, and really has been exemplified, I think already this year, by Chairman Peters and Ranking Member Portman, will guide your Committee's consideration of the deprivation of voting representation in Congress for citizens of our Capital City, as you know, as far as anyone can tell, the only citizens of any capital of any country in the world who are disenfranchised in this way.

I first introduced legislation on this subject in 2002, when some of the current Committee staff members were probably in elementary school. It was called the No Taxation Without Representation Act, and was, I am pleased to say, reported favorably from the Committee but was not acted on by the Senate.

In 2009, a group of us introduced the D.C. House Voting Rights Act, which was favorably reported by this Committee and, in fact, passed by the Senate, in a vote of 61–37. Unfortunately, however, the Senate added an amendment that repealed D.C.'s gun control laws, and therefore, the House never acted on the legislation.

In 2012, which was my last year in the Senate, a group of us introduced the D.C. statehood legislation, which is very much like Senator Carper's initiative that is before you today. But Senator Carper has done a much better job than I did. He has the largest-ever number of co-sponsors for this legislation. It is really a tribute to the cause and to his tenacity and advocacy.

When Senator Carper asked me if I would get involved in supporting the current proposal I immediately said yes. The truth is,

[1] The prepared statement of Senator Lieberman appears in the Appendix on page 53.

I was very grateful to Tom for giving me the opportunity to re-engage in this constitutional cause that has mattered to me for a long time. It has mattered to me because there are two great American constitutional principles that are at the heart of the cause of D.C. statehood and that are violated every day in the current treatment of residents of the District of Columbia. Both of these principles were central to the American Revolution against the British crown.

The first is that governments should govern only with the consent of the governed, not by the whim of the crown or any other leader, particularly not a dictator, and that in a great democracy, a republic like ours, that consent is given by the votes of the citizenry.

The second, as has been mentioned, a great founding principle, is that citizens should not and cannot be taxed without representation in the legislative body that taxes them. Here, in general, I quote Justice Hugo Black, who wrote in Wesberry v. Sanders in 1964, Supreme Court decision, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we must live," end quote. Today's residents of the District of Columbia, as has been said, have every right to sound the battle cry of our revolution, no "taxation without representation". Greater per capita income tax paid from residents of the District, and more, in total, than the residents and citizens of 21 other existing States.

Why would anyone not want to eliminate these grossly outdated, un-American inequities? Today, you will hear some arguments why from the witnesses who will testify against Senator Carper's legislation. I must say, respectfully, that I have heard the arguments before many times over the years, and I suppose as judges say, I have reached a decision. All the arguments seem to me to be legalistic disputations, and ultimately excuses for something that is inexcusable. The arguments against this legislation do not come near to overcoming the great principled constitutional arguments for it.

What is the problem? The media suggests it is not constitutional or philosophical but political and partisan, that Republicans today fear that granting equal voting representation in Congress to D.C. residents will inevitably lead to two more Democratic Senators and one more Democratic member of the House. I hope that is not the problem, because it is self-evidently unacceptable in America to condition the enjoyment of constitutional rights on political party membership, any more than Congress would condition access to constitutional rights on citizens' race or gender or religion or sexual orientation. Besides, it is not sensible to base one's vote on this legislation, which would correct an injustice forever, on a short-range political prediction, which, based on history, may well turn out to be baseless, or at least temporary.

Who among us can really predict how the citizens of the State of Washington, DC. will vote in elections for their representatives in Congress in 50 years, or 20 years, or even five years? For example, who would have predicted, five years ago, that the State of Georgia would elect two Democratic Senators to this Congress? Who could have predicted, 30, 40, 50 years ago, that there would be almost no Republicans from New England, my part of the country, in the Senate today, and almost no Democrats from the House,

which is obviously why we were so surprised by the election of the two Democrats from Georgia.

A look at American history shows that partisan anxieties have been common when States have been considered for admission to our union since the original 13, but 37 times these anxieties were overcome to enable us to become the United States of America we are today.

Here is an example, which I think proves the difficulty of deciding this issue, based on political predictions. In 1959, Alaska and Hawaii were both seeking admission to our union. There was a lot of concern about how the citizens of those States would vote. They were essentially both admitted together, though there was a separation of a few months, because they were expected to balance each other politically. Alaska was expected to vote Democratic, and Hawaii was expected to vote Republican. That was the bipartisan consensus prophecy in 1959.

I could tell you, in my 24 years in the Senate, and still today, the opposite is the case. Hawaii elects Democrats and Alaska has elected Republicans. So much for deciding great constitutional issues, such as this one, because of passing political prognostications. Its not only a weak basis for judgment, it is unacceptable in our system of law and equity.

Mr. Chairman, many times in my 24 years on this Committee our Members were able to find bipartisan solutions to difficult problems, and then to convince the Senate to agree with those solutions, and together we got some great and good things done for our country, I am proud to say. I hope you Members of the Committee in this session will similarly rise to the challenge of this moment and this problem and work together to get something good and great done for our country, our Constitution, and for the people of our Capital City. Thank you very much.

Chairman PETERS. Thank you, Senator Lieberman and Congresswoman Holmes Norton for your perspectives on this issue. I would now like to invite our witnesses up to their chairs and to get settled. As we are making those changes, as the witnesses are coming to their seats, I would also like to welcome our esteemed guests to stay for the remainder of the hearing, if their schedules allow.

As we set up to move into the next phase of this hearing, I hope my colleagues will pause and reflect on the remarks of Representative Norton and Senator Lieberman, with their depth of knowledge and experience working to provide D.C. residents with an equal voice in our democratic process. I think they have set the tone for today's very historic hearing. Today's hearing is not about political posturing, and it should not be predicated on predetermined views. It is simply about providing D.C. residents full and equal democratic rights.

President Eisenhower I think said it best in his 1954 State of the Union address, and I quote President Dwight Eisenhower when he said, "In the District of Columbia, the time is long overdue for granting national suffrage to its citizens and also applying the principle of local self-government to the Nation's Capital." That was Dwight Eisenhower, and now 67 years later those words still ring true. Like folks throughout our Nation, my constituents, and I know the constituents of everyone on this Committee, deserve a

complete voice in government. It is long past time for the Senate to pass this act.

Now that the witnesses have been settled I would like for each of the witnesses know that it is the practice of this Committee, Homeland Security and Government Affairs (HSGAC), to swear in witnesses, so if you will rise and raise your right hand. We have witnesses also on video. If you would do the same I would appreciate it.

Do you swear that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. BOWSER. I do.

Mr. MORIAL. I do.

Mr. PRIMUS. I do.

Mr. PILON. I do.

Mr. MULLER. I do.

Chairman PETERS. You may be seated.

Our first witness is Mayor Muriel Bowser, the eighth Mayor of the District of Columbia. In her role, Mayor Bowser serves as the District of Columbia's chief executive and functions as its Governor, county Executive, and Mayor. You have a lot on your plate, Mayor, and it is certainly wonderful to see you here before the Committee today, and you may proceed with your opening statement.

TESTIMONY OF THE HONORABLE MURIEL E. BOWSER,[1] MAYOR, DISTRICT OF COLUMBIA

Ms. BOWSER. Thank you, Chairman Peters, Ranking Member Portman, and Members of this esteemed Committee, thank you for convening this hearing on S. 51, the Washington, D.C. Admission Act, which provides the 700,000 residents of Washington, DC, full democracy.

I am Muriel Bowser, Mayor of Washington, DC, and I am honored to come before this Committee with a simple request: Senators, we ask you to right the wrong that occurred some 220 years ago when the residents of the District of Columbia were stripped of their full congressional representation, and we ask you to do it now. The Constitution left the issue of democracy for residents of the District of Columbia to the Congress. The House of Representatives has passed the Washington, D.C. Admission Act twice, and the White House has indicated its support for the bill through a Statement of Administration Policy. Our democracy is truly in the hands of this Senate. It is time for the U.S. Senate to support the D.C. petition for statehood.

My testimony today echoes the many arguments that I made before the House Committee on Oversight and Reform in March, and in September 2019, and some of the same arguments made by my predecessor in this very room in 2014. Then, as now, the District's call for full democracy has been drowned out by arguments that ignore the fact that the second-class status of D.C. residents is clearly an anomaly of the U.S. Constitution, not a feature of it.

Over the decades, arguments against D.C. statehood have ranged from assertions that are, quite frankly, preposterous, to inaccurate

[1] The prepared statement of Mayor Bowser appears in the Appendix on page 57.

legal claims. Just to cite a couple, in 2019, we were asked what would happen to the parking spaces for congressional staff if the District were to become a State. We were at a loss to see how our full democracy should be equated to a few parking spaces. This past March, I was confronted with concerns that the District could not be a State because it was believed that we did not have a car dealership, even though we do.

Statements like these not only discount the civil rights of D.C. residents, they also demonstrate a true lack of understanding of the rapidly growing and thriving businesses, neighborhoods, and culture that surround the small Federal presence. It is for those neighborhoods and those people, the neighbors of Michigan Park, where I was born and raised, Congress Park, and Mount Pleasant, Columbia Heights and Hillcrest among them, that make up 99 percent of the District, and the people who live in them and who have come to D.C. for school, government service, or other work, I appear today to represent them.

There is no legal or constitutional barrier to D.C. statehood. The prevailing constitutional issue is the civil rights violation of 700,000 D.C. residents who fulfill all obligations of U.S. citizenship but are denied any representation in this body. We say, and we rely on the opinions of 39 legal scholars who have submitted testimony to you, unequivocally, that the bill before you, S. 51, the Washington, D.C. Admission Act, is constitutional. Dozens of America's most recognized constitutional experts have testified before Congress and penned letters to that effect. Scholars and experts have opined that it is fully within Congress' power, under the Constitution, to make D.C. a State through the passage of S. 51.

The Constitution's Admissions Clause grants Congress authority to admit States into the union, including Washington, DC. Following the 13 colonies, all 37 States were admitted by Congress through this constitutional authority. States were not added solely because of a particular industry, or the size of its land mass. States were added to include the people.

The Constitution's District Clause poses no barrier to admitting D.C. as a State either. The District Clause sets a maximum size of 10 square miles for the Federal District, not a minimum size. S. 51, of course, retains a Federal District, as required by the Constitution. It encompasses the unpopulated areas that make up the Federal presence, including all of the House and Senate office buildings, the Capitol itself, of course, the Supreme Court building, the White House, the monuments and museums on the National Mall, and all of the Federal buildings and land. The people of America, when they come to the Nation's Capital, they will still find all of the great monuments and museums that make up their experience, and, of course, the free museums of the Smithsonian Institution.

The 23rd Amendment to the Constitution, which granted D.C. residents a vote for President in 1961, does not pose a constitutional barrier to statehood either. The bill addresses it head on by repealing statutory language that enables the appointment of electors, and it includes expedited procedures for consideration of the repeal of the unnecessary constitutional amendment, thus virtually ensuring quick and certain ratification by the States to ensure no

ambiguity about the electoral. S. 51 outlines a clear path forward on how to address the 23rd Amendment. post-D.C.'s admission. It is particularly contradictory that the 23rd Amendment, which was passed to expand democracy to taxpaying D.C. residents, is now being held up as the main barrier to further expanding constitutional rights in the District. This flies in the face of the amendment's intent.

Retrocession to Maryland is also not required by the Constitution, nor is it addressed in the Constitution. Maryland has no claim to the land it ceded to the Federal Government when the District was founded. Certainly no one in this body would suggest that Maine should retrocede to Massachusetts, or that West Virginia should return to Virginia. Of course not.

To be clear, D.C.'s current status is due to generations of inactivity by lawmakers, including the Founding Fathers themselves, failing to address the contradiction that D.C. residents of the U.S. Capitol are treated as second-class citizens. With no constitutional underpinning, the disenfranchisement of Washingtonians is a glaring civil rights and voting rights issue of our time. In fact, we are the only capital city, as has been stated, in the world's democracies, without voting rights in the national legislature.

In two weeks, the country will celebrate our Independence Day and the establishment of the United States as a sovereign nation, free from "taxation without representation". Yet the 700,000 predominately Black and Brown residents of Washington, DC. continued to pay taxes without representation for over 200 years.

As we celebrate our nationhood, I appeal to this Senate to end the ongoing systemic injustice faced by the growing population in D.C. and vote for statehood in the 117th Congress. We cannot emphasize enough the civil rights and full democracy of D.C. residents is in your hands.

We are 700,000 people, some born here, others from all 50 States and the many nations of the world. We are Washingtonians who serve proudly in our military and fight for our country, and we are 30,000 veterans of our Armed Forces.

We are Washingtonians. We have served on the front line as essential workers during this pandemic—doctors, nurses, firefighters, schoolteachers—and yet we have no say in this Senate.

We are Washingtonians who heroically defended our Nation's Capital during the January 6th insurrection by answering the call to support our Federal partners, despite not having any representation in this Senate.

We are Washingtonians. We do not have any say when this Senate considers Presidential nominations, Supreme Court justices, and large investments like the Coronavirus Aid, Relief, and Economic Security (CARES) Act or the American Jobs Plan.

I ask you today to treat D.C. residents the same as all taxpaying American. Your inaction could doom yet another generation of Washingtonians to being locked out of their constitutional power and human rights. Will this body perpetuate this civil rights and voting rights wrong? By what authority would this body continue to have Washingtonians pay Federal income taxes without a voice?

Today, I am asking this U.S. Senate usher in a new age of fairness and equality for D.C. residents.

One thing I know about D.C. residents is that they have been fighting for this for 220 years. We will not quit until we achieve full democracy, and our two Senators are seated here with you. D.C. residents are not standing alone. Over the years we have garnered the support of Americans of all stripes and beliefs: the bipartisan United States Conference of Mayors, for example, representing millions of Americans in big cities and small towns; the nonpartisan League of Women Voters (LWV) who, for 100 years have fought to defend our democracy; the National Association for the Advancement of Colored People (NAACP); the Human Rights Campaign (HRC); and the Leadership Conference on Civil and Human Rights (LCCHR), who recognize D.C. statehood for the civil and human rights contradiction that it is; to your former colleague and Independent Senator Joe Lieberman whose focus on justice and fairness makes plain why partisan considerations have absolutely nothing to do with the quest of D.C. citizens for full democracy and absolutely no place in ensuring that S. 51 moves forward in the 117th Congress.

Finally, Chairman, together, with leaders from across America, we know that we will keep pushing until D.C.'s tragic disenfranchisement is rectified. You have the power to make two things happen that I see so clearly in my mind's eye and feel so deeply in my heart and soul. With your courageous leadership and clear-eyed focus on fairness and perfecting our union today, this session, this Congress, you will vote to admit D.C. into our great American union. Second, and prayerfully, I will be the last D.C. Mayor who needs to sit here demanding, on behalf of our 700,000 residents, what is our birthright, and what is owed to us as taxpayers, and that is full citizenship and democracy.

Thank you, Mr. Chairman, and thank you, Senators, and we are happy to take your questions.

Chairman PETERS. Thank you, Mayor, for your opening statement.

Our next witness is Marc Morial, President and Chief Executive Officer (CEO) of the National Urban League (NUL), the nation's largest historic civil rights and urban advocacy organization. Mr. Morial previously served as mayor of New Orleans, a Louisiana State senator, and was the president of the U.S. Conference of Mayors.

Welcome, Mr. Morial. You may proceed with your opening comments.

TESTIMONY OF THE HONORABLE MARC H. MORIAL,[1] PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL URBAN LEAGUE

Mr. MORIAL. Chairman Peters, Ranking Member Portman, and Members of the Committee, I want to thank you for the opportunity to testify on the Washington, D.C. Admission Act. As Chairman Peters indicated, I am Marc Morial. I am President and CEO of the National Urban League. In addition to serving as mayor of New Orleans and a Louisiana State legislator, I am also a former

[1] The prepared statement of Mr. Morial appears in the Appendix on page 70.

Senate staffer, having served for the late Russell B. Long of Louisiana in the 1980s.

I also am proud to say that Congresswoman Norton taught me both civil rights and constitutional law when I was a student at Georgetown University Law Center and a resident of the District of Columbia, from 1980 to 1983, and I thank her, Mayor Bowser, and Senator Lieberman for their testimony and their leadership on this important issue.

We, the National Urban League, were founded in 1910, and we have served the District of Columbia through both the Greater Washington Urban League, since 1938, and the Washington, D.C. Bureau of the National Urban League, since 1962. On behalf of all of our members and supporters across the Nation, I urge the Senate to pass this legislation to remedy the disenfranchisement of nearly 700,000 Americans.

Throughout my career as a voting rights activist, a civil rights lawyer, and an elected official, I have had a longstanding passion in the D.C. statehood movement. While in law school in Washington, I grew to know and love this community and made the city my second home. From 2006 to 2010, I served on the D.C. Statehood Commission, where we pushed for D.C. statehood and statutory representation.

Despite the progress we have made in the fight against disenfranchisement over the 200-plus years, D.C. residents have been pushed to the sidelines as spectators, and continue to be deprived of full representation. They are unable to bring grievances to influential Federal officials, reap the benefits available to other congressional constituents, or have a say in the important issues of war and peace that confront this Nation.

As a civil and human rights services organization, the National Urban League is in a unique position to see how this lack of representation acutely impacts D.C. residents during the Coronavirus Disease 2019 (COVID–19) pandemic. D.C. residents were in dire need of the relief afforded under the CARES Act. However, they did not have congressional representation that could offer amendments to, or vote on the final bill, and D.C. was originally denied some $755 million in critical funding that it needed to provide direct relief to its residents.

Last summer, D.C. residents took to the streets to exercise their First Amendment rights to peacefully protest racial injustice and police brutality. In response, the then administration gave orders to the National Guard and Federal law enforcement to carry out a disproportionate and inappropriate response in the interest of a photo op.

The same administration refused to call in the National Guard in response to a violent attack on the U.S. Capitol on January 6th, until much of the damage had already been done. In both cases, D.C. officials were absolutely powerless to respond to critical events that were happening to their own people, because the District did not have statehood and the critical safety mechanisms that statehood provides.

D.C. residents are not able to hold elected representatives accountable for these horrors. There was no D.C. elected congressional representative to vote to establish the Independent January

6th Commission to investigate the attack on the U.S. Capitol or the George Floyd Justice in Policing Act, which would put in place critical policing reforms.

We are at a unique juncture in American history, where we can create laws that reflect our democratic values and principles and ensure that the fundamental right to vote, which is a foundation of all rights, can be exercised by all American citizens. We cannot let this moment pass. It is time to enact the Washington D.C. Admission Act.

I want to thank Senator Carper for calling attention to this issue by introducing the Washington D.C. Admission Act in the Senate, and I applaud all of the testimony herein. This is an injustice. This is a denial of voting rights. This is something that should be remedied now.

I urge this committee to stand up for American values and for democratic principles and pass the D.C. statehood bill. Thank you so much.

Chairman PETERS. Thank you, Mr. Morial, for your opening statement.

Our next witness is Richard Primus, the Theodore J. St. Antoine Collegiate Professor of Law at the University of Michigan Law School. Go Blue. Professor Primus is an expert in congressional law. He is the recipient of the first-ever Guggenheim Fellowship in Constitutional Studies for his work on the relationship between history and constitutional interpretation. He also clerked for the late Justice Ruth Bader Ginsburg on the Supreme Court.

Professor Primus, welcome. You may proceed with your opening comment.

TESTIMONY OF RICHARD PRIMUS, D.PHIL.,[1] THEODORE J. ST. ANTOINE COLLEGIATE PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN LAW SCHOOL

Mr. PRIMUS. Chairman Peters, Ranking Member Portman, Members of the Committee, my name, as the Chairman says, is Richard Primus. I am the Theodore J. St. Antoine College Professor at the University of Michigan Law School. I am honored by your request that I participate in today's proceedings. I want to recognize Chairman Peters as my own Senator and Ranking Member Portman as a distinguished graduate of the law school where I teach, and I thank the Michigan law students who helped me prepare: Ruby Emberling, Savannah Brice, Rob Loteman, Thomas Quillen, and Tyler Washington.

The constitutionality of S. 51 is straightforward. The Admission Clause, or Article IV, Section 3, empowers Congress to admit new States subject only to the limitation that Congress cannot unilaterally reconfigure existing States. S. 51 would not reconfigure any existing State. It would simply take an American territory that is not currently a State and make it one. This exactly what the Admission Clause empowers Congress to do.

Some say that this admission would require a constitutional amendment, but the Constitution does not say that. The Constitution gives the power to admit new States to Congress, not jointly

[1] The prepared statement of Mr. Primus appears in the Appendix on page 75.

to Congress and the State legislatures by way of constitutional amendment.

Still, some Americans have the intuition that something would be constitutionally amiss about making most of what we know as Washington, D.C. into a State, and that intuition, which I think many people hold on a good-faith basis is based on our knowledge that the Founding generation did not intend Washington, D.C. to be a State. It is true. The Founding generation did not intend Washington, D.C. to be a State. But the Founding generation also did not intend to create a situation in which 700,000 Americans would have no voting representation in Congress. For the Founders, no principle was more central to the Constitution than representative government. At their time there was no conflict between that principle and the non-state status of Washington, D.C, because virtually nobody lived in Washington, D.C, but today it is a conflict.

The number of registered voters in D.C. today is larger than the entire number of voters who participated in all of the elections, of all of the conventions that ratified the Constitution, in all 13 original States put together. On any constitutional vision that takes representative government seriously, that is a serious problem, and given the importance that the Founders attached to representative government, it would be strange to conclude that their vision requires us to maintain a situation in which so many American citizens lack representation.

Unfortunately, it doesn't. The Constitution they adopted gives Congress a tool for solving the problem. That tool is the power to admit new States and give representation for Americans who currently lack it. S. 51 is not at odds with the Founders' vision. On the contrary. S. 51 helps fulfill what is most important in that vision.

Before I close, I should say a word about the ideas expressed in the testimony of two witnesses with whom I have the honor to share this meeting, Professor Derek Muller and Dr. Roger Pilon. Professor Muller cautions that S. 51 could cause confusion at the next Presidential election, given the 23rd Amendment. I agree with Professor Muller that the best solution is to repeal the 23rd Amendment and that the second-best solution is for Congress to ensure, by statute, that the seat of government does not appoint rogue electors, and read S. 51 to accomplish the latter solution by removing any electors that might be appointed for the seat of government from the electoral count. In my written testimony, I offer suggestions for what Congress could do if it wants to improve on that solution, but the existing solution is adequate.

Professor Muller rads the statutes differently, but the key point is this. Professor Muller and I agree that even if his reading were correct, S. 51 would be constitutional, and Congress could solve any confusions rising from the 23rd Amendment statutorily. In other words, he and I agree that nothing about the 23rd Amendment makes S. 51 unconstitutional.

In my limited time, I will address one of Dr. Pilon's arguments that contention to S. 51 would require the consent of the Maryland legislature. The idea is that Maryland gave what is now Washington, D.C, to the United States to be used as the seat of govern-

ment, not so that one day it could be a State of its own. In my own view, this is the strongest of Dr. Pilon's arguments, and Ranking Member Portman picked up on it in his spoken remarks.

But there is a difference between giving a gift for a reason and giving a gift on condition, and I am happy to discuss the distinction further, if it is helpful. But in short, if Maryland had ceded lands to the United States and specified that the cession was valid only so long as the land were used in a certain way, there might be a problem with S. 51. But Maryland's cession has specified no such condition. Washington, D.C., belongs to the United States. Maryland has no greater claim on it than the rest of America does.

I thank the Committee for its attention and I will be happy to address any questions.

Chairman PETERS. Thank you, Mr. Primus.

Our next witness is Roger Pilon, Vice President for Legal Affairs and the B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute. Mr. Pilon is a policy scholar at the Cato Institute and is the Chair of the Constitutional Studies program.

Welcome, Mr. Pilon. Please proceed with your opening statement.

TESTIMONY OF ROGER PILON, PH.D.,[1] VICE PRESIDENT FOR LEGAL AFFAIRS, THE CATO INSTITUTE

Mr. PILON. Thank you.

Chairman Peters, Ranking Member Portman, thank you for inviting me to testify on the D.C. Admissions Act. S. 51 raises both Constitution and practical problems. That has been the conclusion of every Department of Justice (DOJ) that has considered related issues since the time of Attorney General (AG) Robert Kennedy. To summarize my written statement here, in which the points I make here are much more fully discussed in written statement. I will simply touch on four issues: congressional authority, Maryland's consent, practical problems, and most important, 23rd Amendment.

Congress certainly has authority to admit new States to the union. It has done so 37 times under Article IV, Section 3, either with consent of the State from which the new State was created or, more often, from Federal territory acquired in clear contemplation of creating States from it, like the Northwest Territory.

But this is not a normal admissions case. The District of Columbia is unique. Our first Congress created it not under Article IV but under Article I's Enclave Clause for the express purpose of it becoming the seat of the new government. It has been that well over 200 years. Given that history, there is a strong presumption by now against this bill's radical change. The framers certainly did not intend anything like this.

Second, Maryland ceded the land for the express purpose of it becoming the seat of the Federal Government. It did not do so for the purpose of creating a new State on its border, nor is it likely that it would have done so for that purpose. Contrary to the bill's proponents, Article IV alone requires Maryland's consent.

Third, as a practical matter, this bill strips Congress of its authority over the present district. Congress will then have authority over this tiny enclave around the National Mall, and that raises

[1] The prepared statement of Mr. Pilon appears in the Appendix on page 88.

numerous practical problems. As James Madison explained, the Federal Government must not be dependent on any one of the States, nor should any State be either dependent or excessively influential on the Federal Government. This bill fails on each of those counts.

Finally, and most important, the 23rd Amendment granting the District three electoral college votes, would need to be repealed, because there will still be residents in this tiny enclave, including the First Family, and they will have outsized influence on Presidential elections, yet their votes cannot be taken away by mere statute. It is going to take an amendment. Proponents seem to understand this. Indeed, their bill provides for expedited procedures for repealing the 23rd Amendment, but that is a long shot, given the ratification hurdles. The bill also provides for repealing the statute that enables residents to vote.

That would extinguish the residents' right to vote, of course, so there is a problem here, and not even the 39 scholars who wrote to Congress recently to support this bill are able to agree about how to resolve it. One camp reads the 23rd Amendment as self-enforcing and therefore as mandating the appointment of electors. The other reads it as requiring enabling legislation, so without that there is no way for the residents to vote, and that camp seems perfectly happy with that result.

But even if the self-enforcement camp prevailed and the District had to appoint electors in such manner as the Congress made direct, as the amendment reads, both camps claim that Congress could replace the current law. That law orders electors to vote in accordance with the District's popular vote.

The scholars believe that Congress could order electors to vote for the ticket that got the most electoral college votes nationwide, for example, or for the ticket that won the national popular vote. In other words, the scholars read manner as referring not simply to procedures needed to execute voting but to legislation allowing Congress to direct electors now to vote.

The current statute does that, of course, but the way it does it is perfectly consistent with the whole point of the 23rd Amendment, namely to enable District voters to choose electors pledged to their preferred ticket. Congress certainly cannot direct voters how to vote, but neither could Congress direct electors how to vote, except as consistent with the popular vote, in the jurisdiction. Otherwise, the amendment would amount to nothing. Yet that is precisely what the scholars' examples come to.

Thus, if District voters went overwhelmingly for electors pledged to the Democrat ticket, while in the rest of the country the Republican ticket got the most electoral college votes, or won the national popular vote, the District's voters would effectively count for nothing, because the electors they voted for would be required to ignore how they voted. That would surely raise constitutional issues.

In short, I do not see how this bill, if enacted, can overcome the constitutional and practical challenges 22 State attorneys general have promised it is going to face. Thank you.

Chairman PETERS. Thank you, Mr. Pilon. Our final witness is Derek T. Muller, a Professor of Law at the University of Iowa College of Law. Mr. Muller focuses on election law, Federal courts,

civil procedure, administrative law and evidence. His research concentrates on the role of State and the administration of Federal election.

Professor Muller, welcome to the Committee. You may proceed with your opening comments.

TESTIMONY OF DEREK T. MULLER,[1] PROFESSOR OF LAW, UNIVERSITY OF IOWA COLLEGE OF LAW

Mr. MULLER. Thank you, Chairman Peters, Ranking Member Portman, Members of the Committee. I appreciate the kind invitation to testify here today. I am a Professor of Law at the University of Iowa College of Law, as mentioned. I teach election law and Federal courts, and today I am here to talk about four points on voting issues relating to the District. These are not abstract questions about statehood. These are practical problems related to S. 51 as it presently exists.

First, the 23rd Amendment guarantees that the new District would have three electoral votes, no matter how few people reside in it. While most of the District of Columbia would become a State, under S. 51 the new seat of government would be known as "Capital," and Capital would be entitled to three electoral votes. The boundaries of Capital roughly map onto a census tract. That tract had 33 inhabitants in the 2010 census, and 58 in the 2019 survey. A tiny group of prospective voters, potentially including the President and family, who happen to reside here, now have three electoral votes.

Second, S. 51 does not adequately address the 23rd Amendment and related voting issues. To start, there is no guarantee of repeal of the 23rd Amendment. The bill simply hopes it will happen. If there is a legal controversy about whether the District could become a State, everyone has an incentive to wait and see the legal process play out. If statehood is unconstitutional, as found by a Federal court, I assume District residents would prefer to retain the 23rd Amendment rather than see it repealed.

Amending the Constitution is a hard thing to do. It has been done once in the last 50 years. We have had a lull period of amending the Constitution, and we should not simply wish for future events to occur.

Additionally, Section 223 of the act is misleading. It is entitled "Repeal of law providing for participation of seat of government in election of President and Vice President." But in my judgment this does not "repeal" the law providing for participation" in the Presidential election, which is currently codified in the D.C. Code and would continue to be in force after S. 51 was enacted. Instead, it repeals 3. U.S.C. Section 21, a provision enacted to clarify the Electoral Count Act about the timing, transmission, and counting of electoral votes, not the District's participation in a Presidential election.

Finally, Section 221 of the bill may be unconstitutional. It compels States to permit absent Capital voters, eligible voters in Capital who had previously domiciled in another State, to register in their former States and request absentee ballots for Federal elec-

[1] The prepared statement of Mr. Muller appears in the Appendix on page 96.

tions, but States have the broad power of the qualifications of their voters, including reasonable citizenship, age, and residency requirements.

Congress' power to dictate voter qualifications for those who moved out of a State years ago is deeply contested. If this section is successfully contested in court, a related provision in Federal law that entitles tens of thousands of military and overseas voters access to the ballot may well be in peril.

Third, statehood for the District of Columbia should be conditioned on repeal of the 23rd Amendment. An amendment might condition repeal in the event that the District falls below a certain population threshold. If the bulk of the present District of Columbia becomes a State or is retroceded, the 23rd Amendment would simply cease to apply.

Fourth, potential alternative statutory solutions present legal and practical problems. None of these solutions that I describe are present in S. 51. They are the stuff of conjecture at the moment. If Congress decided not to appoint any electors at all, by, say, repealing the relevant provisions of the D.C. Code, Congress would be derelict in its duty. The Supreme Court has repeatedly noted that in the context of elections the word "shall" places a duty. The Constitution provides, in the 23rd Amendment, the District shall appoint electors.

Congress might enact a law awarding Capital's electors to the winner of the electoral college or to the winner of the national popular vote, but the 23rd Amendment provides that the District shall appoint and Congress may direct the manner. The first clause is the "who." The second clause is the "how." If Congress chooses a manner to award electors based on what happens in the rest of the United States, it is hard to say that the District has appointed anyone. Selection must occur within a place, not outside it.

Awarding Capital's electors to the winner of the national popular vote suffers too. How does Congress determine the national popular vote? How does it handle litigation and recounts? Voter eligibility rules vary from State to State. Voting procedures vary. Different candidates appear on the ballot in different States. While some variation in election procedures is inevitable, it may well violate the Equal Protection Clause, and it certainly presents significant practical problems.

In one sense my testimony is modest. It does not weigh in on the merits of constitutionality of statehood. It is addressed simply at the practicalities of S. 51, what it would do and what might happen if it were enacted. It only addresses practical voting rights problems, but these problems are serious and vexing, that in my judgment the present bill is inadequate to address.

Thank you for the opportunity to testify. I look forward to answering your questions.

Chairman PETERS. Thank you, Mr. Muller, for your testimony here today.

As we sit here and meet at this hearing the U.S. Senate, we are within a city outside these grounds that is populated by over 700,000 Americans who simply do not have equal representation or an equal voice in this Congress.

Mr. Morial, as President and CEO of the National Urban League, you lead an organization that is dedicated to achieving equal rights. Would you explain to this Committee how D.C. statehood further our democratic promise of equal representation and how ensuring D.C. very diverse population has a voice in Congress is part of the American Civil Rights Movement.

Mr. MORIAL. Thank you very much, Chairman Peters. It is axiomatic that the right to vote is fundamental to American democracy. Think of what we have here—700,000 American citizens who comply with our laws, pay Federal taxes, participate in our society, are the only who do not have the right to vote in Federal elections in a way that counts, and, of course, excluding territories. That robs the residents of the District of Columbia a voice in many critical decisions—war and peace, taxation, regulation, distribution of proceeds, and I could continue to list it. It is so basic.

We fought, as a Nation, in the 20th Century to expand the right to vote, first to women with the passage of the Nineteenth Amendment, to African Americans, with the enactment of the Voting Rights Act, which made real the promise of the Fourteenth and Fifteenth Amendments, with the constitutional ban on poll taxes. In every single instance, this is one of the last pieces of that, I think, important shift in how we govern this Nation.

For us, at the National Urban League, nothing is more fundamental than the right to vote, the ability to choose a member of the House, who has a vote on the floor of the House, to choose two members of the U.S. Senate, who have a say in all of the important proceedings.

I might add that right now Federal judges and superior court judges are appointed by the President of the United States and ratified, or rather confirmed by the Senate with no voice by the members of the District of Columbia, by the residents of the District of Columbia, and any choice for U.S. Attorney, for district court judge, for appellate court judge, or even the court that deals with, if you will, the counterpart to State laws in the District of Columbia, the superior court. No voice by the residents of the District of Columbia. This is an injustice, and all of the legalistic arguments do not address the fundamental basic issue, and that is the right to vote.

I think I speak for the broad civil rights community and for the voting rights community in saying that this is a long battle whose time has come. It is time to enact this bill.

Chairman PETERS. Thank you. Our country was founded on the principle of no "taxation without representation", the key part of what inspired the Revolutionary War. But the reality for D.C. residents is that unlike any other citizen of this country they pay taxes, Federal taxes, without having full representation in Congress. In fact, residents of the District of Columbia currently pay more than $6.9 billion annually Federal income taxes. That is more than residents in over 20 States, and it means D.C. residents pay more per return in Federal income tax than residents of any other State.

Mayor Bowser, under the status quo, in your mind, is it fair that D.C. residents are paying billions of dollars in taxes every year to

the Federal Government and yet have no say in how that taxpayer money is being spent?

Ms. BOWSER. It is absolutely unfair, Mr. Chairman, and you laid it out perfectly. It is a question of fairness and it is a question for us of what we are entitled to as American citizens and taxpayers. What we have spent, many years, making sure that everybody recognizes is that the residents of the District of Columbia, we pay our own way. We run our own government. We are a State, a city, and a county all at once. It is very important that a jurisdiction as well run as ours, a jurisdiction that has built its population, its tax base, has built a AAA bond rating on Wall Street, have full representation in the Congress, but also that we have full autonomy over our decisions.

Chairman PETERS. Thank you, Mayor, for that response. I need to step out and be on the floor of the Senate, and so I am going to turn over the gavel to Senator Carper. But I will now recognize Senator Johnson. I know Ranking Member Portman had to step away. He has yielded his time to you, Senator Johnson. You may proceed with your questions.

Ms. BOWSER. Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR JOHNSON

Senator JOHNSON. Thank you, Mr. Chairman. We have heard approximately about an hour of testimony, opening statements in favor of D.C. statehood, and about 15 minutes of the counterargument there, which I found quite convincing, the complexities of it, the difficult nature of the Constitution, as well as the statutes.

A number of times I have heard that something is not constitutional about this, that there are constitutional rights being violated. Yet the Constitution set up the District, specifically.

Mr. Pilon, can you talk about what the Founders had in mind and why they set the District apart separate from the type of statehood that we have in the rest of the country?

Mr. PILON. I would be delighted to do, Senator Johnson, and the argument can be found in Federalist 43[1], by James Madison, in which interdependency and the problem it poses runs throughout the arrangements that were set forth, to create a separate District of Columbia such that the Federal Government would not be seated in any one of the particular States.

They had experience with that in 1783, under the Articles of Confederation, where the then Continental Congress was meeting in Philadelphia at the time. They were confronted with a job that sought to storm the Constitutional Hall, and indeed were forced to fleet because the local government would not take measures to prevent that mob from doing so. That was clearly on their mind when they drafted the Constitution's Enclave Clause, which provides for a District no larger than 10 miles square, not 10 square miles. There is a difference between the two.

Senator JOHNSON. There is obviously a conflict between a central Federal Government versus the sovereign States. Those individuals that are within the District obviously have a vested interest in a very powerful Federal Government. Correct?

[1] The Federalist 43 papers appear in the Appendix on page 148.

Mr. PILON. Yes.

Senator JOHNSON. Which is counter to the power vested in the States, that the States want to maintain their sovereign power. Correct?

Mr. PILON. Yes.

Senator JOHNSON. From my standpoint—and again, we can talk about the constitutionality, we can talk about the complexities with the statutes and how to deal with the 23rd Amendment—to me this seems like a naked power grab.

I thought it was interesting, Senator Lieberman talked about that nobody can predict how the District would vote. I think you can predict quite handily. He cited Alaska and Hawaii's examples of what people thought, how they thought they would vote has completely flipped, but I do not think either Hawaii or Alaska had these types of voting histories.

In 2020, 92.2 percent of D.C. votes went to the Democratic candidate, 5.4 percent went to the Republican candidate. In the last eight elections, no Republican candidate has gotten more than 10 percent of the vote. That is over 28 years. Again, I would argue that certainly has something to do with the vested interest of the people here in D.C. who—there is certainly poverty here, but this District is not made of many disadvantaged individuals, because the average median income of the District of Columbia is $92,000. That compares to the average median income nationally of $65,000.

Thirty-four percent of the residents of the District of Columbia that are 25 years or older have some kind of post-graduate or professional degree, versus 13 percent of the rest of the population. This is an elite group of people here. They have a vested interest in the power of the Federal Government, and I think that is one of the issues that we need to address when we are talking about whether we should grant statehood to the District of Columbia.

Professor Muller, would you agree with that, or what would your comments be on that?

Mr. MULLER. I think statehood is a question of representation and a question of the kinds of issues that the Members of this Committee are debating, to determine whether or not it should look like the present form, whether it should look like statehood, whether it should look like retrocession. It is certainly the kind of thing that should be considered.

Senator JOHNSON. In the end, people choose to live here, as well.

Madam Mayor, I cannot let this opportunity pass, as long as you are here testifying before the Committee, to talk about what I consider an important constitutional issue, which is the equal administration of justice. Just a couple of questions in terms of how the District has handled people who have rioted in the summer versus people who breached the Capitol. I condemn both equally. Have you seen any information in terms of insurance claims of how much property damage, was done during the summer rioting? Do you have a figure on that, because we know nationally those riots, close to $2 billion in insurance claims.

Ms. BOWSER. Thank you, Senator, for your interest in the District, but I have to address your question first by talking about the residents of D.C., 700,000 people, hard-working individuals, who educate their children, start businesses, and work in the District.

It would be incorrect to say that D.C. residents have more of an interest in the Federal Government than other Americans. We know that we have——

Senator JOHNSON. Again, that is not the question.

Ms. BOWSER [continuing]. All over——

Senator JOHNSON. That is not the question I asked you, so could you answer the question? Do you have a property damage estimate from the summer riots?

Ms. BOWSER. I am glad to hear you say that you are opposed to riotous behavior, whether it happen on 16th Street or here at the Capitol.

Senator JOHNSON. Madam Mayor, could you answer the question? Do you have an estimate of the property damage during the summer riots?

Ms. BOWSER. I know that we had one night of rioting in the District——

Senator JOHNSON. Do you know how many people were arrested for the summer riots?

Ms. BOWSER. We have had dozens of people arrested over the last year.

Senator JOHNSON. How many are still being detained?

Ms. BOWSER. I do not know. I do not know the answer to that.

Senator JOHNSON. Do you know whether, by using geolocation, did we go and arrest people who participated in the summer riots in their individual States, like we did with the January 6th breachers?

Ms. BOWSER. If you are asking about how the Federal Bureau of Investigations (FBI) operates you will have to address those questions to them. I can speak for the Metropolitan Police Department (MPD), and we do not permit any riotous behavior, whoever is conducting it. We have made arrests in both cases, in cases where we had riotous behavior, and that is a specific behavior, here, on the Congress' grounds, and on city streets.

Senator JOHNSON. OK. My final point is I know the members of the House of Representatives have written a letter to you inquiring about the conditions in the D.C. jail, which people are being held basically the entire population in some form of solitary confinement. When you respond to their letters I would like you to send me the same response.

Ms. BOWSER. Senator, you are aware that our criminal justice system is also unique in the American system, that our Metropolitan Police Department makes arrests, but all arrestees are processed through a Federal system, through the courts who have federally appointed judges, a pretrial system that is Federal as well.

We operate a D.C. jail, and if there are any concerns about conditions at the jail I will address them.

Senator JOHNSON. There are, and again, I just ask you to respond to me when responding to the House members who are asking about the conditions of solitary confinement.

Ms. BOWSER. Yes. Having control of our criminal justice system is a driving force behind why we need statehood. Certainly we have talked about representation, but being able to enforce our own laws is important to how we operate our jurisdiction.

Senator JOHNSON. OK. Thank you, Mr. Chairman.

Senator CARPER [Presiding.] Thank you, Senator Johnson.

To our witnesses, let me just note that the Members of the Committee will have the opportunity and the right to submit questions for the record, and if they exercise that right then we would appreciate very much your timely response.

Again, we thank all of you for joining us today to testify and presenting your points of view. I am going to ask, if I can, for Dr. Primus, if you don't mind I would like for you to reflect on what we have heard today from Dr. Pilon and from Mr. Muller, and to ask is there anything that you have heard from either of these witnesses, anything you would like to comment on, please? Thanks.

Mr. PRIMUS. Sure, and it is a privilege to share the hearing with both of them. They are both people who think a lot about these issues.

The first point I would note is that there is something a little bit curious about the contention that we have heard from Professor Muller that we should not count on the ability to repeal the 23rd Amendment. It is true the repeal does not happen by itself, but here is what I want to point out to the Committee in a very big-picture way.

Many members of the U.S. Senate are committed to a theory of constitutional interpretation that usually goes by the name of originalism. It is the theory that is usually associated with late Justice Scalia. One of its very basic premises is that the Constitution's original leanings are binding because if we do not like what it means we can change it. That is, the whole theory is premised on the idea that the Constitution can be amended whenever we want.

To take the view that the 23rd Amendment could not be amended, that it is very unrealistic to think that would happen, even though the 23rd Amendment would be ultimately pointless—nobody would really want it around if S. 51 were to be adopted—is essentially to say that the theory of originalism associated with Justice Scalia is all wrong, is a fable. I do not think that is a position that everyone who is a member of the U.S. Senate wants to endorse.

I should also say, briefly, to Dr. Pilon's comment. I am sorry?

Senator CARPER. Thank you. I was listening to something that colleague, Senator Johnson said. Go ahead. Anything else you wanted to say on this point?

Mr. PRIMUS. Just very briefly, Dr. Pilon says that there is disagreement among the scholars who wrote in to support the constitutionality of this bill about the best way to solve the complications arising from the 23rd Amendment. It is true that there is disagreement about what the best way to solve the problem is. That is because there are many possible solutions, and as among many adequate possible solutions, not everyone agrees on what the best solution is, but everyone agrees that the problems are solvable. Mr. Muller agrees about this. I agree with this also. I could, if the Committee wanted to, speak about specific details of complexities that are raised and why there are actually not problems, or solvable, but we all agree that all of these problems are solvable, and none of them should be an obstacle to S. 51.

Senator CARPER. Dr. Primus, thank you very much for that response. As you mentioned in your testimony, some people believe that the District of Columbia can only become a State through constitutional amendment. My bill, a bill that many of our colleagues have co-sponsored, as well as the nearly 40 constitutional law experts who recently signed a letter of support, believe otherwise.

Professor Primus, I am going to ask you a series of brief questions, if you do not mind. The first of those is, how many of the 37 States admitted into the union after the original 13 colonies were done so by a constitutional amendment?

Mr. PRIMUS. None.

Senator CARPER. Second, did Congress require constitutional amendment to shrink the Capital in 1946, when it gave land back to Virginia?

Mr. PRIMUS. No, it did not.

Senator CARPER. Third, what is the maximum size of the seat of government established in the Constitution, and does it require a minimum size?

Mr. PRIMUS. The maximum is 10 miles square. That is in plain text. There is no minimum size. It is left to the judgment of Congress.

Senator CARPER. Thank you. Last, can you speak briefly as to why a constitutional amendment is not required, nor the norm——

Mr. PRIMUS. Well, constitutional——

Senator CARPER. Wait. Can you speak briefly as to why constitutional amendment is not required, nor the norm, in entering a State into the union, and how the Constitution grants Congress the authority to make a State? Go right ahead.

Mr. PRIMUS. Sure. This is the text of the Constitution. The Constitution, Article IV, Section 3, the Admissions Clause, which says that Congress can admit new States into the union. Like every other power expressly vested in Congress by the Constitution, except where specifically specified otherwise, that power is accomplished by congressional action by a majority of each house, and then presented to the President. In the small number of cases where something has to be done different, the Constitutional specifies that it has to be done different.

This is not an oversight. At the Constitutional Convention in 1787, there was a proposal considered to require a super-majority of Congress to consent to the admission of new States, and it was rejected. It was felt that this was the sort of thing that Congress can do all by itself, in the normal way that it does everything else. That is the text of the Constitution. To state that it has to be done in some other way is simply to say something that the Constitution does not say.

If I might say one other thing, the suggestion that Congress needs Maryland's permission is not supported by the clause. It is true that Maryland gave the land to the United States to be used as the District. The land was used as the District.

Suppose you wanted to bike to work instead of drive, and I said, "I have an extra bike. Why don't you take my bike? Here, it is a present," and for 10 years you used my bike and ride it every day. Then 10 years later you decide that you want to do something else with the bike. You are going to ride it on weekends, or you are

going to give it to your kid, or some such thing. You do not need to come back and ask me to do that. I gave you the bike. I did not say, "If you do something with it, otherwise one day you have to give it back to me."

That is the position we are in. D.C. belongs to the United States.

Senator CARPER. Thank you for that response. We are being joined by Senator Lankford. I am pleased to recognize him at this time. Thank you for joining us, James.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Senator Carper, thank you very much. I know you have been in this dialogue for a very long time, and that you have been engaged in this, as many of you have been, engaged for a very long time on this. You also know my predecessor, in the last time that there was a hearing on this, Senator Coburn, when he came into this hearing he sat down and said it was a waste of time, and walked out.

Senator CARPER. A man of few words.

Senator LANKFORD. Yes. I know that you all had multiple conversations on things you did not agree on, and I know this was also an area that you had strong disagreements.

Senator CARPER. We had a great friendship. He was a good talker. I was good listener.

Senator LANKFORD. Yes. I appreciate the dialogue on this and to be able to go through it. Obviously this has been a point of conversation for many people for a very long time, to be able to talk about this.

I want to begin with a larger question on this, and that is the issue of retrocession. Obviously we have walked through this area before, as a Nation, that the southern portion of the District of Columbia retroceded back to Virginia in 1847, 1946. I think just about everybody on the panel has mentioned that so far today, to be able to discuss retrocession. What is the barrier to retrocession with Maryland today? Mr. Pilon?

Mr. PILON. Yes. Thank you, Senator Lankford. That issue, with respect to the retrocession of Virginia in 1846 has never been tested. It arose in a private taxpayer suit some 30 years later. The court declined to address the merits because so much water had gone under the bridge, and so much would have to be disturbed.

Many people have questioned whether that retrocession was legitimate, including no less than President Lincoln and President Taft, and others. And so it remains an open question.

Senator LANKFORD. What is the way that that would have to be resolved?

Mr. PILON. The court have to speak to it, first of all.

Senator LANKFORD. You have to find someone with standing, first of all, for the court to speak to it.

Mr. PILON. Yes. The standing issue would certainly come up. But with respect to retrocession to Maryland, which is what your opening question was about, there you would certainly need the consent of Maryland to do that. In fact, if I may respond to a point that Professor Primus made, the grant of land from Maryland to the District was made pursuant to Article I, the Enclave Clause, ex-

pressly for the specific purpose of creating a seat for the new government.

Now, he used a hypothetical. I will give you a hypothetical. Suppose that immediately upon receiving that land the Federal Government turned around and created a State rather than the seat of the new government. Everybody would agree that was sheer political mischief. If that is the case, then what difference does it make whether they did it immediately or in the intervening 200 years? The principle remains the same. They did not use it for the purposes for which the land was granted, but to do something completely different, and that raises a series problem, in and of itself. It raises the Article IV question too, because in order for the Federal Government, Congress, to make a State out of the District, you would need, had they done that initially, the consent of Maryland to do that, under Article IV. It seems to me that consent will still be needed, even though it is more than 200 years later.

Senator LANKFORD. It is interesting to me when I look back on the history of this conversation, again, none of this is new in this dialogue. In 1963, at that time Attorney General Robert Kennedy wrote, "While Congress' power to legislate for the District is a continuing power, its power to create the District by acceptance of secession contemplates a single act. The Constitution makes no provision for revocation and the act of acceptance or for retrocession."

Then Ed Meese, a couple of decades later, as our Attorney General, in 1987, wrote, "Clearly, the District chosen would not exceed 10 miles square, but under the language of that clause, once the session was made and this District became the seat of government, the authority of Congress over its size and location seems to have been exhausted. The Constitution appears to leave Congress no authority to redefine the District's boundaries absent an amendment granting it that power."

Now obviously constitutional scholars, even at this conversation, have disagreed with that. What are your thoughts?

Mr. PILON. Attorney General Kennedy was absolutely right. The creation of the district was a single act. It was completed. It was done. Now you have to look where Congress might have other authority to turn that District into something like a new State.

The other side points to Article IV. The problem there is that the District is sui generis. It is unique. This is not a normal creation of a State process, as though you were doing it under Article IV with the Federal territory, say the Northwest Territory, the Louisiana Purchase, land that was acquired in clear contemplation of new States being created for it. The District of Columbia of was not created with the contemplation of a new State being created from it.

Senator LANKFORD. Mayor Bowser, it is good to see you again. We have had the opportunity to be able to chat for several years now, so it is good to see you again. Let me ask you a couple of questions on this as well.

Were you surprised at the original design of the transition of leadership that the Mayor—whoever the Mayor is, at whatever time that this would automatically become Governor in that transition? Obviously, the Federal officials would have to go under an election, but at that point District leadership would become State

leadership and get automatic transition. Is that surprising to you, just in the structure of it?

Ms. BOWSER. We convened a Constitutional Convention, Senator, so over several months D.C. residents participated in how they would want the State government to look, and we wrote a constitution. In that constitution we expanded democracy by adding more State legislatures, which is important, but also just converted the existing elected officials to seats, and the constitution also contemplates the election of the new State representatives and the Federal officials.

Senator LANKFORD. OK. Let me follow through on one more issue that is connected but not connected on this.

Washington, D.C., during the pandemic time period, had the most strict religious liberty restrictions of all across the United States, with the limitations for gathering of people of faith to be able to gather indoors. There was a lot of pushback that happened. You eventually changed that and opened that up a little bit, but it was still a very strict, non-allowance, I guess I should say, for people of faith to be able to meet, whether it was last Easter or other times, to be able to gather and to be able to go through all these, just a normal faith-gathering time period.

You have to know that Congress overwhelmingly passed, in 1993, the Religious Freedom Restoration Act (RFRA), and it is interesting to me during this time period and this conversation Delegate Norton introduced H.R. 4023, which would amend the Religious Freedom Restoration Act and would take out the applicability of that to Washington, D.C., that Washington, D.C., would no longer follow under the Religious Freedom Restoration Act as the rest of America would, and watching what happened for the limitation of people of faith during the time of the pandemic.

I am trying to figure out, if this became a new State, kind of the direction that this seems to be headed for people of faith to be able to live out their faith. Now I have no belief that you are trying to limit people from having faith in D.C., but it was odd, during this season of the pandemic, to see such strong limits on people of faith gathering together. Can you help me understand that?

Ms. BOWSER. Certainly. The COVID restrictions were for everybody, and I do not have to tell you that we faced a 100-year pandemic, and I am very proud of D.C. residents, businesses, houses of worship who followed health guidance and allowed us to crush this virus. That is why I can sit here today with D.C. fully open, and I know that we saved lives by flattening the curve, keeping people out of the hospital and intensive cares, and making sure our first responders could respond to the virus. I am proud of the work that we did.

Certainly what health guidance told us, Senators, was that some indoor spaces were more of a risk for transmission of the virus than others, and unfortunately churches were among them. Believe me, I have had this debate. I have had this debate with my own church, in court. We came to many compromises. It was always our intent to make sure that people of faith and houses of worship all across the District could practice their faith, but also practice it safely.

I do not have to remind you our very first case in the District was in a church, and we saw the spread of the virus, and we learned a lot about the spread of the virus from case No. 1.

The work that we did was important, it was necessary, and the compromises that we made were also good ones.

Senator LANKFORD. It is an interesting balance, though, to be able to walk through First Amendment protections and also pandemic protections——

Ms. BOWSER. Yes.

Senator LANKFORD [continuing]. In this process, and as you know many churches left the District to be able to go worship a few miles away, either in Maryland or in Virginia, where they could meet for worship, to be able to gather indoors or outdoors. I understand as a mayor you make difficult calls, but there is a unique protection for people of faith to be able to live out their faith and be able to guard that. I appreciate the dialogue——

Ms. BOWSER. Sure.

Senator LANKFORD [continuing]. Let me yield back the time. I apologize for going a little bit long.

Senator CARPER. No, happy to hear you. Thank you for your questions. It would be interesting to know. Senator Lankford is probably, I should mention, a number of members of our body here are people of deep faith, and none deeper than his. It would be interesting to know, attendance at worship services of all different faiths ebbs and flows over time. We are seeing some ebbing going along in most major faiths in this country today. I don't assume to believe that anybody knows what this number would be, but it would be interesting to know what church attendance is like in the District as compared to some of our other States. That would be interesting. We will ask that question for the record. It would be interesting to see what that looks like.

I have a follow-on question, if I could, and I would ask the Mayor if you could handle this, but I also want to ask Mr. Morial to join as well. I will ask the two of you to tag-team it. I never imagined, as an elected official, as Delaware's Treasurer, Congressman, Governor, Senator, that a retired Navy captain, a Vietnam veteran, last Vietnam veteran serving here, but I never imagined serving in all those capacities that I would ever end up leading a charge in the Senate to fight on behalf of the residents of the 51st State. But that is where we find ourselves, and I think we regularly see the negative effects on D.C. residents of not having a vote or a voice in Congress. We talked about that, especially during a global pandemic.

As a District with 46 percent African American population, let's not forget that like other communities of color across the Nation, African Americans are suffering disproportionately, or have suffered disproportionately in D.C. from the COVID–19 pandemic, and most of those infected in D.C. are people of color, as you know, and I am told that about 75 percent of those who have died here are African American.

I would ask the Mayor and then Mr. Morial, can you speak to the issue of inequality here, and, Mayor Bowser, could I please ask you to speak to why the nearly 700,000 District residents, our fel-

low Americans, have been and continue to be disproportionately impacted during the pandemic as a result of not being a State.

Ms. BOWSER. Thank you, Senator, and I think you are about right about those stats. We saw early on in the pandemic that our African Americans residents were not only being affected with COVID–19 but dying from COVID–19 in vastly greater numbers than their white counterparts. We know that African Americans and our Latino residents are more likely to be in essential work positions and were unable to stay at home once the home orders were introduced across America, because they were the grocery workers, they were the nursing assistants, they were the people that were keeping our sanitation services going across America. They were getting infected more, and because of centuries of disinvestment in our health, were also dying more.

What was a tragedy that we did not expect during all of this, as we were facing a 100-year pandemic, is that we would be left out of the emergency funding that we so desperately needed, to stand up testing, to build alternative care sites, to make sure that we could provide alternate spaces for learning. In the CARES Act, $755 million, we were short-changed, and we spent the better part of the year making sure we got that money back. I am grateful to this Congress for seeing that through.

But what that meant, Senator, for the first time in no one could remember since, that we were treated in a formula with territories, rather than being treated like a State, which we are, in hundreds of Federal statutes. So it made clear to all of us how important it was that what our practical operation as a State, a county, and a city can only be codified and not reversed in any piece of legislation with statehood.

Senator CARPER. Thank you for that response. Mr. Morial, would you like to add to those words?

Mr. MORIAL. Let me say, Senator Carper, I appreciate you raising this issue. A few important facts. The United States is approximately 14 percent African American. The District of Columbia is some 46 to 50 percent African American. The failure to provide Federal voting rights, voting rights for a Member of Congress and two U.S. Senators, for the 51st State, disproportionately impacts a large number of African American citizens of the United States.

There was once a time when the District of Columbia was as much as 70 percent African American, and D.C. became, in the early 20th Century, a place where African American residents of Virginia, North Carolina, South Carolina, and the Old South, as a part of the great migration transitioned to. They had no right to vote in Alabama, Georgia, South Carolina, North Carolina, or Virginia, and they had no right to vote in the District of Columbia.

Then the Voting Rights Act came along, and people in Alabama, Georgia, South Carolina, North Carolina, Virginia, Louisiana, Texas, and Florida gained the right to vote for members of the House and members of the U.S. Senate. But the members of the District of Columbia, the black residents, and beyond the black residents, were left out and left behind.

Mayor Bowser identified the structural impact of this, is that D.C., for many Federal programs and initiatives, is treated like a territory, which denies the residents of the District of Columbia, in-

cluding its black residents, equal treatment and therefore equal representation, not only in voting but across the board. That is a structural inequity that is associated with this fundamental denial of a right to vote.

One only believes, as I do, that the residents of the District of Columbia have been patient since 1965, have been patient as they sought to achieve and to accomplish their full rights as American citizens, and I doubt if anyone else outside of the District of Columbia would stand for being disenfranchised in the way the residents of the District of Columbia have been disenfranchised. This is something whose time has come, and this is something that is a right.

Senator CARPER. Thank you for those words. That was very insightful. Thank you.

We have been joined by Senator Rosen. I want to thank you for joining us today, for being in support of this legislation, and you are now recognized. Thank you, Senator Rosen.

OPENING STATEMENT OF SENATOR ROSEN

Senator ROSEN. Thank you, Senator Carper. I appreciate your work on this for many years and your chairmanship of this Committee in the past.

I would really like to thank Mayor Bowser, Congresswoman Holmes Norton, well, Senator Lieberman has left, but everyone for being here and for the work that you have been doing, because we know there are a lot of contributions from our D.C. residents. I like to say every Senator is a parent of an only child, the States we represent, and we are so incredibly proud of them, right? We are their biggest cheerleader, their biggest champion.

For me that means Nevada, and I could not be prouder of our great State and its amazing people, but we were not always a State. We began as a territory, becoming part of the United States but not yet a full State. Via treaty with Mexico in 1848, that is when we were a territory. In the beginning we did not even have our name. We were part of the Utah Territory, becoming the Nevada Territory only in 1861, and it was not until October 31st—Nevada Day, we call it now—1864, in the midst of the Civil War, just eight days before President Lincoln's reelection, that Nevada, the Battle Born State, became the 36th State in the union.

I am a proud co-sponsor of S. 51, the bill that provides statehood to D.C., and so I am so glad to hear your stories and have that become part of your State story when somebody tells that in the future. And so we just want you to be the parents of the newest State.

Mayor Bowser, as a proud D.C. resident, as its elected Chief Executive, can you tell us about some of the wonderful contributions that D.C. residents make to our, not just this community but to our country, every day?

Ms. BOWSER. Thank you for that question, Senator, and thank you for sharing the Nevada story, and we do indeed look forward to telling the D.C. story and being admitted, just like Nevada was, by a simple legislation by this Congress, who has that full authority.

When we think about D.C. residents we are eight wards, 700,000 people, people who start businesses here, who raise their children here, and pay their taxes. In fact, they pay more taxes per capita than any other American, and we pay more taxes than 20 States.

We are what we call a donor State to the Federal Government, and sometimes people are mistaken and think that the Federal Government pays to operate the District of Columbia, and that is just not the case. I presented, just a couple of weeks ago, a $17 billion budget to the Council of the District of Columbia, which will become our State legislature. Unlike other mayors, we operate a school system. We operate our corrections system, our Department of Motor Vehicles (DMV). In so many ways we already function as a State.

Senator ROSEN. You are the busiest mayor—is that what you are saying? [Laughter.]

But you are the most diverse mayor, perhaps, because diversity is a strength. That is for sure. And like D.C., Nevada's population and our State is incredibly diverse. Our strength as well. We have 30 percent Latino, 10 percent African American, about 9.5 percent Asian American and Pacific Islander (AAPI) community. In fact, we have the fastest-growing AAPI community, one of them, in the Nation. While D.C. is often called out for having lots of newcomers, Nevada has many new residents as well, and sometimes we have been known to be the fastest-growing State in the country.

And so only 25 percent of Nevada's 3 million residents were actually born in Nevada. So our diverse population, the influx of people from all around the Nation and the world, make us the dynamic State that we are. I know you too have a diverse population, coming from all over the country and all over the world. Why does it matter to this population as well that they are the 51st State?

Ms. BOWSER. Absolutely. We are diverse, and we are diverse in some ways that people do not recognize. I call him Mayor Morial, but President Morial also mentioned, 46 percent African American, 12 percent Latino, about 3 or 4 percent AAPI. We are also growing. With our recent census we are among the fastest-growing jurisdictions in the Nation as well.

Let me say something about our economic diversity. Infrequently we are thought of us as a Federal Government town, and indeed, we are proud to be host to the Federal Government. But the Federal Government's presence in the District of Columbia has actually been decreasing over a couple of decades. Federal jobs have been decreasing, Federal workers have been decreasing, and even the Federal use of space in the District has been decreasing over several years.

We have been focused on how to diversify our economy, build private-sector jobs, focus on technology and hospitality and education. Those are the jobs of the future in the District. That is why our economy has been so robust.

It was discussed earlier that we are an elite place. Speaking as the daughter of two government workers who raised five kids and focused on family and faith in this city, I can tell you that people work hard here, but we also have a diversity of incomes, and even a diversity of views.

We are particularly well situated right now, Senator, to be admitted as a State. You will see, with our population, we are larger than two States already and we rival five others, and the way that we are growing we will achieve that. We are by far larger than most States when they were admitted to the union. We are just poised to be a great benefit to the union as the 51st State.

Senator ROSEN. Thank you. I think you are a great benefit already. I appreciate your service, and I will yield back my time.

Senator CARPER. Thanks very much for yielding. Senator Lankford, if you would like to be recognized again I am happy to do that.

Senator LANKFORD. Senator Carper, thank you very much for that.

Professor Muller, I want to ask you a couple of questions to be able to follow up on some of your statements earlier. You had talked about the difference in this bill, the H.R. 51 bill, and the way that it handles the 23rd Amendment. This bill says that we will pass it, we will declare D.C. a State, and then we will get around to doing the 23rd Amendment, to be able to change the electors issue that is hanging out there.

You flipped that in your earlier statement in saying why wouldn't this be conditioned on the 23rd Amendment being eliminated first, to be able to make sure that there are not three additional electoral college—I think you mentioned, for 59 people that would be in the new Capital enclave at that point, that those 59 people would not have three electoral college votes. Can you go into that a little deeper?

Mr. MULLER. Sure. The bill does anticipate an expedited repeal process. It could only do one thing, which is an article that says we repeal the 23rd Amendment. But, until that happens we have an enclave of around 59 people, some set of that voters, who would then be eligible to choose three Presidential electors. And so the thought is, well, if we can push people and hopefully wait and see what happens, then maybe the 23rd Amendment will be repealed.

So there is no condition on that. There is no sort of hard rule. The hard rule is that Congress has to have a vote. There is no guarantee that two-thirds of each house of Congress does it. There is not going to be a time limit about when 38 or 39 States approve that amendment. It is sort of waiting to see what will happen while the 23rd Amendment, giving three electoral votes to this enclave, sits there.

So instead, another way might be to say let us repeal the 23rd Amendment or put a condition in the 23rd Amendment saying if the population of the District constituting the seat of government drops below a certain population threshold then the 23rd article of the Constitution is no longer in place, 23rd Amendment no longer applies. Then that way we do not have these sorts of residual problems out there.

Senator LANKFORD. All right. Do you know of any issue with trying to be able to form that way, what you are describing, as far as a constitutional issue or a problem with that?

Mr. MULLER. No. I think you could develop a constitutional amendment that would condition the repeal of the 23rd Amendment on some future event, like retrocession or statehood for the

District. I mentioned in my testimony some of the concerns about how to handle the Capital voters left within that enclave. I think it is contested whether or not Congress has that power. I think a constitutional amendment that empowers Congress expressly to handle those voters left in the Capital. You could certainly fashion amendments and think creatively about how to address that solution holistically, on a constitutional side, before you get to the statutory side.

Senator LANKFORD. Right. But either way there is a tremendous number of constitutional issues that still have to be resolved. Obviously, the Founders designed a Capital region to never be a State. I mean, that was the design in the Constitution to say this is uniquely, so that the Federal Government does not exist under the authority of any State, or try to interact with a State. It was designed very particularly to be able to make sure that constitutionally there would always be a region that is there, that was established so that Federal Government did not have to worry about what is State, what is Federal, and living under that.

So there are lots of constitutional questions here that the farther you go, the larger the constitutional questions get. Many of them are novel. They have never been addressed before. Obviously, the retrocession to Virginia of the southern portion of D.C. was never really resolved long term. That one still hangs out there. But all the other constitutional issues still are reserved. Is that correct or not correct?

Mr. MULLER. Right. There are a number of unsettled constitutional issues. You have heard about some of them today, and they have been written about for decades.

Senator LANKFORD. Right. Two hundred-plus years, any individual that moves to Washington, D.C., understand that Washington, D.C., is unique. This is a place where you do not have a vote for a Senator or a House member. Of the last 100 years, we have had a delegate in the House. But it has been well known that when you move to Washington, D.C., at any point you are moving to an area that does not have two Senators or a House member. Correct or not correct?

Mr. MULLER. Yes, that is correct.

Senator LANKFORD. When I look at it, and just the transition of this, that is a given statement for anyone that is moving. My hometown of Oklahoma City is ten times the size of Washington, D.C,, but there are still individuals that want to live in Edmond, Norman, Moore, or in Bethany, and they choose to be able to move out of Oklahoma City but still commute back and forth in other areas, to be able to work or live, because it is a choice that they make.

In an area that is literally one-tenth the size of my hometown of Oklahoma City, people have options to be able to still work and to be able to travel and to be able to move into other areas. If they wanted to be able to work in Washington, D.C., many people live in Maryland, in Virginia, or in West Virginia, and drive in, to be able to here from longer distances. But that is a volitional choice. No one is compelled to actually be here, knowing that that has been the situation for more than 200 years. Correct?

Mr. MULLER. Yes.

Senator LANKFORD. OK. Thank you.

Chairman PETERS [Presiding.] Thank you, Senator Lankford. The Chair recognizes Senator Hawley for your questions.

OPENING STATEMENT OF SENATOR HAWLEY

Senator HAWLEY. Thank you very much, Mr. Chairman, and thanks to all the witnesses for being here.

Dr. Pilon, let me just start with you, if I could. Just help me understand the history here. My understanding is that the United States Justice Department, the Office of Legal Counsel (OLC), has weighed in on this question a number of times over the course of its history. To my knowledge, the Office of Legal Counsel has never said that Congress has the ability, by statute, to turn the District of Columbia into a State. Is that correct?

Mr. PILON. That is correct. The only exception occurred during the Obama Administration, when the Office of Legal Counsel gave the no-go for this. And so he turned to the Solicitor General's Office (OSG), and the Solicitor General said we can defend this, and, of course, that is very precious, because that is the job of the Solicitor General's Office, to defend even unconstitutional matters that may turn out to be such.

Senator HAWLEY. Sure. What happened was the Attorney General under that administration got a consistent, the same answer that Attorneys General, and Presidents, had been getting for decades, decided he did not like that answer, and said, well, maybe somebody else will give me a different answer. But consistently, the Office of Legal Counsel, which is that unit in the Justice Department, that office that is charged with looking at these constitutional questions and providing dispassionate, impartial, nonpartisan legal counsel, has consistently said there is no constitutional authority for Congress to snap its fingers, use a statute to turn D.C. into a State.

Mr. PILON. Right.

Senator HAWLEY. Now that is a bipartisan tradition. You mentioned in your written testimony one pretty prominent Democrat Attorney General, Robert Kennedy. He rendered a fairly lengthy opinion on this. Tell us about the significance of Robert Kennedy's opinion back in 1963, I think it was, when he said that, no, the Constitution does not give Congress the power, by statute, to turn D.C. into a State. Of course, it can be done by constitutional amendment, how exactly it would have to be worked out, but that is what we are talking about here. We are talking about just doing it by statute. Even Robert Kennedy said no, that cannot be done. Tell us about the significance of his opinion.

Mr. PILON. The significance, beyond the fact that was a Democrat, comes from the fact that he said that this is a single act, the creation of the District. Then the question becomes does Congress have authority to do what is contemplated by these various proposals that have come over the years, and the conclusion that the Office of Legal Counsel gave him was that no, they do not. It is a single act to create the District. It is finished. If you want to do something more like retrocession and so forth you are going to need to find some authority under the Constitution.

The important issue here, which was just brought up by Senator Lankford, namely that the District is unique. It is not an ordinary

process of creating a new State from territory acquired for the express purpose of creating new States from it, the Louisiana Purchase, et cetera. It is sui generis. It was created expressly under Article I, not under Article IV, to be the seat of the Federal Government. Under this bill, S. 51, the seat of the government would be this tiny enclave, and I just invite you to think, in response to an earlier question from Senator Lankford, what this would mean with this much-reduced authority of Congress to have exclusive jurisdiction over this tiny enclave. It means that, for example, they are dependent upon this new, untested State for everything from power to water to fire protection, and going on and on. We can imagine how the framers did not want that, and they did not want it expressly because of what the experience, as we testified earlier, they had under 1783, when the Congress was attacked by a mob.

Senator HAWLEY. Let me ask you this. So we have the scene set. The Constitution of the United States expressly and explicitly created the District of Columbia. It designates it as the seat of government, with the 23rd Amendment, which comes along and ratifies that, essentially. I mean, it is already in the Constitution. The 23rd Amendment ratifies that, so it is there. It is not an unincorporated territory. It is created by the Constitution, created as the seat of government.

Now my understanding of constitutional law is Congress cannot, by legislation, override the Constitution. Am I right about that basic understanding?

Mr. PILON. That is Con Law 101.

Senator HAWLEY. Now what if Congress really wants to? Like if Congress thinks, no, it is really important that we override the Constitution. Do they get to do it then?

Mr. PILON. That is called the demise of the rule of law.

Senator HAWLEY. What happens if there is a great political advantage to one party of they do it? I am looking here at a series of news articles from the last year and a half. The Nation, "Democrats have inherited a broken Senate. Can they make it work? It calls for D.C. statehood to add two more Democrat votes to the Senate."

NBC News, "New push for Washington, D.C., statehood hits the Presidential campaign trail, imperative, Democrats say, to add two more votes to the U.S. Senate for them." New York Magazine, "D.C. statehood is the Democrats' only option." VOX, "Eleven ways to fix America's fundamentally broken democracy, D.C. statehood, to add two more Democrat votes to the U.S. Senate." Indivisible says, "Making democracy reform a priority has to be D.C. statehood."

All of this, the premise of all of these articles, which are very candid, is that Democrats think that they will not be able to control the U.S. Senate in the long term, they need to add two more Democrat seats to control the Senate, so it is really important. If they think it is really important, does the Constitution give them the authority to override what is actually written down on that text with the law? Can they do that?

Mr. PILON. Let me get on the record an important point. It is often thought that we, on this side, are opposed to giving the District residents the vote. Nothing could be further from the truth.

The idea is, however, that you must do it in the right way. You have to do it in the constitutional way. And so that means that you are going to have to address, among other things, the 23rd Amendment problem, because there will still be people within this District who still have the right to vote. You cannot remove that from them by mere statute. It has got to have an amendment to do that. Indeed, if the tables were reversed on some other issue, I think the other side would be screaming if this were attempted.

Senator HAWLEY. Rightfully so, and I will just finish, Mr. Chairman, by saying that it is a fundamental premise of our democracy that the Constitution of the United States is the supreme law of the land, that it binds all who live under it. We, the people, can change it. We absolutely can change it. We have a process to do that, a democratic process.

What Congress cannot do is override the Constitution any time it becomes inconvenient for a majority in Congress, a temporary majority, as James Madison would have said. Today it is the Democrats, tomorrow it is the Republicans, after that the Democrats again. Who knows? The point is the Constitution endures, and that is the fundamental premise of our democratic republic, and I fear that that premise is being threatened by this legislation.

Thank you, Mr. Chairman.

Chairman PETERS. Thank you, Senator Hawley. I want to follow up on Mr. Pilon's comments on the 23rd Amendment. This question is for you, Mayor Bowser. In your written testimony you state that it is, "It is particularly contradictory that the 23rd Amendment is being held up as the main barrier to further expanding constitutional rights in the District." Could you elaborate on this point for the Committee, please?

Ms. BOWSER. Yes, Mr. Chairman, and let me be clear what the 23rd Amendment does. The 23rd Amendment allowed D.C. residents a vote for President, and that was in the 1960s. Let that marinate for a second. Before the 1960s—this is, about 10 years before I was born—we could not even vote for President. So that is what the 23rd Amendment does. Its intent was to expand democracy to D.C. residents, and now it is being held up as a barrier.

I just ask you to look at the comments that were submitted by 39 legal scholars, where Professor Primus has already testified to today, that the 23rd Amendment poses no constitutional barrier to this bill's passage. D.C. can be admitted as a State.

The practical concerns have been discussed, and this bill also lays out practical solutions, by repealing the enforcement legislation. The 23rd Amendment makes clear that Congress, that it is the Congress, by statute, can enforce the 23rd Amendment, must enforce the 23rd Amendment. That is what will happen after this bill is passed.

Chairman PETERS. Thank you, Mayor. Mr. Morial, I want to ask you a question related to the 23rd Amendment as well. You have heard the Mayor speak and you have heard critics say that the 23rd Amendment really provides sufficient voting rights now, because you can vote for President. That is part of it.

Could you, Mr. Morial, would you explain the importance of granting full voting rights and equal representation, and how important that is in your mind?

Mr. MORIAL. Every American citizen has the right, those that live in the States of the United States, the right to elect people to the Legislative Branch and the Executive Branch, and therefore have a voice in the selection of the Judicial Branch. To suggest that for the residents of the District of Columbia that solely having a right to participate in the Presidential election, it is tantamount to the one-third rule—we will give you one-third of your Federal voting rights and the other two-thirds we are going to withhold.

I have listened today to a lot of arguments about the Constitution and about the law, and I am lawyer, and respect those. But when you balance what is fundamental to the United States, all of our rights as citizens, it is the right to vote which is fundamental.

When the 23rd Amendment was passed, black D.C. residents did not have the protection of the Voting Rights Act. Poll tax was legal. These are different times, and I think that all of these arguments fall by the wayside when you balance it against the necessity. What does a vote in Congress give you an opportunity to do? Participate in the appropriations process, participate in the process of writing laws, giving yourselves a voice on taxation issues, on regulatory issues, on a wide range of issues. The District of Columbia is a dynamic community of 700,000 people. It is distinct from the State of Maryland. Its voters have said we do not want to retrocede to Maryland. In fact, the polling suggests that the residents of Maryland have said we do not want the District of Columbia to retrocede to us either.

This is so crucial that the right to vote is what is at stake here, the right to representation is at stake here. Our soldiers have been overseas, fighting in Iraq, fighting in Afghanistan, fighting for democracy, fighting for the right to vote, fighting for the right to participate. What about right here in the United States of America? Why do we single out the residents of the District of Columbia? Forget the partisanship. Forget who will vote for who. That is not what is at stake. If we really, truly want to nonpartisan, we will be like Lady Justice. We will put a blindfold on as to how the residents of the District of Columbia might vote, and affirm their fundamental right to vote, without regard to who they may vote for.

Chairman PETERS. Thank you, Mr. Morial. A foundational principle of our Nation, that I think we can all agree on, and certainly was etched in the Declaration of Independence, is that government is derived from just powers, and the just powers they have is from the consent of the people. Bottom line is it is from the consent of the people.

Professor Primus, in your written testimony you state that that principle, and I would quote here, "animates the whole Constitution and is the idea that Congress should be electorally responsible to the people for whom it legislates."

Professor, could explain how D.C. statehood would fulfill our core democratic principles while also complying with the Founding Fathers' intent that there be an independent seat of government?

Mr. PRIMUS. Statehood would mean that D.C. residents who are American citizens can vote and be represented in Congress. It is that simple. And S. 51 would mean that the Constitution's vision of a seat of government that is not part of any State, it would be maintained. We can have a both. If we can have both, then it does

not seem to make sense to blame the Constitution if we decide not to have both, because the Constitution lets us have both of those things.

We heard a few times today that the Constitution does not give Congress the power to do this, but, in fact, the Constitution does give Congress the power to do this. That is Article IV. Congress has the power to admit new States. That is all this would be. Sometimes we have heard this discussed as if there was a really powerful set of incentives to admit D.C. statement but it cannot be done because the Constitution does not permit it, and we would disrespect the Constitution to go forward.

What actually disrespects the Constitution is to pretend that the Constitution says things that it does not, that stop us from doing the right thing. The Constitution does not say that the seat of government has to be D.C. as we know it. The Constitution does not say anything about D.C. or where it has to be or how small it can be. The Constitution does not say that Article IV permits Congress to admit new States but not D.C. We have heard a number of times today D.C. is unique, but Article IV does not say "except D.C." All of those things that are raised as objections are actually not in the Constitution. The Constitution permits this, and the vision it represents to the government requires it.

Congress can decide to do it or not, but if Congress does not do it, Congress should not say we wish we could but the Constitution prevents it. No one has identified anything in the Constitution that prevents it, for the simple reason that nothing in the Constitution does prevent it.

Chairman PETERS. Thank you, Professor Primus.

Mayor Bowser, the professor has just mentioned nothing is in the Constitution that would prevent this from happening, so we would also like to think about what perhaps were our Founding Fathers thinking, as they wrote this. My question to you is, do you believe that preserving the status quo in D.C., where residents have no voice in their government, do you think that is what the Founding Fathers envisioned when they drafted and ratified the Constitution?

Ms. BOWSER. Absolutely no, Senator. We know, as we have already discussed, that ending "taxation without representation" was a principle that led to the independence of our Nation, and it is a glaring contradiction of our democracy that residents of the Nation's Capital, literally people who could look out of their windows and see this building, do not have a vote or a voice in this chamber, and no vote in the House of Representatives. As the professor outlined, it is very clear that the Congress has the authority to admit new States, including Washington, D.C. We know the time to correct that wrong is now.

Chairman PETERS. Mr. Morial, I mentioned men and women who are serving in the military from the District now, and we know, since World War I, around 200,000 brave men and women from Washington, D.C., have served in the Armed Forces, including 11,000 residents who are actively serving right now, and roughly 30,000 veterans who live within the borders of D.C.

Mayor Bowser, can you speak to the service and to the sacrifice of your veteran constituents, and the injustice that they face as

they put their lives on the line to protect the rights of others, and yet when they return to the city those rights are actually being denied.

Ms. BOWSER. Yes. So our Congresswoman spoke very eloquently when she started. We represent 30,000 veterans. We see D.C. residents sign up and volunteer for the Armed Forces every single day. Our residents go to service academies in service to their country. D.C. residents, you note, Senator, are not asking for special treatment. We are asking to be treated equally. We have stepped up in every case that we have been asked to serve our country, and we want to continue to be able to do that.

When D.C. residents have two Senators they can argue for better treatment for our veterans, not just our own but veterans across America. We can stand shoulder to shoulder with you to make sure the Veterans Administration has what it needs, or like I like to see here in Washington, D.C., a world-class, state-of-the-art, new Veterans Hospital for Washington, D.C.

We can be creative with you and our fellow Americans in addressing the needs of our veterans, including work and job training, job opportunities, and housing. We can promote innovative housing options like we have done right here in Washington, D.C., and share all of that learning with our fellow Senators. So our admission to the union is only going to enhance how our country really invests in and responds to our veterans.

But imagine—and I think when we were here the last time we were joined by members of our Armed Forces, who when important measures come before this Senate, like Mayor Morial said, including issues of war and peace, they have no voice here. That is fundamentally unfair to their service and unfair to their citizenship.

Chairman PETERS. Thank you, Mayor. Senator Carper, you are recognized for your questions.

Senator CARPER. Thank you, and thank you so much. I appreciate your patience as a panel, which we are voting on a number of bills, so thank you for bearing with us. Thank you, Mr. Chairman, as well.

I want to know one last question, if I could, for Professor Primus. Some folks are concerned that if statehood is granted to the District of Columbia, the Federal District is reduced. The individuals living in the Federal District will have outsized power due to the three electoral votes assigned to the District through the 23rd Amendment. Our bill, S. 51, would repeal the enabling statute for the 23rd Amendment and provide for expedited consideration of a joint resolution for the repeal of the amendment.

Now I understand that even if Congress does not move to repeal the 23rd Amendment it has the authority remedy that situation. Professor Primus, can you take a moment to address the options Congress has when it comes to dealing with three electors assigned to the Federal District and why you do not see this as a constitutional obstacle, please?

Mr. PRIMUS. Yes, Senator, I would be happy to. The first best-case scenario, I think everyone agrees, is if the 23rd Amendment should be repealed, and the good news is if everyone agrees that it would be not a good situation to have a couple of dozen people have three electors for the presidency—I think everyone does agree

about that—repeal ought to come pretty quickly. If you think that we cannot get a repeal of the 23rd Amendment on those facts, it means that you do not believe that the Constitution can be amended at all, and that is a proposition that I think few of us want to endorse.

Now, until that happens, secondarily, S. 51, as presently written, takes the electors appointed pursuant to the 23rd Amendment, out of the electoral count, that ultimately names the President. That is an amendment that it makes statutorily. That is enough to prevent the situation where those electors distort the outcome of a Presidential election, even if the 23rd Amendment is still on the books.

If the Congress wanted to do other things to make even more sure that there would be no problem under the 23rd Amendment, Congress has many options. The Congress is in charge of legislation enabling, implementing the 23rd Amendment. For example, Congress could provide, by statute, exercising their constitutional power, that if there are electors named for the seat of government that they will be legally instructed to vote for the candidate that would get the most electoral votes anyway. That would not be hard to do, and it would have the effect of making sure that those electors do not affect the electoral vote. Or Congress could, if it wanted to, decide that it would instruct those electors to vote for the winner of the national popular vote, and if necessary could specify what shall constitute the winner of a national popular vote.

It could even, in a symbolic measure, if it wanted to make the admission of D.C. into a further moment of confirming our connection to the framing of the Constitution, it could even direct those electors to vote for President, for George Washington of Virginia, and for Vice President, for John Adams of Massachusetts. That would not distort our current elections at all.

Again, the best thing is simply for the 23rd Amendment to be repealed, that any of these solutions would do, and the concern that we cannot find a solution for something for which there are many good solutions, is the sort of thing that gets to we do not want to find a solution? There are lots of easy solutions here, and S. 51 already has one of them.

Senator CARPER. Mr. Chairman. Thank you. I want to thank again the panel, Mayor, everyone, all the witnesses on both sides, and Senator Lieberman as well, and for Mayor Morial.

I opened my statement by quoting, earlier today, Mr. Chairman, the words of Mark Twain. I want to close with the words, if I could, of Thomas Jefferson. Jefferson once said words to this effect. He said, "If the people know the truth, they will not make a mistake."

Our intent in this hearing today is to better ensure that people know the truth. I think most people have no—and probably, if you ask them, they do not realize that the District of Columbia has more people living in it than a number of States. Most people in this country probably do not realize that the per capita income, on a per capita basis, the Federal Government income taxes paid by the residents of the District of Columbia are greater than any other State. Most people do not realize that in this case the leader of the District of Columbia does not have the authority to call the Wash-

ington National Guard. There are any number of things that people just do not realize.

My guess is that the framers, when they were writing the Constitution, never would have imagined that the District of Columbia would have this many people, and to pay this much in taxes but yet not have the opportunity to have representation or vote in the House and the Senate.

This is a wrong that needs to be righted, and my hope is with the information, some of the information, the knowledge that we are gaining from this hearing and others going forward that at the end of the day we will do the right thing.

I close with the words of William Wilberforce, not an American but a great British parliamentarian, who, for many years, was a leader against slavery in Great Britain. He said these words, the words of Wilberforce, 150 years ago. He said, "You may choose to look the other way, but you can never again say you did not know." We want to make sure the people of this country know, and know the truth, the whole truth, and nothing but the truth.

Thank you, Mr. Chairman, and again, for our witnesses. Much obliged.

Ms. BOWSER. Thank you.

Chairman PETERS. Thank you, Senator Carper. In closing out this hearing I want to first thank Congresswoman Norton for your opening, for your incredible leadership over the years, and for passing significant legislation out of the House that we are now in the processing of looking at here in the U.S. Senate. I also want to thank Senator Lieberman for his leadership on the issues over the years as well.

I want to thank each of our distinguished witnesses. This has been a great panel that certainly has provided perspective on, in my mind, this fundamental civil rights issue that we discussed here today. I think the Committee heard very compelling testimony on why Washington, D.C., should be admitted to the union as the 51st State. In my mind, it should not be viewed as a partisan issue in any way. This is about ensuring that more than 700,000 American citizens, who call Washington, D.C., home, have an equal voice in this great democratic republic of ours. For far too long, these Americans have been denied our nation's most critical founding principle—the right to equal representation and government.

We heard convincing testimony today that there are no constitutional obstacles to admitting Washington, D.C., as a State, and the importance of passing Senator Carper's legislation here in the Senate would right this longstanding wrong in our nation's history.

Once again, I appreciate our speakers. I appreciate our witnesses for their input on this important issue. The record for this hearing will remain open for 15 days, until July 7th at 5 p.m. for the submission of statements and questions for the record.

Senator CARPER. Mr. Chairman, before you do, can I just say one last sentence? A word of thanks to D.C. shadow Senators, Paul Strauss and Michael Brown, for their input in anticipation of this hearing. We appreciate their input. Thank you.

Chairman PETERS. Very good. With those final words, this hearing is now adjourned.

[Whereupon, at 12:37 p.m., the hearing was adjourned.]

APPENDIX

Chairman Peters Opening Statement As Prepared for Delivery
Full Committee Hearing: Examining D.C. Statehood
March 22, 2021

Thank you to our witnesses for joining us to examine legislation introduced by our colleague, Senator Tom Carper, to make the District of Columbia our nation's 51st state.

I would also like to extend a warm welcome to Washington, D.C.'s Delegate to the U.S. House of Representatives, Congresswoman Eleanor Holmes Norton, as well as former Senator, and also a former Chairman of this Committee, Joe Lieberman.

For decades, they have both served as strong advocates in the conversation to give D.C. residents an equal voice in our democratic republic.

Today, for the first time in nearly seven years, this Committee will continue that discussion and hear from the Mayor, policy, legal, and civil rights experts on how lawmakers can finally give D.C. residents the same representation in Congress as their fellow Americans.

This lack of representation for the residents of this city, which serves as a beacon of freedom and democracy around the world, is a stunning contradiction.

Since 1790, when President Washington signed into law *the Permanent Seat of Government Act*, D.C. has served as our nation's Capital.

D.C.'s more than 700,000 residents, many of whom have fought in our wars, paid federal taxes, and served the American people in public service, have been denied an equal voice in the formation of the very laws and decisions that govern them. That is unconscionable.

It's time to follow the lead of our colleagues in the House, pass the *Washington D.C. Admission Act*, which will finally ensure that D.C. residents have the full Congressional representation and self-governance they deserve, and that our democracy is built on.

Our nation's most defining principle is that our government's power is derived directly from the people. It is why we elect leaders to represent us in Congress, and every American should be entitled to the same representation in our democratic republic, no matter which part of our nation they live in.

When the founders first established a permanent seat of government at a site along the Potomac River, they could have never imagined it would become the large, vibrant, and diverse metropolis that more than 700,000 Americans call home.

While we may hear a number of questions raised about this issue today, I encourage all of my colleagues to stay focused on the core civil rights issue that we have an opportunity to address.

I look forward hearing from our witnesses and having a productive discussion today about making the District of Columbia our nation's 51st state.

Senator Rob Portman
HSGAC Hearing:
S. 51, The Washington, D.C. Admission Act

Thank you, Chairman Peters.

I look forward to hearing the discussion today, but, as you know, I have both practical and constitutional concerns about making Washington, D.C. its own state.

Legally, Congress does not have the power to override the Constitution. D.C. is the only place specifically created by the Constitution in Article 1 as the "seat of Government." Meaning, it has a special constitutional status completely different from any current or previous U.S. territory that eventually became a state through the Article 4 Admissions Clause. Our Framers gave us a *limited* federal government—one in which Congress only wields the power explicitly granted to it. Here, neither the District Clause nor the Admissions Clause provide Congress with the power to transform the "seat of Government" into a new state. Moreover, D.C. has special constitutional status in the Twenty-Third Amendment, which grants D.C. residents three electoral votes in Presidential elections. We cannot just legislate over these constitutional provisions.

Further, when Maryland authorized the cession of nearly 60 miles of its territory to the federal government for the creation of the District of Columbia in 1788, it did so for the purpose that "congress may fix upon and **accept** [the land] for the seat of government." When Congress formally accepted the land from Maryland by legislative act in 1790, we explained that the land was "hereby **accepted** for the permanent seat of the government of the United States." Maryland gave up its land, and we accepted it, so that we could create an independent federal governmental district. Making D.C. into a separate state violates the solemn compact we made over two hundred years ago with Maryland. And, by the way, we'd be creating a state that by acreage comprises less than 6 percent of the next smallest state, Rhode Island. A better option would be to retrocede a large portion of the District to Maryland. Retrocession is the preferable way to provide D.C. residents with voting representation in both chambers of Congress.

This issue has come up before. The states declined to ratify the D.C. Voting Rights Amendment in the 1970s, which would have granted D.C. congressional representation in both Houses of Congress and

repealed the Twenty-Third Amendment. Only 16 states[1] ratified that amendment—22 states short of the required two-thirds number for adoption. Polling today demonstrates the American people are still not interested in eliminating their capital district.

I look forward to hearing from our witnesses.

[1] *Background*: Ohio was one of the 16 states that ratified the amendment on December 21, 1978.

Opening Statement of Senator Tom Carper

"Examining D.C. Statehood"

June 22, 2021

When summer ends and school resumes this fall, millions of American school children will begin each school day repeating these words:

"I pledge allegiance to the flag of the United States and to the Republic for which it stands. One nation under God with liberty and justice for all."

One nation under God with liberty and justice for all.

We are a nation of many faiths…Protestant, Catholic, Jew, Muslim, Buddhist, Hindu and more.

Each of those six religions shares at least one thing in common.

They share this admonition: "To love our neighbors as ourselves and to treat other people the way we want to be treated."

The more than 700,000 citizens of the District of Columbia are our neighbors. They deserve to be treated as such by the rest of our nation's citizens.

They pay more on a per capita basis in federal income taxes that any of the 50 states, yet they have no vote in the U.S. House of Representatives or the U.S. Senate.

They serve in the Army, Navy, Air Force, Marine Corps and National Guard, yet they have no vote in the U.S. House or in the Senate.

The leader of every state is authorized to call up their National Guard in times of crisis.

As we learned on January 6th, the elected leader of the District of Columbia has no such authority.

The District of Columbia has earned a AA+ credit rating – higher than many states – yet the Congress has to approve the District's budget.

Some of the finest judges serve on D.C. courts, but the Congress has to approve each one of them.

When the federal government shuts down because of a budget impasse, it creates budgetary turmoil for DC.

When the Congress fails to vote to confirm highly qualified judges for weeks, months or even years, justice is delayed and, sometimes, denied.

245 years ago, 13 colonies took on the mightiest nation on earth because of unjust treatment. They found particularly galling the requirement to pay taxes without representation. "Taxation without representation became the rallying cry that led to our Declaration of Independence and a war to achieve it.

The people of DC have no interest in waging a war for independence. They just want to be treated fairly and justly. We should do that, and we can start doing that by enacting legislation that has passed the House of Representatives and is the subject of today's hearing.

That is the right thing to do. The right thing to do.

It meets constitutional muster. It also puts the District of Columbia on the same path followed by all 37 states who've entered the Union since 1791.

To paraphrase Mark Twain, "When in doubt, do what's right. You'll amaze your friends and confound your foes."

Let's do what's right. We can start by treating our neighbors – the citizens of the District of Columbia – the way we would want to be treated.

Let's debate and enact the DC Statehood bill before us today. Thank you.

ELEANOR HOLMES NORTON
DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEES
CHAIR, HIGHWAYS AND TRANSIT
AVIATION
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COMMITTEE ON OVERSIGHT AND REFORM
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GOVERNMENT OPERATIONS

Congress of the United States
House of Representatives
Washington, DC 20515-1501

Statement of Congresswoman Eleanor Holmes Norton
Committee on Homeland Security and Governmental Affairs
Hearing on "The 51st State: Examining D.C. Statehood"
June 22, 2021

Chairman Peters, on behalf of the nearly 700,000 District of Columbia residents, including 30,000 veterans, I thank you for holding today's hearing and for being an original cosponsor of the District of Columbia statehood bill. This hearing is only the second Senate hearing on our D.C. statehood bill in the nation's history.

In the last year, the House of Representatives has twice passed the D.C. statehood bill. In 1993, I got the first-ever House floor vote on the D.C. statehood bill, but the bill failed because the House had a very different composition then. Prior to last year, neither chamber of Congress had ever passed the D.C. statehood bill in the nation's history.

Senator Carper, I particularly thank you for sponsoring the D.C. statehood bill and for being a champion for D.C. in the Senate. Following in the footsteps of Senator Joe Lieberman, under your leadership, the D.C. statehood bill has 45 Senate cosponsors, which is the greatest number of Senate cosponsors of the bill in the nation's history.

President Biden strongly supports the D.C. statehood bill and is the first president to put the full weight of the presidency behind the bill in the nation's history.

Fifty-four percent of the American people support D.C. statehood, according to a detailed recent poll. This is the greatest support for D.C. statehood in the nation's history.

Congress has both the moral obligation and the constitutional authority to pass the D.C. statehood bill. This country was founded on the principles of no taxation without representation and consent of the governed, but D.C. residents are taxed without representation and cannot consent to the laws under which they, as American citizens, must live.

The State of Washington, D.C. would consist of 66 of the 68 square miles of the present-day federal district. The federal district would be two square miles and Congress would retain control over it, as required by the Constitution.

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The D.C. statehood bill clearly complies with the Constitution, including the Admissions Clause, the District Clause and the 23rd Amendment. Those who believe the bill is constitutional need only rely on the plain text of the Constitution. A group of distinguished constitutional law professors and scholars from America's top law schools have sent a definitive analysis of the bill's constitutionality to House and Senate leadership.

The Admissions Clause gives Congress the authority to admit new states. All 37 new states were admitted by Congress by majority vote. No state was admitted by constitutional amendment, and no state would have to consent to the admission of the State of Washington, D.C.

The District Clause gives Congress plenary authority over the federal district and establishes a maximum size of the federal district—100 square miles. It does not establish a minimum size or a location of the federal district. Congress reduced the size of the federal district by 30 percent in 1846.

The 23rd Amendment allows the federal district to participate in the Electoral College, but does not establish a minimum size or a location of the federal district. Therefore, the bill complies with the 23rd Amendment. Nevertheless, the bill would repeal the enabling act for the 23rd Amendment and the 23rd Amendment would be repealed quickly.

The Constitution does not establish any prerequisites for new states, but Congress generally has considered three: population and resources, support for statehood and commitment to democracy. The State of Washington, D.C. would meet all three.

D.C.'s population is larger than two states. D.C. pays more federal taxes per capita than any state and pays more federal taxes than 21 states. D.C.'s gross domestic product is larger than 17 states. In 2016, 86 percent of D.C. residents voted for statehood. D.C. residents have been petitioning for voting representation in Congress and local autonomy for all of its 220 years of existence.

Congress has a choice. It can continue to exclude D.C. residents from the democratic process, forcing them to watch from the sidelines as Congress votes on federal and D.C. laws, and to treat them, in the words of Frederick Douglass, as "aliens, not citizens, but subjects." Or it can live up to our nation's founding principles and pass the D.C. statehood bill.

Again, Chairman Peters and Senator Carper, thank you for your leadership on this bill. I look forward to continuing to work with you and your colleagues to enact the D.C. statehood bill this Congress.

Statement of Senator Joe Lieberman
before the Senate Committee on Homeland
Security and Government Affairs
June 22, 2021

Thank you Chairman Peters and Ranking Member Portman for inviting me to speak this morning.

Members of the Committee, Delegate Norton, Mayor Bowser, and other distinguished witnesses:

Thank you Senator Carper for introducing and advocating this legislation to right a wrong that has been done for too long to the residents of the District of Columbia.

I am honored to have the opportunity to return to this Committee in this room where I spent so many of the best, most productive days of my years in the U.S. Senate, working in bipartisan partnership with the leading Republicans on the Committee during that time, first Fred Thomson, and, then for more than a decade, Susan Collins.

I hope that spirit of bipartisanship, as exemplified already this year by Senators Peters and Portman, will guide your Committee's consideration of the deprivation of voting representation in Congress for citizens of our capitol city, apparently the only citizens of any capitol of any country in the world who are disenfranchised in this way.

I first introduced legislation on this subject in 2002. It was called the No Taxation Without Representation Act and was reported favorably from the Committee, but was not acted on by the Senate.

In 2009, we introduced the D.C. House Voting Rights Act which was endorsed by this

Committee and passed the Senate in a vote of 61-37. Unfortunately, the Senate added an Amendment that repealed DC's gun control law, and therefore the House never acted on the legislation.

In 2012, my last year in the Senate, we introduced DC statehood legislation very much like Senator Carper's initiative that is before you today. I am heartened by the largest ever number of cosponsors Senator Carper has for this legislation. When Senator Carper asked me if I would get involved in supporting the current proposal, I was very grateful for the opportunity to reengage in this constitutional cause that has mattered to me for a long time.

There are two great American principles that are at the heart of the cause of DC statehood and that are violated every day in the current treatment of residents of D.C. Both of these principles were central to the American revolution against the British Crown. The first is that governments should govern only with the consent of the governed not by the whim of the Crown or a dictator, and that consent is given by the citizens' votes. The second is that citizens cannot be taxed without voting representation in the legislative body that taxes them.

As Justice Black wrote in *Wesberry vs Sanders*:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we must live."

Today's residents of the District of Columbia have every right to sound the battle cry of our revolution "No Taxation Without Representation." They pay more taxes to the federal government than the residents of 21 states!

Why would anyone not want to eliminate these grossly outdated, un-American inequities? Today, you will hear arguments "why" from the witnesses who will testify today against Senator Carper's legislation. I have heard the arguments before many times over the years, and they all seem to me to be legalistic disputation and excuses for something that is inexcusable. The arguments against this legislation don't come near to overcoming the great principled, Constitutional arguments for it.

So, what's the problem? The media suggests it is not Constitutional or philosophical, but political and partisan, that Republicans fear that granting equal voting representation in Congress to D.C. residents will inevitably lead to two more Democratic Senators and one more Democratic member of the House.

I hope that is not the problem because it is self-evidently unacceptable in America to condition the enjoyment of Constitutional rights on political party membership, any more than Congress would condition access to Constitutional rights on citizens' race, gender, religion, or sexual orientation.

Besides it is not sensible to base one's vote on this legislation to correct an injustice forever on a short range political prediction, which may well turn out to be baseless, or, at least, temporary.

Who among us can predict how the citizens of the State of Washington D.C. will vote in elections in 50 years, or 20 years, or even 5 years.

Who would have predicted 5 years ago that the State of Georgia would elect two Democratic Senators to this Congress?

Who could have predicted 50 years ago that there would be almost no Republicans from

New England in the Senate today, and almost no Democrats from the South.

Partisan anxieties have been common in American history when states have been considered for admission to our Union, but 37 times those anxieties, usually baseless, were overcome to enable us to become the United States of America we are today.

In 1959, Alaska and Hawaii were added to the Union together in part because they were expected to balance each other politically -- Alaska would be Democratic and Hawaii Republican. That was the bipartisan consensus in 1959. In our time, of course, the opposite has been true.

So much for deciding great Constitutional issues because of passing political prognostications. It is not only an illogical basis for judgment. It is unacceptable in our system of justice and equity.

Many times in my years on this Committee, our members were able to find bipartisan solutions to difficult problems that moved the Senate to do the same and get some great and good things done for our country.

I hope you will similarly rise to the challenge of this moment and problem, and work together to get something good and great done for our country and our Constitution.

Thank you.

TESTIMONY OF MURIEL BOWSER, MAYOR OF WASHINGTON, DC

Before the Committee on Homeland Security and Government Accountability
U.S. Senate

Gary Peters, Chairman
Rob Portman, Ranking Member

S. 51, Washington, D.C. Admission Act

June 22, 2021

Chairman Peters, Ranking Member Portman, and members of this esteemed Committee, thank you for convening this hearing on S. 51, the Washington, D.C. Admission Act which provides the 700,000 residents of the District of Columbia full democracy.

I am Muriel Bowser, Mayor of Washington, DC, and I am honored to come before this committee with a simple but powerful request: Senators, right the wrong that occurred some 220 years ago when the residents of the District of Columbia were stripped of their full congressional representation and do it now. The Constitution left the issue of democracy for the residents of the District of Columbia to the Congress. The House of Representatives has passed the Washington, DC Admission Act twice, and the White House has indicated its support for the bill through a Statement of Administration Policy. Our democracy is truly in the hands of this Senate. It is time for the U.S. Senate to support our petition for DC Statehood.

My testimony today echos many of the arguments that I made before the House Committee on Oversight and Reform in March of 2021 and in September of 2019; and many of the same arguments made by my predecessor, Mayor Vincent Gray, in 2014 at the last DC Statehood hearing held by this chamber.

Then, as now, the District's call for full democracy has been drowned out by arguments that ignore the fact that the second-class status of District residents is clearly an anomaly of the U.S. Constitution, not a feature of it.

Over the decades, arguments against DC Statehood have ranged from preposterous assertions to inaccurate legal claims. Just to cite a couple: in 2019, we were asked about what would happen to the parking spots for congressional staff if the District becomes a state. We were at a loss to see the correlation between full democracy for 700,000 American citizens and a few parking spaces. This past March, I was confronted with concerns that the District could not be a state because it does not have a car

dealership – even though it does. Statements like these not only discount the civil rights of District residents, they also demonstrate a true lack of understanding of the rapidly growing and thriving businesses, communities, and culture that surround the small Federal presence. It is for those neighborhoods, Michigan Park, Congress Park and Mount Pleasant, Columbia Heights and Hillcrest among them—that make up 99% of the District—and the people who live in them and who come to DC for school, government service, or other work that I appear today to petition for full equality.

There is no legal or constitutional barrier to DC Statehood; the prevailing constitutional issue is the civil rights violation of 700,000 DC residents who fulfill all obligations of U.S. citizenship but are denied any representation in this body. I can say unequivocally that the bill before you today, S. 51, the Washington, D.C. Admission Act is constitutional. Dozens of America's most recognized constitutional experts have

testified before Congress and penned letters to that effect. [1] Scholars and experts have opined that it is fully within Congress' power, under the Constitution, to make DC a state through passage of S. 51:

- The Constitution's Admissions Clause (Article IV, Section 3) grants Congress authority to admit states into the union, including DC. Following the 13 colonies, all 37 states were admitted by Congress through this constitutional authority. States were not added solely because of a particular industry, or the size of its land mass—states were added to include the people.

- The Constitution's District Clause (Article I, Section 8, Clause 17) poses no barrier to admitting DC as a new state. The District Clause sets a maximum size of 10 square miles for the federal district, not a minimum size. S. 51 retains a Federal District, as required by the Constitution; it encompasses the unpopulated areas that make up the

[1] Letter to Congressional Leaders on Constitutionality of Statehood for Washington D.C. May 22 2021.pdf

federal presence – the House and Senate Office Buildings, the White House, the Capitol, the monuments and museums on the National Mall, and other federal buildings and land (see attached map).

- The 23rd Amendment to the Constitution, which granted DC residents a vote for President in 1961, does not pose a constitutional barrier to statehood either. The bill addresses it head on by repealing statutory language that enables the appointment of electors and including expedited procedures for consideration of the repeal of the unnecessary constitutional amendment, thus virtually ensuring quick and certain ratification by the states to ensure no ambiguity about electoral votes for an unpopulated federal enclave. S.51 outlines a clear path forward on how to address the 23rd Amendment. Any concerns about the ramifications of the amendment can be addressed post-DC Statehood.

  It is particularly contradictory that the 23rd Amendment, which was passed to expand democracy to taxpaying DC residents, is now

being held up as the main barrier to further expanding constitutional rights in the District. This flies in the face of the amendment's intent.

- Retrocession to Maryland is not required by the Constitution, nor is it addressed in the Constitution. Maryland has no claim to the land it ceded to the federal government when the District was founded. Would this body argue that Maine should retrocede to Massachusetts? Or that West Virginia should return to Virginia? Of course not.

To be clear, DC's current status is due to generations of inactivity by lawmakers, including the Founding Fathers themselves, failing to address the contradiction that residents of the U.S. capital are treated as second-class citizens.

With no constitutional underpinning, the disenfranchisement of Washingtonians is the most glaring civil rights and voting rights issue of our time. In fact, we are the only capital city among the world's

democracies without voting rights in the national legislature. In two weeks, the country will celebrate Independence Day and the establishment of the United States as a sovereign nation, free from taxation without representation. Yet the 700,000 predominately Black and Brown Americans living in our nation's capital have continued to pay taxes without representation for over 200 years.

As we celebrate our nationhood, I appeal to this Senate to end the ongoing systemic injustice faced by the growing population of District residents and vote for DC Statehood in the 117th Congress. I am calling on you to swiftly grant full democracy to the residents of the District of Columbia.

I cannot emphasize enough: the civil rights and full democracy of DC residents are in your hands.

- We are 700,000 people; some born here, others from all 50 states and the many nations of the world.
- We Washingtonians serve proudly in our military and fight for our country – yet have no representation or voice in this Senate.

- We Washingtonians have served as front line and essential workers during the pandemic - doctors, nurses, firefighters, schoolteachers - yet had no say in this Senate when the District was shortchanged in the CARES Act funding in 2020.
- We Washingtonians heroically defended our nation's capital during the January 6th insurrection by answering the call to support our federal partners – despite not having a voice in this Senate.
- We Washingtonians have no say when this Senate considers presidential nominations, Supreme Court justices, and large investments like the American Jobs Plan.

I ask you today to treat District residents the same as all other taxpaying American citizens. Your inaction could doom yet another generation of young native Washingtonians to being locked out of their constitutionally-given political power and human rights. Will this body perpetuate this civil rights and voting rights wrong by parroting false arguments? By what authority would this body have Washingtonians continue to pay federal

income taxes without a voice? Today, I am asking this U.S. Senate to usher in a new age of fairness and equality for 700,000 District residents.

Our fate is not in the hands of the Founding Fathers; they left this decision for later generations. It is not in the hands of the courts either. The courts have been clear that this is a political issue, and by its very nature, is within the domain of Congress. It is not in the hands of the U.S. House of Representatives, as they have passed the bill twice. And it is not in the hands of the President of the United States, as he has pledged to sign the bill into law once it reaches his desk. The 700,000 residents that I represent are looking to the 100 members of this Senate for immediate action to rectify this longstanding injustice.

I promise you: DC residents have been at this for nearly 220 years. We will not quit until we achieve full democracy – and our two senators are seated here with you. DC residents are not standing alone. Over the years we have garnered the support of Americans of all stripes and beliefs: the bi-partisan United States Conference of Mayors, representing millions of

Americans in big cities and small towns; the non-partisan League of Women Voters who for 100 years have fought to defend our democracy; the NAACP; the Human Rights Campaign; and the Leadership Conference on Civil and Human Rights – who recognize DC Statehood for the civil and human rights contradiction that it is; to your former colleague and Independent Senator Joe Lieberman whose focus on justice and fairness makes plain why partisan considerations have absolutely nothing to do with the quest of DC citizens for full democracy and absolutely no place in ensuring that S.51 moves forward in the 117th Congress.

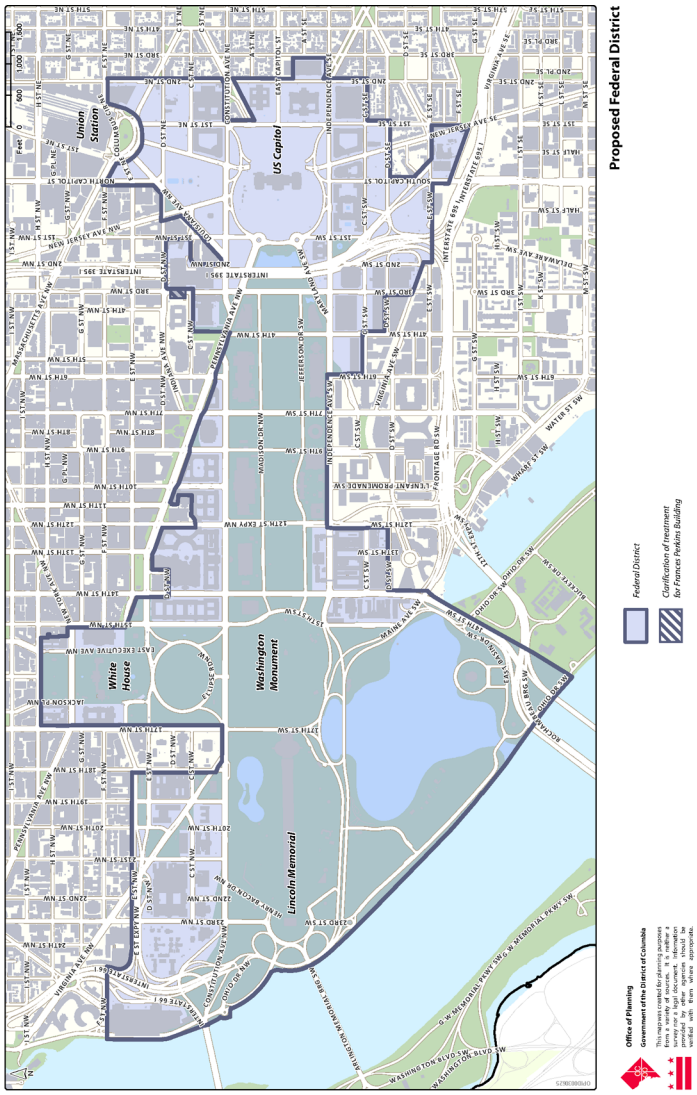
Together, with leaders from across America, we will keep pushing until DC's tragic disenfranchisement is rectified. You have the power to make two things happen that I see so clearly in my mind's eye and feel so deeply in my heart and soul true: 1) With your courageous, clear-eyed focus on fairness and perfecting our union today, this session, this Congress, you will vote to admit DC into our great American union and 2) prayerfully, I will be the last DC mayor who needs to sit here demanding what is our

birthright, and what is owed to us as taxpayers—full citizenship and full democracy.

Thank you in advance for your thoughtful consideration.

Your fellow American,

Muriel Bowser on behalf of residents of the District of Columbia


Proposed Federal District
Federal District
Clarification of treatment for Frances Perkins Building
Office of Planning
Government of the District of Columbia
Union Station
US Capitol
White House
Washington Monument
Lincoln Memorial

National Urban League | *Empowering Communities. Changing Lives.*

Testimony of Marc Morial
President and CEO, National Urban League

U.S. Senate Committee on Homeland Security & Governmental Affairs

"Examining D.C. Statehood"

June 22, 2021

Introduction

Chairman Peters, Ranking Member Portman and Members of the Senate Homeland Security and Governmental Affairs Committee, thank you for the opportunity to testify on the *Washington, D.C. Admission Act*. My name is Marc Morial, and I am the President and CEO of the National Urban League.

Mr. Chairman, on behalf of our entire Urban League movement across the country -- including our Washington Bureau staff who live in Washington, D.C. and the staff and constituents of our Greater Washington Urban League, led by President and CEO, George H. Lambert -- we are urging the Senate to pass this legislation to remedy the disenfranchisement of nearly 700,000 Americans.

Founded in 1910, the National Urban League was established as a nonpartisan, nonprofit civil rights organization dedicated to the empowerment of African Americans and other underserved populations. We conduct our work through a network of 91 Affiliates across 36 states and the District of Columbia by proudly providing direct services to two million constituents each year. We have served the District of Columbia through the Greater Washington Urban League since 1938 and our Washington, D.C. Bureau since 1962.

Marc Morial Leadership on Voting Rights

Throughout my career as a voting rights activist and civil rights lawyer, I have had a deep intellectual interest in constitutional law and a long-standing passion in the D.C. Statehood movement. This passion arose early in my career while working as an advocate in college and law school. While in law school in Washington, D.C., I grew to know and love this community and made this city my second home.

This connection continued, and I served on the D.C. Statehood Commission from 2006 to 2010 and in this position, I pushed for D.C. statehood and statutory representation.

As the former Mayor of New Orleans, I have deep experience in running a busy and thriving city with a diverse population. Residents of these cities, like Americans across the country, need representation in Congress to meet their needs and protect their rights.

History of the Battle for Voting Rights in this Country

The National Urban League has long supported the cause of equality for the District's citizens, including full representation, democracy, and equality through statehood, since it was founded in 1910. Central to the Urban League's mission is its work to advance civil rights, social justice, and economic parity. In our experience, the number one way to achieve these goals is by exercising the right to vote.

In this country, the fight against disenfranchisement has existed for the past 200 years. In 1870 under the leadership of President Ulysses S. Grant, the Republican-controlled Congress passed the 15th Amendment, which states that citizens could not be denied the right to vote based on the color of their skin. After the 15th Amendment was put in place, former Confederate states used numerous tactics to create barriers to voting for Black citizens, from intimidation tactics to voter suppression laws requiring poll taxes and discriminatory literacy exams.

The battle against disenfranchisement continued with the passage of the 19th Amendment (1920), which states that voting rights could not be denied based on sex. Despite this progress, Black citizens of this country continued to experience oppression and the denial of their constitutional right to vote. The advocacy of the Civil Rights Movement in response to this marginalization led to the passage of the *Civil Rights Act of 1964* and the *Voting Rights Act of 1965*, which were intended to prevent and eliminate laws and policies that would restrict the voting rights that these amendments were intended to protect. This path forward continued with the 26th amendment (1971), which states that this right could not be denied based on age for those over 18 years old.

Despite this progress and our unrelenting push to achieve full voting rights in this country, and despite the fact that the District of Columbia slaves were the "first freed" nine months before the *Emancipation Proclamation*, D.C. residents have been pushed to the sidelines as spectators and continue to be deprived of full representation.[1] The right to vote is ultimately meaningless if

[1] *District of Columbia Compensated Emancipation Act*, ch. 54, 12 Stat. 376 (1862); *See also* Fabrikant, *supra* note 12, at 337 ("The D.C. Emancipation Act was the first federal law which granted immediate and unconditional freedom to any slave.").

those attempting to exercise this right are unable to put representatives with full voting status in office. As a result of this inability, the majority-black residents are ultimately given second-class citizenship in our society.

The international community agrees with this sentiment. The United Nations Human Rights Committee, Organization of American States, and Organization for Security and Cooperation in Europe have all recognized the disenfranchisement of D.C.'s residents.[2]

Our position on voting rights compromises our position in promoting democracy globally. The denial of all rights of American citizenship to residents of the District of Columbia that are enjoyed by every citizen who resides outside the District can no longer be tolerated and defended by a nation that advances democracy around the world.

Impact of Disenfranchisement Due to Not Having Congressional Voting Rights

The fight for full equality for District citizens is not about politics, partisanship, or race; it is a fight for democracy. One of the foundations of American democracy is the right to vote. As I previously mentioned, this key right was forged from the blood of our ancestors who fought for their birthright as citizens of this country. The disenfranchisement of hundreds of thousands of Americans undermines the very values our country espouses.

Nearly 700,000 people live in the District of Columbia and suffer under the daily injustice of "Taxation without Representation." Americans living in our nation's capital pay the highest per capita federal income taxes in the country, serve on juries, and fight and die in wars, yet they are denied full democratic rights. They are unable to bring grievances to influential federal officials, reap the benefits available to other congressional constituents, or have a say in the important issues of war and peace that confront this nation.

As a civil rights and human services organization, we are in a unique position to see how this lack of representation directly impacts the populations we serve. The broader civil rights implications have become especially evident in the past year. The pandemic disproportionately impacted communities of color. Black and brown communities experienced higher rates of infections, deaths, and unemployment due to Covid-19. The pandemic also exacerbated racial inequities in education, housing, employment, health care, and the racial wealth gap.

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[2] Inter-American Commission on Human Rights, *Statehood Solidarity Committee/United States*, Report No. 98/03,Case 11.204 (Dec. 29, 2003); OSCE Parliamentary Authority, Washington, D.C. *Declaration and Resolutions Adopted at the Fourteenth Annual Session* (July 1-5, 2005); OSCE, International Election Observation Mission: United States of America –General Elections, 8 November 2016, Preliminary Conclusions, p. 5, at https://www.osce.org/files/f/documents/a/2/280331.pdf.

No where have we witnessed the acute impact of the pandemic than right here in the District of Columbia. D.C. residents, including essential workers and small business owners, were in dire need of the relief afforded under the *CARES Act*. However, unlike the rest of the country, it did not have congressional representation that could offer amendments to or vote on the final *CARES Act* package. Because it was considered a territory and not a state, D.C. was originally denied $755 million in critical funding that it needed to provide direct relief to its residents.[3]

Last summer, when our nation reached a turning point in its tolerance of racially-motivated police violence, D.C. residents took to the streets to exercise their First Amendment rights to peacefully protest the killing of George Floyd, Breonna Taylor, Ahmaud Arbery, and many others. In response to this peaceful uprising, the previous administration gave orders to both the National Guard and to federal law enforcement to carry out a disproportionate and inappropriate response in the interest of a photo op.

Despite receiving urgent requests from D.C. Mayor Bowser, that same administration refused to call in the National Guard in response to a violent attack on the U.S. Capitol on January 6 until much of the damage had already been done. In both of these cases, D.C. officials were unable to adequately respond to critical events that were happening in this city, and the risk they posed to its residents, because the District did not have statehood and the critical safety mechanisms it provides.

Despite all of these actions that directly impacted and harmed them, D.C. residents are not able to hold elected representatives accountable for these harms. Unfortunately, there was no D.C.-elected Congressional representative who could vote on the legislation that would establish the independent January 6 Commission to investigate the attack on our U.S. Capitol on the House floor. There was no D.C. representative that could vote on the George Floyd Justice in Policing Act, which would put in place critical policing reform and reimagine public safety.

Conclusion

We are at a unique time in our nation's history where we are taking a closer look on how we can create laws to truly ensure that the fundamental right to vote is able to be exercised by all of America's citizens. It is crucial that we do not let this moment pass without passing and enacting the *For the People Act*, the *John Lewis Voting Rights Act*, and the *Washington, D.C. Admission Act*.

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[3] 42 USC 801. (Mar. 27, 2020); *See* Meagan Flynn, *D.C. was denied $755 million in coronavirus relief last year. Now it may get that money*, WASH. POST (Feb. 12, 2021 3:59 PM), https://www.washingtonpost.com/local/dc-politics/district-covid-relief-maryland-virginia/2021/02/12/c2e051cc-6cad-11eb-9ead-673168d5b874_story.html.

I thank Senator Carper for calling national attention to the second-class status of the citizens of the District of Columbia by introducing the *Washington, D.C. Admission Act* in the Senate, the focus of this important hearing on equality for District citizens. I also applaud the longstanding and strong leadership on this issue by D.C. Congresswoman Eleanor Holmes Norton who authored the first statehood bill in 1991 when first coming to Congress and has remained a steady soldier in the fight for equality for the District's citizens.

Black Americans have fought and died for the right to vote in this country for centuries - this right has been given and taken away by those in power at the expense of its citizens. The Supreme Court's decision in the landmark case *Wesberry v. Sanders* says it best, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[4] We cannot allow this denial of constitutional rights to continue right outside of Congress's front door. The goals of our civil rights movement will not be realized until D.C. statehood is achieved.

Thank you for inviting me to testify before you today and I look forward to this discussion and your questions.

[4] 376 U.S. 1 (1964).

Written testimony of Professor Richard Primus
to the U.S. Senate Committee on Homeland Security and Governmental Affairs
on the constitutionality of congressional action admitting a portion of the District of Columbia
as a State of the Union

Submitted June 18, 2021

Chairman Peters, Ranking Member Portman, and Members of the Committee:

I am honored by your request that I submit testimony in connection with your Committee's consideration of the constitutionality of the pending bill to admit, as a State of the Union called Washington, Douglass Commonwealth, most of the area currently comprising the District of Columbia.

Discussions of the pending proposal raise two kinds of constitutional issues. The first kind is about specific rules of constitutional law that determine what Congress may and may not do. The second kind is about general constitutional principles that should inform Congress's choices. Both kinds are important. The first kind is important for the simple reason that Congress should not do what it lacks the authority to do. The second kind is important because government officials acting in good faith should strive for fidelity not only to the letter of the Constitution but also to its spirit.

The pending proposal raises no real issues at the level of specific constitutional rules. Congress has the authority to admit Douglass Commonwealth as a State of the Union, and straightforwardly so. There is within this rubric one puzzle to work through, related to the effect of the Twenty-Third Amendment in a world where Douglass Commonwealth is a state. But that puzzle is easily solved. So at the level of specific rules, there are no constitutional obstacles to the pending proposal.

The real action lies elsewhere, in the second kind of constitutional issue. Our constitutional system is more than a rulebook. It is also a covenant and a plan. It encompasses not just rules but also purposes and principles and a national ethos. For most of the people who

have constitutional reservations about the pending proposal, the sense that something is amiss is an intuition that making most of the District of Columbia into a state would be contrary to the Constitution's basic plan, whether or not it violated any specific constitutional rule. That intuition begins, usually, with the idea that the Framers did not want Washington, D.C. to be a state and that we would behave poorly if we betrayed that vision.

I am confident that most of the people who hold that view do so in good faith. But on careful reflection, it is a mistake to think that admitting Douglass Commonwealth as a state would be contrary to the Framers' vision or to the design of our system of government. On the contrary, the best understanding of the constitutional design suggests that admitting Douglass Commonwealth is not only permissible but desirable.

The sense that the pending proposal is at odds with our constitutional design rests, at bottom, on the fact that the Founders of the Republic did not intend Washington, D.C. to be a state. It's true; they didn't. But they also did not intend to leave 700,000 American citizens without voting representation in Congress. And there is no reason to believe that if offered the choice between a sixty-eight square mile seat of government and 700,000 disfranchised citizens on one hand, or a smaller seat of government whose geography would enable those 700,000 citizens to be represented in Congress on the other hand, that the Framers would choose to disfranchise 700,000 American citizens.

In other words, the pending proposal implicates two basic commitments of our constitutional design, not just one. It implicates the idea that we should have a seat of government that is not part of any state, and it also implicates the idea of a national legislature that is electorally responsive to the people for whom it legislates. A state of affairs that vindicates one of those commitments but not the other is a state of affairs that fails to vindicate our Constitution's basic vision. The pending proposal vindicates both, and it does so in a way that is consistent with every applicable rule of constitutional law.

The balance of my testimony has two parts. In Part I, I address the specific constitutional rules that bear on the pending proposal. In Part II, I explain why attention to more general constitutional principles counsels admitting Douglass Commonwealth as a state.

Part I: Constitutional Rules

The constitutional rules relevant to the pending proposal are associated with three clauses in the written Constitution. Taking them in the order in which they appear in the written Constitution, the first of those three clauses is the District Clause, which appears at Article I, Section 8, Clause xvii, and which authorizes Congress to legislate for a seat of government no larger than ten miles square. The second is the Admission Clause, which appears at Article IV, Section 3, and which governs the admission of new states. The third is the Twenty-Third Amendment, which entitles the district constituting the seat of government to three electoral votes in presidential elections.

To analyze the rules in the clearest way possible, it will help to discuss the clauses in a different order from the order in which they appear in the Constitution. Below I will first address the Admission Clause, and then the Twenty-Third Amendment, and then the District Clause.

A) The Admission Clause

Article IV, Section 3 provides that "New States may be admitted by the Congress into this Union[.]" Like all other constitutionally specified powers of Congress except where the Constitution expressly specifies otherwise, the congressional power to admit new states is a power exercised by the passage of ordinary legislation described in Article I, Section 7. All that is required is a majority vote of both Houses followed by Presidential approval, or else passage by two-thirds of each House in the event of a Presidential veto. On every one of the thirty-seven previous occasions when Congress has exercised its power to admit new states, it has done so by ordinary legislation, and appropriately so.

The Admission Clause limits Congress's discretion regarding what territory to admit as a new state in only one respect: Congress may not unilaterally redraw the map of existing states. Congress may not combine two or more states, or divide existing states, without the consent of the legislatures of the states affected.[1] But that is the only limitation that the Admission Clause

[1] See Article IV, Section 3.

articulates. Subject to that proviso, Congress can admit states in whatever configuration it chooses.

Straightforwardly, then, Congress can admit Douglass Commonwealth as the Fifty-First state. Indeed, as a matter of sheer constitutional authority, Congress could admit ten different neighborhoods within the District of Columbia as ten different states, bringing the total number of states in the Union to sixty. Whether Congress should do anything like that is, of course, a different question. But as a matter of constitutional authority, Congress has the power to admit new states, and it could exercise that power to admit territory that we now know as part of the District of Columbia as ten states, or three, or one.

It is my understanding that at least one analyst of the pending proposal has raised the possibility that the Admissions Clause's prohibition on Congress's redrawing the map of existing states prevents Congress from admitting Douglass Commonwealth as a state without securing the permission of the Maryland Legislature, because the land that would comprise Douglass Commonwealth was once part of Maryland. If that land were still part of Maryland, then it would straightforwardly be correct that admitting Douglass Commonwealth as its own state would require the Maryland Legislature's assent. The relevant language in Article IV, Section 3 reads as follows: "[N]o new State shall be formed within the Jurisdiction of another State…without the Consent of the Legislatures of the States concerned as well as of the Congress."

But the land that the pending proposal would make into a new state is not "within the Jurisdiction" of Maryland, nor of any other state. The legislation by which Maryland ceded the relevant territory to the United States in 1791 relinquished all claims that Maryland might have to that land. It reserved no future interest by which Maryland might assert control over the uses to which that land was put in the future.[2] As a result, Congress does not need Maryland's approval in order to admit a state from within the territory of the District of Columbia, just as Congress does not need Maryland's approval to do anything else within the District of Columbia.

[2] See An Act Concerning the Territory of Columbia and the City of Washington, passed December 19, 1791 ("Be it enacted by the General Assembly of Maryland, That all that part of the said territory called Columbia which lies within the limits of the state shall be, and the same is hereby, acknowledged to be forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction[.]") Maryland's act of cession did stipulate that private property holders in the ceded territory were not stripped of their property in favor of the United States, but that reservation has no bearing on the present question.

By way of analogy: If Congress were to decide to admit a portion of the State of Maine as its own state, it would need the agreement of the Maine Legislature. But it would not also need the agreement of the Massachusetts Legislature, even though the relevant territory was part of Massachusetts before Maine and Massachusetts became separate states. When Maine was admitted to the Union, Massachusetts ceased to have claims on its territory. Maryland has no more right to control Congress's actions with respect to the District of Columbia than Massachusetts has to control Congress's actions with respect to Maine.

Some commentators have also suggested that if Douglass Commonwealth is to be admitted as a state, it should be done by constitutional amendment rather than by ordinary legislation under the Admission Clause. To be sure, Congress could proceed by constitutional amendment if it chose to do so. Anything that Congress can do by statute can also be done by constitutional amendment. But there is no requirement that Congress proceed by constitutional amendment, and Congress has never used the amendment process to admit a state in the past.

In short, the Admission Clause authorizes Congress to admit states as it sees fit, so long as it does not reconfigure the map of existing states, and to do so by ordinary legislation.

B) The Twenty-Third Amendment

The Twenty-Third Amendment provides, in relevant part, as follows:

> Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct[, a] number of electors of President and Vice-President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state…
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

This Amendment was adopted in 1961 due to a general recognition that American citizens residing in the District of Columbia should have some say in the choice of the nation's elected officials.

If the State of Washington, Douglass Commonwealth were to be admitted to the Union, it would be entitled to presidential electors on the same basis as all other states, as specified in Article II and the Twelfth Amendment. If the Twenty-Third Amendment were to remain in force after the admission of Douglass Commonwealth as a state, that Amendment would have the effect of allocating three presidential electors to the small geographical area that S.51 designates as the Capital. That area has a vanishingly small population—likely fewer than a hundred people. It does not make much sense to let that tiny population—a significant portion of which might be the First Family—choose three presidential electors all by itself. But this consequence of the Twenty-Third Amendment provides no reason to oppose the admission of Douglass Commonwealth, because the problem is easily solved.

The optimal solution is to repeal the Twenty-Third Amendment. That Amendment exists to prevent the several hundred thousand residents of the District of Columbia from being excluded from presidential elections. If Douglass Commonwealth becomes a state, that purpose will be achieved without the Twenty-Third Amendment. Accordingly, the pending proposal contains a provision calling for the repeal of the Twenty-Third Amendment, and setting in motion a process for that repeal, and appropriately so.

To be sure, neither calling for the repeal of a constitutional provision nor initiating a repeal process is the same as actually repealing the relevant provision, and until the Twenty-Third Amendment is in fact repealed, its allocation of electors to the seat of government would be problematic. But the problem is susceptible of several solutions, and the pending proposal provides for one of them. Section 2 of the Twenty-Third Amendment authorizes Congress to enact legislation to carry out the design of that Amendment. At present, the implementing legislation is codified at 3 U.S.C. § 21. Section 223 of the present proposal, if adopted, would repeal 3 U.S.C. § 21, thus leaving the Twenty-Third Amendment without any implementing legislation. Without implementing legislation, the thinking goes, no electors for the seat of government would be appointed, and the anticipated problem would simply not arise. The Twenty-Third Amendment would be a dead letter.

As a practical matter, this solution would work. That said, it is possible that some Members of Congress might find it dissatisfying, inasmuch as the constitutional design might best be understood to give Congress an obligation to enact implementing legislation. To be sure,

no court would order Congress to enact such legislation were Congress to decline. But it is possible that Members of Congress, out of their own sense that Congress should do more than nothing, would not want to repeal 3 U.S.C. § 21 and simply stop there. Fortunately, it is easy to find alternative solutions. Here are three potential statutory provisions that Congress could adopt in place of the existing language of 3 U.S.C. § 21:

> Option 1: "At each election for President and Vice-President of the United States, the Archivist of the United States [or some other non-partisan federal official] shall appoint persons to act as Electors for the Seat of Government under the Twenty-Third Amendment. The persons so appointed need not be residents of the Seat of Government. The Electors for the Seat of Government shall cast their votes for President for the person earning the most votes for President from among the Electors appointed by the States of the Union, and they shall cast their votes for Vice-President for the person earning the most votes for Vice-President from among the Electors appointed by the States of the Union."
>
> Option 2: "At each election for President and Vice-President of the United States, the Archivist of the United States [or some other non-partisan federal official] shall appoint persons to act as Electors for the Seat of Government under the Twenty-Third Amendment. The persons so appointed need not be residents of the Seat of Government. The Electors for the Seat of Government shall cast their votes for President for the person earning the largest share of the popular vote for President, and they shall cast their votes for Vice-President for the person earning the largest share of the popular vote for Vice-President."
>
> Option 3: "At each election for President and Vice-President of the United States, the Archivist of the United States [or some other non-partisan federal official] shall appoint persons to act as Electors for the Seat of Government under the Twenty-Third Amendment. The persons so appointed need not be residents of the Seat of Government. The Electors for the Seat of Government shall cast their votes for President for George Washington, of Virginia, and they shall cast their votes for Vice-President for John Adams, of Massachusetts."

Any of these provisions, enacted in place of 3 U.S.C. § 21, would solve the problem. Nothing in the Constitution requires that Electors reside in the jurisdictions they represent, so the seat of government's near-zero population would not restrict the choice of persons who might serve in this essentially honorary role. Under the Supreme Court's decision in *Chiafalo v. Washington*,

140 S. Ct. 2316 (2020), the statutory instruction to the Electors as to how to cast their votes would be binding.

These three potential solutions have different virtues. The first promises noninterference with the electoral process outside the Twenty-Third Amendment. The second nods to a fundamental principle about democratic elections. The third makes the admission of Douglass Commonwealth a moment when Congress honors the Founding generation, and affirms its connection to that generation's project, even as it adapts the map of states to the needs of the present. The choice of which solution to pursue is, of course, up to Congress. But the wide selection of sufficient solutions shows that nothing about the Twenty-Third Amendment presents a reason why Douglass Commonwealth should not be admitted.[3]

C) The District Clause

Article I, Section 8, Clause xvii specifies that the seat of government is to occupy an area "not exceeding ten Miles square." If the reference to ten miles square indicated that the seat of government should occupy an area ten miles square, then the pending proposal might be problematic—as would the fact that for more than 170 years, the District of Columbia has occupied only about two-thirds of an area ten miles square. Fortunately, nothing in the District Clause, nor in any other source of constitutional authority, specifies or suggests a minimum size for the seat of government. By the plain text of the clause, ten miles square is a maximum, not a requirement or even a recommendation.

On the most sympathetic understanding, the idea that the seat of government should not be made too small is not really a claim about the meaning of the District Clause, which unambiguously states only a maximum size. It is better understood as a concern that the seat of

[3] Any of these solutions might result in a very small number of Americans not having any role in Presidential elections. If a citizen resided within the area comprising the seat of government and had no previous domicile in any State, such that he or she could not vote absentee, then that citizen would be excluded entirely from the process of selecting presidential electors. But it is hard to imagine that this problem would affect more than a two-digit number of voters—and likely even fewer—in any given election. The total population of the relevant area is tiny, and the subset of that population that could not vote absentee in some other place is even smaller. It seems unlikely that the problem would affect even as many as twenty voters in any given election. To be sure, no solution that risks excluding twenty voters is perfect. But it is hard to see how the risk of excluding twenty voters (and likely fewer) can be a reason to maintain a status quo that disfranchises more than half a million.

government not be made trivially small, lest as a practical matter the seat of government become dependent on the state or states bordering it. This concern is sometimes associated with Federalist 43, in which Madison, defending the Constitution's grant to Congress of exclusive legislative jurisdiction over the seat of government, emphasized the importance of preventing national officials from needing to look to state governments for protection as they went about their duties. If Congress or the President needed some state's assistance to keep the peace at the seat of government, the idea ran, then officials from the relevant state might acquire undue influence over national decisionmakers.

This concern has no bearing on the present proposal. The modern national government has ample resources for its own protection—resources vastly greater than any that a state could offer. To be sure, protecting federal officials as they go about their duties requires that the federal government actually mobilize its resources so as to provide the necessary protection. The disturbing events of January 6 of the current year demonstrate that neither a well-resourced national government nor a seat of government comprising sixty-eight square miles guarantees elected federal officials protection against political violence if the federal officials responsible for providing that protection do not take the steps necessary to provide that protection. But nothing about the events of January 6 arose because the seat of government occupies too small an area. And on the assumption that federal officials will generally do what is necessary, there is no reason to think that reducing the zone of exclusive federal control will render national officials unduly dependent on state governments and thereby compromise the independence of federal decisionmakers. To be concrete: If Douglass Commonwealth is admitted as a state, it will be a state with resources considerably smaller than those of the national government. There is little reason to think that Douglass Commonwealth will be able to push the national government around.

* * *

The conclusion to this first part of the analysis is straightforward. The Constitution authorizes Congress to admit new states. No constitutional rule blocks Congress from exercising that power to admit Douglass Commonwealth as a state, as described in the pending proposal.

Even though no constitutional rule blocks the admission of Douglass Commonwealth, some Americans have the intuition that making most of what we know as the District of Columbia into a state would be contrary to something important in the Constitution's underlying vision of American government. This intuition sounds in the domains that constitutional lawyers sometimes call structure and ethos. It is about the nature of our institutions and the relationships among them, or it is about the values and narratives to which the system is committed, or both. Thinking in those registers, many Americans have the view that the place we know as Washington, D.C. is not supposed to be a state—that the Framers of the Constitution intended it not to be a state, and for good reasons.

This view has a factual basis, but it is also a bit too simple, so it is worth analyzing carefully. It is not quite accurate to say that the Framers did not intend Washington, D.C. to be a state, because strictly speaking the Framers of the Constitution—that is, the delegates at the General Convention of 1787—had no ideas at all about Washington, D.C. At the time of the Constitutional Convention, the idea of placing the seat of government at the location that came to be the District of Columbia still lay in the future. Even after the Constitution was adopted and the new government began to operate, it was not immediately clear where the seat of government would be, and the eventual site of Washington, D.C. was not everyone's first choice. In 1789, the House of Representatives voted to locate the seat of government within the State of Pennsylvania, and only after that plan unraveled did the action move to the Potomac. But if we broaden the lens and speak not of the Framers but of the Founding generation more generally, and if our focus is what people in that generation thought about Washington, D.C. once Washington, D.C. existed, then it is correct to say that they did not intend Washington D.C., or a portion of Washington, D.C., to become a state. They envisioned it as the seat of government, which would not be part of any state. We all know that story. And because we all know that story, it is easy to make the inference that creating a state from within what is now Washington, D.C. would be contrary to the Founding vision for our system of government.

I am confident that most Americans who make that inference do so in good faith. But considered carefully, it rests on an error. That error is the implicit idea that one can think about

one piece of the Founding vision in isolation from all of the other important pieces of the Founding vision. If we think about the Founding vision as a whole, it should become clear that the best understanding of American constitutional principles argues for, rather than against, the admission of Douglass Commonwealth as a state.

The pending proposal implicates two features of the Founding constitutional vision, not just one. One of those two features is the idea that the seat of government should not be within the jurisdiction of any particular state. The other, which animates the whole Constitution, is the idea that Congress should be electorally responsive to the people for whom it legislates. Any state of affairs that honors one of those commitments without honoring the other one fails to realize the Constitution's design.

For the Founding generation, those two commitments were not in tension. The population of the site approved by Congress as the seat of government in 1790 was close to zero. So it is true that when the First Congress approved the Potomac site, it did not intend to set in motion a series of events that would one day include the creation of a new state. But it also did not intend to sanction a state of affairs in which 700,000 American citizens had no voting representation in Congress.

There is no reason to think that the First Congress would have regarded the idea of 700,000 American citizens with no voting representation in Congress as anything other than horrifying. To be sure, most American officeholders at the Founding had different ideas than most Americans today about which Americans should be entitled to vote in elections. But the idea that more than half a million American citizens recognized as qualified to vote could be excluded from all voting representation in Congress is hard to reconcile with the basic commitments of the Framers' design. In the eighteenth century, the idea of Washington, D.C. as a non-state jurisdiction was not in conflict with the Constitution's central commitment to representative democracy. But if there had been such a conflict, it is hard to imagine that the Founders would have resolved that conflict by saying that disfranchising more than half a million registered voters—more voters than participated in the entire process by which the Constitution was ratified in all of the original thirteen states—was an acceptable cost.

We have grown accustomed to a situation in which more than 700,000 citizens have no voting representation in Congress. But the Founding generation might be puzzled—or more

likely, troubled—that we have grown so accustomed. And they might resent any attempt to rationalize that disfranchisement on the grounds that their vision required it. Put differently, we do them no honor by imputing to them the idea that keeping Washington, D.C. as it is justifies the continuing disfranchisement of so many American citizens. Nothing in the history of the Early Republic suggests that if the choice were put to the Founders between a sixty-eight square mile seat of government with 700,000 disfranchised Americans and a smaller seat of government with those 700,000 American enfranchised, they would have thought the geographically larger seat of government worth the costs to representative democracy.

None of this is to devalue the important Framing insight that the seat of government should not be located within the jurisdiction of any particular state. The seat of government should be a place where no local authority can dictate to the United States and where every American meets on equal terms. The pending proposal preserves that feature of the constitutional system. The seat of government would occupy less space than we are used to. But it would still occupy an area large enough for Congress, the President, and the Supreme Court to function in a space not subject to the jurisdiction of any state. The fundamental principle that the seat of government should be an exclusively federal area would remain in force, and properly so. But if we can preserve that commitment without sacrificing another one of the Constitution's core commitments—to representative democracy—then doing so seems like a pretty good idea.

In sum, there is nothing about the Founders' vision that requires that the seat of government look like the District of Columbia we know, except inasmuch as the District is not subject to the jurisdiction of any state and not larger than ten miles square. The pending bill would create a seat of government consistent with those necessary features of the constitutional design. Everything else is optional. Given the Constitution's commitment to representative government, it is hard to see how optional features of the configuration of the seat of government could justify the disfranchisement of 700,000 Americans.

Conclusion

For Americans who have grown up with a stable set of fifty states, the prospect of adding a fifty-first state could seem uncomfortable. The same is true of the prospect of transforming

much of Washington, D.C., which we are accustomed to thinking of as purely federal territory, into a state. But the Constitution is a plan for adaptation as well as for continuity.

There are no constitutional obstacles to the admission of Douglass Commonwealth as a state. We should not make the mistake of thinking that one principle of our constitutional design—that the seat of government should not be subject to the jurisdiction of a state—requires the sacrifice of another principle of our constitutional design—that all American voters should participate in the election of our national legislature. We can have both. Understood that way, the pending proposal does not betray the principles to which our system of government is committed. It honors and vindicates them.

I thank the Committee for the honor of participating in this process and for its attention to this testimony.

Statement

of

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before the

Committee on Homeland Security and Governmental Affairs
United States Senate
June 22, 2021

"Examining D.C. Statehood"

Chairman Peters, Ranking Member Portman, Members of the Committee:

My name is Roger Pilon. I am vice president for legal affairs emeritus at the Cato Institute and the founding director emeritus of Cato's Center for Constitutional Studies. I now hold Cato's B. Kenneth Simon Chair in Constitutional Studies. I want to thank Chairman Peters and Ranking Member Portman for inviting me to testify at today's hearing to discuss the merits of the proposed Washington, D.C. Admission Act (S. 51)

If enacted, S. 51 would create a 51st state from the present District of Columbia, save for a tiny enclave around the National Mall that would then be the seat of the federal government. The bill raises novel constitutional questions implicating the Constitution's Admissions Clause, Enclave Clause, and, especially, Twenty-Third Amendment. Accordingly, it is unclear how courts would rule if the bill were enacted and challenged, as it certainly would be. In fact, in an April 13 letter to President Biden and the congressional leaders, 22 state attorneys general stated clearly that they would bring constitutional challenges to such a statute.[1] That was followed in turn by a May 22 letter to the congressional leaders from 39 constitutional scholars, mostly law professors, assuring Members that the Admissions Act would pose "a classic political question, which courts are highly unlikely to interfere with, let alone attempt to bar."[2] I will respond to the scholars' letter as I discuss the bill.

For the reasons I set forth below, I believe that DC Statehood can be achieved only by amending the Constitution, as others have long thought, including Justice Departments from the

[1] Press Release, Off. Atty. Gen. Tex., Washington D.C. Statehood Violates the Constitution, Is Bad for Texas and America (Apr. 13, 2021) (https://bit.ly/3q2G4ON) .
[2] Sahil Kapur, "Dozens of Constitutional Scholars Tell Congress It Has Power to Make D.C. a State," NBC News, May 24, 2021, https://nbcnews.to/3xxgHH4.

time of Attorney General Robert F. Kennedy.[3] In fact, when the Twenty-Third Amendment was ratified in 1961, providing presidential electors for DC residents, and when an amendment providing congressional representation for DC residents was sent to the states for ratification in 1978 (only 16 states had ratified by the 1985 expiration date),[4] few thought that either of those goals could be achieved other than by constitutional amendment.

Given the more than 200-year history during which the District of Columbia has existed in its present form—save for the small Virginia portion retroceded in 1847, the constitutionality of which has often been doubted but never tested—there must be a strong presumption by now against the kind of radical changes envisioned by this bill. It simply strains credulity to believe that the Framers, when they drafted the Constitution's Enclave Clause, imagined anything like the arrangements this bill contemplates.

Constitutional Objections to S. 51

Congressional authority. Both this bill and the scholars locate Congress's authority to create this new state under Article IV, Section 3, of the Constitution, the Admissions Clause. That would be fine if this were a normal admission as has happened 37 times in our history, either with the consent of the state from which new states like Vermont and Maine were created, or, most often, from federal territory like the Northwest Territory or the Louisiana Purchase. But here, the framing of the question is crucial. This is not a simple question of whether Congress has the authority to create a state from territory acquired in clear contemplation of creating states from it. Rather, the question here is whether Congress has the authority to carve out, create, and admit to the Union a new state from territory that our first Congress acquired from two other states, pursuant to Art. I, sec. 8, cl.17, for the *express* purpose of becoming the seat of the federal government, which it has been for well over 200 years. The District of Columbia is not and never has been "federal territory" in the Article IV sense, territory acquired primarily to be the source of new states. The District is unique. It is a *sui generis* entity, *expressly* provided for not under Article IV but under Article I, the Enclave Clause, in clear, unmistakable contemplation of its becoming the seat of the new federal government. Because this is not an ordinary admissions question, and because it gives rise to other questions not found in ordinary admissions, courts may well want to weigh in, contrary to the scholars' contention that what we have here is a "classic political question."

One such further question is whether Congress has authority to reduce the District over which it has exclusive jurisdiction to this tiny enclave around the National Mall. The Enclave Clause reads, in relevant part:

> 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….

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[3] Letter and Memorandum from Atty. Gen. Robert F. Kennedy to Hon. Basil Whitener, H. Comm. on the District of Columbia (Dec. 13, 1963), reprinted in Home Rule, Hearings on H.R. 141 Before Subcomm. No. 6, H. Comm. on the District of Columbia, 88th Cong., 1st Sess. 341, 345 (1964).

[4] H.R.J. Res. 554, 95th Cong. (1978).

Seizing on the fact that the Framers did not set a *minimum* size for the District, proponents of the bill believe Congress can carve out this new state and leave the federal government seated in this tiny enclave, all without amending the Constitution.

To be sure, the Framers did not set a minimum size for the district. But their mention of "ten Miles square," together with Congress's nearly contemporaneous 1790 creation of the District from land ten miles square, ceded to the federal government by Maryland and Virginia, is strong evidence of what they intended—and evidence, too, against this scheme. Yet this bill would strip Congress of its present authority over today's District, leaving its authority to extend over just this tiny enclave. I will address some of the policy implications of that shortly; but here, the "Power To exercise exclusive Legislation in all Cases whatsoever, over such District" surely was not meant to entail, as some have argued, a power to create a new state from that District.

In fact, that raises a fundamental constitutional principle, the doctrine of enumerated powers, which holds that Congress has only those powers that the people delegated to it as enumerated in the document, mainly in Article I, Section 8.[5] I realize that there are some who have nearly read that doctrine out of the Constitution[6]—much like the post-New Deal Supreme Court has done—but insofar as it has salience, as more recent Courts have demonstrated in still very limited ways,[7] search as you will among Congress's enumerated powers, you will find none authorizing Congress to carve out a 51st state from the present District of Columbia.

That point was stated somewhat differently in 1963 by Attorney General Robert F. Kennedy, commenting on a bill that would have retroceded the District to Maryland:

> While Congress' 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. (emphasis added)[8]

And addressing the question of statehood for the District of Columbia in 1987, Attorney General Edwin Meese made a similar point: "The Constitution appears to leave Congress no authority to redefine the District's boundaries, absent an amendment granting it that power."[9]

True, the scholars note that Congress made minor adjustments to the District's southern boundary in 1791, but that was virtually contemporaneous with the original act. More seriously, in 1846 Congress retroceded the Alexandria portion back to Virginia, reducing the original

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[5] For my Senate testimony on the doctrine of enumerated powers, see Roger Pilon, The United States Constitution: From Limited Government to Leviathan, Econ. Educ. Bulletin, Am. Inst. Econ. Research (Dec. 2005), https://bit.ly/3iTCSmT.

[6] See, e.g., Richard Primus, "Herein of 'Herein Granted': Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers," 35 Const. Comment. 301 (2020).

[7] E.g., United States v. Lopez, 514 U.S. 549 (1995). Chief Justice Rehnquist: "We start with first principles. The Constitution creates a Federal Government of enumerated powers."

[8] Letter and Memorandum from Atty. Gen. Robert F. Kennedy to Hon. Basil Whitener, H *supra*, note 3.

[9] Rep. to the Atty. Gen., The Question of Statehood for the District of Columbia, April 3, 1987, 19, https://bit.ly/2S8jbNi.

District by almost a third. And the scholars cite a House committee as holding at the time that the District Clause places no mandate on the minimum size of the seat of government. But that does not address the question, which President Lincoln and others would raise,[10] of whether Congress had the *power* to make that retrocession. Not until 1875 did the question come before the Court in a private taxpayer suit. The Court declined to declare the act unconstitutional because so ruling would have resulted in dire consequences, given all that had transpired over the 30 some years since the retrocession.[11] In short, the question remains unresolved.

I would add only that every Justice Department that has addressed the question of whether Congress has the power to do what is contemplated here, or to do variations of it, has found that Congress lacks such power—with one exception. In 2009, after the department's Office of Legal Counsel reached a similar conclusion regarding a District voting rights bill then before Congress, Attorney General Eric Holder "rejected the advice and sought the opinion of the solicitor general's office. Lawyers there told him that they could defend the legislation if it were challenged after its enactment."[12] The ambiguity here is precious: of course the solicitor general's office "can defend" the legislation; it is the job of that office to defend all federal legislation, no matter how unconstitutional it might turn out to be.

To be sure, the Constitution does not expressly *prevent* Congress from reducing the size of the District of Columbia or other federal enclaves, as some have argued. But that view turns the doctrine of enumerated powers on its head, contending that all that is not prohibited is permitted. The Constitution's theory of legitimacy is just the opposite—all that is not permitted is prohibited. That is implicit in the document's Preamble together with its first sentence, where limited powers are "granted" by the people through the Constitution; and the principle is made explicit in the Tenth Amendment.

The consent of Maryland is likely necessary for the creation of a new state from the present District of Columbia. As the Enclave Clause contemplates, the District was created through the consent of both Congress and the states that ceded land for its creation. And the purpose of the cession was made clear in the initial act that gave the Maryland delegation in the House of Representatives authority "to cede to the congress of the United States, any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States."[13] Here again we have a single act, for a single purpose. Maryland did not cede the land for the purpose of creating a new state on its border.

To the contention that Maryland's consent will be required to create this new state, the scholars write:

> This objection mistakenly presupposes that Maryland retains revisionary interest in the territory currently composing the District of Columbia, which Maryland ceded to the

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[10] See Mark David Richards, "The Debates Over the Retrocession of the District of Columbia, 1801-2004," Washington History, 55 (Spring/Summer 2004).
[11] Phillips v. Payne, 92 U.S. 130 (1875).
[12] Carrie Johnson, "Some in Justice Department See D.C. Vote in House as Unconstitutional," Wash. Post, Apr. 1, 2009 (link no longer available; hard copy available with author).
[13] An Act to Cede to Congress a District of Ten Miles Square in this State for the Seat of Government of the United States, 2 Kilty Laws of Md., ch. 46 (1788).

> federal government when the District was established in 1791. In fact, Maryland expressly relinquished all sovereign authority over the territory at issue when the federal government accepted it. The express terms of the cession statethat the territory was "for ever ceded and relinquished to the congress and government of the United States, in *full and absolute right*, and *exclusive jurisdiction* ...."[14]

Considered as a simple real property transfer, this argument has merit. But as then-CRS attorney Kenneth R. Thomas testified in the House on Sept. 19, 2019, despite the express terms of the cession,

> The Maryland statute ceding the land made the cession 'pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States,' suggesting that Maryland transferred the land *for the limited purpose of creating the District of Columbia under the District and Federal Enclaves Clause*."[15]

Thomas went on to analyze the issue, concluding that it is unclear how a court would rule on the question.

What is clear, however, is that Maryland did not cede the land for the purpose of creating a new state on its border—nor is it likely that Maryland would have done so for that purpose. Indeed, were Congress to have put that land to a different purpose immediately after the cession, rather than more than 200 years later, Maryland would certainly have objected that the terms of the cession had been violated. It would have been sheer political—and likely legal—mischief for Congress to have done that. If so, Congress cannot now do in two steps, separated by the passage of time, what it could not have done in one fell swoop initially, a conclusion that is further buttressed by Article IV, Section 3, which provides that no new state may be created out of the territory of an existing state without that state's consent. Again, Maryland did not consent to creating a new state from its sovereign land. Whether it would do so now is an open question, of course. There are numerous practical objections that would arise, a few of which I will address below. Suffice it to say here that past efforts in this direction have received little support from the free state.

Practical Objections to S. 51

James Madison, the principal author of the Constitution, explained in *Federalist* No. 43 why we needed a "federal district," separate and apart from the territory and authority of any one of the states, where Congress would exercise "exclusive" jurisdiction:

> The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might

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[14] Quoting from prepared Statement of Viet D. Dinh, Before the Committee on Homeland Security and Governmental Affairs of the United States Senate (Sept. 14, 2014) ("Dinh Statement") (quoting 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), quoted in Raven-Hansen, The Constitutionality of D.C. Statehood, 60 Geo. Wash. L. Rev. 160, 179 (1991) (emphasis added).

[15] Kenneth R. Thomas Before H. Comm. on Oversight and Reform Hearing on "H.R. 51, the Washington, D.C. Admission Act" September 19, 2019. https://bit.ly/3q4foNu.

> say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy.

Independency runs through Madison's explanation: It was imperative that the federal government not be dependent on any one of the states, and equally that no state be either dependent on the federal government or disproportionately influential on that government. Neither of those objectives would be met under this bill.

Today, Congress has authority over the entire District of Columbia, albeit delegated to a significant extent to the District government. That authority would cease under this bill. As noted above, Congress would have exclusive authority over only the tiny sliver of land outlined in the bill—essentially the White House, the Capitol, the Supreme Court, and the area close to the National Mall. That would make the federal government dependent on this new independent state for everything from electrical power to water, sewer, snow removal, police and fire protection, and so much else that today is part of an integrated jurisdiction under the ultimate authority of Congress. Nearly every foreign embassy would be beyond federal jurisdiction and dependent mainly on the services of this new and effectively untested state. Ambulances, police and fire equipment, diplomatic entourages, members of Congress, and ordinary citizens would be constantly moving over state boundaries in their daily affairs and in and out of jurisdictions, potentially increasing jurisdictional problems substantially.

But neither would this new state be independent of the federal government. In *Federalist* No. 51 Madison discussed the "multiplicity of interests" that define a proper state, with urban and rural parts and economic activity sufficient and sufficiently varied to be and to remain an independent entity. That hardly describes the present District of Columbia. Washington is an urban, one-industry town (though not as much as it used to be), dependent on the federal government far in excess of any other state. This new state, our first "city-state," would be no different. Moreover, as a state no longer under the exclusive authority of a Congress that would now be dependent on it, as just outlined, this state would be in a position to exert influence on the federal government far in excess of that of any other state. The potential for "dishonorable" influence, as Madison noted, is palpable. And this tiny new "District of Columbia," compressed as it would be under this bill, would be unable to effectively control its place of business, rendering it susceptible to such influence.

Much of the Framers' thinking on these issues was colored by their experience in 1783 when members of the Continental Congress, meeting in Philadelphia, had to flee the city after the Executive Council of Pennsylvania refused to stop a mutiny threatening the members. With the recent, January 6 storming of the Capitol in mind, some are saying that an independent state surrounding the Capitol would have been able to intercede more quickly and effectively than happened under today's multiple jurisdictional authorities. That is far from clear, however, especially if the point is freighted with political considerations. This is a complex practical issue that should carry limited weight in the larger deliberations. If anything, members' concern for

their own physical security would hardly seem to be served by drastically reducing the geographical range of Congress's authority.

The Constitution Again: The Twenty-Third Amendment

The Twenty-Third Amendment poses the greatest problem for this bill. Ratified in 1961, it gives the District three Electoral College votes "[as] if it were a State." The problem is that there will still be some residents in this tiny enclave, including the first family, and they will have outsized influence on presidential elections. Yet their voting rights, guaranteed by the amendment, cannot be taken away by mere statute. The bill provides for "expedited procedures" for repealing the amendment, suggesting that proponents sense that there is a problem, but repeal is a longshot, given the ratification hurdles, so the bill also provides for repealing the *statutory* provision that enables residents to vote.

That, of course, would amount practically to extinguishing the enclave's residents' right to vote, so we do indeed have a problem here—and the scholars' letter airs their disagreement among themselves about how to address it. One camp reads the Twenty-Third Amendment as self-enforcing and therefore as mandating the appointment of electors. The other reads it as requiring enabling legislation and so, absent such legislation, there is no way for those residents to vote—and those scholars appear to be perfectly satisfied with that result. Indeed, they claim that because the District's residents will be few, they would not have standing to sue; moreover, this bill provides that they can vote in their last "state" of residence, which of course would little avail life-long District residents.

But even if the self-enforcement argument were accepted, the scholars continue, and the District were required to appoint electors "in such manner as the Congress may direct," as the amendment reads, both camps claim that Congress could replace the current law, which mandates that electors vote in accordance with the outcome of the District's popular vote, with one that mandates that they vote in other ways: in favor of the ticket that got the most Electoral College votes nationwide, for example, or for the winner of the national popular vote. In other words, these scholars read "manner" as referring not simply to procedures needed to effect voting but to legislation allowing Congress to direct electors *how* to vote.[16]

The current statute does that too, but it's perfectly consistent with the whole point of the Twenty-Third Amendment—to enable District *voters* to select electors based on which ticket the electors are pledged to vote for in the Electoral College. Enacted prior to any election, such a statute surely cannot direct *voters* how to vote; but neither could it rightly direct *electors* how to vote, except as a reflection of the popular vote *in the jurisdiction*; for otherwise the amendment would effectively be negated. Yet that is precisely what the scholars' two examples come to. Thus, if District voters went overwhelmingly for the Democratic ticket's electors—a likely outcome given recent District voting patterns—while in the rest of the country the Republican ticket received the most Electoral College votes or won the national popular vote, the District's voters would effectively count for nothing since the electors they selected would be required to ignore how they voted. That would surely raise constitutional issues.

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[16] Citing Chiafalo v. Washington, 140 S. Ct. 918 (2020), the scholars claim that Congress could so bind the District's electors. But *Chiafalo* involved a very different issue: *faithless* electors who ignored their pledge.

It's one thing to bind electors to vote in the Electoral College in accordance with the outcome of the popular vote in their own state (or in the District), quite another to bind them to vote in accordance with the overall vote of the Electoral College or the national popular vote. If I may conclude on a larger note, we have here, like the ongoing movement by many to create a National Popular Vote Interstate Compact,[17] a small corner of the larger movement now going on in the country to nationalize elections; to reduce the role of the Electoral College; more broadly to reduce the role of states in our federal system; and, at bottom, to convert the nation from a constitutional republic to a nationwide majoritarian democracy, precisely what the Constitution's Framers sought to avoid, and for good reason, individual liberty.

[17] National Right to Vote, https://bit.ly/35u51cv (last visited June 17, 2021).

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Testimony before the U.S. Senate Committee on Homeland Security & Governmental Affairs

"Examining D.C. Statehood"

June 22, 2021

Professor Derek T. Muller

University of Iowa College of Law

Chairman Peters, Ranking Member Portman, Members of the Committee: thank you for the kind invitation to testify before you today.

My name is Derek Muller. I am a tenured Professor of Law at the University of Iowa College of Law.[1] I teach election law, federal courts, civil procedure, and evidence—in a nutshell, I teach the law of elections and of litigation. I've had the privilege of reading and writing about federal rules concerning elections, state administration of federal elections, presidential elections, the Electoral College, the Electoral Count Act, and litigation surrounding them.

My testimony today makes four principal points. First, the Twenty-Third Amendment guarantees that if the District of Columbia becomes a state and leaves behind some enclave known as "Capital," this new District would have three electoral votes, no matter how few people reside in it. Second, S. 51,[2] in its present form, does not adequately address the Twenty-Third Amendment issue. Third, statehood, if it proceeds, should be conditioned on repeal of the Twenty-Third Amendment. Fourth,

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[1] My remarks are my personal views and do not represent those of the University of Iowa or any other organization. I am here at the request of the Committee, on my own behalf and no one else. Special thanks to Kevin Kim and Mark McDermed for their research assistance with this testimony.

[2] The same holds true for H.R. 51, 117th Cong. (2021).

potential alternative statutory solutions to the Twenty-Third Amendment—which do not exist in the present bill—present constitutional, legal, and practical problems.[3]

In one sense, my testimony is modest. It does not weigh in on the constitutionality of admitting the District of Columbia as a state. It does not address the policy of whether it ought to become a state. It only addresses the Twenty-Third Amendment and related, practical voting-rights problems. But these problems are serious and vexing; problems that, in my judgment, the present draft of S. 51 is inadequate to address. My testimony focuses on the practical, real-world implications of enacting a law that has components that, in my judgment, have not been adequately address and leave genuine areas of uncertainty in its operation.[4]

I. The Twenty-Third Amendment guarantees that the new District would have three electoral votes, no matter how few people reside in it.

The text of the Twenty-Third Amendment states:

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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[3] If retrocession is considered as an alternative proposal, the same analysis applies.

[4] Portions of this testimony are adapted from Derek T. Muller, *Statehood, the District of Columbia, and the Twenty-Third Amendment*, EXCESS OF DEMOCRACY (Feb. 28, 2019), https://excessofdemocracy.com/blog/2019/1/statehood-the-district-of-columbia-and-the-twenty-third-amendment; Derek T. Muller, *Voting Rights Problems with the District of Columbia Statehood Bill*, EXCESS OF DEMOCRACY (June 29, 2020), https://excessofdemocracy.com/blog/2020/6/voting-rights-problems-with-the-district-of-columbia-statehood-bill; Derek T. Muller, *The DC Statehood Proposal Could Give a Handful of People Three Electoral Votes*, REALCLEARPOLICY (May 6, 2021), https://www.realclearpolicy.com/articles/2021/05/06/the_dc_statehood_proposal_could_give_a_handful_of_people_three_electoral_votes_775920.html; Derek T. Muller, *Potential Double-voting Problems and District of Columbia Statehood*, EXCESS OF DEMOCRACY (May 13, 2021), https://excessofdemocracy.com/blog/2021/5/potential-double-voting-problems-and-district-of-columbia-statehood.

This Amendment guarantees the District three presidential electors. Congress directed the "manner" of appointing electors after the Amendment was ratified in 1961. It provided a popular election for slates of electors, and the presidential ticket receiving the most votes would have all three of its electors chosen on behalf of the District.[5]

Under S. 51, the new "District constituting the seat of Government of the United States" would be known as "Capital."[6] Capital would be entitled to three electoral votes.

The boundaries of Capital are set out in S. 51.[7] They roughly—but not exactly—map onto Census Tract 62.02. That tract had 33 inhabitants in the 2010 census.[8] Per the 2019 American Community Survey, the tract had 58 inhabitants.[9] The actual population of a future Capital will likely differ. A subset of that population is of voting age.[10] The President typically does not change residency to the White House, but the President and family members might do so, which would heavily influence this new federal enclave.

A small group of prospective voters who happen to reside in this federal enclave would now have three electoral votes all to themselves. Critics of the Electoral College point to disproportionate voting power in states such as Vermont and Wyoming, each guaranteed three electoral votes despite having disproportionately smaller populations than states such as Texas and California. But such disparities would be dwarfed by an enclave about 1/20,000th smaller than Vermont receiving three electoral votes.

This is a serious problem. In the event the District becomes a state, there would be 541 electoral votes.[11] Three electoral votes would be about 0.5% of the total

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[5] *See* An Act to amend the act of August 12, 1955, relating to elections in the District of Columbia, Pub. L. 87-389 (1961). *See also* D.C. CODE § 1-1001.10(a)(2).

[6] S. 51, 117th Cong. § 112 (2021).

[7] *Id.*

[8] *See Population by Race and Hispanic or Latino Origin in the District of Columbia – Census Tracts: 2010*, DC OFFICE OF PLANNING, *https://*plandc.dc.gov/sites/default/files/dc/sites/op/publication/attachments/DC%2520Census%252020 10%2520Population%2520by%2520Census%2520Tract.pdf.

[9] *Census Tract 62.02, District of Columbia,* U.S. CENSUS BUREAU (2019), http://censusreporter.org/profiles/14000US11001006202-census-tract-6202-district-of-columbia-dc/.

[10] *See* Charlie Savage and Emily Cochrane, *White House Is Said to Quietly Push Change to D.C. Statehood Bill*, N.Y. TIMES (May 13, 2021), https://www.nytimes.com/2021/05/13/us/politics/biden-dc-statehood.html ("It is not clear how many, if any, potential voters would be left there. The only residence in the rump federal enclave would be the White House; presidential families traditionally choose to vote in their home states, but nothing forces them to do so. In theory, homeless people might also claim residency in the envisioned enclave.").

[11] One aside. If an objective of S. 51 is to oversee the ultimate repeal of the Twenty-Third Amendment, it should also ensure that the size of the House is an odd number, not an even number, in part to prevent the possibility of a tie in the Electoral College. At present, the potential for a tie exists in the

number of electors. Exceedingly narrow Electoral College margins are not unheard of, and three votes may make the difference in an election.[12] Presidential elections should not turn on a handful of Capital residents.

The new District, then, will have a handful of inhabitants and be entitled to three electoral votes. The next question asks how to resolve the issue.

II. S. 51 does not adequately address the Twenty-Third Amendment and related voting issues.

S. 51 addresses problems concerns new District voting rights in Sections 221–24. First, it would allow Capital inhabitants to vote in their last state of domicile; second, it would repeal the Office of District of Columbia Delegate; third, it would repeal a federal law relating to timing, transmission, and counting of electoral votes; and finally, it would allow for expedited repeal of the Twenty-Third Amendment. These provisions are inadequate.

First, there is no guarantee of repeal of the Twenty-Third Amendment. The expedited procedures would allow swift action on the floor of an amendment to repeal the Twenty-Third Amendment.[13] But there is no assurance that the required two-thirds of each chamber of Congress would vote to repeal.[14] Nor is there any guarantee that the legislatures of three-fourths of the states would approve the repeal before the next election, if ever.[15]

Electoral College because there are 538 votes, which evenly divides in half into 269. In the event no candidate wins a *majority* of the Electoral College, the election is sent to the House of Representatives to select a president between the tied candidates, and each state receives one vote. *See* U.S. CONST. amend. XII. There are 538 votes because there are 100 senators (always an even number, as there are 2 senators in each state); 435 members of the House (presently fixed by statute); and the District of Columbia is guaranteed the smallest state's allotment of electors, which, since the Twenty-Third Amendment's ratification, has been 3. An even number plus an odd number plus an odd number always yields an even number. S. 51 would permanently increase the size of the House by 1. *See* S. 51, 117th Cong. § 102(d). That would yield 102 senators, 436 members of the House, and 3 new District electors, for a total of 541, an odd number. If the Twenty-Third Amendment is repealed, that figure would drop back down to 102 plus 436, or 538, an even number. Increasing the size of the House to 437—or to some other odd number—would be preferable, because it would eliminate the remote possibility of a tie.

[12] In 2000, George W. Bush received 271 votes in the Electoral College, needing 270 votes to secure a majority. In 1876, Rutherford Hayes received 185 votes in the Electoral College, the minimum number of votes to secure a majority.

[13] S. 51, 117th Cong. § 224 (2021).

[14] *See* U.S. CONST. art. V.

[15] If the District were to become a state, it would take 39 states to ratify an amendment, for there would be 51 states and it takes three-fourths of the states to ratify an amendment. *Id.* But if there is a dispute about whether the new District were a state, one might wonder whether there were just 50 states requiring 38 legislatures' approval. Or if the new District's legislature approved the

Why might Members of Congress or state legislatures choose not to ratify the repeal? If there is a genuine legal controversy about whether the District could become a state,[16] both supporters and opponents of statehood have an incentive to wait for the legal process to play out. If a federal court finds that statehood is unconstitutional, then I assume District residents would prefer to retain the Twenty-Third Amendment. Litigation takes time.[17]

Amending the Constitution is a hard thing to do, and it has been happening with increasing rarity. The Constitution has been amended once in the last 50 years, and that was to ratify an amendment approved by Congress in 1789.[18] Before that, an amendment was ratified nearly 50 years ago to this day, when the Twenty-Sixth Amendment was ratified on July 1, 1971.[19] Only one amendment has ever been repealed.[20] While past performance is no indication of future success, we have been in a lull period of amending the Constitution, and I would not be inclined to rely on wishing for future events to occur. Enacting a statute, then hoping for Congress and the states to ratify a constitutional amendment, is, in my judgment, unwise. Even increased uncertainty for one presidential election would be problematic.

Second, Section 223 is misleading in its scope. It is entitled, "Repeal of law providing for participation of seat of government in election of president and vice president."[21] But this amendment does not "repeal" the law "providing for participation" in the presidential election. It repeals 3 U.S.C. § 21, a provision added to clarify the Electoral Count Act of 1887 after the enactment of the Twenty-Third Amendment.

The Electoral Count Act provides the rules for participation in presidential elections, such as the day on which "states" participate in presidential elections, the manner in which states send their electoral votes to Congress, and the manner in which Congress counts the electoral votes. 3 U.S.C. § 21 was added to clarify that "state" in the Electoral Count Act included the District of Columbia. It solely regulates the timing, transmission, and counting of electoral votes.

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amendment, there might be disputes about whether it could validly approve an amendment in the first place while a dispute remained pending.

[16] This testimony takes no position on merits or the likelihood of the outcome of that litigation. It simply notes that it is a non-trivial possibility.

[17] *But see* May 22, 2021 letter to Congressional Leaders Re: Washington, D.C. Admission Act ("May 22 letter"), https://www.scribd.com/document/509015647/Letter-to-Congressional-Leaders-on-Constitutionality-of-Statehood-for-Washington-D-C-May-2021, at 4 ("None of the other 50 States has reason to seek to retain three electors for a largely unoccupied seat of government.").

[18] U.S. CONST. amend. XXVII.

[19] U.S. CONST. amend. XXVI.

[20] U.S. CONST. amend. XXI, § 1 (repealing U.S. CONST. amend. XVIII).

[21] S. 51, 117th Cong. § 223 (2021).

The District of Columbia's participation in presidential elections is currently codified elsewhere.[22] That law remains in effect in Capital upon admission.[23] S. 51 does not change presidential elections in Capital. Indeed, S. 51 goes out of its way to amend some portions of the Elections Code *without* abolishing the rules pertaining to presidential elections.[24] In other words, the title of Section 223 does not do what it purports to do.

In contrast, 3 U.S.C. § 21 is principally a conforming amendment. Among other things, the Electoral Count Act instructs Congress on the method of counting electoral votes, the circumstances in which members of Congress may object to counting of votes, and the procedures for handling objections.[25] The Twenty-Third Amendment entitles the District to three electoral votes, regardless of what federal law says. Capital would still hold a presidential election, choose three electors, and send those electors to Congress. The Electoral Count Act would no longer instruct Congress how to count them.

But on January 6, Congress would still have three electoral votes from Capital when it convenes to count electoral votes—votes constitutionally authorized for the District to select. Congress might then ignore the Electoral Count Act, as it would confront a circumstance falling outside its scope. A situation encouraging Congress to create new mechanisms in counting electoral votes seems unwise.[26]

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[22] *See* D.C. CODE § 1-1001.10(a).

[23] *See* S. 51, 117th Cong. § 114 (2021)

[24] *See id.* at § 222 (amending portions of the District of Columbia Elections Code of 1955 to strike the election of a "delegate" to the House of Representatives, but not the remainder of the elections code).

[25] 3 U.S.C. § 15.

[26] The May 22 letter confuses 3 U.S.C. § 21, D.C. Code § 1-1001.10(a), and the Twenty-Third Amendment. The May 22 letter argues that Section 223 "mandate[es] the immediate repeal of the provision of federal law that provides the current mechanism for District residents to participate in federal election." May 22 letter at 4. As demonstrated, this is inaccurate. Section 223 repeals the provision making the District a "state" for purposes of the timing, transmission, and counting of electoral votes. It does not "repeal" the "mechanism" for "participat[ion]," which is codified at D.C. Code § 1-1001.10(a), and which is not altered by S. 51.

The May 22 letter also inaccurately states that 3 U.S.C. § 21 "provid[es] that the District residents may select presidential electors." Again, 3 U.S.C. § 21 relates to the timing, transmission, and counting of electoral votes. D.C. Code § 1-1001.10(a) provides for the participation of District residents in presidential elections.

The May 22 letter confuses 3 U.S.C. § 21 as linked to the Twenty-Third Amendment, instead of Congress's related power under the Twelfth Amendment (amending Article II of the Constitution) to count electoral votes. In the event Section 223 repeals 3 U.S.C. § 21, Capital would still be entitled, under D.C. Code § 1-1001.10(a), to elect presidential electors. Capital would no longer be obligated to vote on the "Tuesday next after the first Monday in November," 3 U.S.C. § 1, but it would still be required to do so under D.C. law, D.C. Code § 1-1001.10(a)(2). Some provisions of law would necessarily apply to Capital's electors. First, Capital's electors must vote on the "first Monday after such second Wednesday in December." 3 U.S.C. § 7. Even with the repeal of 3 U.S.C. § 21, the Constitution mandates that Congress determines "the day on which" electors give their votes, and that "day shall be the same throughout the United States." U.S. CONST. art. II, § 1, cl. 4. The Constitution also requires

Third, Section 221 may be unconstitutional. Section 221 is designed to reduce the likelihood that there would be any voters in Capital. It compels states to permit "absent Capital voters"—eligible voters in Capital who were previously domiciled in another state—to register in their former states and request absentee ballots for federal elections.

As mentioned earlier, it is likely that 30 to 60 people would reside in Capital, and only some of them would be eligible voters. In a way, it is negligible to try to press those voters back to their former states. But Congress likely lacks the power to create voter qualifications.

States have broad power over the qualifications of voters, including "reasonable citizenship, age, and residency requirements."[27] Congress's power to dictate qualifications for eligible voters, even in federal elections, is much more contested.

Extensive articles have been written on the topic, so I'll only scratch the surface here. Congress has the power to "make or alter" regulations pertaining to the "times, places and manner of holding elections for Senators and Representatives."[28] But states determine who is eligible to vote in those elections. For the House, "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[29] The same is true for the Senate.[30] There is no federal power to fix voter qualifications.

Congress's power in presidential elections is ostensibly even less. There is no analogous "times, places and manner" clause, although "Congress may determine the time of choosing the electors."[31] Instead, "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors . . . ."[32] All states currently hold popular elections for the selection of presidential electors, and these states define who is eligible to vote in those elections.

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that "the votes shall then be counted" "in the presence of the Senate and House of Representatives." U.S. CONST. amend. XII. This power requires no implementing legislation. *Cf.* "Annal of Congress," 1st Cong., Vol. I, pp. 16–18 (reporting on the convening of Congress to count electoral votes). Congress can, of course, act pursuant to implementing legislation, and it has acted pursuant not simply to the Electoral Count Act, but also pursuant to a concurrent resolution. *See, e.g.*, S. Con. Res. 1, 117th Cong. (Jan 3., 2021).

Respectfully, the May 22 letter appears to defend a hypothetical bill that does not exist in S. 51. Media commentary makes the same mistake, too. *See* Savage & Cochrane, *supra* note 10 (noting that in the bill, "legal procedures for appointing any electors would be rescinded").

[27] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 625 (1969).

[28] U.S. CONST. art. I, § 4, cl. 1.

[29] U.S. CONST. art. I, § 2, cl. 1.

[30] U.S. CONST. amend. XVII.

[31] U.S. CONST. art. II, § 1, cl. 4.

[32] U.S. CONST. art. II, § 1, cl. 2.

The Supreme Court has held that Congress's authority to regulate presidential elections might be broader than the Constitution's language suggests.[33] And the Constitution does forbid states from denying or abridging the right to vote on account of race, color, or previous condition of servitude;[34] sex;[35] failure to pay a tax;[36] or age, for those over the age of 18.[37]

So where is Congress's power to establish voter qualifications—that is, to compel a state to allow people who moved out of the state and into Capital to vote back in their former state? Supreme Court precedent on weak footing supplies some hints.

In 1970, Congress amended the Voting Rights Act with, *inter alia*, two provisions. First, it fixed the age of voters in federal elections at 18 (in most states at the time, it was 21).[38] Second, it effectively reduced residency requirements in presidential elections to 30 days before the election; and if a resident moves elsewhere within those 30 days, the resident may cast a vote in the presidential election in her former state.[39]

In *Oregon v. Mitchell*, the Supreme Court upheld these regulations. The age requirement in federal election was upheld. A similar age requirement in state election was found unconstitutional, which was the impetus for enacting the Twenty-Sixth Amendment. The *reason* for upholding the law was elusive. No single reason commanded a majority of the Court—indeed, a majority of the Court affirmatively rejected each constitutional basis for the law. One arguable basis was the Elections Clause; another, the Fourteenth Amendment. But the Supreme Court concluded in 2013: "That result, which lacked a majority rationale, is of minimal precedential value here."[40]

The Court in *Oregon v. Mitchell* also upheld Congress's authority to set minimum residency requirements on the basis of the right to travel.[41] A strong majority of the Court endorsed Congress's power to help address the right to travel across parts of the country, here prohibiting states from treating new arrivals from other states differently.[42]

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[33] *See* Burroughs & Cannon v. United States, 290 U.S. 534, 544–45 (1934).
[34] U.S. CONST. amend. XV.
[35] U.S. CONST. amend. XIX.
[36] U.S. CONST. amend. XXIV.
[37] U.S. CONST. amend. XXVI.
[38] *See* Oregon v. Mitchell, 400 U.S. 112, 117 (1970).
[39] *See id.* at 147–50
[40] Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 16 n.8 (2013).
[41] *See* Brian C. Kalt, *Unconstitutional But Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOKLYN L. REV. 441, 475–77 (2016).
[42] *Id.*

In 2013, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, a seven-justice majority of the Court endorsed a more limited understanding of congressional power: "Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the times, the places, and the manner of elections.' The Federalist No. 60, at 371 (A. Hamilton)."[43] A strong majority of the Supreme Court has pressed back on *Oregon v. Mitchell*. It opens questions about whether Congress has much authority, if any, to dictate voter qualifications to states in federal elections.

Furthermore, Section 221 may threaten the votes of tens of thousands of military and overseas voters. Section 221 language tracks identical language in the Uniformed and Overseas Citizens Voting Act of 1986 ("UOCAVA").[44] UOCAVA has never faced a serious legal challenge, no doubt in part due to the politically-fraught position of a plaintiff requesting the federal courts to strip military and overseas voters of federal voting opportunities.[45] Section 221, if enacted, would assuredly be challenged by some state that, under Section 221, would resist voter registration of an absentee Capital voter. An "absentee Capital voter" might attempt to register to vote in a former state, be denied, and sue for the right to register. Or a state, facing an absentee Capital voter, might seek injunctive relief to prevent enforcement of Section 221. A federal court—perhaps ultimately the Supreme Court—might repudiate Congress's power to enact Section 221.[46] And with an on-point precedent, a litigant or a state might be emboldened to challenge UOCAVA.[47]

I use "may threaten" deliberately. It is possible, of course, that this litigation fails for a myriad of reasons. Perhaps no one sues. Perhaps federal courts and the Supreme Court ultimately conclude that Congress *does* have the authority to compel states to keep voters, who moved out of the state into Capital long ago. Perhaps no one would try to apply a holding of Section 221 to UOCAVA. And it is also possible that states would each voluntarily accede to UOCAVA's rules even after it were found unconstitutional.

Simply put, these are, in my judgment, legitimate areas of uncertainty. S. 51 inadequately addresses them.

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[43] *Inter Tribal Council of Arizona, Inc.*, 570 U.S. at 17.
[44] *Compare* 52 U.S.C. § 20302(a)(1) & (2) *with* S. 51, 117th Cong. § 221(a)(1)(A) & (B) (2021).
[45] *See* Kalt, *supra* note 41, at 500–01 (2016).
[46] *See generally id.* (describing constitutional problems with UOCAVA).
[47] The May 22 letter claims, "no potential litigant would suffer the constitutionally cognizable injury required to establish standing to bring a court challenge to such legislative action" that might require District electors to cast votes for the candidate who receives the most electoral votes. Part of the justification is that Capital residents would be able to vote elsewhere under Section 221. But the May 22 letter elides over whether there are any infirmities with Section 221 and how litigation might proceed.

III. Statehood for the District of Columbia should be conditioned on repeal of the Twenty-Third Amendment.

Requiring repeal before statehood is hardly a new concern.[48] As this testimony argues, the existing repeal mechanisms are inadequate. And a repeal could take different forms. One might be a straight repeal of the Twenty-Third Amendment, similar to the text of the Twenty-First Amendment: "The twenty-third article of amendment to the Constitution of the United States is hereby repealed." But repealing, then awaiting statehood, seems like a suboptimal solution for District residents.

An alternative amendment might condition repeal of the Twenty-Third Amendment in the event the number of inhabitants in the District, constituting the seat of government, falls below 10,000. If the bulk of the present District of Columbia becomes a state or is retroceded, the conditional repeal would take effect, and the Twenty-Third Amendment would cease to apply to the remaining federal enclave.

Relatedly, an amendment could expressly authorize Congress to establish voter qualifications for inhabitants in the District constituting the seat of government in federal elections after repeal. This provision would obviate concerns that Section 221 might be unconstitutional.

In its current form, S. 51 allows for an expedited consideration of a repeal of the Twenty-Third Amendment, but only if the text of that amendment is "solely" dedicated to repealing the Twenty-Third Amendment.[49] Alternative amendments like those described would not benefit from any expedited consideration. And as mentioned, there is no guarantee of a repeal.

IV. Potential alternative statutory solutions to the Twenty-Third Amendment present constitutional, legal, and practical problems.

It is worth noting that none of the alternatives discussed below exists in S. 51. They are merely the stuff of conjecture. And because there are an unlimited number of alternative proposals that might arise, I'll stick with three that have received material attention.[50] First, Congress could award the electoral votes to nobody.

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[48] *See, e.g.*, Mike DeBonis, *Is the D.C. statehood bill constitutional?*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/blogs/mike-debonis/wp/2014/09/15/is-the-d-c-statehood-bill-constitutional/ (citing comments of Roger Pilon "that the 23rd Amendment would need to be repealed, lest the tiny number of residents left in the federal enclave stand entitled to three presidential electoral votes").

[49] S. 51, 117th Cong. § 224 (2021).

[50] *See, e.g.*, the May 22 letter; Savage & Cochran, *supra* note 10.

Second, Congress could award them to the winner of the Electoral College. Third, Congress could award them to the winner of the "national popular vote," the aggregation of the vote across the states. Each faces problems.

First, if Congress decided not to appoint electors by, say, repealing relevant provisions of the D.C. Code, Congress would be derelict in its duty. The Court has repeatedly noted that, in the context of elections, "shall" places a duty upon states.[51] The Constitution provides that "Each state *shall* appoint . . . a number of electors"[52] and that "The District . . . *shall* appoint" electors.[53] One construction of these mandates is that the District has a duty to appoint electors. Congress's power—to "direct" the "manner" of appointing electors—is to provide the framework for how the District goes about that appointment.[54] And even if Congress decided not to award electors in the next presidential elections, Capital's three electoral votes would be waiting for the next Congress. Congress could at any time change its mind and decide that the federal enclave should appoint electors. It would be a significant temptation and hardly an optimal solution.

Second, Congress might enact a new law awarding Capital's electors to the winner of the Electoral College. But this is unconstitutional because it is impossible to comply with the Constitution's terms. Presidential electors must give their votes on the "same" day "throughout the United States."[55] To award a slate of presidential electors to the winner of the Electoral College would require waiting until after all the electors cast votes. Even then, controversies might arise in Congress in the event that a state submitted multiple slates, or in the event a controversy arose over the legitimacy of the appointment of an elector in the first place.[56]

A more generous reading might be that sometime after Election Day, the apparent winner of the Electoral College would be awarded Capital's electors. But that date, used to determine presidential transitions, is uncertain and in recent years yielded controversy.[57] And it would incentivize states to drag their feet or offer competing slates of electors to influence the outcome of Capital's electors.

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[51] *See, e.g.*, Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 8 (2013); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804–05 (1995). *See also* Chiafalo v. Washington, 140 S.Ct. 2316, 2329 (2020) (Thomas, J., concurring in the judgment).

[52] U.S. Const. art. II, § 1, cl. 2 (emphasis added).

[53] U.S. Const. amend. XXIII, § 1 (emphasis added).

[54] For arguments surrounding Congress's duty, consider Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 G.W. L. REV. 160, 184–89 (1991) (weighing the "close" debate).

[55] U.S. CONST. art. II, § 1, cl. 4.

[56] *See* 3 U.S.C. § 15.

[57] *See, e.g.*, Andy Card and John Podesta, *The life-threatening costs of a delayed transitions*, WASH. POST (Nov. 10, 2020), https://www.washingtonpost.com/opinions/podesta-card-bush-gore-transition-trump/2020/11/10/ae1a960a-239f-11eb-8672-c281c7a2c96e_story.html; Letter from Emily W. Murphy,

This proposal and the proposal that Congress award Capital's electors to the winner of the national popular vote suffer from another problem. The proposals emphasize Congress's power to "direct" the "manner" of appointing presidential electors. That power is undoubtedly broad.[58] But it is only one clause of a two-clause directive. The Twenty-Third Amendment provides, "The District . . . shall appoint," and "Congress" "may direct" the "manner."[59] The first is the who. The second is the how.

If Congress directs that it will award Capital's electors based on the popular vote of the inhabitants of France, it would be hard to say that "the District" has appointed the electors. In the same way, if Congress chooses a manner that awards electors based on what happens in the rest of the United States, it is hard to say that "the District" has appointed anyone. Every choice of presidential electors in American history has been based on some sort of election *within* the state, not outside the state.[60]

Supporters of these alternative proposals have cited the Supreme Court's recent opinion in *Chiafalo v. Washington*.[61] In *Chiafalo*, the Court approved a fine levied by the State of Washington on electors who cast votes inconsistent with state law, which required electors to vote for the candidate they had pledged to support.[62] The electors' candidate had won the statewide popular vote. The Court emphasized that Washington had broad discretion over how to handle electors' discretion, and the Constitution did not take away the power to do what Washington did.[63]

Chiafalo certainly speaks broadly about how states may control electors. But it says nothing about the predicate question: the selection of electors in the first place. Once a state holds a popular election, and the people choose a presidential candidate who carries the popular vote in a state, electors can be bound to vote for that candidate. But *Chiafalo* does not authorize legislatures to compel electors to vote for anything the legislature wants. The legislature cannot violate the Equal Protection Clause or add qualifications to presidential candidates.[64] The power may not extend to compelling electors to vote for a dead candidate.[65] Similarly, if Congress cannot

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Administrator, U.S. General Services Administration, to to the Honorable Joseph R. Biden, Jr., Nov. 23, 2020, https://www.gsa.gov/cdnstatic/2020-11-23_Hon_Murphy_to_Hon_Biden_0.pdf.

[58] *See, e.g.*, McPherson v. Blacker, 146 U.S. 1, 35 (1892) (describing the power as "plenary").

[59] U.S. CONST. amend. XXIII, § 1.

[60] *See* Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, B.Y.U. L. REV. 1523, 1540, 1572–73, 1581–83 (2012).

[61] 140 S.Ct. 2316 (2020). *See, e.g.*, Jessica Bulman-Pozen & Olatunde Johnson, *The Electoral College Shouldn't Get in the Way of D.C. Statehood*, TAKE CARE (July 7, 2020), https://takecareblog.com/blog/the-electoral-college-shouldn-t-get-in-the-way-of-d-c-statehood.

[62] *Chiafalo*, 140 S.Ct. at 2322.

[63] *Id.* at 2324–25.

[64] *Id.* at 2324 n.4

[65] *Id.* at 2328 n.8.

direct the power of appointment outside the District, then *Chiafalo* is simply inapplicable.

The third proposal, awarding Capital's electors to the winner of the "national popular vote," suffers from many legal and practical problems, written about extensively elsewhere in the context of the National Popular Vote Compact.[66] To start: how and when does Congress determine the winner of the "national popular vote"? How does it handle litigation and recounts—or a state that refuse to recount because the margin in the home state is wide but the margin nationwide is narrow?

There are major Equal Protection problems, too. Voter eligibility rules vary (or may vary in the future) from state to state—incarcerated felons can vote in some states, but ex-felons are prohibited in others. Voting procedures vary, from strict photo voter identification laws to no identification laws at all. Polling places are open in Hawaii well after the polls close in Kentucky. While some variance of election procedures is inevitable, other variations are so broad that they implicate the Equal Protection Clause.[67]

Ballot access standards vary from state to state. For instance, 2016 Green Party nominee Jill Stein and 2020 independent candidate Kanye West, among others, appeared on the ballot in only some states. How can we assemble a "national popular vote" when Americans aren't even looking at the same ballot?

Imagine your own Senate elections. Imagine that your name appeared on the ballot in Oakland County, Michigan, but not in Macomb County. Imagine that incarcerated felons could vote in Cuyahoga County, Ohio, but no one ever convicted of a felony could vote in Sandusky County. Imagine the polls were open until 6 pm in Maricopa County, Arizona, but 9 pm in Yuma County.

Such a system seems unbelievable because we couldn't fathom such disparities when we're all voting for the same office. If it's a single constituency election—like a nationwide popular election for president—we have to have a uniform set of rules. A system that creates a "national popular vote" is really just adding up the votes from

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[66] Much analysis in this section draws from Derek T. Muller, *The Electoral College and the Federal Popular Vote*, HARV. L. & POL'Y REV. (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3528268; Michael Morley, *The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact*, HARV. L. & POL'Y REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546546; Derek T. Muller, Invisible Federalism and the Electoral College, 44 ARIZ. ST. L.J. 1237 (2012); Norman D. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Sub-Constitutional Change*, 100 GEO. L.J. 173 (2011).

[67] *See generally* Morley, *supra* note 66 (discussing Equal Protection Clause concerns); *see also* Bush v. Gore, 531 U.S. 98 (2000) (per curiam)

51 separate presidential elections. It may well would violate the Equal Protection Clause, and it certainly presents significant practical problems.

Again, none of these proposals has been introduced in Congress, and they are not in the text of S. 51 as it has been presented before you today. But even these proposals, presented as "solutions" to the Twenty-Third Amendment dilemma, are wanting.

* * *

In my judgment, the Twenty-Third Amendment problems facing S. 51 are significant. Anomalies will exist. If statehood (or retrocession) is the goal, the best path forward is a constitutional amendment that would repeal the Twenty-Third Amendment contingent on future statehood. That amendment should also expressly empower Congress to address the voting status of inhabitants of any federal enclave. Alternative solutions—both in the bill and in ideas floated about in the public domain—are inadequate to address constitutional, legal, and practical problems.

I thank you again for the opportunity to testify before you. It is a distinct privilege to speak with you about such an important topic. I look forward to answering any questions you may have.

END TAXATION
WITHOUT
REPRESENTATION
S. 51
The Washington,
D.C. Admission Act

PREPARED STATEMENT OF

VIET D. DINH

FOUNDING PARTNER
BANCROFT PLLC

PROFESSORIAL LECTURER IN LAW
DISTINGUISHED LECTURER IN GOVERNMENT
GEORGETOWN UNIVERSITY

Before the

COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

of the

UNITED STATES SENATE

On the

NEW COLUMBIA ADMISSION ACT

I have been asked to advise on the constitutionality of S.132, the New Columbia Admission Act. The Act would reduce the District of Columbia to a smaller federal capital district encompassing the White House, Capitol, Supreme Court and the area containing the National Mall and Monuments. The rest of the current District of Columbia would become the state of New Columbia and be admitted as the 51st state. For the reasons amplified below, I think that courts would likely decline to adjudicate any constitutional challenge to the Act and, in all events, would likely hold that the Act is constitutional.

As an initial matter, the courts would likely avoid ruling on the merits of any constitutional challenge to the New Columbia Admission Act. In many ways, Congress' admission of new states is the paradigmatic political question. The Constitution commits the task exclusively to Congress. It is difficult to imagine judicially manageable standards for assessing the admission of New Columbia. And any decision would express disrespect for the political branches while risking the embarrassment and uncertainty of multiple branches' conflicting judgments on a state's existence. History is helpful here: When the 1846 retrocession of Arlington and Alexandria from the District to Virginia was challenged, the courts avoided ruling on the merits. It is likely that the courts would do the same if faced with a challenge to the admission of New Columbia.

In all events, courts reaching the merits would likely find the New Columbia Admission Act constitutional. Under the New States Clause, U.S. Const. art. IV, § 3, cl. 1, Congress has constitutional authority to accept new states through simple legislation. This is how states are constitutionally admitted: Aside from the original thirteen colonies, the thirty-seven remaining states were all admitted through simple legislation pursuant to Article IV. Alaska and Hawaii, most recently, were admitted through simple legislation with terms similar to those of the New Columbia Admission Act, including the provision of a republican form of government. And, quite analogous to the current situation, Congress formed Ohio with the Enabling Act of 1802 from the eastern portion of the Northwest Territory, which itself came from lands previously ceded to the federal government from other states.

Congressional authority under Article IV to admit new states is broad and subject to just three requirements within the Constitution. First, Congress must guarantee new states a republican form of government; second, new states formed from within or by combining existing states must receive state legislature approval; and third, new states must be admitted on an equal footing with existing states. The New Columbia Admission Act satisfies these three constitutional requirements. Citizens of New Columbia must adopt the 1987 constitution, which secures a republican form of government; New Columbia's territory would come entirely from the current District of Columbia, and so would not require the approval of any other state legislature; and the Act, by its terms, would admit New Columbia on an equal footing with existing states.

In addition to the constitutional requirements, Congress has traditionally imposed two additional prerequisites for statehood: First, the people of the proposed state must *want* to form a state; second, the proposed state must have sufficient population and resources to support itself and to contribute its share of the cost of maintaining the federal government. The Act meets these traditional requirements as well: The future residents of New Columbia must approve the admission of the state, and Congress' passage of the Act would signify its satisfaction that New Columbia is a viable state.

Adjudicating courts will not likely find any contravening constitutional provisions. The District Clause, U.S. Const. art. I, § 8, cl. 17, which contemplates an exclusively federal district,

is satisfied because the Act would preserve an exclusively federal district not larger than 10 miles square. The District Clause actually supports the Act because it grants Congress sweeping and exclusive authority over the federal district and thus affirms Congressional authority to alter its size or shape. In fact, history shows that Congress *can* alter the district: the First Congress altered the southern boundaries of the original District of Columbia, and in 1846 Congress retroceded Alexandria and Arlington to Virginia. Likewise, the Twenty-Third Amendment, which allows the District of Columbia to participate in the Electoral College, is not contravened just because the federal district is smaller. Although granting a shrunken federal district three electoral votes would be bad policy, the Constitution does not prohibit it. It would indeed be sound policy to repeal the Twenty-Third Amendment, concurrent with admission of New Columbia, but it is not a constitutional prerequisite.

Nor will courts likely require Maryland's consent, just because the land was part of Maryland before 1790. The Constitution requires a state's consent when a new state is created from within the existing state's jurisdiction. But the land that would form New Columbia is not within Maryland's jurisdiction. Maryland lost that authority as soon as the federal government accepted Maryland's absolute cession of the land. While the Act presents a handful of other concerns—e.g., New Columbia would have a uniquely federal character and influence, it would have an outsized influence in the Senate, and it would lack the sort of internal diversity of interests that most view as an ideal characteristic of statehood—those are policy issues for Congress' consideration. The mechanism is constitutional; it is for you, the people's representatives, to decide if it is wise.

I. Background on New Columbia Admission Act

The New Columbia Admission Act would admit as the 51st state most of the land area and population within the current District of Columbia. *See* Act § 111(a). New Columbia would be admitted "into the Union on an equal footing with the other States in all respects whatever." *Id.* § 101(a). Thus, New Columbia would be entitled to at least one representative and two senators in Congress.

The Act would preserve a small enclave of federal territory as the District of Columbia. That remaining federal district would "include the principal Federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall and the Capitol Building." *Id.* § 112(a); *see also id.* § 112(b) (setting forth metes and bounds of remaining District of Columbia); *id.* § 112(c) (setting forth exceptions to metes and bounds description, including certain military property). "After the admission of the State into the Union," the remaining federal district will be "the seat of the Government of the United States." *Id.* § 201.

The Act sets forth a specific process for admitting New Columbia into the Union. Following Congress' passage of the bill, the people of the District of Columbia would vote at a special election on whether to:

(1) admit New Columbia as a state, *id.* § 102(a)(1)(A);

(2) adopt the 1987 Constitution for the State of New Columbia approved by the Council of the District of Columbia, *id.* § 102(a)(1)(B);[1]
(3) approve the state's boundaries, *id.* § 102(a)(1)(C); and
(4) agree to the terms of the New Columbia Admission Act, *id.* § 102(a)(1)(D).

District of Columbia voters must approve all four items for New Columbia to be admitted as a state. *Id.* § 102(b)(1). If the provisions are approved, "the State Constitution shall be deemed ratified," *id.* § 102(b)(1)(A), and "the President shall issue a proclamation" within 90 days that admits New Columbia into the Union, *id.* §§ 102(b)(1)(B), 104. In addition, after passage of the Act, an election would be held to elect two senators and one representative, who will be entitled to "all the rights and privileges of Senators and Representatives of other States in the Congress of the United States," upon admission of New Columbia as a state. *Id.* § 103(c).

The New Columbia Admission Act also provides expedited procedures for repealing the Twenty-Third Amendment. "At any time after the date of the enactment of" the Act, "it shall be in order in either the House of Representatives or the Senate to offer a motion to proceed to the consideration of a joint resolution proposing an amendment ... repealing the 23rd article of amendment to the Constitution." *Id.* § 206(b)(1).[2] A motion proposed under this provision would be treated as "highly privileged and...not debatable." *Id.* § 206(b)(2)(A). The motion could not be amended; nor could the vote on the motion be reconsidered. *See id.* § 206(b)(2)(B). And any "motion to postpone shall be decided without debate." *Id.* § 206(b)(2)(C). But neither the Act's passage nor admission of New Columbia is conditioned on repeal of the Twenty-Third Amendment.

Finally, the New Columbia Admission Act guarantees a republican form of government and ensures continuity between the current District of Columbia and the state of New Columbia. The Act requires that the Constitution of New Columbia "shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." *Id.* § 101(b). The bill also provides that the current Mayor and Council of the District of Columbia would become the Governor and House of Delegates of New Columbia. *Id.* § 103(d). And current District executive and judicial officials would automatically become New Columbia executive and judicial officials; pending cases would be transferred to the appropriate courts. *Id.* §§ 103(e), 123(a)(2).

II. New Columbia's Admission Would Present A Nonjusticiable Political Question.

Whatever the constitutional merits of admitting New Columbia as the 51st state, it is unlikely that the courts would decide the question. The Supreme Court has held that a case presents a nonjusticiable political question when it involves:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy

[1] District of Columbia voters approved a constitution in 1982, but the Council of the District of Columbia has since made substantive changes that would need to be ratified by voters.

[2] The Act also strikes provisions from the U.S. Code that implement the Twenty-Third Amendment. *See* Act § 205(a) (striking 3 U.S.C. § 21, which defines the District of Columbia as a "State" for purposes of presidential elections).

> determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). A constitutional challenge to admission of New Columbia would present a number of these problems.

The Constitution textually commits the question of whether to admit a new state to Congress. *See* U.S. Const. art. IV, § 3, cl. 1. Long ago, the Supreme Court held that "it rests with Congress to decide what government is the established one in a State" and whether that government is republican in form. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849). When Congress makes that decision it "is binding on every other department of the government, and could not be questioned in a judicial tribunal." *Id.* So too it would be with the congressional decision that New Columbia is fit for admission to the Union. Though the courts will review congressional attempts to attach lasting unconstitutional conditions on newly admitted states, *see, e.g.*, *Coyle v. Smith*, 221 U.S. 559, 567 (1911), that question is very different from whether the state is eligible for admission in the first instance. The latter is much closer to the question in *Luther*.

The constitutional debates surrounding New Columbia statehood confirm the absence of judicially manageable standards. Opponents' core arguments proceed from the Founders' intent, an implied conflict with the purpose of the Twenty-Third Amendment, and the niceties of Maryland's cession of land in the Eighteenth Century. But the constitutional provisions invoked do not expressly embody the claimed prohibitions. The courts are ill-equipped to impose free-floating notions of original intent, unrelated to the *interpretation* of any textual provisions. Even if such principles could be discovered and applied in a judicial fashion, striking down New Columbia's admission to the Union would express a grave disrespect for the political branches. This is not like reviewing run-of-the-mill legislation for adherence to the Constitution's express protections. And no doubt conflicting statements from the political and judicial branches on the validity of a state's admission would result in political embarrassment and uncertainty. Thus, the question raises the "unusual need for unquestioning adherence" to Congress' "political decision."[3]

These are among the reasons why the Supreme Court previously avoided ruling on the constitutionality of Congress' retrocession of Arlington and Alexandria. In *Phillips v. Payne*, at a time before the modern political question doctrine, the Court opened its analysis by stating: "In cases involving the action of the political departments of the government, the judiciary is bound by such action." 92 U.S. 130, 132 (1875) (citing *Luther*, among other cases). Then, after holding that "Virginia is *de facto* in possession of the territory," the Court noted that "serious consequences

[3] The Supreme Court has recently rebuffed overbroad applications of the political question doctrine. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1425 (2012) (holding that the judiciary is "fully capable of determining" the constitutionality of a statute permitting Americans born in Jerusalem to list "Israel" as their place of birth on their passports); *id.* at 1427 ("In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))). But deciding the merits of whether congressional legislation infringes on the executive's foreign affairs powers is a vastly different question than whether to admit a state into the Union. Nothing in *Zivotofsky* suggests that the much more analogous decision in *Luther* was incorrect, or that the judiciary should itself wade into the business of recognizing foreign or domestic governments. *See id.* at 1428.

would follow" from a contrary holding. *Id.* at 133. Specifically, it would call into question scores of laws enacted, taxes collected, and judicial sentences and decrees entered over the decades between retrocession and the lawsuit in *Phillips*. *See id.* A constitutional challenge to New Columbia's admission presumably would occur immediately upon the Act's adoption and thus would not present the same retroactivity concerns. But the fear of disrupting the political organization of the Union would still probably dissuade judicial review.

III. The New Columbia Admission Act Satisfies All Constitutional Requirements And Congressional Prerequisites For New States.

The Constitution authorizes Congress to admit new states through simple legislation. The New States Clause provides: "New States may be admitted by the Congress into this Union." U.S. Const. art. IV, § 3, cl. 1. This broad authorization "vests in Congress the essential and discretionary authority to admit new states into the Union by whatever means it considers appropriate as long as such means are framed within its vested powers." Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 Case W. Res. J. Int'l L. 315, 317 (1981). The New Columbia Admission Act is a proper exercise of that broad authority, consistent with constitutional requirements and traditional legislative practice and procedures.

The Constitution contains only two textual limits and one structural limit on the admission of new states. First, Congress must guarantee that the new state will provide a republican form of government. *See* U.S. Const. art. IV, § 4. Second, no new state may be formed "within the Jurisdiction of any other State" or by combining two or more existing states, or parts of states, "without the Consent of the Legislatures of the States concerned." U.S. Const. art. IV, § 3, cl. 1. The Supreme Court has also interpreted the constitutional structure to require that new states be "admitted on an equal footing with the original states." *Coyle*, 221 U.S. at 567 (quotation marks omitted). Though Congress can condition admittance on a state satisfying certain requirements, Congress cannot place lasting limitations on a state's sovereignty—e.g., it cannot require that the state keep its capital in a specified city after admission. *See id.* at 567-68; *see also Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) ("[T]he United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.").

Traditionally, Congress has also imposed two other prerequisites for statehood. First, Congress has required proof that the residents of the proposed state actually *want* to form a new state. *See* J. Otis Cochran, *District of Columbia Statehood*, 32 How. L.J. 413, 418 (1989). This requirement reflects the fundamental principle of self-governance that "[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the *consent of the governed*." *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1868) (emphasis added). Second, Congress has considered whether "the proposed new state has sufficient population and resources to support state government and at the same time carry its share of the cost of the federal government." Cochran, 32 How. L.J. at 418. This prerequisite is a core exercise of Congress' plenary authority over the admission of new states. It is a means for the current states—through their representatives in Congress—to preserve the integrity and well-functioning of the Union by ensuring that new states will carry their load.

Congress has typically exercised its power to admit new states through a three-step process. First, Congress usually "passes an enabling act prescribing the process by which the people of a United States territory may draft and adopt a state constitution" and express their desire to form a new state. David F. Forte, *New States Clause*, The Heritage Guide to the Constitution.[4] Second, the proposed state "then submits its proposed constitution to Congress, which either accepts it or requires changes." *Id.* Third, "[u]pon approval of the new state constitution, Congress may direct the President to issue a proclamation certifying the entry of the new state into the United States." *Id.*[5]

The New Columbia Admission Act satisfies these requirements and procedures. New Columbia's admission to the Union satisfies the Constitution's requirements. The Act expressly requires that the "State Constitution shall always be republican in form," Act § 101(b), and admission is conditioned on ratification of the 1987 Constitution adopted by the D.C. Council, *id.* §§ 102(a)(1)(B), 102(b), which is in fact republican in form. Moreover, the Supreme Court long ago held that "it rests with Congress to decide" whether a state provides a "republican form of government." *Luther*, at 48 U.S. at 42. Thus, so long as Congress assures itself that the 1987 Constitution secures to New Columbia a proper form of government, the courts will not second-guess that judgment. Part IV of this memorandum explains why Maryland's consent is not required for the creation of New Columbia. In short, the new state is not "within the Jurisdiction" of Maryland because Maryland divested itself of authority over the land when it ceded the territory to the United States in 1791. New Columbia would not be created by combining existing states. And the Act provides that the new state will be "admitted into the Union on an equal footing with the other States in all respects whatever." Act § 101(a).

Congress' traditional prerequisites are present here as well. The Act ensures that New Columbia's residents want to create the new state. Section 102 requires that the question be put to vote in a special election and provides that the Act's provisions "shall cease to be effective" if the voters reject statehood. *See* Act § 102(b)(2).

Congress alone decides whether New Columbia can support itself and the Union as a new state. This is a practical analysis that the existing states' representatives must undertake according to the political and economic concerns of their constituents. Thus, there is not much room for constitutional analysis on this point—other than to say that Congress' judgment will likely not be questioned by the courts. To be sure, there has been considerable debate over whether New Columbia would be a viable state. *See, e.g.*, U.S. Dep't of Justice, Office of Legal Policy, *Report to the Attorney General: The Question of Statehood for the District of Columbia* 59-68 (1987) ("OLP Report") ("[T]he District of Columbia simply lacks the resources both to support a state government and to provide its fair share of the cost of the federal government."). This is a concern that warrants Congress' careful consideration. But if Congress is satisfied that it poses no political problem to the Union, then that conclusion is controlling.

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[4] Available at: http://www.heritage.org/constitution#!/articles/4/essays/125/new-states-clause.

[5] Some states have pursued an alternative path, known as the "Tennessee Plan," by which they adopted a state constitution then petitioned Congress for admission. *See* R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, The Heritage Lectures 3 (1993), http://thf_media.s3.amazonaws.com/1993/pdf/hl461.pdf. D.C. Statehood proponents initially pursued this route, but the most recent New Columbia constitution has not yet been ratified. Thus, the New Columbia Admission Act is best viewed as a traditional enabling act that requires adoption of a pre-existing, un-ratified state constitution.

The New Columbia Admission Act follows the typical procedure for admission of new states. The Act functions like "enabling legislation" that provides for admission so long as certain criteria are met. Key among those criteria is that New Columbia's residents ratify an acceptable constitution, and the Act specifies that the 1987 Constitution is acceptable. Thus, once New Columbia's residents approve admission, ratify the 1987 Constitution, and accept the boundaries and other provisions set forth in the Act, the President will issue a proclamation accepting New Columbia as the 51st state. *See* Act §§ 102(b)(1), 104.

The Act thus complies with all constitutional and congressional requirements. If New Columbia were being created out of any other territory, its admission likely would face little or no constitutional attack. But the unique nature of the District of Columbia raises some unique constitutional concerns. This memorandum will next address those concerns.

IV. The New Columbia Admission Act Does Not Violate Any Other Constitutional Provisions.

Three core concerns have been raised with the constitutionality of admitting New Columbia as a state. First, the Constitution's District Clause contemplates a federal city like the current District of Columbia and thus shrinking the District to a small federal enclave violates the Founders' intent. Second, the Twenty-Third Amendment prohibits the creation of New Columbia because it contemplates the continued existence of the current federal district. Third, admittance of New Columbia requires Maryland's consent because its land originally belonged to Maryland and was ceded to the federal government solely to create the District of Columbia. I address each in turn.

A. The Act does not violate the District Clause.

The broadest challenge to admitting New Columbia as a state is rooted in the Constitution's District Clause. This clause grants Congress 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." U.S. Const. art. I, § 8, cl. 17. This provision, so goes the objection, requires the District of Columbia to remain fixed in size and character: "a federal enclave was created to ensure the independence of the new government, to avoid, in George Mason's words, 'a provincial tincture to ye Natl. deliberations.'" OLP Report 55 (quoting James Madison, *Notes of Debates in the Federal Convention of 1787* 378 (A. Koch ed., 1966)). The concerns are that the federal government "cannot be dependent upon any one of the states to ensure its smooth operation," nor is any state "entitled to a greater voice in the national councils than any other." *See id.*

Instead of imposing constitutional limits, the District Clause grants Congress authority over the federal district that "may" be created as the federal seat of government. Though it contemplates that a federal district will exist, the District Clause does not mandate that the district be any minimum size or specific shape. In fact, it conspicuously avoids placing a lower limit on the district's geographic area, while placing an absolute *upper* limit on its size. Had the Framers wished to mandate a lower bound for the size of the federal district, they knew how. But they did not. Thus, the text of the Constitution does not prohibit Congress from reducing the size of the District of Columbia, as contemplated in the New Columbia Admission Act. *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 166-77 (1991) (refuting the "fixed form" argument).

If anything, the District Clause affirmatively supports the constitutionality of the New Columbia Admission Act. The District Clause grants Congress plenary and exclusive power over the District of Columbia, and the courts have granted Congress wide latitude in its exercise of that authority. In *District of Columbia v. John R. Thompson Co.*, the Supreme Court explained that "[t]he power of Congress over the District of Columbia relates not only to national power but to all the powers of legislation which may be exercised by a state in dealing with its affairs." 346 U.S. 100, 108 (1953) (quotation marks omitted); *see also Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1940) (Congress' District Clause authority "is sweeping and inclusive in character"). Just as a state may consent to the creation of a new state from within its borders, so too should Congress be permitted to carve a state from the District of Columbia, over which it enjoys sovereign control. *See Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. (2007) (statement of Viet D. Dinh) ("D.C. Voting Rights Testimony") ("In few, if any, other areas does the Constitution grant any broader authority to Congress to legislate.").

History, too, supports this view. The original District of Columbia was much larger than the current District because it included land in Virginia that is now Arlington County and Alexandria City. In 1846, Congress retroceded that land to Virginia, thus reducing the District's area by one third. *See* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846); *see also* Raven-Hansen, 60 Geo. Wash. L. Rev. at 169. Faced with similar arguments that the District Clause prohibited Congress from reducing the boundaries of the once-set federal district, the House Committee on the District of Columbia at that time concluded:

> The true construction of [the District Clause] would seem to be that Congress may retain and exercise exclusive jurisdiction over a district not exceeding ten miles square; and whether those limits may enlarge or diminish that district, or change the site, upon considerations relating to the seat of government, and connected with the wants for that purpose, the limitation upon their power in this respect is, that they shall not hold more than ten miles square for this purpose; and the end is, to attain what is desirable in relation to the seat of government.

Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 29-325, at 3-4 (1846). Only half a century removed from its acceptance of lands to create the District, Congress was convinced that there was no restriction on its ability to alienate large portions of that land.[6] Even earlier, in 1791, the First Congress altered the southern boundaries of the District to capture portions of what are now Alexandria and Anacostia. *See* Raven-Hansen, 60 Geo. Wash. L. Rev. at 169-70. Thirteen of the Constitution's Framers, including James Madison, voted in favor of this amendment, *see id.*, which "'is contemporaneous and weighty evidence'" that the District Clause does not prevent Congress from altering the District's boundaries, *Marsh*

[6] The Virginia retrocession was challenged decades later by citizen attempting to avoid taxation by Virginia, but the Supreme Court declined to rule on the question, holding that "[i]n cases involving the action of the political departments of the government, the judiciary is bound by such action," and "[t]he State of Virginia is *de facto* in possession of the territory in question." *Phillips v. Payne*, 92 U.S. 130, 132-33 (1875). As explained above, the Court's avoidance of the question in *Payne* is strong evidence that courts likely would not rule on admittance of New Columbia.

v. Chambers, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

Contrary historical arguments, which focus on the Founders' statements regarding the need for a federal district, do not prove otherwise. For instance, James Madison wrote that "a dependence of the members of the general government on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy." The Federalist No. 43 (James Madison). A large federal city like the current District of Columbia, so goes the argument, is necessary so that Congress can "ultimately control the basic services needed by the national government." OLP Report at 57. Indeed, "[e]very Justice Department that has addressed the question, from the Kennedy Administration to the Bush Administration, has concluded that the Constitution does not allow for legislative alteration of the District's status." R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment,* The Heritage Lectures 6 (1993).

The need for independence from state control or dependence undoubtedly influenced the Constitution's provision for a federal district, and it should inform Congress' policy judgment on the admission of New Columbia. But it is just that: a policy concern. The Act preserves a federal district that is outside the control of any state and is less than ten miles square. That is all the Constitution requires. The statements of individual Framers cannot convert a constitutional clause that *grants* Congress broad authority into a clause strictly *limiting* Congress' authority.

At bottom, neither the District Clause nor the policy concerns that led to its enactment present a constitutional obstacle to the New Columbia Admission Act. The Act preserves a federal district to serve as the "Seat of the Government of the United States." Congress has plenary power over the District, and it has previously exercised that power by reducing the District's size. Arguments concerning the independence and vitality of a shrunken District are serious and should be seriously considered. But they pose no *constitutional* limit. They are within Congress' sound discretion to legislate on this sensitive political matter.

In this regard, it is worth noting that the concerns that motivated the Framers may be attenuated when the surrounding state (New Columbia) is relatively small and poses no particular risk of usurpation, especially when the federal enclave has been independent and autonomous for over two centuries. And any rational policy debate would weigh the benefit (protecting the federal seat from state usurpation) against the cost (disenfranchisement of residents who pose no threat and have no particular connection to the federal seat). It strikes me that it is harder to justify why someone living far from the federal seat—say, in Anacostia or upper Northwest--should be disenfranchised than it is to explain how having those neighborhoods under direct federal control is necessary to protect the federal government. Again, these are policy questions and not matters of constitutional law, but the presence of an upper, not lower, limit on the geographical size of the District in the Constitution at least suggests that the Framers were, if anything, more concerned with the latter.

B. The Act does not violate the Twenty-Third Amendment.

It is urged that admitting New Columbia would be inconsistent with the voting rights provided to District residents in the Twenty-Third Amendment. Because the Twenty-Third Amendment provides District residents with three votes in the Electoral College, the few remaining residents of the Act's shrunken federal district could claim an outsized influence on

presidential elections. Opponents argue that this electoral anomaly would violate the Twenty-Third Amendment's intent. *See generally* Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 Geo. Wash. L. Rev. 475 (1992). Moreover, they argue, the amendment is premised on the existence of a large populated District, which confirms that the Constitution prohibits Congress from reducing the District's size. *See, e.g.*, OLP Report at 21-23. But these arguments are policy inferences not mandated by the constitutional text. A constitutional provision is not violated anytime the factual premise behind its enactment changes. While the Twenty-Third Amendment will pose grave policy concerns if the New Columbia Admission Act is adopted, the amendment does not *prohibit* the Act.

Section 1 of the Twenty-Third Amendment provides:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State.

U.S. Const. amend. XXIII, § 1. As a practical matter, the amendment enables District of Columbia residents to cast three electoral votes in presidential elections because the smallest state will virtually always have one representative and two senators in Congress.

Nothing in the Twenty-Third Amendment prohibits the admission of New Columbia. Because the New Columbia Admission Act will preserve a federal "District constituting the seat of Government of the United States," the Twenty-Third Amendment plainly can still operate according to its terms. The amendment, like the District Clause, says nothing about minimal geographic or population limits on the federal district. Nor does it matter if the population within the federal district changes. That was always going to be true to some extent: The District of Columbia's population is ever increasing or decreasing; yet the Twenty-Third Amendment's provision of electoral votes does not shift with those population fluctuations. Similarly, it would not violate the Constitution if the least populous state in the Union divided itself in two states, one of which contained very few residents, and Congress admitted the new state into the Union. This might be bad policy, but it would be constitutional.

That is because, in general, the Constitution is not violated anytime the factual assumptions underlying a provision change. For example, the increased number and economic influence of District residents does not mean that the Constitution changes to mandate their enfranchisement. *See Adams v. Clinton*, 90 F. Supp. 2d 35, 50 (D.D.C. 2000) (per curiam). Thus, changing a factual premise of the Twenty-Third Amendment does not violate its prior grant of electoral rights. The full electoral rights of New Columbia residents could logically and practically co-exist with the Twenty-Third Amendment rights for the shrunken district's residents. There is no inherent conflict and thus no constitutional problem.

Objections to New Columbia based on the Twenty-Third Amendment ignore the difference between a statute that alters the premise for a constitutional amendment and legislation that violates a constitutional prohibition included in an amendment. By way of analogy, a statute repealing the income tax is not unconstitutional because it renders superfluous the Sixteenth

Amendment, which authorizes a federal income tax. Of course, the Twenty-Third Amendment was passed against the factual backdrop of a District that included a substantial number of residents disenfranchised from presidential elections. But that does not mean that Congress lacks the power to alter that factual premise through legislation rather than constitutional amendment. Consider, as illustration, whether Congress had authority to adopt the New Columbia Admission Act before the Twenty-Third Amendment. Absolutely nothing in the Twenty-Third Amendment purports to limit congressional power, so if Congress had the power to admit New Columbia prior to the Twenty-Third Amendment, the amendment did not take that power away. All of this is to say that the Twenty-Third Amendment by itself adds little to the analysis of congressional power to admit New Columbia.

To be sure, it makes little policy sense to grant the smaller district's residents outsized influence on the presidential election. (Given that the President and First Family will be among those few residents, it would pose a particularly pernicious advantage to presidential incumbents.) Thus, if New Columbia is admitted, I think the Twenty-Third Amendment *should* be repealed. The Act provides for expedited consideration of a constitutional amendment for repeal, and one would expect Congress and the states to quickly ratify the repeal amendment to protect their electoral votes from dilution. In fact, the better policy would be to make repeal of the Twenty-Third Amendment a prerequisite to New Columbia's admittance. But that is a political judgment for Congress to make, not a constitutional limit on New Columbia's admittance to the Union.

In all events, the New Columbia Admission Act seeks to avoid the problem of granting three electoral votes to the reduced federal district. The Act repeals 3 U.S.C. § 21, which currently provides for the District of Columbia's participation as a state in presidential elections, thus leaving the District without any legislatively-provided presidential electors. *See* Act § 205. This provision builds on Professor Schrag's theory that the Twenty-Third Amendment is not self-executing and thus Congress can simply decline to provide electors for the federal district. *See* Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U. L. Rev. 311, 348-49 (1990). Congress is granted some authority to control the appointment of the District's electors: The District "shall appoint" those electors "in such manner as the Congress may direct," and the Amendment grants Congress the "power to enforce this article by appropriate legislation." U.S. Const. amend. XXIII. But it is unlikely that the "power to *enforce*" the Twenty-Third Amendment includes the power to nullify it. And the Twenty-Third Amendment speaks in mandatory terms: "The District constituting the seat of Government of the United States *shall* appoint" electors for President and Vice President. *Id.* (emphasis added). But the constitutionality of New Columbia's admittance does not rise or fall with this provision. Whatever the legality and effect of Section 205, it is severable from the rest of the Act, and the admission of New Columbia remains constitutional.

C. Admission of New Columbia does not require Maryland's consent.

Some also argue that the Constitution requires Maryland's consent before New Columbia can be carved out of the existing District of Columbia. The New States Clause prohibits the creation of any new state from "within the Jurisdiction of any other State" without the existing state's consent. U.S. Const. art. IV, § 3, cl. 1. Statehood opponents argue that Maryland ceded its land to the federal government solely for use as the federal capital district and thus Maryland retains an interest in the land that would trigger the New States Clause's consent requirement if Congress attempts to alienate the land. *See, e.g.*, OLP Report at 58; *see also generally* Raven-Hansen, 60 Geo. Wash. L. Rev. at 177-83.

The premise of this argument is false. The land that would create New Columbia is not "within the Jurisdiction" of Maryland, and Maryland has no residual authority over the land. On the contrary, Maryland relinquished all sovereign authority over the land when it ceded the territory and the federal government accepted it. The express terms of the cession state that the land is "*for ever* ceded and relinquished to the congress and government of the United States, in *full and absolute right*, and *exclusive jurisdiction* ...." 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), *quoted in* Raven-Hansen, 60 Geo. Wash. L. Rev. at 179 (emphasis added). The terms could not be more clear. Maryland retained no authority over the land because, "the cession had ended residents'] political link with" Maryland. D.C. Voting Rights Testimony (citing *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901); *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356 (1805); *Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966)). Thus, by its terms, the consent provision in the New States Clause does not apply. In this vein, the New Columbia Admission Act follows the precedent of the Enabling Act of 1802, which did not require consent from Connecticut even though the Act formed Ohio partially from territory Connecticut ceded to the United States in 1786. The Enabling Act of 1802, 2 Stat. 173 (1802); 5 *The Territorial Papers of the United States* 22-24 (Clarence Edwin Carter ed., 1934).

D. Other policy concerns do not raise constitutional problems.

Statehood opponents also raise a number of other practical concerns that do not raise any constitutional problems. For instance, even setting the Twenty-Third Amendment aside, the state of New Columbia would have an outsized influence in the Senate, given its exceptionally small geographic size and relatively low population. New Columbia would also undoubtedly retain the culture of a "national city" and would likely enjoy the advantages of geographic proximity to the federal government. And New Columbia would hardly present the sort of economic, cultural, and geographic diversity of the traditional Madisonian democracy. It would add a diverse counterweight to large, sparsely populated states, but New Columbia would consist *entirely* of one city, whose existence and prosperity are tied to the federal government. These are all significant concerns that counsel against admitting New Columbia as a state. But the Constitution does not speak directly to any of these problems and thus they are for Congress to resolve in its political judgment.

* * *

At its core, the admission of New Columbia is a political decision for Congress. The New Columbia Admission Act satisfies the minimal constitutional requirements and traditional prerequisites for the admission of new states, and courts will likely find other constitutional attacks to be meritless. Virtually all of the objections actually amount to disputes over political policy—that is, whether New Columbia would structurally fit within the existing Union. But the Constitution commits that judgment to Congress, which has the power to admit new states and possesses plenary power over the District of Columbia. There is little cause for the courts to second-guess that decision.

Fitzroy Lee
Interim Chief Financial Officer
Government of the District of Columbia

TESTIMONY

I. Greetings, Introduction, Summary of Testimony

Good morning, Chairwoman Maloney, Ranking Member Comer and members of the House Committee on Oversight and Reform. I am Dr. Fitzroy Lee, Interim Chief Financial Officer of the District of Columbia. The Office of the Chief Financial Officer (OCFO) is an independent agency charged with ensuring the District's long-term financial health and viability. I am pleased to provide testimony today on the strength of the District's finances and economy, the current relationship between the District's budget and the federal government, and how the District of Columbia can transition to statehood.

II. Strength of the District's Finances

Like many jurisdictions, the District of Columbia's economy faces challenges as a result of the COVID-19 public health emergency. The pandemic caused an estimated $2.6 billion in lost revenues through 2025, hitting the District's budget as hard as any state. Through careful recession planning, prudent use of reserves to maintain operations, and responsible decision making by its elected leadership, the District has weathered this unprecedented financial challenge while still funding its budget priorities. The District of Columbia concluded the fiscal year that ended September 30, 2020 with a positive general fund balance exceeding $3.2 billion and maintained its triple-A credit rating. This triple-A credit rating is an accomplishment achieved by only ten of the 25 largest cities and a rating higher than 32 other states. The bond rating is an important

indicator of the District's overall financial health and is testament to the sound financial management practices that have been established in law and continue to be enhanced by the OCFO, the District's elected leadership and key stakeholders.

The District's financial management practices include a balanced budget and multi-year financial plan, a six-year capital improvement plan, quarterly revenue estimates to ensure spending stays on track, a self-imposed debt limit to restrict borrowing, and the best practice level of cash reserves. The District maintains a cash reserve policy of 60 days of operating revenues as compared to the federally mandated requirement of approximately 22 days.

The District has implemented a comprehensive capital asset inventory system and long-range capital financial plan to bring all assets or infrastructure to a state of good repair by 2031. No other city or state in the United States has developed an implementable program to reach this goal. The District has also fully funded its public safety and teacher pension trust funds as well as its retiree health care benefits trust funds, a funding level no other state can claim. Finally, the District has achieved 24 consecutive years of clean audits as verified by independent auditors.

A common misperception is that the District is strictly a government town. In fact, only 25% of the workforce are federal government employees, down from 30% in 2010. From 2010 to 2019, while federal government employment declined by 15,000, private sector jobs grew by 95,000. The District and the Washington metropolitan area have developed into a vibrant and dynamic region with a diversifying economic base. Some of the fastest growing private sector industries over the last several years include professional and technical services as well as hospitality, sports, and entertainment. We are a destination where people choose to live, work and play, with five

major sports teams, world class restaurants, and thriving neighborhoods. The District's resident population has grown 25% over the last two decades and now stands at approximately 714,000, making it the 20th largest city according to the U.S. Census. This economic diversity increases our resilience and financial dexterity. As the District recovers from COVID-19, we expect that robust private sector growth will continue to anchor the District's solid economic performance.

III. Federal Government and the District Budget

In many respects, the District already functions as a state. The District collects personal and business income taxes, administers worker's compensation and unemployment insurance programs, and runs a Department of Motor Vehicles. In addition, the District funds and provides services to residents, businesses, commuters, and visitors, including police, fire and public works services, and it operates a K-12 school district, public university and a two-year community college. Prior to COVID-19, the daytime population would increase by over half a million people, including Virginia and Maryland commuters and domestic and foreign visitors.

Contrary to a widespread misconception, the District does not receive an annual payment to cover its operations. Over 75% of District revenue is generated from our local taxes and fees. The District's budget is comparable to other states in its reliance on federal dollars for Medicaid, education, other human services and transportation.

IV. Transition to Statehood

With the transition to statehood, we expect that certain functions currently managed by the federal government will fall to the new state. The District's finances have proven resilient, even in the face of the global pandemic. The true financial impact of statehood will depend on policy decisions yet to be made by Congress and the newly-elected state government, as District

policymakers adopt future budgets to take over responsibilities that are currently under the federal government. My office stands ready to advise on the policies being considered, the revenues that could be generated, and the effects of budget allocations to accommodate new state functions.

V. Conclusion

In conclusion, the fiscal foundation of the District is extremely strong. Due to prudent financial management, judicious use of our reserves, and precautionary recession planning, the District has been able to weather the COVID-19 storm and maintain vital services. Given its strong financial condition and established best practices, the District is more than capable of transitioning to statehood and will work with the federal government to ensure a smooth transition.

I thank you for allowing me the opportunity to provide testimony at this important hearing and am happy to answer any questions you may have.

Harry Wingo Testimony
Before the House of Representatives Oversight and Reform Committee
H.R. 51, "The Washington, D.C. Admission Act"
March 22, 2021

The views expressed are my own and do not reflect the official policy or position of my employer, the National Defense University, the Department of Defense or the U.S. Government.

Chairwoman Maloney, Ranking Member Comer, Congresswoman Norton, and other Members of the Committee, thank you for the opportunity to testify in support of H.R. 51, the "Washington, D.C. Admission Act", which if enacted would admit the District into the Union on an equal footing with the other States in all respects.

I urge the Congress to grant full citizenship to the 712,000 residents of Washington, D.C., and to consider why the 30,000 veterans who live in D.C. are particularly deserving of D.C. Statehood. D.C. veterans have volunteered to give their very lives in defense of this Nation -- and many have paid that ultimate price, even though they have been disenfranchised. Today, I am humbled to speak on behalf of these Patriots, these sons and daughters of Washington who have served, fought and died in defense of the freedom they have too long been denied.

I am Harry Wingo, a Washington, D.C. born, current citizen and resident of Washington and a third generation military veteran. Military service runs in my family.

My father, Harry Wingo, Sr., is a 91-year old Army veteran who rose from the rank of private to be a Chief Warrant Officer Three with 35 years of service. His father, my grandfather, Harry Fisherman Wingo, also served in the Army, and survived the horrors of trench warfare and poison gas in World War I. While my mother's father, William Smith, did not wear a military uniform, he was a volunteer police officer in Prince George's County, Maryland.

After graduating from the U.S. Naval Academy in 1988, I was an active duty Navy SEAL officer for over six years, serving first at a mini-sub team, SEAL Delivery Vehicle Team ONE, and then finishing my active duty with Special Boat UNIT TWO SIX, working out of the Panama Canal Zone and traveling throughout Latin America in support of our Nation's counter-drug efforts. While I was granted an honorable discharge long before the crushing operational cadence of the global war on terror, as an active duty Frogman in the 1990s, I went in harm's way.

As a veteran, I signed a blank check, committing my life to support and defend this great Nation. And yet, as a resident of the District, I have no voting Member of Congress who can represent my voice when decisions are made on issues like going to war, or properly caring for wounded veterans. Accordingly, I strongly urge the Congress to vote for D.C. statehood, something that so many of Washington's 30,000 veterans also demand.

D.C. veterans are denied the basic rights enjoyed by other Americans, despite our sacrifice. No taxation without representation has been a worthy rallying cry for D.C. statehood. For D.C. veterans, we have an additional note: No sacrifice without representation.

No American should be denied the benefits of federalism, the power (and responsibility) of participation in both local and national governance -- the Republic that Benjamin Franklin told the American People they had achieved, if they could keep it. In D.C., we know that we can keep full Democracy, if only given the chance. The desire for statehood burns even stronger in the hearts of D.C. veterans, having devoted our lives to the defense of the U.S. Constitution, the defense of our own families, and *all American families*.

Going back to the time of the American Revolution, military veterans from Washington have fought and died in every war. D.C. veterans have paid, and continue to pay the ultimate price. D.C. veterans have returned home from military service to be denied the full measure of citizenship they selflessly protected for others.

According to the Congressional Research Service Report, "American War and Military Operations Casualties: Lists and Statistics", dated July 29, 2020 (CRS Report, No. RL 32492), the following deaths and casualties befell fighting men and women from Washington:

World War I: **202 deaths**; 773 casualties (*includes, Battle Deaths, Wounded in Action (WIA), Missing in Action (MIA), Prisoner of War (POW)*).

World War II, Army and Air Force Honor List of Dead and Missing: **1,106 Killed in Action**; 157 Died of Wounds; 10 Died of Injuries; 1,487 Died Non Battle; 187 Finding of Death; 82 Missing; 3,029 Total Casualties.

World War II, Navy, Marine Corps, and Coast Guard: **343 Combat Dead**; 10 Prison Camp Dead; 810 Total Casualties.

Korean War: **158 Total Deaths** *(more than 10 States: Alaska (10); Delaware (45); Idaho (131); Montana (137); Nevada (37); New Hampshire (137); Rhode Island (149); Utah (141); Vermont (94); Wyoming (60)).*

Vietnam War, 242 Total Deaths (*more than 10 States: Alaska (57); Delaware (122); Idaho (217); Nevada (149); New Hampshire (226); North Dakota (199); Rhode Island (209); South Dakota (192); Vermont (100); Wyoming (119)).*

The casualties from Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF) are available online from the Defense Casualty Analysis System:

OIF, 5 "Names of the Fallen": Darryl Thomas Dent (Army National Guard); Randy Lewis Johnson, Jr. (Army Active Duty); Gregory Edward MacDonald (Marine Corps Reserve); Keisha Marie Morgan (Army Active Duty); Kevin Michael Shea (Army Active Duty).

OEF*, 4 "Names of the Fallen": William John Cahir (Marine Corps Reserve); Paul Wayne Kimbrough (Army Reserve); Darrell Cornelius Lewis (Army Active Duty); Jerome David Miller, Jr. (Air Force Reserve). *(* as of March 19, 2021).*

D.C. Veterans were, thankfully, spared combat deaths in the Persian Gulf war, but so too were four States: Nebraska, Nevada, South Dakota, and Vermont. (CRS Report, pp. 40-42). I share this grim math out of respect, and to underscore my plea that Congress honor the sacrifice of the brave battle-fallen of Washington with the inalienable rights they died for. The official sources tell of 2,060 patriots who gave their very lives for liberties they never themselves enjoyed. This is injustice and it is wrong. Please, help to right this wrong by voting for H.R. 51.

Of the 712,000 citizens of D.C., over 30,000 are military veterans. These men and women are Patriots who stepped forward to defend the full rights of their fellow citizens around the Nation. Do we not deserve the same rights, to the full extent, as our fellow Americans?

Before this hearing, I listened to the powerful stories of fellow D.C. veterans, patriots who urged me to remind the Members of Congress of the many men and women of Washington who have died fighting for the full freedom and equality enjoyed by other Americans, but who have been denied those same inalienable rights. I spoke with members of Veterans United for D.C. Statehood. Led by D.C. veteran Hector Rodriguez, this group has long fought for statehood. Please search YouTube for "Veterans United for DC Statehood Message to Congress", and you will see the group's powerful message delivered just days ago, URL: https://www.youtube.com/watch?v=nMC5aFlPSEE.

I spoke with Ms. Antoinette V. Scott, a D.C. veteran and shero who volunteered and was wounded in combat. Ms. Scott, an American nurse and soldier, is the first female resident of D.C. to receive a Purple Heart, awarded for her service with the D.C. Army National Guard during Operation Iraqi Freedom, where she drove her team to safety after being wounded in an improvised explosive device attack. By the way, Ms. Scott is a graduate of Dunbar High School, the alma mater of both Congresswoman Norton, and the late great Admiral Wesley A. Brown, the first African American graduate of the U.S. Naval Academy.

Speaking of Annapolis, consider the story of another D.C. veteran, U.S. Navy Admiral (retired) Cecil D. Haney. From 2012 to 2013, Admiral Haney served as Commander of the U.S. Pacific Fleet, the largest component of the world's largest fleet. After that, Admiral Haney became Commander, U.S. Strategic Command, where he served until 2016. Admiral Haney, yet another example of one of D.C.'s veterans, followed his colleague and fellow Washingtonian, Admiral J. Paul Reason, to become the *second* African-American Naval Officer promoted to four-star Admiral, the Navy's highest peacetime rank.

Before this hearing, I also spoke with another son of D.C., Dr. Howard Gambrill Clark, a battle-tested Marine who during his combat deployments to Afghanistan and Iraq wondered why some Members of Congress supported giving residents of Baghdad and Kabul a right to vote for their national legislature but denied this very same right to Americans, much less military veterans, in our own capital. Among the D.C. veterans by whom I am inspired, I also count lawyer Kerwin Miller, another Naval Academy graduate, and a proud D.C. patriot who served and continues to serve the community.

In the late 1960s, my father bought a home near the Shrimp Boat, a landmark in Southeast D.C., and found a home at Tabernacle Baptist Church. My extended family lived nearby, in the

Northeast part of the city, and a few family members lived in Northwest, on the east side of Rock Creek Park. That world was one that we continued to be part of even after moving to Maryland, including most Sundays after church when we would visit family in D.C.. On Saturdays, my mother took my sister and I shopping at D.C. thrift stores, to make ends meet.

As a child, I did not often come to the part of D.C. in which Congress convenes. After my military service, however, I would work in the core of the federal zone: as a staffer to the late, great Senator Ted Stevens of Alaska, a veteran of the "Flying Tigers" in World War II, and as a Special Counsel at the Federal Communications Commission, when it was run by Colin Powell's son, Michael Powell. This was also the part of Washington where I clerked for another great veteran, the late Honorable James Robertson, for whom I clerked when he was on the bench for the U.S. District Court of the District of Columbia, and who was one of the judges on the FISA court. Judge Robertson was in the Navy, like me.

That service as a civilian in the Congress, in an independent agency, and in the federal courts, all in the core federal zone of the District, came long after my childhood days spent with family in Washington's tree-lined neighborhoods in Southeast, Northeast, and some of Northwest, D.C., east of Rock Creek Park. I would come to learn the other parts after attending Yale Law School, after marrying my wife who was born and grew up in the Northwest, D.C. area around Blessed Sacrament church along Western Avenue, near Rock Creek.

I'm blessed to have three daughters. One is set to graduate from Georgia Tech with a degree in Chemical Engineering, and my youngest two are growing up in what seems a world away from where marble buildings contain the corridors where the three branches of the federal government, the Congress, the Executive, and the Judiciary do the People's work. The People are in Washington, D.C., as well. The Patriots who are among the one-percent who choose to serve are also in this territory, this District of Columbia that should be a State.

Congresswoman Norton, again, I thank you for your tireless leadership on the march towards D.C. statehood. I would also like to recognize the efforts of Mayor Muriel Bowser, who selected me in 2015 to be the Chairperson of the Advisory Board on Veterans Affairs for the District of Columbia, a role that I was honored to fulfill.

I am not before you today to discuss the details of Constitutional law, although as a graduate of the Yale Law School, like Congresswoman Norton, I would stand ready to accept that task. Today, I'm honored to simply share what I know so many D.C. veterans deeply believe -- statehood should be granted to Washington.

I trust that upon hearing today's testimony, and reflecting on the inalienable rights that some Members continue to deny their fellow Americans, much less military veterans, you will afford the fundamental right of D.C. statehood to those who have earned it and who will continue to earn it with their very lives.

Thank you for your consideration. I look forward to any questions you may have.

May 22, 2021

The Honorable Nancy P. Pelosi
Speaker of the House
United States House of Representatives
Washington, D.C. 20515

The Honorable Kevin O. McCarthy
Minority Leader
United States Senate
Washington, D.C. 20515

The Honorable Charles E. Schumer
Majority Leader
United States Senate
Washington, D.C. 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20515

Re: Washington, D.C. Admission Act,
H.R. 51 and S.51 (the "D.C. Admission Act")

Dear Congressional Leaders:

As scholars of the United States Constitution, we write to correct claims that the D.C. Admission Act is vulnerable to a constitutional challenge in the courts. For the reasons set forth below, there is no constitutional barrier to the State of Washington, Douglass Commonwealth (the "Commonwealth") entering the Union through a congressional joint resolution, pursuant to the Constitution's Admissions Clause, just like the 37 other states that have been admitted since the Constitution was adopted. Furthermore, Congress's exercise of its express constitutional authority to decide to admit a new state is a classic political question, which courts are highly unlikely to interfere with, let alone attempt to bar.

The D.C. Admission Act. The House passed the Act, as H.R. 51, on April 22, 2021, and as of this writing, the substantively identical companion bill (S.51) is under consideration by the Senate. The Act provides for the issuance of a congressional joint resolution declaring the admittance as a State of most of the territory currently comprising the District of Columbia, while the seat of government (defined as the "Capital") will fall outside of the boundaries of the new State and remain under federal jurisdiction. The Act also repeals the provision of federal law that establishes the current mechanism for District residents to participate in presidential elections, pursuant to Congress's authority under the Twenty-Third Amendment; and provides for expedited consideration of the repeal of that Amendment.

The Admissions Clause grants Congress constitutional authority to admit the Commonwealth into the Union. The starting point for a constitutional analysis of the Act is the Constitution's Admissions Clause (Art. IV, Sect. 3), which provides that "New States may be admitted by the Congress into this Union." The Clause "vests in Congress the essential and discretionary authority to admit new states into the Union by whatever means it considers

appropriate as long as such means are framed within its vested powers."[1] *Every* State admitted into the Union since the Constitution was adopted has been admitted by congressional action pursuant to this Clause; *no* State has been admitted pursuant to a constitutional amendment.

The Supreme Court has broadly construed Congress's assigned power to admit new states and has never interfered with Congress's admission of a state, even when potentially legitimate constitutional objections existed. For example, in 1863, Congress admitted into the Union West Virginia, which had been part of the State of Virginia, in potential violation of a provision of the Admissions Clause that bars the formation of a new State out of a portion of the territory of another State without the consent of the ceding State. The Supreme Court, however, did not bar West Virginia's admission; to the contrary, it later tacitly approved of it.

Some critics of the D.C. Admission Act have suggested that Maryland's consent might be required under the foregoing provision of the Admissions Clause. This objection mistakenly presupposes that Maryland retains a reversionary interest in the territory currently composing the District of Columbia, which Maryland ceded to the federal government when the District was established in 1791. In fact, Maryland expressly relinquished all sovereign authority over the territory at issue when the federal government accepted it. The express terms of the cession state that the territory was "for ever ceded and relinquished to the congress and government of the United States, in *full and absolute right*, and *exclusive jurisdiction* ...."[2] As Viet D. Dinh, who served as an Assistant Attorney General during the presidency of George W. Bush, has explained, because Maryland's cession of the territory now constituting the District was full and complete, it severed D.C. residents' now far distant "political link with" Maryland.[3] The current District is not part of Maryland, and Maryland has no claim on any portion of the District's territory. There is accordingly no basis to require Maryland's consent for the establishment of the new State.

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[1] Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 Case W. Res. J. Int'l L. 315, 317 (1981).

[2] Prepared Statement of Viet D. Dinh, Before the Committee of Homeland Security and Governmental Affairs of the United States Senate (Sept. 14, 2014) ("Dinh Statement") (quoting 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), quoted in Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev.,60 Geo. Wash. L. Rev. 160, 179 (emphasis added) (1991).

[3] As Dinh has further explained, the formation of the State of Ohio provides a direct precedent. A portion of what, in 1802, became Ohio had previously been part of Connecticut. But, because Connecticut had unqualifiedly ceded the territory at issue to the United States (just as Maryland ceded the territory now composing the District), Congress did not require, and did not seek, Connecticut's permission when it approved Ohio's admission to the Union. Dinh Statement, *supra* (citing The Enabling Act of 1802, 2 Stat. 173 (1802); 5 *The Territorial Papers of the United States* 22-24 (Clarence Edwin Carter ed., 1934)); *see also* Raven-Hansen, *supra*, at167-69 (same).

The Constitution's District Clause poses no barrier to admitting the Commonwealth into the Union. The Constitution's District Clause grants Congress 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."[4] Based on this Clause, Congress established the current District of Columbia, which (as explained) was taken from territory ceded by Maryland, as well as Virginia.

The D.C. Admission Act complies with the District Clause because it provides that the Capital -- which is defined in the Act to include (among other things) the White House, the Capitol Building, the United States Supreme Court Building, and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall -- will not become part of the new State and will remain under the sovereignty of the federal government.

Some critics have argued that the District Clause somehow mandates that the District of Columbia permanently retain all of its current territory, and that its size may neither be increased or reduced by Congress. The plain language of the District Clause says no such thing; it does not mandate that the District be any size or shape, except it limits the *maximum* size of the federal enclave to ten square miles.

Historical practice confirms that Congress can change the size of the District. In 1791, Congress altered the District's southern boundary to encompass portions of what are now Alexandria, Virginia and Anacostia. Then, in 1846, Congress retroceded Alexandria and its environs back to Virginia. As a result, the territory composing the District was reduced by a third.[5]

At the time of the 1846 retrocession, the House's Committee on the District of Columbia considered, and rejected, the very argument that critics of the D.C. Admission Act are raising today, reasoning that the "true construction of [the District Clause] would seem to be solely that Congress retain and exercise exclusive jurisdiction" over territory comprising the "seat of government." The language of the District Clause, the legislators observed, places no mandate on the size, or even the location, of that seat of government, other than preventing the government from "hold[ing] more than ten miles for this purpose."[6] The House's judgment was correct in 1846, and remains so today.

The Twenty-Third Amendment does not prevent Congress from granting the Commonwealth statehood. Opponents of statehood have suggested that the Twenty-Third

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[4] U.S. Const. art. I, § 8, cl. 17.
[5] *See* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).
[6] Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 29-325, at 3-4 (1846).

Amendment bars Congress from exercising its constitutionally enumerated authority to grant statehood to the Commonwealth. In fact, the Amendment poses no barrier to the admission of the Commonwealth into the Union through an act of Congress, in accordance with the plain language of the Admissions Clause, just as Congress has done in connection with the admission of several other States, including most recently Alaska and Hawaii.

Section 1 of the Twenty-Third Amendment, which was ratified in 1961, provides:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State.[7]

By its plain terms, the Amendment poses no barrier to Congress's admission of the Commonwealth into the Union. Indeed, it is entirely silent on the matter.

The only question raised by the existence of the Twenty-Third Amendment is a practical, not a constitutional one: How best to address the Twenty-Third Amendment's provision for the assignment of presidential electors to what will become a vestigial seat of government, with virtually no residents? The Act satisfactorily addresses this question by providing for the repeal of the provision of federal law that establishes the current mechanism for District residents to participate in presidential elections, pursuant to Congress's authority under the Twenty-Third Amendment, as well as by commencing the process for repealing the Amendment itself.

Initially, the Act provides for an expedited process for repeal of the Twenty-Third Amendment, a process that should move forward to ratification swiftly and successfully once the Commonwealth is admitted as a State. None of the other 50 States has reason to seek to retain three electors for a largely unoccupied seat of government.

But the Act also addresses the possibility that the Twenty-Third Amendment is not promptly repealed by mandating the immediate repeal of the provision of federal law that provides the current mechanism for District residents to participate in federal elections.

In 1961, following the adoption of the Twenty-Third Amendment, Congress exercised its enforcement authority by enacting legislation (codified at 3 U.S.C. § 21), providing that the District residents may select presidential electors; the votes of the electors are currently awarded to the ticket prevailing in the District's presidential election.[8]

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[7] U.S. Const. amend. XXIII, § 1.
[8] 3 U.S.C. § 21.

The existing statutes fall within the broad authority granted to Congress by the Twenty-Third Amendment to define the terms of, and effectuate, the District's participation in presidential elections. The Amendment allows for the appointment of a number of Electors "in such manner as the Congress may direct." The Amendment also allows Congress to select the number of Electors the District may receive, subject only to a maximum: The District may participate in the presidential Electoral College through the appointment of no more electors than those of the smallest State, *i.e.*, three. And section 2 of the Amendment grants Congress the power to "enforce" the provision "by appropriate legislation," as it did in 1961.

But once Congress acts again, pursuant to its express grant of constitutional authority, and repeals the legislation that creates the existing procedure for District residents to select presidential electors, that will remove the legislative provision providing for the District's participation in presidential elections. Without such a provision, there is no mechanism for identifying the Capital area's electors or allocating their votes.[9]

Some scholars have questioned whether that approach is satisfactory. They contend that the Twenty-Third Amendment is self-enforcing, and effectively mandates the appointment of electors on behalf of the District of Columbia, regardless of whether such appointment is called for under a federal statute. Some of us disagree; indeed, the very existence of Section 2 of the Amendment makes clear that enabling legislation is required to effectuate the District's participation in the presidential election process.[10] And Congress's 1961 enforcement legislation supports this interpretation.

Even if this self-enforcement argument were to be accepted, however, Congress could easily address it by replacing the current law mandating that the Capital area's electors vote in accordance with the outcome of the popular vote in the District with a new legislative mandate that the Capital area's electors vote in other ways. For example, Congress could require District electors to vote in favor of the presidential ticket that receives the most Electoral College votes (of the remaining 538 electors).[11] Or, alternatively, Congress could require that District electors vote for the winner of the national popular vote winner.

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[9] Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U. L. Rev. 311, 348-49 (1990) (arguing Twenty-Third Amendment is not self-executing, so Congress can simply decline to provide electors for the District); *see also* Raven-Hansen, *supra*, at 187-88.

[10] Section 2 supports a distinction between the Twenty-Third Amendment and other arguably self-executing provisions such as Art. I, Section 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended...."), which may require the availability of the writ in some form even in the absence of legislation. Unlike the Twenty-Third Amendment, the Suspension Clause makes no reference to the role of Congress.

[11] Furthermore, even assuming, wholly *arguendo*, that Congress lacks the authority to prevent electors from being appointed on behalf of the District, no potential litigant would suffer the constitutionally cognizable injury required to establish standing to bring a court challenge to

A recent Supreme Court decision confirms that a legislative directive to the Capital area's electors would be enforceable. The Twenty-Third Amendment provides that the District "shall appoint" electors "in such manner as Congress may direct"; this language is a direct parallel to the Constitution's grant of broad authority to each of the States to appoint and instruct their respective electors. In its recent decision in *Chiafalo v. Washington*,[12] the Supreme Court held that electors do not have discretion to decide how to cast their Electoral College votes, but rather are legally bound to follow the instructions given by their respective states.

As Columbia Law School Professors Jessica Bulman-Pozen and Olatunde Johnson have observed, it follows from the Court's holding in *Chiafalo* that Congress could legally bind any electors to vote in accordance with the overall vote of the Electoral College or the national popular vote, just as the existing enabling statute currently binds them to vote in the Electoral College in accordance with the outcome of the popular vote in the District.

In sum, none of the critics' constitutional objections to the D.C. Admission Act are meritorious; and the contention that a constitutional amendment is required to admit the Commonwealth into the Union is incorrect. The D.C. Admission Act calls for a proper exercise of Congress' express authority under the Constitution to admit new states, a power that it has exercised 37 other times since the Constitution was adopted.

Courts are unlikely to second-guess Congress's exercise of its constitutional authority to admit the Commonwealth into the Union. Apart from the fact that the legal objections to admission of the Commonwealth as a State are without merit, it is also unlikely that the courts will ever consider those objections. As Mr. Dinh has observed, the decision whether to admit a state into the Union is a paradigmatic political question that the Constitution expressly and exclusively assigns to Congress.[13] The Supreme Court has long, and strenuously, avoided

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such legislative action. This is because the only individuals whose putative rights could even arguably be prejudiced by Congress preventing D.C. from participating in the Electoral College would be the exceedingly small number of voting age adults who reside in the territory of the Capital (likely the President and her family, and a smattering of people with residences in the Capital Hill neighborhood). Furthermore, under the terms of the Act, such residents of the "Capital" will be fully entitled to vote in their last state of residence before taking up residence in the seat of the federal government. Therefore, as George Washington University Law School Professor Steven Saltzburg has observed, these individuals will not incur the type of injury required for standing to bring an action changing the D.C. Admission Act in court. *See* Fauntroy, *A Simple Case of Democracy Denied, An Analysis of the D.C. Voting Rights Amendment by the Office of U.S. Delegate*, http://m.dcvote.org/simple-case-democracy-denied-analysis-dc-voting-rights-amendment-office-us-delegate-walter-e.

[12] 140 S. Ct. 918 (2020).

[13] Dinh Statement, *supra*.

adjudicating disputes respecting matters that the Constitution makes the sole responsibility of the coordinate, elected branches.[14]

The remaining objections to Statehood do not concern applicable constitutional law, but rather matters of policy.

For example, some have argued that the District should not be admitted to the Union because it is a single city and have instead proposed that most of the District's territory be retrocessioned to Maryland. There is, however, no constitutional barrier to a large, diverse city, with a population comparable to that of several existing States, joining the Union. Furthermore, the Maryland retrocession proposal is subject to many of the same supposed constitutional objections raised by those who object to statehood for the District. For example, retroceding the District to Maryland would decrease the size of the remaining federal enclave, which objectors to District Statehood have claimed is constitutionally impermissible. A forced merger of the District and Maryland would also do nothing to address the purported constitutional objection to leaving the residual seat of government with three potential electors, pursuant to the terms of the Twenty-Third Amendment, prior to the Amendment's repeal.

* * *

Opponents also argue that Congress should not grant the District statehood because it will lead to a lawsuit. But any court challenge will be without merit, and indeed likely will be dismissed as presenting a political question. We respectfully submit that Congress should not avoid exercising its express constitutional authority to admit the Commonwealth into the Union because of meritless threats of litigation.

Sincerely yours,

Caroline Fredrickson
Georgetown University Law Center

Erwin Chemerinsky
University of California, Berkeley School of Law

Stephen I. Vladeck
University of Texas Law School

Franita Tolson
University of Southern California, Gould School of Law

Jessica Bulman-Pozen
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Leah Litman
University of Michigan Law School

Laurence H. Tribe
Harvard Law School

Paul Smith
Georgetown University Law Center

Geoffrey R. Stone
University of Chicago Law School

Peter Edelman
Georgetown University Law Center

[14] *See* Baker v. Carr, 369 U.S. 186 (1962); Nixon v. United States, 506 U.S. 224 (1973).

Congressional Leaders
May 22, 2021

Kermit Roosevelt
University of Pennsylvania Carey Law School

Eric Segall
Georgia State College of Law

Trevor Potter
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AN OPEN LETTER TO CONGRESS: D.C STATEHOOD IS AN ISSUE OF PUBLIC HEALTH, RACIAL EQUITY

Washington, D.C.'s more than 712,000 residents pay federal taxes, serve in the armed forces, and outnumber the residents of Wyoming or Vermont. Yet, because the District is not a state, Washingtonians are denied the right to representation in Congress. They have no vote on the federal laws and policies that shape their lives. Instead, lawmakers who do not represent Washingtonians use the District's lack of statehood to play politics with residents' livelihoods, and with their health.

Nearly half of District residents are Black. If Washington finally became a state, it would be the first state with a plurality of Black residents. Statehood for the District of Columbia is a racial justice issue — and it's a public health imperative.

As the country works to distribute vaccines and end the COVID-19 pandemic — which has devastated Black and Latino communities with higher infection rates, death rates, and job losses — the District's lack of autonomy has put residents' health at risk. Large proportions of D.C.'s vaccine allotment has gone to federal agencies and to non-residents while Black residents are going without. While D.C.'s Black residents have accounted for nearly half of COVID-19 cases and nearly 70% of deaths, they've received only 37% of vaccines.

This is not new: Congress passes annual legislation prohibiting D.C. from using locally-raised tax dollars to cover abortion care for people enrolled in Medicaid, forcing many to pay out-of-pocket for this essential health care service. Because of centuries of systemic racism, people who use Medicaid are disproportionately people of color — this D.C. Medicaid policy is part of the long history of denying Black and Brown people and immigrant communities autonomy over their reproductive health.

And reproductive health care in the District is in crisis: While white D.C. residents have a maternal mortality rate of almost zero, Black residents suffer a maternal mortality rate so high that the District has the fifth worst overall rate in the country — more than 50% higher than the national average.

It has always been morally reprehensible to deny the people of Washington, D.C. representation in our democracy. But the triple intersecting crises of COVID-19, systemic racism, and attacks on reproductive health have laid bare the depth of inequity experienced by D.C residents, particularly those of color. People who live in Washington, D.C. are being denied the autonomy to build their own health care systems and make their own choices about their bodies. This is a matter of life and death.

We applaud the U.S. House of Representatives for passing H.R. 51: Washington, D.C. Admission Act. Now the U.S. Senate must immediately take up and pass the bill and admit the District as the 51st state.

Sincerely,
Alexis McGill Johnson, President and CEO, Planned Parenthood Federation of America
Dr. Serina Floyd, Vice President of Medical Affairs/Medical Director, Planned Parenthood of Metropolitan Washington, DC
U.S. Rep. Lauren Underwood (IL-14)
Akosua Ali, President, NAACP Washington, DC Branch

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Federalist No. 43 - The Powers Conferred by the Constitution Further Considered (continued)

Written by James Madison
Independent Journal, Wednesday, January 23, 1788

To the People of the State of New York:

THE fourth class comprises the following miscellaneous powers:

1. A power "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries."

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

2. "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; and to exercise like authority over all places purchased by the consent of the legislatures of the States in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority

over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.

The necessity of a like authority over forts, magazines, etc., established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, requires that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment.

3. "To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained."

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

4. "To admit new States into the Union; but 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."

In the articles of Confederation, no provision is found on this important subject. Canada was to be admitted of right, on her joining in the measures of the United States; and the other colonies, by which were evidently meant the other British colonies, at the discretion of nine States. The eventual establishment of new States seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the new system supplied the defect. The general precaution, that no new States shall be formed, without the concurrence of the federal authority, and that of the States concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution, against a junction of States without their consent.

5. “To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,” with a proviso, that “nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.”

This is a power of very great importance, and required by considerations similar to those which show the propriety of the former. The proviso annexed is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.

6. “To guarantee to every State in the Union a republican form of government; to protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.”

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be substantially maintained. But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. “As the confederate republic of Germany,” says Montesquieu, “consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland.” “Greece was undone,” he adds, “as soon as the king of Macedon obtained a seat among the Amphictyons.” In the latter case, no doubt, the disproportionate force, as well as the monarchical form, of the new confederate, had its share of influence on the events. It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for antirepublican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors. The history, both of ancient and modern confederacies, proves that the weaker members of the union ought not to be insensible to the policy of this article.

Protection against domestic violence is added with equal propriety. It has been remarked, that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature.

At first view, it might seem not to square with the republican theory, to suppose, either that a majority have not the right, or that a minority will have the force, to subvert a government; and consequently, that the federal interposition can never be required, but when it would be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations, for purposes of violence, be formed as well by a majority of a State, especially a small State as by a majority of a county, or a district of the same State; and if the authority of the State ought, in the latter case, to protect the local magistracy, ought not the federal authority, in the former, to support the State authority? Besides, there are certain parts of the State constitutions which are so interwoven with the federal Constitution, that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose, will generally prevent the necessity of exerting it.

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side, against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen, in fine, that the minority of citizens may become a majority of persons, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.

In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms, and tearing a State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends. Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind!

Should it be asked, what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right? The answer must be, that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the federal Constitution, that it diminishes the risk of a calamity for which no possible constitution can provide a cure.

Among the advantages of a confederate republic enumerated by Montesquieu, an important one is, "that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound."

7. "To consider all debts contracted, and engagements entered into, before the adoption of this Constitution, as being no less valid against the United States, under this Constitution, than under the Confederation."

This can only be considered as a declaratory proposition; and may have been inserted, among other reasons, for the satisfaction of the foreign creditors of the United States, who cannot be strangers to the pretended doctrine, that a change in the political form of civil society has the magical effect of dissolving its moral obligations.

Among the lesser criticisms which have been exercised on the Constitution, it has been remarked that the validity of engagements ought to have been asserted in favor of the United States, as well as against them; and in the spirit which usually characterizes little critics, the omission has been transformed and magnified into a plot against the national rights. The authors of this discovery may be told, what few others need to be informed of, that as engagements are in their nature reciprocal, an assertion of their validity on one side, necessarily involves a validity on the other side; and that as the article is merely declaratory, the establishment of the principle in one case is sufficient for every case. They may be further told, that every constitution must limit its precautions to dangers that are not altogether imaginary; and that no real danger can exist that the government would dare, with, or even without, this constitutional declaration before it, to remit the debts justly due to the public, on the pretext here condemned.

8. "To provide for amendments to be ratified by three fourths of the States under two exceptions only."

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.

9. "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States, ratifying the same."

This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention, which our own experience would have rendered inexcusable.

Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it?

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. Perhaps, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation, that in many of the States it had received no higher sanction than a mere legislative ratification. The principle of reciprocality seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the multiplied and important infractions with

which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate.

The second question is not less delicate; and the flattering prospect of its being merely hypothetical forbids an overcurious discussion of it. It is one of those cases which must be left to provide for itself. In general, it may be observed, that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncancelled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and, above all, the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain moderation on one side, and prudence on the other.

1820.

Loughborough v. Blake.

in. It is therefore DECREED and ORDERED, that the decree of the said Circuit Court in this case be, and the same is hereby, reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court for further proceedings to be had therein according to law.

(CONSTITUTIONAL LAW.)

LOUGHBOROUGH v. BLAKE.

Congress has authority to impose a direct tax on the district of Columbia, in proportion to the census directed to be taken by the constitution.

The power of Congress to *levy and collect taxes, duties, imposts and excises*, is co-extensive with the territory of the United States.

The power of Congress to exercise *exclusive jurisdiction in all cases whatsoever* within the district of Columbia, includes the power of taxing it.

THIS case, which was an action of trespass brought in the Circuit Court for the district of Columbia, to try the right of Congress to impose a direct tax on that district, and in which the Court below gave judgment for the defendant, was argued by Mr. *Jones* for the plaintiff, and by the *Attorney General* for the defendant. *March 7th.*

Mr. Chief Justice MARSHALL delivered the opinion of the Court. This case presents to the consideration of the Court a single question. It is this: *March 10th.*

1820.

Loughborough v. Blake.

Has Congress a right to impose a direct tax on the District of Columbia?

The counsel who maintains the negative has contended, that Congress must be considered in two distinct characters. In one character as legislating for the States; in the other, as a local legislature for the district. In the latter character, it is admitted, the power of levying direct taxes may be exercised; but, it is contended, for district purposes only, in like manner as the legislature of a State may tax the people of a State for State purposes.

Without inquiring at present into the soundness of this distinction, its possible influence on the application in this district of the first article of the constitution, and of several of the amendments, may not be altogether unworthy of consideration. It will readily suggest itself to the gentlemen who press this argument, that those articles which, in general terms, restrain the power of Congress, may be applied to the laws enacted by that body for the district, if it be considered as governing the district in its character as the national legislature, with less difficulty than if it be considered a mere local legislature.

But we deem it unnecessary to pursue this investigation, because we think the right of Congress to tax the district does not depend solely on the grant of exclusive legislation.

The power of Congress to *lay and collect taxes, duties, &c.* extends to the district of Columbia, and to the territories of the United States.

The 8th section of the 1st article gives to Congress the "power to lay and collect taxes, duties, imposts and excises," for the purposes thereinafter mentioned. This grant is general, without limitation as to place. It, consequently, extends to all

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places over which the government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, "but all duties, imposts, and excises, shall be uniform throughout the United States." It will not be contended, that the modification of the power extends to places to which the power itself does not extend. The power then to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows, that the power to impose direct taxes also extends throughout the United States.

The provision that *direct taxes shall be apportioned among the several States, according to their respective numbers*, to be ascertained by a census, was not intended to restrict the power of imposing direct taxes to States only.

The extent of the grant being ascertained, how far is it abridged by any part of the constitution?

The 20th section of the first article declares, that "representatives and direct taxes shall be apportioned among the several States which may be in-

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cluded within this Union, according to their respective numbers."

The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those who were not represented in Congress, that intention would have been expressed in direct terms. The power having been expressly granted, the exception would have been expressly made. But a limitation can scarcely be said to be insinuated. The words used do not mean, that direct taxes shall be imposed on States only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to States, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every 30,000 souls, one State had been found to contain 59,000, and another 60,000, the first would have been entitled to only one representative, and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty. This clause was obviously not intended to create any exemption from taxation, or to make taxation dependent on representation, but to furnish a standard for the apportionment of each on the States.

The 4th paragraph of the 9th section of the same article will next be considered. It is in these words: "No capitation, or other direct tax, shall be laid, unless in proportion to the census, or enumeration herein before directed to be taken."

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The census referred to is in that clause of the constitution which has just been considered, which makes numbers the standard by which both representatives and direct taxes shall be apportioned among the States. The actual enumeration is to be made "within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."

As the direct and declared object of this census is, to furnish a standard by which "representatives, and direct taxes, may be apportioned among the several States which may be included within this Union," it will be admitted, that the omission to extend it to the district or the territories, would not render it defective. The census referred to is admitted to be a census exhibiting the numbers of the respective States. It cannot, however, be admitted, that the argument which limits the application of the power of direct taxation to the population contained in this census, is a just one. The language of the clause does not imply this restriction. It is not that "no capitation or other direct tax shall be laid, unless on those comprehended within the census herein before directed to be taken," but "unless in proportion to" that census. Now this proportion may be applied to the district or territories. If an enumeration be taken of the population in the district and territories, on the same principles on which the enumeration of the respective States is made, then the information is acquired by which a direct tax may be imposed on the district and territories, "in proportion to the

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census or enumeration" which the constitution directs to be taken.

The standard, then, by which direct taxes must be laid, is applicable to this district, and will enable Congress to apportion on it, its just and equal share of the burthen, with the same accuracy as on the respective States. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.

But the argument is presented in another form, in which its refutation is more difficult. It is urged against this construction, that it would produce the necessity of extending direct taxation to the district and territories, which would not only be inconvenient, but contrary to the understanding and practice of the whole government. If the power of imposing direct taxes be co-extensive with the United States, then it is contended, that the restrictive clause, if applicable to the district and territories, requires that the tax should be extended to them, since to omit them would be to violate the rule of proportion.

But Congress are not bound to extend a direct tax to the district and territories.

We think, a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the constitution which have been recited.

That the general grant of power to lay and collect taxes, is made in terms which comprehend the district and territories as well as the States, is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power, not to withdraw from it any portion of the community.

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The words in which those clauses are expressed import this intention. In thus regulating its exercise, a rule is given in the 2d section of the first article for its application to the respective States. That rule declares how direct taxes upon the States shall be imposed. They shall be apportioned upon the several States according to their numbers. If, then, a direct tax be laid at all, it must be laid on every State, conformably to the rule provided in the constitution. Congress has clearly no power to exempt any State from its due share of the burthen. But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the district or territories. The words of the 9th section do not in terms require, that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the 2d section require that it shall be extended to all the States. They, therefore, may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them. It could scarcely escape the members of the convention, that the expense of executing the law in a territory might exceed the amount of the tax. But be this as it may, the doubt created by the words of the 9th section, relates to the obligation to apportion a direct tax on the territories as well as the States, rather than to the power to do so.

If, then, the language of the constitution be construed to comprehend the territories and district of Columbia, as well as the States, that language confers on Congress the power of taxing the district

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and territories as well as the States. If the general language of the constitution should be confined to the States, still the 16th paragraph of the 8th section gives to Congress the power of exercising "exclusive legislation in all cases whatsoever within this district."

The power of exclusive legislation over the district includes the power of imposing taxes.

On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion; but it is contended, that they must be limited by that great principle which was asserted in our revolution, that representation is inseparable from taxation.

The difference between requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our constitution, to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the territories; or which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government, as is the case with the district, is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted whether, in fact, its interests would be rendered thereby

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the more secure; and certainly the constitution does not consider their want of a representative in Congress as exempting it from equal taxation.

If it were true that, according to the spirit of our constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts, and excises, within this district? If the principles of liberty, and of our constitution, forbid the raising of revenue from those who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? If the principles of our revolution give a rule applicable to this case, we cannot have forgotten that neither the stamp act nor the duty on tea were direct taxes.

Yet it is admitted, that the constitution not only allows, but enjoins the government to extend the ordinary revenue system to this district.

If it be said, that the principle of uniformity, established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true, that the principle of apportionment, also established in the constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes.

After giving this subject its serious attention, the Court is unanimously of opinion, that Congress possesses, under the constitution, the power to lay and collect direct taxes within the District of Columbia, in proportion to the census directed to be taken by the constitution, and that there is no error in the judgment of the Circuit Court.

Judgment affirmed.

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Keeping D.C. Constitutional

Ilan Wurman

Beck & Stone



If taxation without representation is the problem, Democrats don't seem interested in solutions.

Last month, the U.S. House of Representatives passed a bill to make Washington, D.C. a state and limit the area of exclusive federal jurisdiction to certain federal buildings and monuments. The goal of this legislation, according to its proponents, is to remedy the problem of the disenfranchisement of the residents of the District.

In addition to being almost certainly unconstitutional, the bill appears to be motivated by power rather than principle. If Congress were truly concerned about the taxation of Washingtonians without real congressional representation, there are ways to resolve the current dilemma without benefitting only one major political party. Congress could, by ordinary legislation, return the existing lands in the District back to the states from which they were ceded, or by constitutional amendment provide that the citizens of the federal District shall be treated, for purposes of federal elections, as citizens of the state from which the land on which they reside was ceded. Yet Congress is choosing the path that, if it were constitutional, would exclusively benefit the Democratic Party.

The framers provided for a federal district over which Congress would enjoy exclusive legislation because of their experience under the Articles of Confederation. In 1783, a mob of former soldiers descended on the seat of government in Philadelphia demanding payment for services in the Revolutionary War, and the Pennsylvania Governor refused to call forth the militia to protect the federal representatives. It was evident that the national legislature could not count on the honor of the state governments for their protection. Thus, Article I, §10 of the new Constitution allowed Congress "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."

James Madison, in *Federalist* #43, connected this clause to the events earlier in the decade. Without the power of exclusive legislation over a federal district,

> not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other [states].

Madison also observed that the residents of the federal district would be amenable to these new arrangements because their land would only be ceded to the federal district "with the consent of the State ceding it," which state "will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it." Moreover, the residents "will have had their voice in the election of the government which is to exercise authority over them [because] a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them," and because they, along with the whole people of the state ceding the lands, will have concurred in this national power when they voted to adopt the Constitution.

More to the point, nothing requires Congress to exercise its power of exclusive legislation. If Congress had initially acquired only the lands on which the specific federal buildings we have today were to be built, and there were in fact no residents of that land, that would have been perfectly constitutional. And Congress could—as it did in the past with Alexandria and Arlington—cede back portions of the land currently comprising the federal district. But in either case, the existing lands would be or become part of the *existing* states.

In contrast, it is not at all clear that Congress can exercise its power to accept ceded territory for purposes of creating a federal district, and then from that territory create a new state altogether. Per Article IV, Section 3 of the Constitution, to form a new state from part of another

state Congress must obtain the consent of that state. It would be a blatant workaround of this provision—a bait and switch, in fact—to have convinced Maryland and Virginia to cede territory for purposes of creating a federal district, only to then create a new state out of that territory and thereby decrease the political power of both Maryland and Virginia in the national councils. The only constitutional solution today would be to cede the remaining district lands *back* to Maryland (the Virginia portion was already retroceded in 1847), and *then* to request Maryland's consent for the formation of a new state.

Which bring us to the political point: If taxation without representation is the problem, then retroceding the land back to Maryland is precisely the solution. The Democrats appear to have no interest in that solution, however, likely because it would not benefit them politically. It could be that Maryland would not consent to reacquire its previously ceded lands. Even if so, Congress could arrive at a constitutional solution by proposing an amendment to the Constitution that would treat the residents of the District of Columbia, for purposes of federal representation, as residents of the states from which the land on which they reside was ceded. This would give the current residents representation in the halls of Congress by treating them as part of Maryland, but only for purposes of federal representation.

The National Constitution Center recently commissioned three teams—conservative, progressive, and libertarian—to draft new constitutions for the United States. Team conservative, which I led, proposed the following language:

> Congress shall have the 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, but all residents in such District shall be considered for purposes of voting, apportionment, and representation in federal elections as residents of the particular States from which the territory in which they reside was ceded.

This does not answer *all* objections. For example, under our proposal, the residents would not have a say in the election of state legislatures that then draw the federal electoral districts of which the D.C. residents would form a part. Law professor Stephen Sachs has proposed an additional clause that would solve this problem by providing that "the citizens residing in such territory shall enjoy the same right to representation in the legislatures and conventions of the respective states as is enjoyed by citizens of those states, with respect to any act concerning the times, places, and manner of holding elections for Senators and Representatives...." I am not so sure such an additional proposal on state legislative elections for purposes of apportionment is necessary, or how differentiating between such acts and the other acts of a state legislature would work in practice. The point is only that politically neutral proposals are available.

What is more, such proposals are more normatively desirable than creating a state where government officials and employees will constitute a large proportion of the population. The framers were correctly concerned about the political power and attachments that could result from being near the seat of government. George Mason, for example, worried that Senators "will probably settle themselves at the seat of Govt." and "will pursue schemes for their own aggrandizement." When discussing a proposal to have the Senate appoint the national

executive, Edmund Randolph was "apprehensive...that the advantage of the eventual appointment would fall into the hands of the States near the Seat of Government."

Mason added that the President was likely to choose his own political appointees from near the seat of government: "as the seat of Govt. must be in some one State, and the Executive would remain in office for a considerable time, for 4, 5, or 6 years at least he would insensibly form local & personal attachments within the particular State that would deprive equal merit elsewhere, of an equal chance of promotion." And Roger Sherman worried that should the members of Congress "have a longer duration of service, and remain at the seat of government, they may forget their [constituents], and perhaps imbibe the interest of the state in which they reside, or there may be danger of catching the esprit de corps."

What these various statements suggest is that the founders were generally concerned about political power and favors being concentrated near the seat of national power. The people who lived there, including a large number of government employees and people who otherwise had business with the national government, would develop their own interests and attachments. Such interests would not necessarily be in line with the interests of the people in other parts of the Union. To give individuals near the seat of government their own state, with the immense political power that follows, would create risks of self-aggrandizement and tyranny.

Fortunately, we need not confront such risks today. The current proposal for D.C. statehood is likely unconstitutional. And, as noted, there are politically neutral proposals to grant representation to the people of the District. Whether Democrats have any interest in pursuing such proposals remains to be seen.

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Written Statement of the Record
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Hearing on "Examining D.C. Statehood"
June 22, 2021

Submitted to the U.S. Senate
Committee on Homeland Security and Governmental Affairs

On behalf of the American Civil Liberties Union (ACLU) and the ACLU of the District of Columbia, we submit this written statement to the Senate Committee on Homeland Security and Governmental Affairs for its June 22, 2021 hearing on D.C. statehood in support of the Washington, D.C. Admission Act, S. 51. The ACLU previously submitted this statement to the House Oversight and Reform Committee's March 22, 2021 hearing in support of the companion bill, H.R. 51.

In 1788, James Madison wrote that the inhabitants of the yet-to-be-chosen federal district should have a "voice in the election of the government which is to exercise authority over them." More than two-hundred years later, residents of the District of Columbia still lack full representation in Congress, and events over the past year reinforce how D.C.'s lack of statehood continues to wreak havoc on the health, safety, and daily lives of its nearly 700,000 residents. The continuing denial of representation for District residents is an overt act of voter suppression with roots in the Reconstruction era. It is beyond time to rectify this by giving D.C. the true autonomy and self-governance that comes with statehood.

S. 51 would grant statehood to the residential areas of the current District of Columbia as the State of Washington, Douglass Commonwealth. The bill outlines a process to elect two senators and one representative for the new state. It sets the state's physical boundaries and the transfer of territorial, legal, and judicial jurisdiction and authorities to the new state. In addition, it defines the reduced federal territory that would remain the District of Columbia and serve as the seat of the federal government.

Our statement covers two points. First, D.C. residents deserve full representation in our national government. Decisions on policies that impact D.C. residents' rights, liberties, health, and welfare are routinely made by Congress—a body that neither represents their interests nor is politically accountable for its decisions regarding the District. D.C. residents pay taxes, serve on juries, fight in wars, and contribute to our country's prosperity; they deserve equal representation in their own government. Second, in granting statehood through an act of Congress, S. 51 is a valid and defensible exercise of congressional power. The Constitution says that a state's government must be "republican in form" for admission, and the Supreme Court held in the 1849 case of *Luther v. Borden*, that the decision of whether or not that requirement has been met "rests with Congress."

By any measure, S. 51 ensures that the State of Washington, Douglass Commonwealth passes this test.

I. Congress Should Grant D.C. Residents Full and Equal Representation

In 1867, President Andrew Johnson vetoed a bill granting all adult male citizens of the District, including Black men, the right to vote.[1] Congress overrode that veto, which—along with an increase in D.C.'s Black population from 19% in 1860 to 33% in 1870[2]—granted "significant influence in electoral politics" to Black Washingtonians.[3] District residents

[1] Andrew Glass, *Congress expands suffrage in D.C. on Jan. 8, 1867*, Politico (Jan. 1. 2008), https://www.politico.com/story/2008/01/congress-expands-suffrage-in-dc-on-jan-8-1867-007771.
[2] *Demographic Characteristics of the District and Metro Area*, D.C. Office of Planning (May 23, 2012), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Chapter%25202.pdf.
[3] Kate Masur, *Capital Injustice*, N.Y. Times (Mar. 28, 2011), https://www.nytimes.com/2011/03/29/opinion/29masur.html.

elected the first Black municipal office holder by the late 1860s, and Black men like Lewis H. Douglass were given a platform from which to spearhead the fight against segregation. But just as activists like Douglass began to exercise their power, Congress replaced D.C.'s territorial government, including its popularly elected House of Delegates, with three presidentially appointed commissioners in 1871.[4]

The goal of this move was unmistakable: disenfranchising an increasingly politically active Black community.[5] In his filibuster against the Federal Elections Act of 1890, Senator John Tyler Morgan of Alabama, one of the most prominent, outspoken white supremacists of the Jim Crow era, cited D.C. as a model for a national segregationist policy:[6]

> [T]he negroes came into this District from Virginia and Maryland and from other places . . . and [] took possession of a certain part of the political power . . . and there was but one way to get out . . . [by] deny[ing] the right of suffrage entirely to every human being in the District and have every office here controlled by appointment instead of by election . . . . in order to get rid of this load of negro suffrage that was flooded in upon them.[7]

To Morgan, it was necessary to "burn down the barn to get rid of the rats."[8] "[T]he rats being the negro population and the barn being the government of the District of Columbia."[9] The continued disenfranchisement of D.C. residents perpetuates both a shameful policy of a racist past and Morgan's legacy.

The Home Rule Act of 1973 gave District residents the power to elect a mayor and council for the first time.[10] Today, residents elect 13 councilmembers who exercise legislative authority over the District.[11] The council and the mayor serve as co-equal branches of government and council committees conduct oversight of D.C. executive agencies.[12]

D.C. residents also elect Advisory Neighborhood Commissioners who advise the council on hyper-local concerns in each of the District's eight wards.[13] A democratically elected attorney general helps enforce the laws of the District, provides legal advice to District agencies, and is charged with upholding the public interest.[14] And "[t]he judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia."[15] Finally, D.C. has one seat in the House of Representatives.[16]

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[4] *History of Local Government in Washington, D.C.*, DC Vote, https://www.dcvote.org/inside- dc/history-local-government-washington-dc (last visited Sept. 12, 2019).
[5] *See* Masur, *supra* note 3.
[6] Thomas Adams Upchurch, *Senator John Tyler Morgan and the Genesis of Jim Crow Ideology, 1889- 1891*, Alabama Review 57, 110-31 (April 2004).
[7] Harry S. Jaffe and Tom Sherwood, *Dream City: Race, Power, and the Decline of Washington, D.C.* 8 (2014 ed.).
[8] *Id.*
[9] *Id.*
[10] D.C. Code Ann. § 1-201.01 *et seq.*
[11] *Id.* §§ 1- 204.01, 204.04.
[12] *About the Council*, Council of the District of Columbia, https://dccouncil.us/about-the-council/ (last visited Sept. 12, 2019).
[13] D.C. Code Ann. § 1-309.01.
[14] *Id.* § 1-204.35.
[15] *Id.* § 1-204.31.
[16] *Id.* § 1-401.

This representative, currently Congresswoman Eleanor Holmes Norton,[17] has the "right of debate." She is not a voting member of the chamber.[18]

Notwithstanding D.C.'s fully functioning local government, Congress essentially exercises authoritarian rule over the District and its residents. Indeed, several features of Congress's understood authority over the District ensure that Congress will routinely encroach on its autonomy. In general, legislation passed by the D.C. Council and signed by the mayor into law must still go through congressional review before taking effect.[19] And even when it does, Congress can repeal it.[20] In this way, representatives from other states, elected by other constituents with no ties to D.C., are free to impose their own policy preferences on the District, leaving District residents with no recourse to hold them accountable through a democratic process.[21] Oftentimes, the policies forced upon D.C. advance polarizing ideologies to score political points that gravely impact the lives of residents. For example:

- In 1981, the D.C. Council repealed the death penalty. However, in 1992, at the request of a Senator from Alabama, Congress ordered a voter referendum to reinstate the death penalty. At the time, D.C.'s population was 70% Black. It was not lost on D.C. residents and lawmakers that the referendum would have disproportionate consequences on Black residents.[22] D.C. residents voted against reinstatement and ultimately defeated the referendum.
- In 1989, Congress inserted a provision known as the Armstrong Amendment into the D.C. Appropriations Act. The Amendment permitted religiously affiliated schools to discriminate on the basis of sexual orientation. In 1990, Congress codified the policy into D.C. law. The provision remained in effect until 2015, when the Council repealed it.
- In 1998, Republicans in Congress prevented the District from using its own funds to pay for needle exchange programs to stem the spread of HIV/AIDS. By the time legislation lifted the needle exchange ban in 2007, D.C. had the highest rate of HIV/AIDS in the country.[23] It is estimated that hundreds[24] of District residents died (and continue to die) because of this deadly instance of congressional meddling.[25]
- In 2010, two senators from Arizona and Montana sought to loosen D.C.'s gun laws with a bill repealing the District's ban on assault weapons and high-capacity

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[17] *About Eleanor*, Congresswoman Eleanor Holmes Norton, https://norton.house.gov/about (last visited Sept. 12, 2019).
[18] D.C. Code Ann. § 1-401.
[19] *How a Bill Becomes a Law*, Council of the District of Columbia, https://dccouncil.us/how-a-bill-becomes-a-law/ (last visited Sept. 12, 2019).
[20] D.C. Code Ann. §§ 1-206.01-03 (discussing Congress's plenary power over the D.C. Council).
[21] *Id.* §§ 1- 204.01, 204.04.
[22] Neil Lewis, *Issues of Race and Home Rule Confound Death Penalty Vote in Washington*, N.Y. Times (Nov. 1, 1992), https://www.nytimes.com/1992/11/01/us/issues-of-race-and-home-rule-confound-death-penalty-vote-in-washington.html.
[23] *DC Needle Exchange Program Prevented 120 New Cases of HIV in Two Years*, George Washington University (Sept. 3, 2015), https://publichealth.gwu.edu/content/dc-needle-exchange-program- prevented-120-new-cases-hiv-two-years.
[24] Lauren Ober, *Once-Controversial D.C. Needle Exchange Found To Save Money — And Lives*, WAMU (Sept. 25, 2015), https://wamu.org/story/15/09/25/dc_needle_exchange/.
[25] New HIV and AIDS cases from intravenous drug use began declining in 2008, but they fell more sharply in 2009. Lena Sun, *AIDS remains an epidemic in District, but new cases on decline, report finds*, Washington Post (Jun. 15, 2011), https://www.washingtonpost.com/local/aids-infection-rate- remains-epidemic-in-district-report-finds/2011/06/15/AGpHyuVH_story.html?utm_term=.3b73c6fe331e.

magazines and lifting gun registration requirements.[26]

- In 2016 alone, there were "25 different attempts by Members of Congress to overturn, overrule, or change local Washington, D.C. laws."[27]
- In 2018, House Republicans led by a Representative from Utah attempted to repeal D.C.'s death with dignity law,[28] which passed the D.C. Council with a vote of 11-2 and which two-thirds of D.C. voters supported.[29]
- Congress regularly attaches a rider known as the Dornan Amendment to an annual appropriations bill, blocking the District from using its own local tax dollars to provide abortion coverage for individuals enrolled in Medicaid—something states are free to do. Bans on insurance coverage for abortion disproportionately harm poor women, and particularly poor women of color.[30]

Another example is that despite Congress routinely treating Washington, D.C. in the same manner as the states when it comes to federal financial assistance, such as federal grants, Medicare reimbursement, and funding for highways, education, and food assistance,[31] when Congress passed a $2 trillion COVID-19 stimulus bill in March of 2020, members of Congress opted to treat the District of Columbia as a territory. This shortchanged D.C. residents a full $755 million in relief at a time when D.C. had more COVID-19 cases than 19 other states.[32] Over a full year after passage of the first stimulus bill, the $755 million was retroactively made whole in the American Rescue Plan Act of 2021 (H.R. 1319) passed by Congress in March 2021.[33] During this critical public health crisis, D.C. residents needed test kits, hospital supplies, and emergency relief for businesses as much as every other American but without statehood, lacked full representation in the governmental body making key decisions in the timely allocation of federal funding and resources.

The District's lack of control over its courts and criminal system has also had profound impacts on the lives of thousands of D.C. residents. The federal government has controlled D.C.'s courts and criminal justice system since 1997. Unlike states, where judges are either appointed by state officials or elected, D.C. Superior and Appeals Court judges are

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[26] *Norton Releases First Details of Tester-McCain/Childers Gun Bill in Preparation for Meeting Wed.*, Press Release, Congresswoman Eleanor Holmes Norton, (May 4, 2010), https://norton.house.gov/media-center/press-releases/norton-releases-first-detalis-of-tester-mccainchilders-gun-bill-in.

[27] *2016 Attacks on DC's Home Rule*, DC Vote, https://www.dcvote.org/2016-attacks-dcs-home-rule (last visited Sept. 12, 2019).

[28] DC Code § 7-661.01 *et seq.*

[29] Mikaela Lefrak, *'Death With Dignity' Law Goes Into Effect In D.C. As Congress Pushes To Repeal It*, WAMU (Jul. 18, 2017), https://wamu.org/story/17/07/18/death-dignity-goes-effect-d-c-congress-pushes-repeal/.

[30] *Research Brief: The Impact of Medicaid Coverage Restrictions on Abortion*, Ibis Reproductive Health (Nov. 2015), https://ibisreproductivehealth.org/sites/default/files/files/publications/ResearchBriefImpactofMedicaidRestrictions.pdf.

[31] Fenit Nirappil, *Aid Bill Expected To Pass This Week Doesn't Include $700 Million Sought By D.C.*, Washington Post (Apr. 21, 2020), https://www.washingtonpost.com/local/dc-politics/aid-bill-expected-to-pass-this-week-wont-include-700-million-sought-by-dc-city-says/2020/04/21/f28ac89a-83d7-11ea-ae26-989cfce1c7c7_story.html.

[32] Meagan Flynn, *D.C. Was Denied $755 Million In Coronavirus Relief Last Year. Now It May Get That Money*, Washington Post (Feb. 12, 2021), https://www.washingtonpost.com/local/dc-politics/district-covid-relief-maryland-virginia/2021/02/12/c2e051cc-6cad-11eb-9ead-673168d5b874_story.html.

[33] Press Release, Congresswoman Eleanor Holmes Norton, Norton Hails House Passage of American Rescue Plan Act, Sending Bill to President's Desk for Signature (Mar. 10, 2021), https://norton.house.gov/media-center/press-releases/norton-hails-house-passage-of-american-rescue-plan-act-sending-bill-to.

appointed by the President and confirmed by the U.S. Senate, where District residents have no representation at all.[34]

The courthouses in which these judges sit are guarded by U.S. Marshals. This has consequences for District residents who interact with the local court system. A particularly serious one: unlike D.C.'s local law enforcement agencies, U.S. Marshals cooperate with ICE detainers. Thus, despite the fact that its elected representatives have declared it a "Sanctuary City," D.C. cannot effectively protect immigrants from deportation if they visit or appear in its courts.[35]

Perhaps the most significant criminal justice consequence of D.C.'s lack of statehood is the District's lack of control over local prosecutions. D.C. has a locally elected attorney general who serves as the chief juvenile prosecutor for the District. However, all juvenile felonies and various adult misdemeanors are prosecuted by a federally appointed U.S. Attorney who has little incentive to be transparent with the D.C. community. Moreover, as in many other cities and states, D.C. residents have elected district attorneys seeking to reform criminal justice policies in progressive ways, but the U.S. Attorney is not accountable to voters in the way district attorneys are in states. For that reason, prosecutorial reform—key to combating mass incarceration—has proved unattainable. In September 2019, the District's U.S. Attorney took steps, even going as far as spreading misinformation, to aggressively oppose effective sentencing reforms backed by locally elected officials.[36] Today, as a state, D.C. would have the highest incarceration rate in the country.[37]

Additionally, because D.C. is not a state and has no prisons, persons convicted of D.C. offenses are placed in the custody of the Federal Bureau of Prisons, which may house them as far away as California and Arizona, making it difficult to maintain close family ties due to the distance and expense for family members to travel to visit. Maintaining these familial and community bonds is essential to successful rehabilitation both during and after incarceration. One person from the District held in a New Jersey prison reflected: "Not being able to see your family in some years can make you forget about life. It can make you think your life is in prison, there's no hope outside that wall."[38]

D.C. also lacks control over its parole system. All parole and supervised release decisions for D.C.'s returning citizens are made by the federal U.S. Parole Commission instead of a local agency (as it is in states), making local reform impossible. In 2018, about 76 percent of the U.S. Parole Commission's caseload, or 6,521 people, were D.C. Code offenders. The Commission is a major driver of over-incarceration in the District.[39] It has been known to

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[34] D.C. Code Ann. § 1-204.33.

[35] Martin Austermuhle, *Marshal Law: D.C. Is A Sanctuary City, But That Status Stops At The Courthouse Door*, WAMU (Sept. 20, 2018), https://wamu.org/story/18/09/20/marshal-law-d-c-sanctuary-city-status-stops-courthouse-door/.

[36] Mark Joseph Stern, *D.C. Residents Aren't Buying a Trump-Appointed Prosecutor's Campaign Against Criminal Justice Reform*, Slate (Sept. 6 2019), https://slate.com/news-and-politics/2019/09/dc-us-attorney-blocks-community-from-community-event.html.

[37] *District of Columbia and NATO incarceration comparison*, Prison Policy Initiative (2018), https://www.prisonpolicy.org/graphs/NATO2018/DC.html.

[38] Martin Austermuhle, *D.C. Inmates Serve Time Hundreds Of Miles From Home. Is It Time To Bring Them Back?*, WAMU (Aug. 10, 2017), https://wamu.org/story/17/08/10/d-c-inmates-serving- time-means-hundreds-miles-home-time-bring-back/.

[39] Philip Fornaci *et al.*, *Restoring Control of Parole to D.C.*, The Washington Lawyer's Committee (Mar. 16 2018),

hold people longer than intended[40] and to deny parole due to non-completion of rehabilitative programs—even if the facility in which the person is being held does not offer such programs. The Commission can also revoke supervised release and send people back to prison for minor technical violations or for reasons that go against District policies. For example, Tyrone Hall was sent back to prison for 13 months even though he was acquitted of the misdemeanor charge that triggered his parole violation.[41] Another federal agency, the Court Services and Offender Supervision Agency (CSOSA) monitors D.C. Code offenders after they have been released, and a third federal agency, the Pretrial Services Agency runs all of D.C.'s pretrial services, including drug treatment programs, mental health services, and referral to social services in the District.[42]

The fact that these federal agencies, and not the local D.C. government, make these important decisions has had a devastating impact on the lives of D.C. residents and their families. Statehood would allow the District to delegate these crucial services and enact locally supported reforms to state agencies accountable to local lawmakers and residents.

II. S. 51 is a Valid Exercise of Congressional Authority

D.C. residents deserve statehood, and Congress is empowered to grant it. The Washington, D.C. Admission Act is a valid and defensible exercise of congressional authority and is constitutionally permissible. The following pages offer a legal analysis of the bill. It begins by summarizing the bill's relevant provisions, reviews the bill's constitutional and legal bases, and makes the following findings:

First, S. 51 is constitutional under the District and Federal Enclaves Clause, which provides for a federal district that "may" serve as the "Seat of Government." S. 51 reduces the size of the District but preserves a small area consisting of federal buildings as a redrawn federal district and national seat of government. Thus, it does not violate the clause. Furthermore, the District Clause affords Congress broad plenary powers over the District, including authority to change its boundaries and size so long as it is smaller than ten square miles.

Second, there is no Admission Clause problem. That clause provides that "no new State shall be formed or erected within the Jurisdiction of any other State," and vests Congress with the authority to admit new states to the Union. And Congress may grant D.C. statehood without first obtaining consent from the state of Maryland, because Maryland does not retain a reversionary interest in the land it ceded to the federal government for creation of the District.

Third, S. 51 is not at odds with Twenty-Third Amendment, which provides the

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http://www.washlaw.org/pdf/2018_03_16_why_we_need_a_dc_board_of_parole.PDF.

[40] Letter from the Council for Court Excellence to the United States Court of Appeals for the District of Columbia Circuit, (Aug. 31, 2015), http://www.courtexcellence.org/uploads/publications/Restoring_Local_Control_of_Parole_Sign_On_Letter.pdf.

[41] Mitch Ryals, *Local D.C. Courts Acquitted Him, But He Still Went to Prison*, Wash. Cty. Paper (May 15, 2019), https://www.washingtoncitypaper.com/news/loose-lips/article/21068873/advocates-say-dcs- federally-controlled-parole-system-needs-reform.

[42] *What PSA Does*, Pretrial Services Agency for the District of Columbia, https://www.psa.gov/ (last visited Sept. 12, 2019).

District with three electoral votes. While the Twenty-Third Amendment raises important policy considerations by giving the residents of a smaller federal district outsized influence in presidential elections, it does not bear on the constitutionality of S. 51. In any event, the bill avoids these problems in two ways: (1) by repealing the statute that provides for the District's participation in federal elections—thus leaving it without appointed electors—and (2) kickstarting expedited procedures to repeal the Twenty-Third Amendment.

Fourth, arguments that the new State of Washington, Douglass Commonwealth fails to meet the minimum requirements of statehood fail because such requirements are policy concerns, not constitutional limitations.

a. Summary Analysis of S. 51

The Act would admit most of the District of Columbia's currently populated areas into the Union as a new state, preserving a small area consisting of federal buildings (e.g., White House, Capitol, U.S. Supreme Court Building) as a redrawn federal district. The bill directs the process for admission, describes with particularity the territorial bounds of the newly constituted state, regulates the transfer of real and personal property held by the former District of Columbia to the new state, establishes the jurisdiction and powers of the new state, outlines the responsibilities and legal interests of the federal government, and establishes expedited procedures for repealing the Twenty-Third Amendment, which assigns Electoral College votes to the District of Columbia.

i. Summary of Title I—Procedures for Admission

Subtitle A of Title I of the bill generally issues three directives that guide the admissions process of the State of Washington, Douglass Commonwealth. Section 101 states that upon proclamation by the President and the certification of elections for federal representation, the State of Washington, Douglass Commonwealth will be a state on equal footing with all other states. Section 102 outlines the elections process for two federal senators and one representative (until the next reapportionment) in Congress. It also directs the transfer of offices of the mayor and members and chair of the D.C. Council to the new governor, legislative assembly, and speaker of the legislative assembly, respectively, and also orders the continuation of authority and duties of judicial and executive offices to the respective executive and judicial offices of the new state. Section 103 directs the President to proclaim the election results of the first election held pursuant to this section not later than ninety days after receiving the certification of the election results, and directs that upon the President's proclamation, the state will be admitted into the Union.

Subtitle B describes the new territory of the State of Washington, Douglass Commonwealth. Section 111 directs that the state will include all of the current territory of the District of Columbia minus the area of the "Capital," which would remain as the District of Columbia for purposes of serving as the seat of the federal government. The territory that remains as the Capital would be determined pursuant to the specific geographic boundaries established by the bill. It also requires the President, in consultation with the Chair of the National Capital Planning Commission and in accordance with the boundaries established by the bill, to conduct a technical survey of the metes and bounds of the District of Columbia and the new state.

Section 112 specifies the specific street boundaries of the Capital that will remain as the District of Columbia, and expressly includes the principal federal monuments, the White House, the Capitol Building, the U.S. Supreme Court building, and the federal executive, legislative, and judicial office buildings located adjacent to the National Mall and the Capitol Building. Section 113 directs the continuation by the state of title to (or jurisdiction over) all real and personal property held by the former District of Columbia for purposes of administration and maintenance. It also directs the District of Columbia, on the day before it's admitted as a state, to convey to the federal government all interest held by it in any bridge or tunnel that connects Virginia with the current District.

Subtitle C establishes the jurisdiction and powers of the new state. Section 121 establishes the legislative jurisdiction and powers of the state and extends the force and effect of federal laws to the state. Section 122 establishes parameters for the continuation and transfer of all judicial proceedings of District of Columbia courts to the appropriate newly established state courts, and the continuation of judicial proceedings of the U.S. District Court for the District of Columbia. Section 123 prohibits the new state from imposing any taxes on federal property, except to the extent permitted by Congress. Section 124 directs that no provision of the act will confer U.S. nationality, terminate lawful U.S. nationality, or restore U.S. nationality that has been lawfully terminated.

ii. Summary of Title II—Responsibilities and Interests of the Federal Government

Title II assigns responsibilities, jurisdiction, and legal interests of the federal government in relation to the grant of statehood. Subtitle A describes the treatment of federal property. Section 201 establishes exclusive congressional jurisdiction of lands within the new state that were controlled or owned by the federal government for defense or Coast Guard purposes prior to admission of the state. It also prohibits congressional jurisdiction to operate in a manner that prevent such lands from being a part of the state, and permits concurrent jurisdiction by the state in matters it would otherwise have jurisdiction over and which are consistent with federal law. Section 202 establishes that the state and its residents disclaim all right and title to any unappropriated lands or property not granted to the state or its subjurisdictions under the act, the right or title of which is held by the federal government. It also clarifies that the act does not affect any pending claims against the United States.

Regarding elections, Subtitle C Section 221 outlines registration procedures and voting requirements to allow individuals residing in the revised District of Columbia to vote absentee in federal elections in the state where the voter was domiciled before residing in the District of Columbia. It gives the Attorney General authority to enforce this section. Section 223 repeals the law providing participation of the District of Columbia in the election of President and Vice President of the United States. Finally, Section 224 outlines expedited procedures for the House and Senate to consider a constitutional amendment to repeal the Twenty-Third Amendment.

iii.Summary of Title III—General Provisions

Title III contains general provisions, including definitions for terms in the bill, and directs the President to certify enactment not more than sixty days after the date of enactment.

b. S. 51 is a constitutional exercise of congressional power.

Critics—including the Department of Justice under several presidential administrations—have raised concerns about the constitutionality of admitting the District of Columbia as a state through an act of Congress, rather than by a constitutional amendment. However, S. 51 is a valid and defensible exercise of congressional authority. It complies with the District and Federal Enclaves Clause, the Admission Clause, and the Twenty-Third Amendment. Concerns about D.C.'s viability as a state are policy considerations that should be appropriately addressed, but they are not constitutional limitations on Congress's authority to pass S. 51.

i. The District and Federal Enclaves Clause

The District and Federal Enclaves Clause states:

> [Congress shall have power . . .] [t]o 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 Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall for, the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.[43]

Courts have consistently interpreted this provision to find that Congress has broad "plenary" powers over the District and other federal enclaves.[44] S. 51 is consistent with Congress's broad authority because the clause provides for a federal district that "may" serve as "the Seat of Government."[45] Because the Act only reduces (instead of absorbing) the District of Columbia, it does not violate the clause.

Critics, however, assert that the District and Federal Enclaves Clause permanently fixed the size of the District, thereby depriving Congress of the power to shrink the District from its current size.[46] Neither the language of the clause nor its history supports these interpretations.

1. The "Fixed Boundaries" Argument

Critics have charged that the District Clause deprives Congress of authority to dispose of lands currently part of the District of Columbia. This argument posits that once Congress determined the amount of land required for the District and accepted those ceded lands from the states, it cannot dispose of any of it. In essence, the argument goes, Congress may not reduce the District's now "fixed" boundaries.[47]

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[43] U.S. Const. art. I, § 8, cl. 17.
[44] *See O'Donoghue v. United States*, 289 U.S. 516, 539 (1933); *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932); *Shoemaker v. United States*, 147 U.S. 282, 300 (1893); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 619 (1838).
[45] U.S. Const. art. I, § 8, cl. 17.
[46] *See* 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 iii, 18, 36 (1987) [hereinafter OLP].
[47] *See id.* at iii; *see also* Letter and Memorandum from Robert K. Kennedy, Attorney General, to Rep. Basil L.

This argument has drawn on analogies to Article IV, section 3—the Admission Clause—which gives Congress the power to admit new states but makes no provision for one's expulsion or secession.[48] Just as the Supreme Court has held that the relationship between the Union and a state is "indissoluble,"[49] so too, the argument goes, Congress's acceptance of ceded lands to create the District "contemplates a single act" and "makes no provision for revocation of the act of acceptance or for retrocession."[50] Put another way, the argument is that Congress exhausted its authority to change the boundaries or size of the District when it accepted land to create it, and those boundaries are now fixed.

However, as noted above, it is sufficiently well-settled that Congress's power over the District of Columbia is sweeping—or "plenary." Its authority "relates not only to national power but to all the powers of legislation which may be exercised by a state in dealing with its affairs."[51] The District Clause, unlike the Admission Clause, grants Congress authority in the most expansive language possible, giving it power to exercise "exclusive Legislation in *all Cases whatsoever*."[52] This sweeping and exclusive authority should include the power of Congress to contract the District to less than its current size.[53] Indeed, Congress's authority to alter the boundaries and size of the District is supported by the language of the District Clause, its legislative history, and its historical application.

First, the District Clause provides no textual limitation preventing Congress from reducing the size of the District. Its only explicit limitation is that Congress shall not establish a district *larger* than ten square miles; it says nothing about a lower limit.[54] Furthermore, Congress's authority is conferred by the same operative language—"The Congress shall have Power . . . [t]o"—as all other powers listed in Article I, section 8, none of which are exhausted by exercise of that authority.[55] There is no reason to believe that the District Clause is somehow different.

Second, the clause's history supports an interpretation that recognizes Congress's power to move or change the size of the District. During the Constitutional Convention, Charles Pinckney of South Carolina urged the Committee on Detail to adopt language that would authorize Congress "to fix and ***permanently*** establish the seat of Government of the [United States]."[56] While some of Pinckney's language was eventually incorporated into the

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Whitener (1963), in *Home Rule, Hearings on H.R. 141 Before Subcomm. No. 6 of the H. Comm. on the District of Columbia*, 88th Cong., 1st Sess. (1964), *reprinted in* OLP, *supra* note 46, at 128 [hereinafter Kennedy letter]. *But see* Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 167-69 (1991) (rejecting argument).

[48] *See* Kennedy letter, *supra* note 47, at 128.

[49] *See Texas v. White*, 74 U.S. 700, 726 (1868).

[50] Kennedy letter, *supra* note 47, at 128; *see also* OLP, *supra* note 46, at 36.

[51] *Dist. of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 108 (1953); *see also Neild v. Dist. of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1940) (Congress's District Clause authority "is sweeping and inclusive in character").

[52] U.S. Const. art. I, § 8, cl. 17 (emphasis added).

[53] *See Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing on S. 132 Before the S. Comm. on Homeland Security and Governmental Affairs*, 113th Cong. 2d Sess. 82 (2014) (prepared statement of Viet D. Dinh, Professor, Georgetown University) [hereinafter Dinh] ("Just as a state may consent to the creation of a new state from within its borders, so too should Congress be permitted to carve a state from the District of Columbia, over which it enjoys sovereign control.").

[54] *See id.* at 83 ("[T]he presence of an upper, not lower, limit on the geographical size of the District in the Constitution at least suggests that the Framers were, if anything, more concerned with the latter.").

[55] *See* Raven-Hansen, *supra* note 47, at 168.

[56] James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States

District Clause, the adverb "permanently" was dropped.[57] Similarly, a proposal that Congress be granted exclusive jurisdiction over an area no less than three, and no more than six, miles square for the purpose of a permanent seat of government was abandoned in favor of the language now enshrined in the District Clause, which establishes a maximum size for the District but no minimum.[58] The failure of these proposals suggests that the Framers intended for Congress to have flexibility to move or change the size of the District.[59] Indeed, had the District Clause required a permanent and fixed capital, a constitutional amendment would be needed to move the capital even in cases of invasion, insurrection, or epidemic—all significant concerns at the founding.[60]

Third, history undermines arguments that the District Clause permanently fixed the District's form, as Congress changed its boundaries twice since the Constitution's ratification. The first change occurred in 1791, less than one year after Virginia and Maryland ceded land for the District and less than four years after the Constitutional Convention, when the First Congress—including James Madison—voted to change the District's southern boundary to include all of the area that is now known as Anacostia, Arlington, and Alexandria.[61] That measure significantly bolsters S. 51, because the Supreme Court has observed that "an Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of [the Constitution's] true meaning."[62]

Similarly, in 1846, Congress reduced the District's area by roughly one third when it returned to Virginia the entirety of the land the state ceded to the national government in 1789—*i.e.*, what is now Arlington County and Alexandria.[63] Congress only did so after specifically considering and rejecting the fixed form interpretation of the District Clause. The House Committee on the District of Columbia concluded:

> The true construction of [the District Clause] would seem to be that Congress

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of America 420 (1920) (emphasis added).

[57] As Peter Raven-Hansen noted: "Congress itself subsequently resurrected 'permanency' when it accepted the cessions of Maryland and Virginia 'for the *permanent* seat of the government,' but it did not and could not thereby with a single statute either amend the District Clause or prevent future Congresses from enacting further legislation on the subject." Raven-Hansen, *supra* note 47, at 168 (quoting Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia,
H.R. Rep. No. 325, 29th Cong., 1st Sess. 3 (1846)).

[58] *See* H.P. Caemmerer, *Washington: The National Capital*, S. Doc. 332, 71st Cong., 2d. Sess. 5 (1932) (cited in OLP, *supra* note 46, at 54).

[59] *See* The Federalist, No. 43 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left to the hands of a single State, and would create . . . *many obstacles to a removal of the government*. . . .") (emphasis added).

[60] *See* Raven-Hansen, *supra* note 47, at 168.

[61] An Act to amend "An act for establishing the temporary and permanent seat of the Government of the United States," ch. 17, 1 Stat. 214 (1791).

[62] *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)); *see also* Raven-Hansen, *supra* note 47, at 170 ("Neither the 'permanency' of the seat of government nor the District Clause gave pause to any of the thirteen original Framers, including James Madison, who voted for the amendment.").

[63] *See* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846); *see also* Dinh, *supra* note 53, at 82 ("Only half a century removed from its acceptance of lands to create the District, Congress was convinced that there was no restriction on its ability to alienate large portions of that land.").

> may retain and exercise exclusive jurisdiction over a district not exceeding ten miles square; and whether those limits may enlarge or diminish that district, or change the site, upon considerations relating to the seat of government, and connected with the wants for that purpose, the limitation upon their power in this respect is, that they shall not hold more than ten miles square for this purpose; and the end is, to attain what is desirable in relation to the seat of government.[64]

The constitutionality of the 1846 retrocession did come before the Supreme Court in *Phillips v. Payne*.[65] However, the Court found that, because 30 years had passed between the retrocession and the constitutional challenge, the plaintiff was "estopped" from bringing his claim.[66] While the Court did not reach the merits of the case, it did state in dictum that, "[i]n cases involving the action of the political departments of the government, the judiciary is bound by such action."[67] Thus, *Phillips* should not be read to raise questions about the retrocession's constitutionality.

Finally, returning to the language of the District Clause itself, it is worth noting that it is immediately followed in the same paragraph by a grant permitting Congress "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."[68] This authority has been construed consistently to allow Congress to both acquire and convey such places.[69] Further, Article IV, section 3, clause 2 of the Constitution provides that Congress shall have "[p]ower to dispose of . . . Property belonging to the United States."[70] Indeed, there are numerous instances where the United States has ceased to exercise ceded jurisdiction over federal enclaves, either by retrocession or transfer of lands to another state.[71] As George Washington University Law Professor Peter Raven-Hansen has reasoned, "Congress does not exhaust its authority by using it to acquire these places. If it can thus change the form of such federal places, then it has 'like authority' to do the same to the District itself."[72]

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[64] Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 29-325, at 3-4 (1846).

[65] 92 U.S. 130, 132 (1875).

[66] *Id.* at 134.

[67] *Id.* at 132.

[68] U.S. Const. art. I, § 8, cl. 17 (emphasis added); *see generally*, Cong. Research Serv., *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing on S. 132 Before the S. Comm. on Homeland Security and Gov. Affairs*, 113th Cong. 2d Sess. (2014) (Statement of Kenneth R. Thomas, Legislative Attorney, American Law Division), *available at* https://norton.house.gov/sites/norton.house.gov/files/CRS.pdf [hereinafter Thomas].

[69] *See* U.S. Interdepartmental Comm. for the Study of Jurisdiction over Federal Areas Within the Sates, *in* 2 Jurisdiction Over Federal Areas Within the States: A Text of the Law of Legislative Jurisdiction 273 (1957) (stating that "[b]y reason of article IV, section 3, clause 2, of the Constitution, Congress alone has the ultimate authority to determine under what terms and conditions property of the Federal Government may or shall be sold").

[70] U.S. Const. art. IV, § 3, cl. 2.

[71] *See, e.g.*, Pub. L. 83-704, 68 Stat. 961 (1954) (retroceding jurisdiction over Atomic Energy Commission land at Sandia Base, Albuquerque to New Mexico); 81 Pub. L. 14, 63 Stat. 11 (1949) (retroceding jurisdiction over Los Alamos Energy Commission area to New Mexico); Act of Feb. 22, 1869, 44 Stat. 1176 (1921) (ceding to Virginia the authority to police land originally ceded to the United States by Maryland).

[72] Raven-Hansen, *supra* note 47, at 171; *see also* Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 325, 29th Cong., 1st Sess. 3 (1846) (stating "[t]here is no more reason to believe that [Congress's power to locate the District], when once exercised and executed, is exhausted, than in any

2. The "Fixed Function" Argument

Second, opponents of D.C. statehood have argued that reducing the size of the District to an area comprising federal monuments and buildings only and largely devoid of people would undermine the *intent* of the District and Federal Enclaves Clause.[73] This argument, in effect, posits that the District Clause fixed the "function" of the whole District and no change in form or size that would impinge on that essential function is constitutional absent a constitutional amendment.[74] However, it is doubtful that a reduction in the size of the District would, in fact, impede the function of a separate federal capital.

D.C. statehood detractors highlight the fact that the reduced District—comprising the Capitol and surrounding buildings—would be entirely within the new State of Washington, Douglass Commonwealth and so would be akin to any other federal enclave, wholly dependent on the new state for essential services.[75] They argue that this would undermine the District's independence and give the new state outsized benefits and outsized influence on federal policy.

One answer—most strongly advanced by Professor Raven-Hansen—is that the reduced District would be no more an enclave within a state than the existing District.[76] The current District is a contiguous federal territory surrounded on three sides by Maryland. The proposed reduced District would be a contiguous federal territory surrounded on three sides by the new State of Washington, Douglass Commonwealth. "Geographically speaking, the only difference is size; to say that one is 'outside' Maryland and the other 'inside' [the State of Washington, Douglass Commonwealth] is an exercise in semantics."[77]

Furthermore, as Professor Raven-Hansen has argued, the current District has "long since ceased to be self-sustaining in any practical sense of the word."[78] The District is already inextricably connected to the surrounding metropolitan areas, including parts of Maryland and Virginia, which are home to many federal employees and several important federal buildings.[79] This level of interconnectedness has not undermined the independence and authority of the federal government within the District, nor should the proposed change in the size of the District.

Finally, Congress's plenary authority under the District Clause has never been territorially limited to the District. The Supreme Court has recognized that "the power in Congress, as the legislature of the United States, to legislate exclusively within [the District], carries

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other of [Congress's enumerated powers]").

[73] OLP, *supra* note 46, at 25, 55.

[74] *Id.* at 25.

[75] *Id.* at 57-58 ("In a very real sense, the federal government would be largely dependent upon the [State of Washington, Douglass Commonwealth] for its day to day existence. . . . In short . . . the Congress would lose control over the immediate services necessary to the government's smooth day to day operation. The national government would again be dependent upon the goodwill of another sovereign body.").

[76] *See* Raven-Hansen, *supra* note 47, at 174-75.

[77] *Id.* at 174.

[78] *Id.* at 175.

[79] *See id.* (citing Phillip W. Buchen, *Time for the Sun to Set On Our Imperial Capital*, Legal Times 26, 27 (Feb. 18, 1991) (remarking that the placement of the Department of Defense, the Central Intelligence Agency, the National Security Agency, and the Social Security Administration in surrounding states has not undermined the independence of the federal government)).

with it, as an incident, the right to make that power effectual."[80] This means that Congress has the power to legislate against state encroachments on the independence of the District. It would surely retain that power even if the District were reduced in size.

ii. Admission Clause

The Admission Clause provides:

> New States may be admitted by the Congress into this Union; but 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.[81]

Congress thus is the branch of government imbued with the power to admit new states through legislation. The Supreme Court has construed this power expansively.[82] Indeed, aside from the Admission Clause, the Constitution imposes only one textual limitation on congressional power to admit new states. Article IV, section 4—the Guarantee Clause— of the Constitution requires that the United States must "guarantee to every State in this Union a Republican Form of Government."[83] Section 101(b) of the bill meets this substantive prerequisite.[84]

Still, some critics of D.C. statehood argue that Congress lacks the authority to admit the new State of Washington, Douglass Commonwealth without the express consent of Maryland because the new state would be "formed or erected within the Jurisdiction of [an]other State."[85]

The Admission Clause prohibits the creation of new states from "within the Jurisdiction of any other State" without the existing state's consent.[86] Opponents of D.C. statehood argue that Maryland ceded to the federal government the lands that now make up the District of Columbia solely to create such a District.[87] They argue that, if the ceded land is not used for that purpose, Maryland holds a "reversionary interest" in the current District and, thus, an

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[80] *Cohens v. Virginia*, 19 U.S. 264, 428 (1821); *see also id.* at 429 ("The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution."). *Cohens* established the Supreme Court's jurisdiction to review state criminal proceedings. Having established jurisdiction, the Court found that there was no conflict between Congress's authorization of a lottery in the District of Columbia and a Virginia statute prohibiting lotteries in the state. However, it recognized that "[w]hether any particular law be designed to operate within the District or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases, the constitution and the law must be compared and construed." *Id.*

[81] U.S. Const. art. IV, § 3, cl. 1.

[82] *See Luther v. Borden*, 48 U.S. at 42 ("[I]t rests with Congress to decide what government is the established one in a State[.]").

[83] U.S. Const. art. IV, § 4.

[84] *See* S. 51 § 101(b) ("The State Constitution shall always be republican in form[.]").

[85] *See* R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, The Heritage Lectures 5 (1993). *But see* Raven-Hansen, *supra* note 47, at 177-83 (rejecting argument).

[86] U.S. Const. art. IV, § 3, cl. 1.

[87] *See* OLP, *supra* note 46, at iii.

act like S. 51 would be unconstitutional without Maryland's permission, as triggered by the consent requirement of the Admission Clause.[88]

But as Professor Peter Raven-Hansen explained, this argument "treats use of the ceded land for the district as a condition subsequent to the cession and assumes that the condition would be defeated by any other use of the ceded lands."[89] For the reasons discussed below, no such reversionary interest exists.

The principal problem with the Maryland "reversionary interest" argument is that an asserted condition subsequent or reverter has been neither expressly made nor implied. Maryland's legislature originally authorized its delegation to the House of Representatives "to cede to the congress of the United States any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States."[90] After legislation determining where such land was to be situated passed in Maryland and Congress, Maryland passed another statute ratifying the cession of those specific lands. That cession stated:

> That all that part of the said territory, called Columbia, which lies within the limits of this state, shall be and the same is hereby acknowledged to be **for ever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction**, as well of soil as of persons residing, or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States.[91]

The language of this statute does not appear to contemplate a reversionary interest.[92] Indeed, its express terms—"*for ever ceded and relinquished* . . . in *full and absolute right,* and exclusive jurisdiction"—appear to signal the exact opposite: an unconditional grant of land to the United States.[93] This language should control and Maryland should retain no authority over the land it ceded because "the . . . cession of the District of Columbia to the Federal government relinquished the authority of the States."[94] Thus, the consent provision in the Admission Clause should not apply.[95]

Still some may argue that, while Maryland's statute ratifying cession did not expressly state a reverter interest, it implied one by making the transfer of land "pursuant to the tenor and

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[88] *See* Pate, *supra* note 85, at 5.

[89] Raven-Hansen, *supra* note 47, at 178.

[90] 2 Laws of Maryland 1788, ch. 46 (Kilty 1800).

[91] 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), as quoted in *Adams v. Clinton*, 90 F. Supp. 2d 35, 58 (D.D.C. 2000) (per curiam) (emphasis added).

[92] *See* Thomas, *supra* note 68, at 3-4.

[93] 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800) (emphasis added); *cf. Van Ness v. Washington*, 29 U.S. 232, 285 (1830) (construing a private land grant to the District "for use of the United States forever" as vesting "an absolute unconditional fee-simple in the United States").

[94] *Downes v. Bidwell*, 182 U.S. 244, 261 (1901); *see also Reily v. Lamar*, 6 U.S. 344, 356-57 (1805); *Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1996); *Albaugh v. Tawes*, 233 F. Supp. 576, 578 (D. Md.), *aff'd*, 379 U.S. 27 (1964) (per curiam).

[95] This follows the precedent of the Enabling Act of 1802, which did not require consent from Connecticut, even though the Act formed the state of Ohio partially from territory ceded to the United States by Connecticut in 1786. *See* Dinh, *supra* note 53, at 75 (citing The Enabling Act of 1802, 2 Stat. 173 (1802)).

effect of the eight section of the first article of the constitution of the government of the United States," thereby suggesting that the transfer was only made for the limited purpose of creating the District of Columbia under the District and Federal Enclaves Clause.[96] However, even if the language of Maryland's statute ratifying cession of the District were not expressly prohibitive of a reverter interest, one cannot infer any such reverter. Reverter would presumably be determined under Maryland common law[97] and Maryland property law does not favor implied reversionary interests.[98] The Maryland Court of Appeals has gone to "great lengths in refusing to imply a condition subsequent which would result in a forfeiture," instead insisting on "words indicating an intent that the grant is to be void if the condition is not carried out."[99] Here, there are no words indicating intent that Maryland should retain any interest in the District once it ceded such land to the United States. Again, the operative language of the statute—"for ever ceded and relinquished . . . in full and absolute right, and exclusive jurisdiction"—denotes the exact opposite. The statute's statement of purpose that the land be used to create the District of Columbia is "no more than an expression of personal trust and confidence that the grantee will use the property so far as may be reasonable and practicable to effect the purpose of the grant, and not . . . a condition subsequent or restraint upon the alienation of the property."[100]

Finally, as James Madison explained in The Federalist No. 43, the consent provision of the Admission Clause was adopted as a "particular precaution against the erection of new States, by the partition of a State without its consent."[101] As the lands comprising the District of Columbia have not been a part of Maryland since before 1790, it is hard to imagine how Congress's exercise of its valid authority to alter the size of the District would undermine the original intent of the Admission Clause. Thus, D.C. statehood is both consistent with and constitutional under the Admission Clause and does not require Maryland's consent for Congress to change the boundaries and size of the District.

In any event, a textual reading of the Admission Clause precludes any reverter interest, implied or otherwise. The Admission Clause forbids the "form[ing] or erect[ing]" of a "new

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[96] *See* Pate, *supra* note 85, at 5. *But see* Thomas, *supra* note 68, at 4-5 (rejecting argument).

[97] This seems intuitively correct, but it is an understandably open question.

[98] *See generally* Raven-Hansen, *supra* note 47, at 178-82; *see Gray v. Harriet Lane Home for Invalid Children*, 64 A.2d 102, 110 (Md. 1949) ("Conditions subsequent [are] not favored in the law, because the breach of such a condition causes a forfeiture and the law is averse to forfeitures."); *Faith v. Bowles*, 37 A. 711, 712 (Md. 1897).

[99] *Gray*, 64 A.2d at 108; *see also Estate of Poster v. Comm'r*, 274 F.2d 358, 365 (4th Cir. 1960) ("[U]nyielding insistence upon language expressly voiding the gift in case of diversion from the declared use is an established Maryland rule in the construction of written instruments; in the absence of language expressly stating that such diversion shall effect a forfeiture, the gift is absolute and not conditional."); *Kilpatrick v. Baltimore*, 31 A. 805, 806 (Md. 1895) ("[A] condition will not be raised by implication, from a mere declaration in the deed, that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition.").

[100] *Columbia Bldg. Co. v. Cemetery of the Holy Cross*, 141 A. 525, 528 (Md. 1928); *see also* Raven- Hansen, *supra* note 47, at 181 n.96 ("Even when a statement of purpose was accompanied by the proviso that if the grant was used for any other purpose it 'shall at once become void,' the Maryland Court of Appeals refused to find a reverter because the proviso did not expressly state that the grant was effective for only 'so long as' it was used as provided.") (quoting *McMahon v. Consistory of St. Paul's Reformed Church*, 75 A.2d 122, 125 (Md. 1950)); *cf. Selectmen of Nahant v. United States*, 293 F. Supp. 1076, 1078 (D. Mass. 1968) ("The mere recital in the deed of the purpose for which the land conveyed was to be used is not in itself sufficient to impose any limitation or restriction on the estate granted.").

[101] The Federalist No. 43, at 274 (James Madison) (1961).

State . . . within the Jurisdiction of any other state."[102] But the District of Columbia, in its current form, is neither part of Maryland nor within its jurisdiction.[103] The enactment of S. 51 would not change that. Once passed, the Mayor of the District of Columbia would issue a proclamation for the election of two Senators and one Representative in Congress within thirty days.[104] Upon certification of that election, the President would "issue a proclamation announcing the results of such elections" within ninety days,[105] at which point the State of Washington, Douglass Commonwealth would immediately become a separate, new state by operation of law.[106] At no point in this process would the new state be "within the Jurisdiction" of Maryland.

iii. Twenty-Third Amendment

The Twenty-Third Amendment was proposed by Congress in June 1960 and ratified in March 1961. It states:

> Sec. 1. **The District constituting the seat of Government of the United States shall** appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice-President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State . . . .
>
> Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.[107]

The purpose of the amendment was to provide all those living in the District of Columbia with the right to vote in national elections for President and Vice President. There is discernable tension between it and S. 51.

The Twenty-Third Amendment practically means that residents of the District of Columbia hold three votes in the Electoral College. Under S. 51, the few residents who live in the reduced District—*including the President and their family*—would therefore have outsized influence in presidential elections. Critics have argued that this anomaly would violate the Twenty-Third Amendment's intent, thus foreclosing a statutory reduction in the size of the District.[108] Critics have also argued that the Twenty-Third Amendment, by giving the District three electoral votes, contemplates the continued existence of a large populated federal district.[109]

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[102] U.S. Const. art. IV, § 3, cl. 1.
[103] *See Downes*, 182 U.S. at 261 ("[T]he . . . cession of the District of Columbia to the Federal government relinquished the authority of the States . . . ."); *see also Hobson*, 255 F. Supp. at 297 ("[T]he effect of cession upon individuals was to terminate their state citizenship and the jurisdiction of the state governments over them."); *cf. Brennan v. S & M Enters.*, 362 F. Supp. 595, 599 (D.D.C. 1973) (noting "unique geographic status of Washington, D. C."), *aff'd*, 505 F.2d 475 (D.C. Cir. 1974).
[104] S. 51 § 102(a).
[105] *Id.* 103(a).
[106] *Id.* 103(b).
[107] U.S. Const. amend. XXIII (emphasis added).
[108] *See* Kennedy letter, *supra* note 47, at 132.
[109] *See id.* at 134 ("[A] persuasive argument can be made that the adoption of the 23d Amendment has given

However, these arguments are not supported by the text of the Amendment or any other part of the Constitution. The Twenty-Third Amendment, like the District Clause, makes no mention of a minimum geographic size or population in the federal district and it applies regardless of changes in the District's population. "[I]n general, the Constitution is not violated anytime the factual assumptions underlying a provision change."[110] Thus, changing the factual premise underlying the Twenty-Third Amendment—that there will be a large populated district—does not violate its terms granting electoral rights to residents of that district.

Indeed, there is no inherent *conflict* between S. 51 and the text of the Twenty-Third Amendment. Although peculiar, this result does not pose a constitutional obstacle to S. 51. The concerns raised by the interaction of S. 51 with the Twenty-Third Amendment are policy considerations, not constitutional limits.

The most significant concern is with the allocation of three electoral votes to residents of the reduced District, including the President and their family. This may be bad policy, but not unconstitutional. Regardless of what the Founders might have thought, members of Congress would do well to focus on what the Founders said within the four corners of the constitutional text. As noted *supra*, in Article IV, they provided that "New States may be admitted by the Congress into this Union." And as constitutional law scholars have explained, "[t]he Supreme Court has broadly construed Congress's assigned power to admit new states and has never interfered with Congress's admission of a state, even when potentially legitimate constitutional objections existed."[111] Moreover, S. 51 seeks to avoid the problem in two ways: (1) by repealing 3 U.S.C. § 21,[112] which presently provides for the District's participation in federal elections—thus leaving it without appointed electors—and (2) by kickstarting "Expedited Procedures for Consideration of Constitutional Amendment Repealing 23rd Amendment."[113] While these measures do not likely escape the Amendment's mandatory language (i.e., "The District . . . ***shall*** appoint in such manner as the Congress may direct" electors), neither does the Amendment foreclose the Act from a constitutional standpoint.[114]

Other policy solutions include proposals that there be no voting residents in the reduced District. S. 51 already provides for Capital residents to be allowed to vote in federal

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permanent 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."). *But see id.* ("This is not to imply that the existing boundaries of the District of Columbia are immutable or that Congress could not move the seat of government to a different location. . . .").

[110] *See* Dinh, *supra* note 53, at 84 (citing *Adams*, 90 F. Supp. 2d. at 50).

[111] Caroline Frederickson et al, *Letter to Congressional Leaders on Constitutionality of Statehood* 4 (May 22, 2021), available at https://www.dropbox.com/s/ghtdagoapnlzowf/Letter%20to%20Congressional%20Leaders%20on%20Constituionality%20of%20Statehood%20for%20Washington%20D.C.%20May%2022%202021.pdf?dl=0.]

[112] *See* S. 51 § 223.

[113] *Id.* § 224.

[114] *See* Kennedy letter, *supra* note 47, at 132 ("[The Twenty-Third] amendment does not leave it up to Congress to determine whether or not the District of Columbia shall cast three electoral votes in a particular presidential election. It contains a clear direction that the District 'shall appoint' the appropriate number of electors, and gives Congress discretion only as to the mechanics by which the appointment is made."). *But see* Phillip G. Shrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 348-49 (1990) (arguing Twenty-Third Amendment is not self-executing, so Congress can simply decline to provide electors for the District); *see also* Raven-Hansen, *supra* note 47, at 187-88.

elections in their last state of residence.[115] The President and their family could vote in their home state, as they do customarily already.[116] The few other residents of the reduced District could vote in Washington, Douglass Commonwealth. Professor Raven-Hansen has argued that Congress has the authority to enact legislation entitling residents of the reduced District to vote in the new state for elections to federal office, much as citizens living overseas may vote in federal elections in their previous state of residence even if they do not have a current home there or intend to return.[117] These solutions would render the Twenty-Third Amendment inoperative. "The result is untidy—an obsolete yet unrepealed constitutional provision—but it is neither unprecedented nor unconstitutional."[118]

As a separate practical matter, it is worth noting that repealing the Twenty-Third Amendment will itself require a constitutional amendment. Thus, despite the appeal of S. 51 as a legislative resolution to D.C. statehood, the Act would not foreclose the need to engage in the amendment process. However, the repeal process does not, as some critics assert, have to begin before a statehood bill is legislatively considered. Given Congress's interest in ensuring fairly appointed electors, Congress should have a strong incentive to begin the expedited procedures for repealing the Twenty-Third Amendment.

iv. Minimum Requirements of Statehood

One final argument has been made against D.C. statehood, namely that the new state "effectively lacks the minimum requirements to become a state."[119] This argument takes the premise that "[t]here are . . . certain effective minimum requirements defining a 'state eligible for admission to the Union, which are not found in the Constitution."[120] For example, statehood detractors argue that a state must have a large enough population and enough resources to support a state government and uphold its share of the cost of the federal government.[121] Second, critics argue that any new state must have sufficiently diverse interests to function as "a proper Madisonian society."[122] Only then, in this view, could the state serve as an appropriate counterweight to federal authority.[123]

In essence, opponents of D.C. statehood argue that it is "too small, too poor, and too identified with the federal government" to satisfy these requirements.[124] However, as explained, there are no explicit requirements for statehood other than states should not be formed from within or by joining lands of states without those states' consent and must

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[115] *See* S. 51 § 221.
[116] Brian Pamer, *Why Are the Obamas Still Eligible To Vote in Illinois?*, Slate (Nov. 6, 2012), https://slate.com/news-and-politics/2012/11/where-does-obama-vote-shouldnt-the-president-vote-in-washington-rather-than-illinois.html.
[117] *See* Raven-Hansen, *supra* note 47, at 185-6.
[118] *Id.* at 186 (referencing "U.S. Const. art. II, § I (procedures for selection of President by electors), impliedly superseded by amendment XII (providing new procedures for selection of President by electors), itself impliedly superseded by amendment XX, § 3; article IV, § 2, clause 3 (Fugitive Slave Clause), impliedly repealed by amendment XIII (outlawing slavery and involuntary servitude); cf. U.S. Const. art. I, § 2 (describing initial entitlements of original states to representatives); U.S. Const. art. 1. § 9 ($10 limitation of tax or duty on imported slaves); U.S. Const. art. V (limitation on certain amendments prior to 1808).")
[119] OLP, *supra* note 46, at 59. *But see* Raven-Hansen, *supra* note 47, at 191-92 (rejecting argument).
[120] OLP, *supra* note 46, at 59.
[121] *See id.* at vi, 59-62.
[122] *See id.* at v, 62-63; *see also* The Federalist No. 51 (James Madison) (Clinton Rossiter, ed., 1961).
[123] *See* OLP, *supra* note 46, at 63-67; *see also* The Federalist No. 51, at 323 (James Madison).
[124] Raven-Hansen, *supra* note 47, at 166.

have "a republican form of government." This has led Professor Raven-Hansen to characterize the argument as "strictly a political one, dressed up in constitutional garb."[125]

To the extent there is any authority requiring sufficient population and financial viability for statehood, it can only be found in a House Committee report on Alaskan statehood prepared in 1957.[126] That report describes these requirements as "historical standards" and "traditionally accepted requirements for statehood."[127] However, they are not implicit constitutional requirements. They have not even been strictly applied as historical standards.[128]

Second, Congress has not articulated a "multiplicity of interests"[129] standard. Indeed, according to Professor Raven-Hansen, "[t]he ideal Madisonian society was actually a construct which Madison directed toward American society as a whole, not each component state."[130] Had that concept been applied to the original thirteen colonies—or Utah for that matter, with an overwhelmingly Mormon population now and at the time it was admitted to the Union—they might have failed to gain statehood.

Furthermore, it is not even clear that a new State of Washington, Douglass Commonwealth would lack this "multiplicity of interests." While the federal government is undeniably the primary economic driver in the District, it is simply "untrue and patronizing" to assert that there are no competing interests in the District or that its identity is wholly wrapped up with the national government.[131] Regardless, these considerations are nothing more than policy considerations—for Congress to decide—not constitutional limits on D.C. statehood.[132]

III. Conclusion

Continued congressional control of the District of Columbia and its residents undermines the fundamental principle of self-government and is antithetical to a free society.

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[125] *Id.* at 189.

[126] *See* H.R. Rep. No. 624, 85th Cong., 1st Sess. 11 (1957).

[127] *Id.*

[128] *See* Northwest Ordinance of 1787, *reprinted in* Act of Aug. 7, 1787, 1 Stat. 50, 53 n.(a) (1789) (setting the first population standard for statehood at 60,000 people; however, that standard was subsequently disregarded on five occasions); General Accounting Office, Experiences of Past Territories Can Assist Puerto Rico Status Deliberations 12 (1980) (listing states with "dubious economic potential" at the time of their admission); *see generally* Raven-Hansen, *supra* note 47, at 191.

[129] The Federalist No. 51 (James Madison) (1961).

[130] Raven-Hansen, *supra* note 47, at 191.

[131] *See id.* at 192.

[132] Indeed, though multiple Departments of Justice have raised these concerns, even they have recognized that these are political, not constitutional concerns. *See* OLP, *supra* note 46, at v ("The District of Columbia lacks this essential *political* requisite for statehood.") (emphasis added); *see also District of Columbia Representation in Congress: Hearing on S.J. 65 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong., 2d Sess. 17-18 (1978) (testimony of Assistant Attorney General John M. Harmon), *reprinted in* OLP, *supra* note 46, at 92, 94 ("At this point, a *practical* problem is presented.") (emphasis added); *Representation for the District of Columbia: Hearings on Proposed Constitutional Amendment to Provide for Full Congressional Representation for the District of Columbia Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong., 1st Sess. 126 (1977) (testimony of Assistant Attorney General Patricia M. Wald), *reprinted in* OLP, *supra* note 46, at 98, 100 ("This presents *practical and even theoretical* problems.") (emphasis added).

Congressional interference in D.C.'s autonomy has had disastrous consequences for the health and welfare of District residents. Congress has an opportunity to rectify a great injustice that has left hundreds of thousands of Americans in the District of Columbia unable to fully participate in our representative democracy. Disenfranchised District residents deserve full representation in Congress, and the true autonomy and self-governance that comes with statehood.

If you have any questions, please contact Kristen Lee, Policy Analyst, at klee@aclu.org.



Written Statement of the Record of
American Civil Liberties Union of West Virginia
Regarding
Hearing on the Washington, D.C. Admission Act (S.51)
Before the
U.S. Senate Homeland Security and Governmental Affairs Committee
June 22, 2021

The American Civil Liberties Union of West Virginia (ACLU-WV) writes to express its support for The Washington, D.C. Admission Act (S.51), and encourages you to move this legislation swiftly through committee. We support this important legislation that is aligned with the Mountain State's values and heritage.

We want to thank you for holding this historic hearing on June 22, 2021. We were glad to see that the House version (H.R. 51) passed this year, and are also pleased that there are currently 46 Senate co-sponsors. The President and Vice President also both support granting the residents of D.C. the same rights afforded to Americans living in all 50 states.

Democracy, civic participation, and equality of opportunity are issues that motivate the work of all of us. Statehood for D.C. is an issue that sits at the intersection of those issues. It is unconscionable that 700,000 Americans -- who are mostly Black and Brown -- who pay federal taxes have no voting representation in Congress.

D.C. has more residents than Vermont or Wyoming and pays more in taxes than 22 states. D.C. residents have served and died in every war America has fought and 32,000 veterans currently call D.C. home. Unlike other members of the armed forces, D.C. residents serve without having full voting rights or representation in Congress. That is also true for Gold Star Families whose loved ones made the ultimate sacrifice yet are also unjustly excluded.

Many of the D.C. police officers who came to defend the Capitol and congress during the January 6th riot have no representation in that congress they risked their lives to protect. They deserve the same rights as all other Americans. D.C.'s lack of statehood also makes its local budgets subject to federal override, and for this reason, D.C. has been unable to implement a number of laws that were duly passed. As we saw last summer and again tragically in January, D.C.'s lack of statehood means it does not control its national guard.

Because D.C. is not a state, it received just $500 million in the 2020 CARES Act funding, when all states received at least $1.25 billion. So D.C., with more people and more COVID-19 cases and deaths than recognized states, received three times less per capita in assistance.

The history of D.C.'s disenfranchisement is, sadly, rooted in racial discrimination. The ACLU recently explained in a brief history of this issue: "As Sen. John Tyler Morgan of Alabama explained in 1890, after 'the negroes came into this district,' it became necessary to 'deny the right of suffrage entirely to every human being.'" The majority of District residents are people of color, and the District is 46% Black. There are currently only three Black members of the U.S. Senate, and in some recent years there have been none, even though the U.S. is 13% Black. Empowering a jurisdiction that has a plurality Black population could help the U.S. Senate look slightly more like the United States.

The process for admitting D.C. as a state would be the same as has been used to admit the other 37 states that have joined the union since the country's founding. An overwhelming majority--86%--of D.C. residents voted in favor of statehood in their 2016 referendum. Additionally, the last three national polls conducted on D.C. statehood have all found more Americans favor than oppose it.

A complicating factor is that the constitution specifies land must be set aside for the nation's capital, but it does not set a minimum size. The Washington, D.C. Admission Act complies with this requirement by setting boundaries that include the Capitol, White House, and other key federal land as the nation's capital, while the bulk of D.C., which is residential and commercial, would become the 51st state. Numerous constitutional lawyers have reviewed this legislation, including George W. Bush's Assistant Attorney General, Viet Dinh, and confirmed its constitutionality.

There is also a tradition of support for D.C. statehood from West Virginia, with Sen. Jay Rockefeller being a longtime co-sponsor of the Senate bill, and Rep. Harley Staggers, Jr. co-sponsoring the House companion.

We appreciate your leadership on voting rights issues and expanding the promise of America's democracy to all. We hope that you will once again lead on these issues by moving the Washington, D.C. Admission Act through your committee this year to grant equality to the 700,000 Americans living there.

Respectfully,

Joseph Cohen

Joseph Cohen
ACLU-WV Executive Director

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Eric Bunn Sr.
National Secretary-Treasurer

Dr. Everett B. Kelley
National President

Jeremy A. Lannan
NVP for Women & Fair Practices

June 22, 2021

The Honorable Gary Peters
Chairman
Committee on Homeland Security
and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Rob Portman
Ranking Member
Committee on Homeland Security
and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Peters and Ranking Member

On behalf of the American Federation of Government Employees, AFL-CIO, which represents 700,000 federal and District of Columbia (D.C.) government workers, we write to express our support for S. 51, the "Washington, D.C. Admission Act," introduced by Senator Tom Carper (D-DE).

AFGE represents tens of thousands of D.C. and federal government employees who live in the District of Columbia. They, and indeed every resident of Washington, D.C., deserve to have full and equal representation in Congress. One in five residents of the District of Columbia – more than 140,000 in total – work for the federal government and yet do not have equal representation in the government for which they work. This must be corrected. We strongly endorse S. 51 to give the more than 700,000 residents of D.C. the full and equal rights and representation that is afforded to the citizens of every other state in the nation.

States are the fundamental basis for our system of government and to deny a population the ability to form a state denies them the ability to fully participate in self-governance. Any solution short of statehood would simply continue the two-tiered system of citizenship the residents of the District of Columbia have endured for 200 years.

The need for D.C. statehood became glaringly clear last year when Congress passed the CARES Act and treated D.C. as a territory, instead of as a state, in the Coronavirus Relief Fund. D.C. is almost always treated as a state for purposes of federal funding because it pays full federal taxes. In this instance it was not, and as a result, for nearly a year until Congress corrected this wrong in the American Rescue Plan, D.C. was deprived of $755 million in much-needed revenue.

We thank you for holding this important hearing on S. 51, the "Washington, D.C. Admission Act," to give full and equal representation to the tens of thousands of federal and D.C. government employees who call D.C. home.

If you have any questions about AFGE's position on this bill, please contact Sandra Salstrom, sandra.salstrom@afge.org; 202-765-8439.

Sincerely,

Everett B. Kelley
National President

Testimony from Arizona Jews for Justice
On The Washington, D.C. Admission Act (S. 51)
Before the U.S. Senate Homeland Security and Governmental Affairs Committee
June 22, 2021

We write to express our support for The Washington, D.C. Admission Act (S. 51), and encourage you to move this legislation swifty through committee. This bill is essential to our democracy because it would grant equal voting rights to the 700,000 disenfranchised Americans living in Washington, D.C. For this reason, we have been vocal in support of D.C. statehood. When Arizona lacked statehood until 1912, we needed Americans from other parts of the country to speak up for us so we could gain equal rights. Now that we have that privilege, we use it to speak up for those in Washington, D.C., who are mostly people of color and face taxation without representation. Below please find a column co-authored by our executive director, Rabbi Dr. Shmuly Yanklowitz and another by our former intern, Ellie Sims in support of D.C. statehood.

https://www.azmirror.com/2021/03/29/granting-d-c-statehood-would-honor-freedom-during-this-holy-season/

Granting D.C. statehood would honor freedom during this holy season

By**Rabbi Dr. Shmuly Yanklowitz**| **Reverend Dr. William Lyons** -March 29, 2021

Spring is the season of freedom, when we observe the holidays of Passover and Easter. As religious leaders in Arizona, we cherish the freedom to worship, which has led many people around the world to flee tyranny and move to welcoming lands, including the United States. This freedom to worship has led to a diversity of religions and cultures that enriches our community and democracy. Greater Phoenix has congregations that are Catholic, Protestant, Jewish, and Muslim, among others. All these religious traditions teach that our freedoms come with responsibilities to treat each other as we would be treated, lift up the fallen and speak for the voiceless.

Jews are currently celebrating the holiday of Passover, which began Saturday night. It is a celebration of liberation from 400 years of enslavement under Pharaoh in Egypt. The story focuses on how the ancient Israelites went from being *avdei Pharaoh* — Pharaoh's workers — to *avdei Hashem*, or God's workers. This language shows how liberation comes with an obligation to serve and to form a more perfect society.

Christians have been preparing for Easter in a season called Lent, which offers an invitation to step out of broken relationships with God, neighbors, creation, and self, and into new lives of wholeness. The Resurrection Story calls Christians to build a world in which "Good is stronger than evil; love is stronger than hate; light is stronger than darkness; life is stronger than death," as Archbishop Desmond Tutu proclaimed.

In both of these holidays, true freedom is not only the removal of oppression, it is about assuming responsibility — even seeking it out. Most of America's great leaders who worked to end slavery in the 1800s drew on their religious faith. When at last the United States abolished slavery, after centuries of multiracial resistance, organizing, and finally the Civil War, we quickly passed the 15th amendment to protect formerly enslaved men's voting rights. Emancipation went hand-in-hand with the right to have a vote in our democracy.

Yet even as formerly enslaved Black men registered to vote, and thousands were elected to local, state, and federal office, white leaders across the country — not just in the South — came up with strategies to deny and repress those rights.

Following the Civil War, many emancipated people moved north, including to the District of Columbia. With slavery behind them, they had reached a new land. As the Black population of the District flourished with formerly enslaved people, seeking out new opportunities and community, Black men began to exercise their new political power on the local level. Congress responded by replacing elected local leaders with Congressionally-appointed commissioners, and prevented everyone in D.C. from voting as a way to stifle Black political activity. District residents won the right to vote in presidential elections only in 1961, and have never gained the right to vote for Congress or full autonomy over local laws.

Something visceral tells us this is simply not right. There is no way for us to reconcile our biblical responsibilities to one another with disenfranchising our brethren in the nation's capital . Passover and Easter both carry powerful messages that my liberation is bound to yours, and yours to mine.

Today, some members of our state legislature seem focused on advancing bills to curtail voting rights. These measures transgress the spirit of the season of freedom. We hope that pro-democracy views prevail in our state and in Congress to welcome all voices in our community. Our U.S. senators, Kyrsten Sinema and Mark Kelly, should draw on the biblical teachings of mutual respect and protecting the freedoms of all members of the community, whether they reside in Arizona or they are the 712,000 disenfranchised residents who call Washington, D.C., home.

The people of Washington, D.C., have been asking for equality since the 1800s. In their 2016 referendum, 86% supported statehood. But only Congress can grant statehood, and D.C. families have no one to speak for them in Congress.

So we heed the words of Proverbs 31 to "speak up for those who cannot speak for themselves" and lift up their voices.

The Bible is replete with tales of communities' struggles to improve themselves. As Americans, we can be proud of our country's progress towards democracy. At our founding, only white men with property could vote. Women could not vote until 1920. The rights of many Black Americans to vote were not secure until 1965. When we look at American history — and current struggles — we see that freedom is hollow without the power, and responsibility, of the vote.

Today, we continue that work so all of us can share the dignity of participating in democracy, no matter where in America we live or our race or ethnicity. We pray that Senators Sinema and Kelly join us in embracing this most sacred right during this most holy season.

Rabbi Dr. Shmuly Yanklowitz is the Founder of Arizona Jews for Justice and the Executive Director of Valley Beit Midrash.

Reverend Dr. William Lyons is the Conference Minister of the Southwest Conference of the United Church of Christ.

Guest Opinion: Ellie Sims "It's Time for Our Senators to Realize the Legacy of John Lewis"

By Ellie Sims|May 19th, 2021|Civil & Human Rights, National Elections, National Politics

This past November's election was, um, consuming for a lot of us, myself included. I recognized how high the stakes were for our democracy. But I'm 17, so I couldn't cast a ballot. In next year's election I'll be able to vote for the first time and you can be sure I will. That's thanks to the 26th amendment which lowered the voting age from 21 to 18. It

was ratified by Arizona's legislature in May of 1971, in a step forward for voting rights and democracy.

Exactly 50 years later, Arizona's legislature seems to feel a bit differently about these issues. Rather than building faith in our democracy, the legislature has obsessed over auditing the last election and several Arizona representatives in Congress voted to overturn it. Now Gov. Ducey has signed SB 1485 to make voting by mail harder in ways that may disproportionately impact people of color. And other state legislatures have created similar or more aggressive voting obstacles.

These anti-democracy bills contrast with the narrative taught in social studies classes in middle school and high school. I learned there that America was founded on the promise of democracy and equal representation, but it wasn't granted to everyone. So our country's history was one of extending that promise to more and more people: The 15th amendment let formerly enslaved men vote; the 19th amendment let women vote; the Voting Rights Act in 1965 guaranteed the right to vote for Black people who were often disenfranchised for a century after the 15th amendment was ratified. And Arizona residents only gained the right to vote and have representation when we were granted statehood in 1912 with a simple majority vote in congress. The pace of democratic gains wasn't smooth or easy in our history, but it always moved in the direction of more enfranchisement and representation.

SB 1485 and other anti-voting bills being passed after the record turnout in this past election tell a different story. These bills show some politicians value their grip on power more than America's principles of democracy. When segregationists were still using tactics to disenfranchise Black voters into the 1960s, the federal government stepped in and put the constitutional guarantees of equal protection and representation above deferring to state-level politicians who were abusing their power. Great Americans like John Lewis and our own Lincoln Ragsdale devoted their lives to making that happen.

Fittingly, the Voting Rights Act has been updated and renamed the John Lewis Voting Rights Act. Congress should pass it, along with two other crucial pro-democracy reforms that Congressman Lewis supported: the For the People Act, and the Washington, D.C. Admission Act. Passing the updated Voting Rights Act would require states to receive Justice Department approval for changes to their voting procedures if they or counties within their state have a significant recent record of discrimination.

A key provision of the For the People Act (S.1) is that it would ban partisan gerrymandering in drawing districts, and instead would require election districts to be drawn in a fair, nonpartisan manner by an independent commission, as we do in Arizona because our state constitution requires it. Our policy lets voters choose their

elected officials, but in too many states, it's the other way around, so elections are not competitive, and the party that wins fewer votes can still ensure it holds the majority of seats. S.1 would bring other states that have employed aggressive, anti-democracy redistricting tactics in line with Arizona.

The Washington, D.C. Admission Act would grant equal voting rights and representation to the people living in D.C. There are 700,000 Americans there, more than in Vermont or Wyoming. Allowing D.C. households to have equal rights is a matter of simple justice. Just as people in Arizona lacked voting rights until statehood, those in D.C. still do today, over 100 years later. But they pay federal taxes, so they're experiencing taxation without representation. D.C. would have the highest share of Black residents of any state, and white supremacists in congress in the 1800s and 1900s were explicit that this was the reason they did not want to allow people in D.C. to vote. The bill would leave a federal district covering federal buildings in D.C.'s core, as required by the constitution, and it would grant the people in D.C. equal protection under the law, as promised by the constitution.

Forty-six senators have backed D.C. statehood, but ours, Kyrsten Sinema and Mark Kelly, haven't yet. They should. D.C. statehood, the For the People Act, and the John Lewis Voting Rights Act all should become law. Mitch McConnell will surely use the filibuster to try and block them, but Senators Sinema and Kelly can recognize that for the simple obstruction it is and prioritize our democracy and Arizonans' voting rights by supporting a simple majority vote on these bills. Fifty years ago this month Arizona leaders acted to lower the voting from 21 to 18. It's time for them to see that democracies are best when they are inclusive and support voting rights legislation once again.

Ellie Sims is an organizer with Arizona Jews for Justice, focusing on youth engagement in civic processes, as well as environmental justice, racial justice, and gender studies. She will be studying at Georgetown University in the fall with a major in Government. Sims finds passion within justice and representation for all, and uses her connection and love for the Jewish people and their history to fuel her justice work.

★ DEFEND ★
AMERICAN
DEMOCRACY

THE CONSERVATIVE CASE FOR STATEHOOD

Over the past several decades, the idea of statehood and voting representation for the residents of Washington, D.C., has enjoyed support from people on both sides of the aisle. It is only in recent years that the movement for full enfranchisement for the residents of the nation's capital has become partisan. Below is a selection of conservative voices – including former Vice President Mike Pence and Republican party platforms from the second half of the 20th century – that have expressed support for statehood and/or voting representation for D.C. residents, underscoring the widespread belief in the moral imperative for the statehood movement.

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Former Vice President Mike Pence

In 2007, then-Rep. Mike Pence (R-IN) gave a floor speech in support of the D.C. House Voting Rights Act, saying the following:

> *Madam Speaker, I come to the House today to express my support for the District of Columbia House Voting Rights Act of 2007.*
>
> *I believe after much consideration that this legislation is a constitutional remedy to a historic wrong. Now, while many have focused on the political consequences of such a move, I believe the only question for a Member of Congress on such matters is this: What does justice demand and what does the Constitution permit this Congress to do about it?*
>
> *The fact that more than half a million Americans live in the District of Columbia and are denied a single voting representative in Congress is clearly a historic wrong, and justice demands that it be addressed...*

Former Arizona Senator and Republican Nominee for President Barry Goldwater

Goldwater, a five-term senator from Arizona and the father of the modern conservative political movement, supported D.C. statehood during his time in office. In 1978, the D.C. Voting Rights Amendment was introduced as a proposed constitutional amendment that would have given the District full Congressional representation and Electoral College votes – representation just short of statehood. The amendment passed the House by a 289–127 vote and the Senate by a 67–32 vote, with Senator Goldwater voting in the affirmative.

In April 2021, Former Arizona Senator Dennis DeConcini – who served alongside Goldwater for ten years – wrote an opinion piece calling for D.C. statehood. In it, he recounts his and Goldwater's shared support for D.C. statehood:

> *We believed [D.C.'s fiscal weak position] simply did not outweigh the residents' most basic rights as Americans.*
>
> *D.C., then as now, had no voting representation in the House or Senate. Most D.C. residents, then as now, were people of color. Congress also, then as now, could override their local laws and budgets. That struck us both as wrong, and Goldwater thought that, in 1978, fixing it was overdue.*

DeConcini recounts Goldwater's speech during the 1978 Senate debate explaining his vote in favor of the amendment:

> *"The right to vote in federal elections is a right that flows directly from the Constitution to each citizen of the United States. This right is one belonging to national citizenship and it arises out of the very nature and existence of the nation itself... It is the right thing to do.*

Former South Carolina Senator Strom Thurmond

Along with Senator Goldwater, Senator Thurmond – famous for being the third-longest serving senator in Senate history and infamous for his 24-hour-long filibuster of the 1957 Civil Rights Act – also voted in favor of the 1978 D.C. Voting Rights Amendment. Beyond just voting for the bill, Thurmond is credited with securing multiple Republican co-sponsors for the bill. During the Senate debate on the 1978 bill, Thurmond declared:

> *"It is just not fair, that in the year 1978, more than 700,000 American citizens do not have the right to elect representatives to Congress. No one in 1790, when the District was created, could have imagined the rapid growth and changes that were to take place in the District of Columbia ... The residents of the District of Columbia deserve the right to (full) representation in Congress if for no other reason than simple fairness.*

Former Missouri Republican Congressman Tom Coleman

Coleman wrote an opinion piece in USA Today in May 2021 highlighting the fact that representation for D.C. used to be a bipartisan issue – one that he, along with dozens of other Republican congresspeople, supported.

Discussing the 1978 effort to pass a constitutional amendment for D.C. voting representation, Coleman wrote:

> *"For many of us Republicans running for reelection, the vote was not politically convenient: We knew there could be political blowback from our constituents since it was certain our vote would result in the addition of three Democratic members of Congress – one in the House and two in the Senate. But the question was a moral one, pitting political expediency against a straightforward question of equality: Could we, the public servants charged with representing Americans in Congress, deny that same representation to our fellow citizens?*

Former George H.W. Bush Administration Solicitor General Ken Starr

In 2007, as the D.C. House Voting Rights Act of 2007 was being introduced into the House, Starr weighed into the debate making the case in favor of House representation. According to the Washington Post:

> *"Starr notes that the Constitution is silent on the matter of whether D.C. residents may vote... [and] that Congress routinely regulates the flow of commerce between the District and the states, and that power is also expressly reserved in the Constitution for Congress to act on commerce 'among the several states.' That means Congress can also decide that the best way to govern the District is for Washingtonians to have the same voting rights as other taxpaying Americans.*

The Washington Post continued to say that Starr wrote:

> *"...Article I [of the Constitution] creates the republican form of the national government, and Article IV guarantees that form to its people, regardless of whether they reside in a District or a State.*

Republican Party Platforms

Between 1956–1964 and 1968–1976, the Republican party platforms advocated for increased representation for D.C. residents, ranging from self-government to voting representation in Congress. An excerpt of the 1972 platform, calling for voting representation and self-government, is below:

> *We remain committed to a comprehensive program of human rights, social betterment and political participation for the people of the District of Columbia. We will build on our strong record in this area—a record which includes cutting the District of Columbia crime rate in half, aggressive support for a balanced transportation system in metropolitan Washington, initiation of a Bicentennial program and celebration in the national capital region, and support for the first Congressional Delegate in nearly a century. We support voting representation for the District of Columbia in the United States Congress and will work for a system of self-government for the city which takes fair account of the needs and interests of both the Federal Government and the citizens of the District of Columbia.*

The 1976 platform similarly supported self-determination, full representation in the House and Senate, and home rule over local matters:

> *We again…support giving the District of Columbia voting representation in the United States Senate and House of Representatives and full home rule over those matters that are purely local.*

Former George W. Bush Administration Assistant Attorney General Viet Dinh

In 2014, Dinh wrote a statement for the Senate Homeland Security and Governmental Affairs Committee that supported the constitutionality of the D.C. statehood bill. He said that:

> *Courts would likely decline to adjudicate any constitutional challenge to the Act and, in all events, would likely hold that the Act is constitutional.*

In his 2014 statement, Dinh explains that Congress is permitted to admit states through simple legislation, and highlights that this in fact is the process by which all states – except for the original thirteen colonies – have been admitted.

Dinh did not see the 23rd Amendment as an obstacle to admitting Washington, D.C., into the union through simple legislation, saying that "*the Constitution is not violated anytime the factual assumptions underlying a provision change.*"

Dinh, according to the Washington Post, called the lack of voting rights in Washington, D.C., a "*historical accident.*"

Former Virginia Republican Congressman Tom Davis

In 2006, Davis wrote a piece originally published on Human Events, a conservative political news site, rebuking his fellow House members for not supporting the effort to grant D.C. residents direct representation.

In 2021, he said that he believed the reason Republicans were against statehood was partisan:

> *It's hard to argue with a straight face that people that fought and died in a half a dozen wars and pay federal income tax shouldn't have federal representation…If they were voting Republican, they'd be there in a heartbeat.*

DISTRICT OF COLUMBIA BAR

District of Columbia Affairs Community

Statement of the District of Columbia Affairs Community of the District of Columbia Bar on S. 51 -- the Washington, D.C. Admission Act -- Presented to the United States Senate Committee on Homeland Security & Governmental Affairs

The District of Columbia Affairs Community of the District of Columbia Bar (the "Community") commends the Committee on Homeland Security & Governmental Affairs for holding a hearing on an important matter of public concern, S. 51 – The Washington, D.C. Admission Act (the "Bill") – on June 22, 2021. The Community respectfully submits the following statement in support of the Bill which, if enacted, would grant Statehood to the residents of the District of Columbia.[1]

The Community consists of D.C. Bar members who are concerned about issues relating to the laws and government of the District of Columbia. The legislation falls within the Community's special expertise and jurisdiction over Home Rule issues and relates closely and directly to the administration of justice. The Community has consistently advocated for full and equal citizenship rights for District of Columbia residents through budget and legislative autonomy, Congressional voting rights, and full Home Rule.

[1] The views expressed herein are presented on behalf of the D.C. Affairs Community, a voluntary association of individuals, most but not necessarily all of whom are members of the D.C. Bar. The D.C. Bar itself made no monetary contribution to fund the preparation or submission of this statement. Moreover, the views expressed herein have been neither approved nor endorsed by the D.C. Bar, its Board of Governors, or its general membership.

Nothing compromises the administration of justice in the District of Columbia more than denying its residents the equal rights of self-determination enjoyed by the residents of the 50 current states. District residents are denied Congressional representation in the selection of both local and federal judges. The District's own elected Attorney General is denied the authority to enforce local criminal laws. District residents cannot petition their government because they have no voting representative. District residents pay federal taxes like all other Americans but do not have a vote in the federal legislature that determines whether to tax and how to spend those taxes. District residents have fought in every war since the Revolution and yet do not have an elected representative who can vote on whether to go to war. The District's National Guard forces are not its own to call upon in the event of civil unrest, and the Metropolitan Police Department may be commandeered by the President.

Residents of the District have no vote in Congress on federal measures that would overturn laws duly enacted by the Council of the District of Columbia; and the District's local budget containing its own taxpayer-raised revenue (over $8.6 billion in recent years) cannot become law until Congress affirms it. District residents have no vote on riders that Congress proposes to add to the District budget, even if those riders would undo decisions made by local legislators accountable to District residents. There is no legitimate reason why federal budget impasses should force a shut-down of the District of Columbia, alone among the 50 current states, and prevent it from spending its own locally raised tax dollars. These undemocratic constraints on District self-determination

(and many others) negatively impact upon the administration of justice in the Nation's Capital.

If adopted into law, the Bill would remedy these injustices by admitting into the Union as the 51st state, on an equal footing with the other 50 current states. Admission would occur upon approval by the voters of the District of Columbia of the State Constitution and joining the Union. Among other things, the Bill provides that the State of Washington, Douglass Commonwealth would hold elections for two Senators and one Representative in Congress; and the Mayor and members of the Council and the Chair of the Council at the time of admission would be deemed the new state's Governor, members of the House of Delegates, and the President of the House of Delegates, respectively. A portion of the existing District of Columbia, to include the White House, the Capitol Building, the United States Supreme Court Building, other Federal buildings, monuments and military property would remain in the new capital district and thus remain under Federal control for purposes of serving as the seat of the government of the United States.

Some have argued that the District of Columbia, a separate federal jurisdiction since 1801, cannot constitutionally be made a state.[2] Our considered view is that the Bill is constitutional. The Constitution, Article I, Section 8, Clause 17 (the "District Clause") gives Congress the power to legislate for "such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat

[2] See H.R. Rep. No. 116-433, at 190-92 (2020) (Minority views).

of the government[.]" First, by its plain language, this clause is permissive, not mandatory: Congress *may* create a special federal District if it accepts the cession of land from a state, but it is not required to do so. Second, although the Constitution's District Clause limits the *maximum* size of the federal District to ten miles square, there is no minimum size. The Bill does not eliminate the separate federal jurisdiction over the national capital; it merely reduces its size to the parts of the city constituting the federal core. Accordingly, the Bill is solidly within Congress's power under the Constitution's Article IV, Section 3 to admit new states into the Union and "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The Bill also includes conforming statutory changes. The Bill strikes Title 3, United State Code, section 21, considering the existing District of Columbia to be a state for purposes of the election of the President and Vice President of the United States. It further provides for expedited repeal of the 23rd Amendment, which allows the District of Columbia to appoint electors as if it were a state.[3] The Bill also establishes a Statehood Transition Commission ("Statehood Commission") to assist with an orderly transition to statehood for two years after the admission of the State. It would be expected that the Statehood Commission will address any technical issues that might arise surrounding the establishment of the new State and the reduced federal district.

[3] The resulting federal district would be largely unpopulated. To avoid disenfranchising any individuals remaining in the Capital, the Bill makes it clear that states would allow

The Bill would put District of Columbia residents on an equal playing field with other Americans and is a substantial remedy for the long denial of self-determination, because Statehood would guarantee to the residents of the District of Columbia full Congressional voting representation, budget and legislative autonomy, and all of the rights that the people of the current 50 United States enjoy.

As the United States continues to bring democratic values and ideals to nations historically governed by tyrants, the Community urges Congress to correct a lingering injustice in its own shadow, namely, the denial of equality and full democracy to the more than 712,000 residents who live in the Nation's Capital.

This statement was approved by the Community's Steering Committee by a unanimous vote of four of its elected members, with one abstention due to recusal. For further information please contact: Community Steering Committee member and public statements representative Daniel Mayer, Esq. at dmayer3@gmail.com.

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any residents of the Capital to vote absentee in Federal elections in the State of their most recent domicile.

Testimony of DC for Democracy

Before the Homeland Security and Governmental Affairs Committee

Testimony in support of the Washington, DC Admission Act (S.51) Hearing on June 22, 2021

Dear Chairman Peters, Ranking Member Portman, and members of the Committee,

Please accept this testimony from DC for Democracy in support of the Washington, DC Admission Act (S.51). We thank you and the committee for taking the time to consider this important legislation and encourage you to move it swiftly through the committee.

DC For Democracy is an all-volunteer, progressive grassroots organization with over 700 voting members. We are a local group of the national organization, Democracy for America. Since 2004, our organization has taken a people-powered approach to focus on issues and campaigns that impact our community the most. DC for Democracy has mobilized its member base to support progressive victories in elections, issue campaigns, and other community-based activities.

As an organization that is deeply committed to democratic values and people-centered politics, we have been actively engaged in the movement for DC statehood since 2009. Our members understand that ***as long as DC residents live in a federal district, the exercise of our democratic rights is severely constrained***. Becoming a state is the only way the 700,000 residents of the District of Columbia can enjoy the same rights as other Americans: full and equal voting representation in Congress and equal rights of local self-government. We are fully committed to achieving this goal in the near future and righting this centuries-long injustice.

Following are some of the key reasons we believe Congress should mark-up and pass S.51 as soon as possible with a ***simple majority vote***, the same method used to admit the other 37 states that have joined the union since the country's founding.

DC RESIDENTS DESERVE REPRESENTATION IN CONGRESS

D.C. residents pay more federal taxes per person than the residents of any state, yet we have no voice in voting on these taxes or deciding how they will be spent.

Washingtonians have fought and died in every war since the Revolution of 1776--but since 1800, no one representing the people of the District of Columbia has participated in the decision to send our sons and daughters to war.

We have suffered the consequences of multiple Supreme Court decisions, including the decision in *District of Columbia v. Heller*, which limited the District's ability to implement gun control legislation, but have not had any say in the confirmation of Supreme Court nominees.

The United States is the only country with a federal form of government that refuses to allow the citizens of the national capital to be represented in its national legislature.

FEDERAL CONTROL HURTS DC RESIDENTS

There are many negative effects of the federal controls placed on the District. Here are some of the most egregious.

Since 1997, DC courts and our criminal justice system have been highly controlled by the Federal Government, creating extreme challenges for incarcerated DC residents. We have the highest incarceration rate in the country, in part because we have no control over prosecutions, sentencing reforms, parole, or immigration detention. Incarcerated DC residents are placed all over the country, making family visitation extremely difficult, which in turn greatly undermines rehabilitation.

Our status also prevents us from accessing federal resources, including during emergencies like the COVID-19 pandemic. Like other communities of color across the nation, African-Americans are suffering disproportionately in DC from the pandemic. Most of those infected in D.C. are people of color, and 75% of those

who have died are African American. In the CARES Act, Congress awarded DC residents $755 million less in funding simply because we were not a state.

DC residents suffer from Congress treating us like a federal agency and overruling the will of DC voters. Congress has prevented us from using our local tax dollars for HIV-AIDS prevention, medical marijuana and reproductive health subsidies.

CONSTITUTIONAL CONCERNS

It is settled law that Congress has plenary power over the District of Columbia. The Constitution gives Congress the power to "exclusive legislation (over DC) in all cases whatsoever," US Constitution Art.1, sec. 8, cl.17. And Congress has Constitutional authority to admit new states to the Union, which it has done, by a simple majority vote, 37 times before. Thus, Congress has the power to confer Statehood on DC.

The Constitution sets only a maximum size, "ten miles square," for the federal district that is the "Seat of the Government of the United States." Congress has the authority to redefine the borders of the federal district and shrink its size, as it did in 1846, when the portion west of the Potomac was returned to Virginia.

Creating the new state will require a simple reduction in the size of the federal district to an unpopulated area that includes the Capitol, the Mall and the museums and federal office buildings that border it, the White House, and the Supreme Court, and key national parks and monuments.

STATEHOOD FURTHERS RACIAL JUSTICE

The name DC voters have chosen for our new state is Douglass Commonwealth, in honor of Frederick Douglass. Frederick Douglass lived in the District for many years after escaping slavery in Maryland, and he was a national leader of the abolitionist movement and a celebrated orator and author.

Our history, like the history of our chosen namesake, has much to do with the struggle of Black Americans for equality.

We are Black and white, brown and Asian, with Black people constituting almost 50% of our population. Blacks were the majority in DC until 2011 and have been the District's largest ethnic group since the 1950s.

DC residents have been subjected to intense racism throughout the history of our efforts for self-governance and representation. In 1890, John Tyler Morgan, a leading white supremacist, wanted to "get rid of this load of negro suffrage" that was DC. Last year Senator Tom Cotton said in his argument against statehood: "Wyoming is a well-rounded working-class state. A new state of Washington would not be." Wyoming residents are 92% white. Senator Steven Daines said, "Sometimes I think it's important for Senators and Congressmen... [to] get out of this city and go out to where the real people are at across the country and ask them what they think," implying that people in DC are not real people. Senator Chuck Schumer rightfully called Daines' remarks "dehumanizing and disgraceful."

While our nation is 13% African American, the US Senate is just 3% black. Representation for DC residents in the US Senate will help correct the racial imbalance in the Senate and further racial equity.

REPUBLICANS HAVE SUPPORTED STATEHOOD

Except for during the last 30 years, throughout DC's history, there has been strong Republican as well as Democratic support for Statehood.

In 1956, 1961, 1970, and 1978, Republicans led Statehood initiatives and in every year except one between 1956 and 1976, both the Democratic and Republican platforms supported full congressional representation for the District of Columbia.

The District of Columbia Voting Rights Amendment had bipartisan support when it passed Congress in 1978, and both Strom Thurmond and Barry Goldwater supported Statehood. Goldwater said, "It is the right thing to do." Former Vice

President Mike Pence voted for the District of Columbia House Voting Rights Act of 2007.

Republican opposition to DC statehood is a recent development that coincides with recent hostility to other democratic rights, such as the Voting Rights Act.

STATEHOOD IS THE SOLUTION

DC residents want and deserve statehood. In 2016, 86% of DC voters approved a referendum in support of D.C. statehood, confirming support for a state constitution, state borders, a republican form of government, and a state name (Washington, Douglass Commonwealth).

DC residents do not want retrocession. We have been a unique culture and society distinct from Maryland for 230 years and deserve to be our own state. In a 2016 poll by Public Policy Polling, 44% of Marylanders opposed annexing DC, and only 28% were for it. Maryland elected officials, including its Congressional delegation, are almost entirely in support of DC statehood.

Thank you for your consideration.

June 22, 2021

The Honorable Chuck Schumer
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20510

The Honorable Gary Peters
Chair, Senate Homeland Security
& Governmental Affairs Committee
United States Senate
Washington, D.C. 20510

The Honorable Rob Portman
Ranking Member, Senate Homeland Security
& Governmental Affairs Committee
United States Senate
Washington, D.C. 20510

Dear Senators:

As clergy and faith leaders from across our nation, we write to express our strong support for granting the 700,000 residents of Washington, D.C. full equality in our nation. Voting and representation is a sacred right that should not be denied. We support D.C. statehood, a cause that is aligned with our country's highest values, and we urge a swift hearing for and passage of S. 51, the Washington, D.C. Admission Act.

As religious leaders from Washington, D.C. and around our nation, we are people who lead congregations, study, counsel, and share our commitment to our faiths. Yet disenfranchisement leaves the faith communities of Washington, D.C. voiceless in determining the laws of our nation. It is incumbent on us to lift up those communities in a democracy that excludes them, to stand against discrimination and to speak up for justice.

We are all too aware of the inequities facing the residents of Washington D.C, which has more residents than Vermont or Wyoming. D.C. residents pay full federal taxes but lack representation in Congress to set those taxes or determine how they are spent. Moreover, D.C. has been unable to implement a number of local laws its government has passed because its budgets remain subject to federal oversight, and at times, including during the COVID pandemic, D.C. has not received the same level of federal funding that it would as a state. Many of the D.C. police officers who defended the Capitol during the January 6th insurrection have no representation in the Congress that they risked their lives to protect, and as we saw tragically on that day, D.C.'s lack of statehood means it does not control its own National Guard.

The history of D.C.'s disenfranchisement is sadly rooted in racial discrimination. In 1890, Sen. John Tyler Morgan of Alabama said that, after "the negroes came into this district," it became necessary to deny the right of suffrage entirely to every human being." The historical record is replete with those who opposed voting rights for D.C. residents for explicitly racial reasons.

As the late Congressman John Lewis reminded us, "The civil rights movement was based on faith . . . Segregation and racial discrimination were not in keeping with our faith, so we had to

do something." As faith leaders, we will stand, speak, and protest against the disenfranchisement of the residents of D.C.

Taking action to grant statehood to D.C. requires only a simple majority vote by the Senate, as has been the case for 37 states in our nation's history. Expanding the promise of America's democracy to all is fundamental to our country's values and to our nation's very origins. Our country should afford its citizens the same democratic rights that we advocate globally. We therefore urge the Senate to fulfill those values by supporting D.C. statehood and passing S. 51.

Sincerely,

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Charleston, WV

To the members of the Senate Homeland Security and Government Affairs Committee,

I am writing as a concerned citizen to urge you to advance S.51, the Washington, D.C. Admission Act. I am in full support of this bill as it has the power to grant full representation and voting rights to the over 700,000 residents of DC. The bill would address an injustice that has gone on for far too long - one that should have never existed.

As an Arlington, Virginia resident, it is unconscionable that my neighbors not even five miles away lack both the voting representation in Congress and the autonomy over local legislation that residents of every other state possess. This lack of voting representation in Congress excludes DC residents from national decisions on urgent issues that have a huge impact on DC's population. For example climate change disproportionately affects the majority Black and brown population of DC[1][2], yet they have no voting representatives in Congress to advocate for their needs and desires. In addition, DC's lack of statehood means that its local legislation and budget must be approved by Congress. This has tangible negative consequences for DC residents in the past - denying them from implementing programs and policies that were both desired by residents and would have had tangible benefits, including a needle exchange program to reduce HIV transmission[3] and medical marijuana dispensaries.[4] By granting DC statehood, you have the chance to improve the health of our people, our planet, and our democracy. **Please use your power to support racial justice and enfranchisement by advancing S.51, the Washington, D.C. Admission Act.**

Sincerely,
Rose Ippolito

[1] https://www.lung.org/media/press-releases/air-quality-in
[2] https://www.wusa9.com/article/weather/weather-blog/dc-just-had-its-warmest-decade-on-record/65-09f9d85f-aa18-4610-8608-3dc1de17ac93
[3] https://wamu.org/story/15/09/25/dc_needle_exchange/#:~:text=In%201998%2C%20Congress%20banned%20the,they%20could%20encourage%20drug%20use.&text=But%20in%202007%2C%20Congress%20reversed,own%20funds%20for%20needle%20exchange.
[4] https://wamu.org/story/19/12/17/in-latest-spending-bill-congress-still-wont-let-d-c-legalize-sales-of-marijuana/

Mr. Jesse Lovell
4849 Connecticut Ave, NW #115
Washington, DC 20008
pravdasatya@yahoo.com
June 15, 2021

Senate Homeland Security and
Governmental Affairs Committee
340 Dirksen Senate Office Building
Washington, DC 20510
202-224-2627

Dear Senators,

I am writing to you today as someone who has lived almost exactly half my life in Washington, DC since finishing school (in a different state) in the late 1990s. I grew up in Vermont, a state with a smaller population than the District of Columbia, where much of my family still lives. Like many young people who move from small, rural towns to large, urban areas, I came here in my early twenties looking for professional work, initially in international affairs, although I soon moved into domestic and local work in politics and budget issues in the nonprofit sector (I have never worked in the federal government).

I also believe I am lucky that I can remember back to a time, in elementary and high school during the 1980s, when America was much, much less politicized than today, when political differences among friends or within a family just weren't that important (such as my lifelong Republican grandfather, who wasn't interested in politics outside of a few key issues, such as the history of the Native American peoples, and honestly had no problem with his son and daughter-in-law being Democrats). I recall a time when provocative, denunciatory rhetoric was truly seen as fringe on both sides of the aisle, and both parties were seen in their more natural contexts – as two large coalitions, each representing a variety of viewpoints that differed by region and by economic and social issues. I will come back to this as it relates to DC.

After becoming a DC resident shortly before the turn of the millennium, I began to pay much closer attention to what progress was being made in making significant reforms to the District's political status. I was born in 1974, the year the DC Home Rule Act went into effect, allowing for DC's first elected government in a century. Today, of course, we have a local government that has operated much like a state government for almost fifty years, longer than most of the pre-state territories of the nineteenth and twentieth centuries. But it's amazing to see how long the progress of decades ago has been virtually stopped in its tracks. When I came to DC, statehood was not considered politically feasible, and so our Delegate and political leaders on Capitol Hill pursued a strategy to slowly grant the people of DC a bit more representation in the House and a bit more local

control of our local budget and local legislation. But even as the District's budget has grown and grown and local DC taxpayers have financed more and more, political reform has remained stuck in place, with opponents ever more focused on finding excuses to say no, and ever more unwilling to consider real alternatives. In 2011, most of the Congressional leaders agreed that incremental reform to provide a single Representative in the House would never cross the threshold of victory, and that it was therefore time to discuss comprehensive solutions again. I jumped in like never before and never looked back.

Local politics and local charitable and social work is the same in DC as in any of the other twenty-some largest cities in America. The District is experiencing rapid gentrification, rising rents and an overall rising cost of living that has driven many of my own friends and acquaintances out of the city, even as others arrive (and some exiles manage to return). Homelessness, poverty and crime affect DC just as much as anywhere, whether crime is lower or higher in one year than another. The difference in Washington, DC, of course, is that our local government develops its own budgets to address local issues just as state legislatures do. Our elected municipal "Mayor" and "Council" do much more than officials in any regular city government. And after so many decades of largely (if imperfectly) independent local governance, there are significant differences between the laws in the District versus Maryland or Virginia.

That is why I remain strongly opposed to retrocession, an idea proposed over and over by statehood opponents in Congress in these last couple of decades, by elected officials who ignore our 220 years of independence from Maryland. Marylanders, who generally support DC statehood, have their own reasons for opposing retrocession, as polling shows. And, as a friend whose family has lived here for generations once said, "Why don't we just talk about retrocession to Britain? We've only been independent of them 16 more years than Maryland."

I have learned over the years that today's debates, where opponents of DC statehood declare representation and self-government essentially irrelevant in the face of a "Democrat power grab," actually conceals the earlier political history of Washington, DC in the twentieth century, when overwhelming bipartisan majorities recognized that the people of DC deserved a vote for President, an elected local government, independent self-government on par with the 50 states – and Congressional representation. Is it really an accident that the Republican Party called for all of these things in its platforms as early as 1956 and as late as 1976? Or that presidents from Dwight Eisenhower to Gerald Ford and senators from Robert Dole to Barry Goldwater to Howard Baker all echoed this sentiment when they voted in favor of the 1978 DC Voting Rights Amendment? The question today should not be, "Why don't you just join Maryland or move somewhere else?" – but rather, "Why don't opponents of statehood support equal representation for the people of Washington, DC anymore?"

Today's DC Statehood movement is largely the result of the failure of the 1978

amendment to achieve ratification, as conservative activists worked to stop it in state legislatures during the early to mid-1980s and the Republican Party in Congress and the White House went silent on the issue (saying nothing about Washington, DC in its 1980, 1984 or 1988 platforms), combined with the failure of recent incremental reform legislation to survive the political games of non-germane amendments and interminable quasi-legal debates that never actually reach the courts. And then as we have moved on to DC Statehood, it has unfortunately but unsurprisingly become symbolic of all of the worst aspects of modern Congressional hyperpartisanship.

But it doesn't have to be. I believe senators and former elected officials who recall a time when policymaking wasn't synonymous with political grandstanding can rework today's debate to consider the real history of Congressional action during the twentieth century and force today's hyperpartisan critics to come to terms with the true historical support for civil rights and equal citizenship for the people of Washington, DC. Taking that history seriously again, DC Statehood could come to stand for a return to more honest and sensible partisan politics.

Sincerely,

Jesse Lovell
Forest Hills, DC



Statement for Virginia Kase, Chief Executive Officer League of Women Voters of the United States

U.S. Senate Committee on Homeland Security and Government Affairs Hearing on Examining DC Statehood

June 22, 2021

Chairman Peters, Ranking Member Portman, and members of the Homeland Security and Government Affairs Committee: we appreciate and commend you for holding this timely and critical hearing today to examine DC Statehood. My name is Virginia Kase, and I am the CEO of the League of Women Voters of the United States (the "League"). The League is a century-seasoned federated organization with more than 500,000 members and supporters across the country who carry out our mission to empower voters and defend democracy. The League has been advocating for full rights for DC citizens since 1938. After all these years, it has become clear that statehood is the only appropriate option if we want to live in a country that gives full rights of citizenship to all of its citizens—including those in the District of Columbia.

The League supports legislation which will create a 51st state from the residential and commercial areas of the District of Columbia while preserving a smaller federal district as the nation's capital. It has taken much hard work to get to this committee hearing. Our grassroots networks across the country have advocated for DC Statehood for years, joining petitions, building support, organizing watch parties for the Congressional hearing, and spreading the dream of DC statehood to communities around the country. The passage of S51, *the Washington DC Admission Act,* will finally end the 220-year struggle for equality that started when Congress disenfranchised the citizens living in DC through the passage of the *Organic Act of 1801.*

In recent months, we have seen the ramifications that a lack of self-governing control has had even in the halls of the US Congress. On January 6, DC Mayor Muriel Bowser lacked direct authority over the DC National Guard. DC's chief executive was unable to activate the DC National Guard in assisting the defense of the capital city. A lack of autonomy and jurisdictional authority played a significant role in the considerable delay in the National Guard response to the insurrection, putting members of Congress, their staff, and the hundreds of workers in the capital complex at risk. More than three

hours passed while the attack was unfolding, and lawmakers, staff, reporters, and others in the United States Capitol were in fear for their lives. The lack of DC statehood undeniably was a leading factor in that day's failures.

Congress has a historic opportunity to set aside partisan politics and end the disenfranchisement of hundreds of thousands of mostly Black and brown American citizens. The fight for DC statehood is a civil rights issue and cannot be separated from the battle for racial justice. Continued efforts to block full representation is discrimination against the people who live, work, and pay taxes in the district. For decades, Congress has refused to vote on statehood, based on racist accusations that DC cannot govern itself. It is long past time that we dispel these racist and discriminatory excuses and deliver justice to the residents of our nation's capital. Washington, DC has a population larger than two states and on par with six. Its economy is healthy and able to manage the shift of expenses involved in becoming a state.

Scholars from across the country have supported the constitutionality of this bill. The legislation maintains the federal District to a 2-square mile area that includes all the iconic buildings and monuments people think of when they think about our nation's capital. As defined in the US Constitution, Article 1, Section 8, Clause 17, the legislation establishes a redefined footprint of the capital reserved for the seat of our national government. At the same time, the rest of the current District, with schools, churches, grocery stores, parks, and people's homes, is freed to become the state of Douglass Commonwealth. The legislation also addresses the 23rd Amendment as it reiterates that complete control of the federal District is guaranteed to Congress.

The League of Women Voters of the United States strongly urges you to support S51, the *Washington, DC Admission Act*. This legislation will enable the 700,000 residents of DC to acquire full citizenship with equal rights to representation in Congress and self-government enjoyed by those who live in the 50 states.

Maine People's Alliance

Testimony from Maine People's Alliance
On The Washington, D.C. Admission Act (S. 51)
Before the U.S. Senate Homeland Security and Governmental Affairs Committee
July 6, 2021

We write to express our support for The Washington, D.C. Admission Act (S. 51), and encourage you to move this legislation swifty through committee. We support this important bill to grant equal voting rights to the 700,000 Americans -- who are majority Black and Brown -- living in Washington, D.C.

Maine was admitted as a state in 1820 after splitting from Massachusetts, 32 years after the ratification of the U.S. Constitution. D.C. became the nation's capital in 1800 — 220 years ago, and split from Maryland in 1790 —30 years prior to Maine. Furthermore, when Maine was admitted to the U.S., it had just shy of 300,000 residents. D.C. today has 700,000, more than either Wyoming or Vermont.

It is for these reasons that we joined several other local Maine groups in urging Senator Angus King to support D.C. statehood. The historical record makes plain both that D.C. residents do not have equal voting rights because of the District's large Black population after the Civil War, and that until just a few decades ago, there was strong support in both political parties for ending this clear and profound injustice. Below please find the letter we submitted to Senator King last year.

Thank you,

Adam Zuckerman
Lobbyist
Maine People's Alliance

Re: Co-sponsoring the Washington, D.C. Admission Act (S. 631)

December 18, 2020
Dear Senator King,

We, the undersigned 8 organizations, write to express our support for The Washington, D.C. Admission Act (S. 631), and encourage you to co-sponsor this important legislation.

We were glad to see that the House version (H.R. 51) passed 232-180 earlier this summer with support from both Maine representatives. We're also pleased to see there are already 43 Senate co-sponsors. President-elect Joe Biden and Vice President-Elect Kamala Harris also both support granting the residents of D.C. the same rights afforded to Americans living in all 50 states.

As you know, democracy and racial justice are two of the issues that are at the core of all of our organizations' work. Statehood for D.C. is an issue that sits at the intersection of those issues.

It is unconscionable that 705,000 Americans who pay federal taxes have no voting representation in Congress.

D.C. has more residents than Vermont or Wyoming and pays more in taxes than 22 states. D.C. residents have served and died in every war America has fought and 32,000 veterans currently call D.C. home. They should be treated equally. D.C.'s lack of statehood also makes their local budgets subject to federal override, and for this reason, D.C. has been unable to implement a number of laws their government passed.

The history of D.C.'s disenfranchisement is sadly rooted in racial discrimination. As the ACLU wrote recently in a brief history of this issue: "As Sen. John Tyler Morgan of Alabama explained in 1890, after 'the negroes came into this district,' it became necessary to 'deny the right of suffrage entirely to every human being.'" D.C. Mayor Muriel Bowser wrote this year "It is no coincidence that Washington— affectionately known as Chocolate City — is also the only capital of a democratic nation that denies its residents a vote in the federal legislature. To think these two truths are not related is to be willfully ignorant of our nation's history."

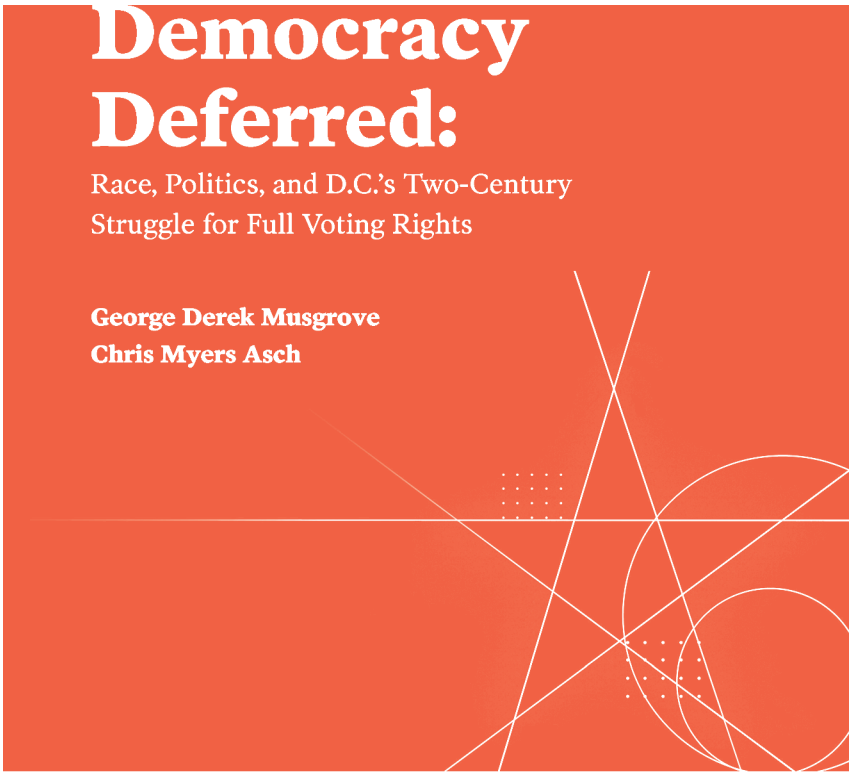
The majority of District residents are people of color, and the District is 46% Black. Starting in 2021, there will only be two Black members of the U.S. Senate, and in some recent years there have been none, even though the U.S. is 13% Black. Empowering a jurisdiction that has a plurality Black population could help the U.S. Senate look slightly more like the United States. The process for admitting D.C. as a state would be the same as has been used to admit the other 37 states that have joined the union since the country's founding. An overwhelming majority--86%--of D.C. residents voted in favor of statehood in their 2016 referendum. Additionally, recent polling has found Americans support D.C. statehood by 9 percentage points, and Mainers favor D.C. statehood by an identical 9-point margin.

A complicating factor is that the constitution specifies land must be set aside for the nation's capital, but it does not set a minimum size. The Washington, D.C. Admission Act complies with this requirement by setting boundaries that include the Capitol, White House, and other key federal land as the nation's capital, while the bulk of D.C., which is residential and commercial, would become the 51st state. Numerous constitutional lawyers have reviewed this legislation, including George W. Bush's Assistant Attorney General, Viet Dinh, and confirmed its constitutionality.

We appreciate your leadership on voting rights issues, expanding the promise of America's democracy to all, and racial justice. We hope that you will once again lead on these issues by co-sponsoring The Washington, D.C. Admission Act to grant equality to the 705,000 Americans living there.
Sincerely,

ACLU of Maine
League of Women Voters of Maine
Maine AFL-CIO
Maine Citizens for Clean Elections

Maine Conservation Voters
Maine People's Alliance
Planned Parenthood Maine Action Fund
Professional Firefighters of Maine



March 2021

Statehood Research DC

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SRDC is a nonprofit 501(c)3 organization that seeks to educate the public and policymakers about the economic, financial and historical aspects of the movement for DC statehood. It fulfills its research agenda through publication of papers and other materials. It was created by prominent members of the DC business community and is being incubated at the Federal City Council, a nonprofit, nonpartisan business civic organization committed to the improvement of the District of Columbia.

About the Authors

George Derek Musgrove, Ph.D. is an Associate Professor of History at the University of Maryland, Baltimore County. He is the author of Rumor, Repression, and Racial Politics: How the Harassment of Black Elected Officials Shaped Post-Civil Rights America (U. of Georgia, 2012), and co-author, with Chris Myers Asch, of Chocolate City, A History of Race and Democracy in the Nation's Capital (UNC, 2017). His latest project is "Black Power in Washington, D.C." a web-based map of Black Power activism in the nation's capital between 1961 and 1998. He lives with his wife and two sons in Washington, D.C.

Chris Myers Asch teaches history at Colby College and runs the Capital Area New Mainers Project, which helps immigrants and refugees adjust to life in central Maine. He is a native of Washington, D.C. In addition to co-authoring Chocolate City, he is the author of The Senator and the Sharecropper: The Freedom Struggles of James O. Eastland and Fannie Lou Hamer. He and his wife have three children and live in Hallowell, Maine.

Summary

This report provides a summary and analysis of the circumstances that led the citizens who lived in the area designated as the seat of government to lose their right to vote in 1801, why Congress has only partially addressed this state of affairs in the intervening 220 years, and how the modern struggle for self-determination among Washington, D.C., residents has evolved into the present push for statehood.

Key historical points to understand include:

- The Founders never reconciled the tension between the revolutionary imperative for "no taxation without representation" and the federal government's need for "exclusive legislation" regarding the seat of government. D.C. residents originally voted for U.S. senators and representatives, but that right was stripped away when Congress claimed "exclusive legislation" over the federal district with the Organic Act of 1801. D.C. residents objected to losing their rights, arguing for the primacy of the principle of "no taxation without representation."
- After a brief flowering of interracial democracy during Reconstruction, D.C. residents, Black and White, lost all voting rights in 1874. For nearly a century, race — and the fear of Black political power — played a significant role in defeating all attempts to win home rule and congressional representation as segregationists successfully derailed efforts to return suffrage to District residents.
- Buoyed by the civil rights movement, a bipartisan, interracial coalition of activists, with support from federal leaders, won a series of victories that provided for a vote in presidential elections, local self-government, and a non-voting delegate in the House of Representatives in the 1960s and 1970s. D.C. activists gained bipartisan support for a constitutional amendment providing for voting representation in Congress in the mid-1970s, but it was defeated by New Right opposition at the state level. In the late 20th century, D.C. residents embraced statehood as their favored vehicle for winning representation in Congress.
- In the 220 years since Congress set the precedent of taxation without representation, District residents have repeatedly demanded a return of the democratic rights that they considered their birthright as American citizens. Today, Washingtonians and their supporters nationwide have coalesced behind a bill to grant statehood, which they believe will protect the principles of both "exclusive legislation" and "no taxation without representation."

Introduction

On January 4, 2021, Non-Voting Delegate Eleanor Holmes Norton (D-D.C.) introduced H.R. 51, the Washington, D.C. Admission Act in the House of Representatives. As of this writing, the measure has 212 co-sponsors. (An identical bill had passed the chamber on June 26, 2020, by a vote of 232 - 180; the first time a chamber of Congress has ever advanced D.C. statehood legislation.) Senator Tom Carper (D-DE) introduced a companion bill in the Senate as S. 51, which currently has 40 co-sponsors, the largest number of Senators to sign on to a D.C. statehood bill. The Speaker of the House and the Senate Majority Leader have both voiced support for these bills, and they likely will come up for votes during the 117th Congress.

If past debates about D.C. statehood are any guide, the debates about these bills will be contentious and will focus largely on questions of history. The history of District governance is long and complicated, covering more than two centuries of political machinations, legislative proposals, and local movements for self-determination. To inform that debate, we offer this white paper to provide a concise explanation of this complicated topic.

Specifically, we seek here to explain:

1. When and why the residents of the nation's capital lost the right to vote for local government, members of Congress, and the President;
2. Why Congress has not remedied this state of affairs in the previous 220 years despite the stated desire of many members of that body and District citizens to afford Washingtonians voting representation in the national legislature; and
3. How the post-WWII struggle for District self-determination has evolved into the present push for statehood.

We do not take a stand on the best path for securing voting representation in Congress for the citizens of the District of Columbia.

The Founding Era: A Right Stripped Away

The Founders failed to reconcile the tension between the revolutionary imperative for "no taxation without representation" and the federal government's need for "exclusive legislation" regarding the seat of government.

Washington, D.C., is a creature of the Constitution. Article I, Section 8, Clause 17 mandates that the federal seat of government must reside in a "District" over which Congress exercises "exclusive legislation." The federal government has held ultimate authority over the District of Columbia since it passed the Organic Act in 1801.

The idea to place the national seat of government in an independent district where Congress exercised "exclusive jurisdiction" dates at least to 1782, when Baltimore merchant George Lux Jr. proposed it to Confederation Congressman Theodorick Bland of Virginia. Lux's proposal gained little traction, however, until June 20, 1783, when a band of Continental Army veterans held a raucous protest outside the Pennsylvania State House, where the Confederation Congress and the Pennsylvania Executive Council both met. The Confederation Congress was not the target of the protest and indeed was not even in session when the soldiers first assembled. Though owed back pay by the central government, the veterans had little confidence that they could get redress from the Confederation Congress, an infant body that lacked a dedicated source of income. Instead, they sought their money from the Pennsylvania state government, which they deemed would be more likely to pay up.[1]

The fact that the soldiers ignored the Confederation Congress incensed Congressman Alexander Hamilton of New York and other national leaders who were determined to establish the primacy of the new central government over the states. Hamilton hurriedly arranged a special session of Congress, then demanded that Pennsylvania leaders protect the Congress by forcibly dispersing the protestors. But Pennsylvania Executive Council President John Dickson refused, choosing instead to negotiate with them. Dickson's refusal further highlighted the federal government's weakness relative to the states. Hamilton and other national leaders used the incident to popularize the notion that Congress could be held hostage to state interests unless it had full control of its capital.[2]

The Philadelphia Mutiny, as it came to be called, convinced members of the Confederation Congress that they should exercise "exclusive jurisdiction" over the federal seat of government. Though the phrase did not appear in the *Journals of the Continental Congress* before the mutiny, just four months later Congress voted that it should exercise "an exclusive or such other jurisdiction as Congress may direct" over its future, permanent capital. By 1787, this idea (also referred to as "exclusive legislation") was widely shared among the men who met for the Constitutional

Convention. They wrote it into Article 1, Section 8, Clause 17 of the Constitution, which authorized Congress 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."[3]

"No taxation without representation" was not only the rallying cry of the War for Independence, it also was the principle of the constitutional republic that the founders were laboring to build.

Yet while most founders believed that Congress should exercise exclusive legislation over the seat of government, they disagreed on how to balance this idea with another fundamental principle of the Revolutionary era: that citizens have the right to representation in any legislature that rules over them. "No taxation without representation" was not only the rallying cry of the War for Independence, it also was the principle of the constitutional republic that the founders were laboring to build. If the federal government assumed exclusive control over its capital, how could it preserve the rights of the capital's citizens to have both representation in the national legislature and self-government at the local level?

The founders struggled to reconcile these two principles. As early as 1783, Virginia Delegate James Madison conceded that Congress was unsure what "exclusive legislation" would mean for the potential residents of the seat of government, lamenting that "the nearer the subject is viewed, the less easy it is found to mark the boundary." Five years later, as Madison lobbied for the adoption of the Constitution, he implied that the Constitution itself did not define that boundary. In Federalist 43, he promised only that "the State [ceding land for the seat of government] will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it," and that "a municipal legislature for local purposes, derived from their own suffrages, *will of course* be allowed them [the residents of the seat of government]."[4]

Those members of the founding generation who were not willing to leave the matter to chance expressed genuine alarm at Clause 17. Samuel Osgood of Massachusetts, a veteran of the War for Independence and delegate to the Confederation Congress, then serving as Commissioner of the Treasury, expressed his fear of the exclusive legislation clause in a letter to John Adams: "It has cost me many a Sleepless Night to find out the most obnoxious Part of the proposed Plan.—And I have finally fixed upon the exclusive Legislation in the Ten Miles Square.—This space is capable of holding two Millions of People… shall there be in the Bowels of the United States such a Number of People, brot up under the Hands of Despotism, without one Privilege of Humanity, that they can claim…"[5]

Even Alexander Hamilton who, more than anyone else, was responsible for popularizing the concept of exclusive legislation, wrestled with this contradiction. During the ratification

convention in his home state of New York, Hamilton proposed an amendment requiring that "when the Number of Persons in the District or Territory to be laid out for the Seat of the Government of the United States...amount to ___ [Hamilton does not specify the number]... Provision shall be made by Congress for having a District representation in that Body."[6]

Madison, Hamilton, and other founders failed to reconcile the tension between the federal government's need for "exclusive legislation" regarding the seat of government and the revolutionary imperative for "no taxation without representation." Hamilton's amendment did not pass, Osgood was not a delegate to the Constitutional Convention (though his concerns were shared by delegates such as George Mason and Patrick Henry), and despite Madison's assurances, the founding generation left unresolved the question of both national representation for the District and local self-government.[7]

Critical Early Legal Writing and Laws Regarding District Governance

Federalist 43
"The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy... The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated..."

Constitution, Article 1, Section 8, Clause 17
"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 Government of the United States..."

Residence Act of 1790
"Be it enacted... That a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomack, at some place between the mouths off the Eastern Branch and the Connogochegue be, and the same is hereby accepted for the permanent seat of the government of the United states: Provided nevertheless, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide..."

Organic Act of 1801
This act makes no mention of democratic governance for the residents of the District except to state "That nothing in this act contained shall in any wise alter, impeach or impair the rights =, granted by or derived from the acts of incorporation of Alexandria and Georgetown... except so far as related to the judicial powers of the corporations of Georgetown and Alexandria."

D.C. residents originally voted for senators and representatives, but their right to congressional representation was stripped away in 1801 over their strenuous objections.

Between 1788 and 1790, the founders diverted their attention away from defining exclusive legislation to fighting over the location of the seat of government. Many observers assumed that the federal district inevitably would become a thriving political, economic, and cultural center, and political leaders and city boosters vied for the prize. Several states made formal proposals to cede land for the capital. Though James Madison had assumed that these states would bargain with Congress to protect residents' rights, none of them did. From among the proposed sites, the House of Representatives voted in late 1789 to place the seat of government in Pennsylvania. But Southern leaders — including Virginians Madison, Thomas

Jefferson, and President George Washington — pushed instead for a site along the banks of the Potomac River. They sought a Southern capital for all the reasons their Northern colleagues did – power, prestige, and economic growth – but also to protect the central institution in Southern life: slavery.[8]

Over dinner at Jefferson's New York home in June 1790, Madison and Jefferson met with Alexander Hamilton to broker a deal that determined the future location of the nation's capital. In exchange for Southern votes allowing the national government to assume states' debts from the War for Independence — an issue of critical importance to Northerners — Hamilton would persuade his Northern allies to support placing the seat of government in the South. The legislation that eventually emerged from the deal was titled the Residence Act of 1790, for it determined where the federal government would "reside."[9]

The law gave President Washington the power to choose the spot for the national capital, and he selected an area at the confluence of the Potomac River and Eastern Branch (now known as the Anacostia River), including the existing port villages of Georgetown, Maryland, and Alexandria, Virginia. Maryland ceded roughly 70 square miles, Virginia ceded about 20, and another ten were covered by the Potomac. Washington then appointed three commissioners to oversee the construction of the city and ensure that it would be ready to become the official capital in 1800. Congress agreed to move the federal government to Philadelphia for ten years while the new seat of government, named in honor of President Washington in September 1791, was under construction.[10]

As Washington was being built, Congress mandated that residents abide by the laws of the states that had ceded the land "until Congress shall otherwise by law provide." Thus on the eastern bank of the Potomac they were governed by Maryland's laws, while on the western bank Virginia's laws ruled. Eligible residents (at the time, the city's White, male landowners) cast their ballots in local, state, and national elections up through 1800.[11]

That soon changed. The elections of 1800 brought Thomas Jefferson and his Republican allies to power, spelling the end of Federalist Party rule. The two parties had spent the previous decade sparring over the scope of the federal government's powers enumerated in the Constitution. During the several months between the election and Jefferson's inauguration, the lame-duck Federalist majority in Congress scrambled to consolidate as much power in the federal government as possible before their small-government Republican foes took control. In early 1801 one last battle loomed: what to do with the District of Columbia.

Begun in the fall of 1800 as a serious discussion of constitutional intent and republican principles, the debate over the governance of the federal district pitted Federalist calls for Congress to assume exclusive legislation against Republican declarations that Congress could take up residence in the District without invoking that authority. Both sides expressed concern that if and when Congress assumed exclusive legislation the residents of the District

would lose their state citizenship and the rights therein pertaining *unless* Congress created a mechanism for their governance.[12]

Any assumption of exclusive legislation that left federal district residents without representation in the Congress or a vote for President and Vice President was "contrary to the genius of our constitutions" and "violat[ed] an original principle in republicanism."

District residents also joined the debate, encouraging Congress to assume exclusive legislation (for fear that if it did not, the capital could be moved to another location) *and* insisting that Congress protect residents' rights to representation and self-government. A meeting of Alexandria citizens expressed their belief that it would be "unjust and inexpedient" for Congress to assume exclusive legislation "until the people are assured of a representation" in the national legislature. The most eloquent defender of District rights was Augustus Brevoort Woodward, a precocious Washington City lawyer and friend of Thomas Jefferson who later distinguished himself as the first chief justice of the Michigan Supreme Court. Woodward authored a series of essays on the "Government of the District of Columbia" for the *National Intelligencer* in which he argued that any assumption of exclusive legislation that left federal district residents without representation in the Congress or a vote for President and Vice President was "contrary to the genius of our constitutions" and "violat[ed] an original principle in republicanism." He laid out in painstaking detail how the District could remain a federal city under congressional jurisdiction and enjoy self-government and representation in Congress. Woodward's essays were the most thorough treatments of the subject written at the time, and several members of the House adopted his suggestions *in toto*.[13]

This spirited exchange all but ceased in February 1801 as members of Congress were consumed with the national electoral crisis. When they returned to the subject of District governance late that month, the Federalist majority, determined to assume "exclusive legislation" before the Republicans assumed power, hurriedly passed the Organic Act. The Act placed the city's three developed areas — Washington City, Georgetown, and Alexandria (the latter two retained their town governments) — under the exclusive control of Congress and the President but made no provision for Washington City local government or District citizens' representation in Congress and their participation in presidential elections. The law also organized the unincorporated territory within the District into two counties: the County of Washington (on the Maryland side) and the County of Alexandria (on the Virginia side) where residents similarly lacked the suffrage.[14]

No longer were the residents of these areas considered citizens of Maryland or Virginia; no longer could they vote for president; no longer could they help choose representatives

in Congress. Instead, they were disenfranchised subjects of the federal government. Or, as Representative James Asheton Bayard of Delaware explained, D.C. residents had become "children, over whom it is not our wish to tyrannise, but whom we would foster and nurture." Just a generation after "no taxation without representation" had inspired Patriots to fight for independence, District residents lost the right to vote in all elections.[15]

District residents on the Virginia side of the Potomac River regained their full rights as American citizens by successfully petitioning to have all the District land west of the Potomac "retroceded," or given back, to the state of Virginia.

Debate about the governance of the federal district continued after 1801. Responding to continued complaints from Augustus Woodward and other local advocates of self-rule, the new Republican Congress incorporated Washington City and established a local municipal government consisting of a mayor appointed by the President and an elected council in 1802. (Georgetown and Alexandria continued with their preexisting town governments.) This limited home rule allowed the city's small population of White male landowners to vote, and in the election of 1802 about 90% of them did.[16]

Mirroring national trends, during the antebellum period Congress granted city voters increased control over local government. In 1820, Congress authorized a new city charter that allowed voters to directly elect the mayor, and in 1848 Congress removed economic barriers to voting, extending the ballot to all White men who lived in the city for at least a year. Despite these reforms, the federal government remained firmly in control of the District. City residents still had no representation in the national legislature and could not vote for President, and Congress retained veto power over any legislation that emerged from the city's municipal governments in Washington City, Alexandria, and Georgetown.[17]

While Washington City residents accommodated themselves to congressional rule for fear that the capital would be moved elsewhere, some White voters in Alexandria organized to regain their full rights as citizens. They did so by successfully petitioning to have all the District land west of the Potomac "retroceded," or given back, to the state of Virginia.

The retrocession movement had economic roots. Alexandria residents had expected to benefit financially from being included in the federal District. Yet Congress' ban on federal buildings on the west side of the Potomac and neglect of public works led to the area's economic stagnation, particularly after the War of 1812. Alexandrians blamed this neglect in part on their lack of representation in Congress, bemoaning their political status as "slavery" and condemning the indifference of their congressional "masters."[18]

Alexandria's leaders petitioned Congress for retrocession in 1824, but were ignored. They renewed their push in the 1840s, compelled by the increasing strength of the abolitionist movement in Washington City. Alexandria was one the nation's top slave-exporting ports in the 1830s, and abolitionists flooded Congress with thousands of antislavery petitions to end

slavery in the nation's capital. Many White Alexandrians came to see retrocession as a way not only to gain political rights and prosper economically, but also to protect their right to own and trade enslaved people.[19]

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With support from slaveholding representatives from the eastern Tidewater part of the state, the Virginia House of Delegates passed a retrocession bill in early 1846. Congress gave its stamp of approval that summer, and in September White voters in Alexandria voted overwhelmingly in favor. No longer ten miles square, the District was reduced to the 68 miles square on the Maryland side of the Potomac.[20]

The Disenfranchisement Era: Persistent Racial Concerns

After a brief flowering of interracial democracy during Reconstruction, D.C. residents, Black and White, lost all voting rights.

Reconstruction in Washington was a time of revolutionary racial and political progress. Thousands of former slaves migrated to D.C. during and after the Civil War, joining White Radical Republicans and educated Black leaders to drive an ambitious experiment in biracial democracy. They made remarkable progress, founding Black public schools and Howard University, building Black churches and civic institutions, and increasing Black home and land ownership. Perhaps none of the era's revolutionary changes had more impact than Black voting, which led to an unprecedented flowering of interracial democracy in the city.[21]

Because Congress wielded exclusive authority over the city, Washington was the one place where Radical Republicans could implement their policies without interference from state and local authorities. Radicals sought to turn Washington into what Sen. Charles Sumner (R-MA) called "an example for all the land," the prototype of an integrated America where Black people enjoyed political and civic (though not social) equality. Each major piece of Reconstruction legislation, from freedmen's relief to Black men's suffrage, was "field tested" in the District before being implemented across the South.[22]

Pushed by Black Washingtonians, Radicals made Black voting in D.C. a top priority — it was H.R. 1, the very first piece of legislation that the House considered when the first postwar Congress convened in December 1865. Passed in January 1867 over President Andrew Johnson's veto, the bill allowed Black men in the District to vote in the city's municipal elections. A month later, Black voters in Georgetown helped oust the incumbent mayor, a notorious racist; that June, Black voters in Washington City helped Republicans win a majority of seats on both the Board of Aldermen and the Common Council. By 1869, Black men from each of the city's seven wards had won election to the Common Council.[23]

The city's biracial government desegregated the municipal bureaucracy, provided jobs to a burgeoning Black middle class, implemented massive public works projects, and supported the expansion of what became the nation's best Black public school system. City leaders also passed anti-discrimination legislation that remained on the books well into the next century and provided the legal foundation for the city's post-World War II civil rights movement. D.C. developed a reputation as a haven for Black advancement, attracting some of the nation's top Black intellectuals and political figures, including famed orator Frederick Douglass.

Yet that very success triggered a backlash from white conservatives and business leaders who persuaded Congress to retreat from biracial democracy. The first step came in February 1871, when Congress established a territorial government that limited residents' electoral power. The

new government was a democratic hybrid, consisting of a presidentially appointed governor, upper Legislative Council, and Board of Public Works alongside a popularly elected lower House of Delegates and a non-voting delegate in the U.S. House of Representatives.[24]

Though District voters could still elect some officials, most of the power in the new territorial government was vested in the presidential appointees, particularly the Board of Public Works, which controlled the distribution of contracts and patronage. Under the leadership of businessman Alexander Shepherd, the Board became an engine of taxpayer-funded economic development. Shepherd spearheaded a comprehensive public works campaign to improve the city. His debt-fueled spending triggered an 1874 congressional investigation that uncovered conflicts of interest, influence peddling, no-bid contracts, and cost overruns.[25]

The investigating committee's report excoriated Shepherd and the Board of Public Works for excessive spending, but it also blamed District voters for allowing the legislature and the board to spend so freely. Given the perceived inability of voters and their representatives to restrain themselves, the committee recommended returning the city to rule by unelected commissioners, as it had been governed in its founding era in the late 18th century.[26]

Congress accepted the committee's recommendations, voting 216-22 in June 1874 to end the territorial government and establish a presidentially appointed board of three commissioners to manage the city and pay its debts. By law, one commissioner had to be a member of the Army Corps of Engineers; by custom, the other two commissioner spots were split between the Democratic and Republican parties. In response to pressure from local leaders, Congress pledged to cover 50% of the city's annual budget, acknowledging that the federal presence in Washington added expense (by requiring upkeep for public buildings) and curtailed revenue (because federal property was not taxed). Though this new system of commissioner rule was initially intended to be a temporary measure, Congress made it permanent in 1878.[27]

The scope of disfranchisement was remarkable. "Under this bill," wrote the editors of The Nation, "not a vestige is left of popular municipal government: aldermen, common councilmen, mayors, boards of works, school boards, police boards, primaries, conventions, all are swept away, and

"Under this bill," wrote the editors of The Nation, "not a vestige is left of popular municipal government: aldermen, common councilmen, mayors, boards of works, school boards, police boards, primaries, conventions, all are swept away, and the entire government is handed over to three men, appointed by a foreign authority, responsible not to their fellow citizens, but to the President and Senate."

the entire government is handed over to three men, appointed by a foreign authority, responsible not to their fellow citizens, but to the President and Senate." District men, White and Black, rich and poor, lost their right to vote. They would not cast another meaningful ballot for decades.[28]

For nearly a century, the fear of Black political power played a significant role in defeating repeated attempts to win home rule and congressional representation for D.C. voters.

Disfranchisement hurt both Black and White voters, but it had a particularly devastating impact on Black Washingtonians because it crippled their ability to defend and advance their interests. Without the ballot, Black leaders struggled to hold city officials accountable or secure access to public jobs. The commissioners who ran the city – all three of whom were White men, as all commissioners would be until 1961 – routinely ignored Black concerns. Black laborers complained that they were shut out from city contracts, and appointments to city positions vanished.

Black leaders worked with willing White counterparts to win back the right to vote. An interracial push for suffrage won support from an increasingly active labor movement in the 1890s. The Knights of Labor and the American Federation of Labor, claiming to represent about 20,000 D.C. workers, held mass meetings, led petition drives, passed resolutions in support of universal suffrage, and testified before Congress repeatedly in favor of an 1896 bill introduced by Sen. Jacob Gallinger (R-NH) that called for a referendum on D.C. suffrage.[29]

Despite a flurry of activity, however, the Gallinger bill failed and the suffrage movement fizzled. Supporters could not convince Congress to reconsider its blanket ban on District voting, in large part because they confronted widespread and well-organized opposition from the local White press and the White business community. Once the commissioner government had been established in 1874, it quickly gained the favor of the city's White elites, who had the ear of the commissioners. Many of Washington's most influential White leaders believed that self-government would jeopardize the federal government's 50% contribution to the city budget. They feared that Congress would not be willing to foot the bill for a city run by locally elected officials. When weighed against the tangible benefits of federal money, the Evening Star concluded, "The ballot is a meaningless bauble in this District."[30]

When weighed against the tangible benefits of federal money, the Evening Star concluded, "The ballot is a meaningless bauble in this District."

Beneath these economic arguments lay a core of racism, manifested by the distorted, racialized memory of biracial democracy that had become the common-sense consensus among many White Washingtonians. As elsewhere in the South, White people came to remember

Reconstruction as a tragic, turbulent era when the excesses of interracial democracy led to corruption, profligacy, and racial animosity. This dubious interpretation quickly hardened into incontrovertible truth among most White Washingtonians, even though the territorial legislature had only two Black members and the worst abuses of the era had been committed by White appointees on the Board of Public Works. "An experiment had been tried in negro suffrage and it had failed," concluded one influential academic study in 1893.[31]

A blunter encapsulation came from Senator John Morgan of Alabama, a former Confederate general, during an 1890 debate on restoring D.C. suffrage. The Black-supported local government had been so "abominable and disgraceful," Morgan claimed, that Congress "found it necessary to disfranchise every man in the District of Columbia." It was akin, Morgan claimed, "to burn[ing] down the barn to get rid of the rats, . . . the rats being the negro population and the barn being the government of the District of Columbia."[32]

Restoring suffrage would lead once again to Black power and "negro domination," wrote the Star, and that explains "why tax-payers are almost unanimously opposed to the restoration of suffrage here." Even though "the present form of alien government is about as bad as can be devised," declared the *Washington Post*, "a system which gives the control of the District to ignorant and depraved negroes, is still worse." One Star reader explained the connection between race and democracy: "If you get rid of the 90,000 negroes residing in this city I am in favor of suffrage. As long as they are here I am opposed to it." This fear of "negro domination" undermined future efforts to win D.C. suffrage.[33]

Beginning in the late 1910s, a new suffrage movement led by *Evening Star* editor Theodore Noyes paralleled the nationwide push for women's suffrage. District residents were "defective and delinquent Americans," Noyes argued, and the best way to protect the city's economic and political interests was to have a voting representative in Congress. In 1917, he helped form the Citizens' Joint Committee on National Representation for the District of Columbia, and the movement won support from leading White organizations, including the Board of Trade, the "Voteless" League of Women's Voters, and the Federation of Citizens Associations.[34]

Support for suffrage grew in part because the federal government had failed to live up to its fiscal obligations to the city. The disfranchisement bargain struck in the 1870s was simple: in exchange for giving up their claims to suffrage, District residents gained the security of having the federal government pay for half of the city's annual budget. The "half-and-half" plan became sacrosanct among city leaders. Frugal members of Congress, however, retreated from the half-and-half plan, and in 1921 Congress abandoned it altogether. By 1937, the federal government contributed less than 15% of the city's budget. As a result, local officials struggled to meet basic public health standards, provide adequate schools, or keep the city safe. Suffrage supporters argued that if D.C. had representatives in Congress, then the city could secure stable funding and prevent undue meddling in District affairs.

An unofficial referendum held in April 1938 drew nearly 100,000 voters and showed overwhelming support for both local suffrage (88%) and national representation (93%). Black Washingtonians

were even more supportive: one *Washington Post* poll showed that 95% of Black respondents supported suffrage compared to 80% of White voters. The racial split grew wider on the question of self-government (known locally as "home rule") for District residents. Black Washingtonians generally supported both national representation and home rule, but placed a higher priority on the latter. Walter A. Pinchback of the Black Bloomingdale Civic Association testified at a 1938 congressional hearing that "every fair-minded citizen of the District would like to have the privilege" of national representation, but "would it not be better for Congress to establish some form of local government, whereby the citizens could choose their own officials who would be directly responsible to them?"[35]

Most White voters also supported home rule, but Theodore Noyes, the Board of Trade, and other White elites adamantly opposed it. Home rule, they argued, would lead to Black control, as they believed it had during Reconstruction. Black voters would support huge spending increases, rack up debt, and levy higher taxes, all of which would hurt business, lower property values, and encourage wealthy people to leave Washington. The city has "a color problem," wrote Grover Ayers of the Ten Miles Square Club in the Post in 1938. "In the past, politicians used the colored vote as they intend to do should Congress grant the District any kind of suffrage today." At a 1943 congressional hearing on D.C. governance, White gadfly Clinton Howard warned that if D.C. were granted suffrage, the city would be ruled by "the under-privileged, illiterate, proletarian class. . . . The alley will dominate the avenue."[36]

Race remained the biggest stumbling block to restoring suffrage in the early 20th century. The specter of Black political power, Theodore Noyes acknowledged, undercut the elite effort to win D.C. representatives in Congress: "We have had a hard time getting this Congress to discriminate between national representation and the Negro dominating in local suffrage." No suffrage bill passed Congress before
World War II.[37]

Segregationists in Congress helped derail efforts to expand voting rights in Congress.

At the end of World War II, life in Washington was largely segregated, protected by the laws and customs of a city that remained officially dedicated to preserving racial separation. Despite decades of protests, D.C. remained a Southern city whose White leaders defended racial restrictive covenants, upheld a dual school system, and supported Jim Crow practices. Within a decade, however, the pillars of that world had crumbled under the pressure of ceaseless community agitation, powerful interracial alliances, key Supreme Court decisions, and strategic support from federal authorities, including Presidents Harry Truman and Dwight Eisenhower. Despite their lack of voting power, Black Washingtonians and their white allies across the nation used a variety of political and legal strategies to rouse public opinion and force Congress and the courts to dismantle the legal framework of Jim Crow.[38]

The years between the end of World War II in 1945 and the Supreme Court's 1954 decision in *Bolling v. Sharpe* (a companion case to *Brown v. Board of Education*) were the most decisive

period in the city's history since the 1860s. Segregation in the nation's capital collapsed, half a decade or more before similar changes happened elsewhere in the South. By the end of the 1950s, the institutions of public life in Washington – schools, hotels, restaurants, theaters, recreation facilities, government agencies, unions, professional associations – were no longer racially segregated. In 1961 President John Kennedy chose lawyer John Duncan to become the city's first Black commissioner. The end of official segregation coincided with – and helped spur – massive demographic shifts that by 1957 had turned Washington into the nation's first major city with a Black majority.

Despite civil rights progress, however, Washington through the 1950s still lacked local self-government or representation in the national legislature. Congress remained effectively in control of District affairs through the congressional committees with jurisdiction over the city: the House District Committee and the Senate District Committee, as well as the appropriations subcommittees responsible for the District budget.

The prospect for expanded voting rights depended significantly on the composition of those committees. In the Senate, D.C. suffrage benefited from the support of Sen. Matthew Neely (D-WV), who chaired the Senate District Committee for much of the 1950s. Neely introduced, and the Senate repeatedly passed, legislation to provide local self-government (home rule) for D.C. In the House, however, Southern segregationists stymied suffrage efforts. Rep. John McMillan (D-SC) rose to the helm of the House District Committee after Democrats won the House in the 1954 elections, and he remained chair until his defeat in 1972. An avowed segregationist, "Johnny Mac" opposed all efforts to expand D.C. voting rights. His committee largely responded only to White residents and played "an obstructionist role in District government, willfully and maliciously frustrating the best interests of the District," wrote political scientist Martha Derthick in 1962.[39]

These men are dedicated to the proposition that the District cannot work as an integrated, progressive city, and they have it within their power to make it fail.

Another impediment was the Senate appropriations subcommittee responsible for the District budget, which was headed by a former Ku Klux Klan member with a flair for theatrical oratory: Senator Robert Byrd (D-WV). McMillan, Byrd, and their Southern colleagues reworked city budgets, eviscerating welfare, education, and housing programs while beefing up the police force. "These men are dedicated to the proposition that the District cannot work as an integrated, progressive city, and they have it within their power to make it fail," wrote Andrew Kopkind and James Ridgeway in *The New Republic.* Segregationists in Congress pounced on news stories that cast the District in a negative light, held hearings about the perceived evils of integration in the city, and bottled up bills promising to expand voting rights in the District. But their efforts to keep D.C. segregated and completely disfranchised faced an increasingly powerful interracial, bipartisan coalition of suffrage advocates.[40]

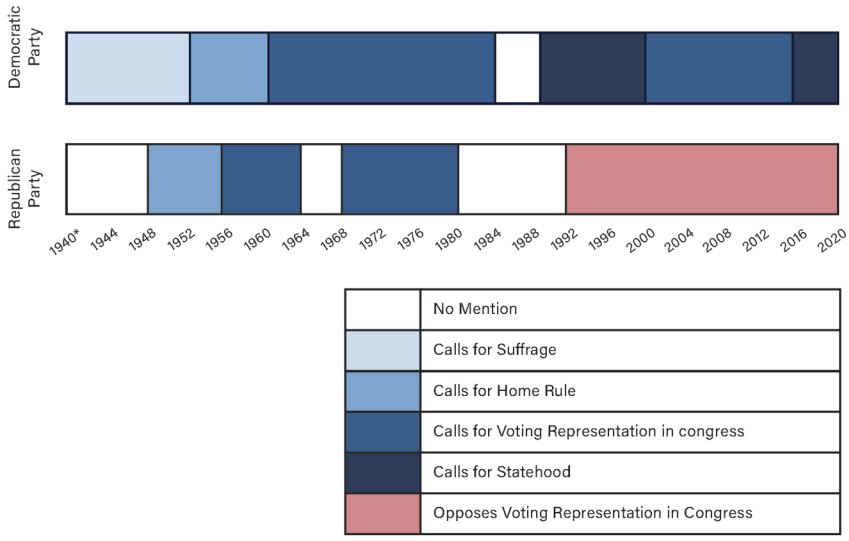
The Struggle for Home Rule and Voting Representation in Congress

A bipartisan, interracial coalition of activists, with support from federal leaders, won a series of victories that expanded D.C. voting rights in the 1960s and 1970s.

After eight decades of disenfranchisement, District residents' ongoing struggle to win back the ballot began to bear fruit in the 1950s. Civil rights protests and the United States' need to present itself as an exemplar of democracy in the Cold War lent new immediacy to the bipartisan push for suffrage.

As early as 1940, liberals in the Democratic Party endorsed returning "the right of suffrage to the people of the District" in their party platform. In 1948, reformers in the GOP went one step further, endorsing "self-government of the residents of the nation's capital." For the next 28 years,

National Party Platform Positions on D.C. Self Determination



*Neither Party mentions D.C. self-determination in their platform before 1940.
Source: The Republican and Democratic Party Platforms housed at www.presidency.ucsb.edu

the platforms of both major parties supported home rule and, after 1960, voting representation in Congress for the District (excluding the GOP's decision not to adopt a position on D.C. self-determination in 1964).[41]

Republicans often took the lead in the post-WWII push for expanding D.C. voting rights.

Republicans often took the lead in the post-WWII push for expanding D.C. voting rights. President Eisenhower called for home rule in his 1954 State of the Union address, and the next year he demanded both home rule and voting representation in Congress. Following Ike's lead, supportive members of Congress, including Senate District Committee Chairman Francis Case (R-SD), redoubled their efforts to return the franchise to the citizens of the nation's capital. In 1955 Congress passed a bill allowing District residents to vote for Democratic and Republican convention delegates and national committee members. Residents cast their first ballots in 82 years the following April. It was a small but important victory for local and congressional advocates of home rule and national representation.[42]

The city's successful staging of the 1956 primary election helped propel the effort to win a vote in presidential elections. After the election, many Washingtonians formerly affiliated with the Citizens Joint Committee for National Representation established the Citizens for a Presidential Vote for the District of Columbia. The affluent, majority-white group secured impressive bipartisan support for a 23rd Amendment to the Constitution, including endorsements from Americans for Democratic Action, and President Eisenhower. Senator Kenneth Keating (R-NY) sponsored an amendment providing that D.C. residents get voting representation in the House of Representatives proportional to the city's population (which in 1961 likely would have been three seats) as well as in the Electoral College. The measure easily passed the Senate, but the House Judiciary Committee eliminated the congressional representation sections. The revised amendment passed Congress in June 1960 and quickly was ratified by the requisite 38 states. It became law in March 1961.[43]

It was a remarkable triumph, though supporters noticed an undercurrent of racial opposition to expanding voting rights for the newly majority Black city — D.C.'s Black population hit 54% in the 1960 Census. Only one Southern state voted to ratify the amendment, and in the Midwest and New England, the *Evening Star's* Haynes Johnson observed, "touring reporters from the capital were questioned sharply – off the record, of course – by... legislators [who] wanted to know about the 'Negro problem' in Washington. They wondered if the right to vote wouldn't be thrown away by giving it to a city where more than half the people are colored."[44]

Despite such concerns, the ratification of the 23rd Amendment meant that in 1964 President Lyndon Johnson became the first president since Thomas Jefferson to win office with actual D.C. votes. About 90% of the city's 200,000 eligible voters cast their ballots. Yet D.C. voters still had neither representation in Congress nor self-government.

President Johnson worked to change that. Johnson saw home rule as a vital part of his overall civil rights strategy and threw his weight behind a 1965 bill that would have created an elected city council. Like so many before it, the bill passed the Senate but died in the House. *Congressional Quarterly* attributed the bill's defeat in part to fears of "Southerners and some Northerners of both parties that the Negro majority would dominate the city elections and consequently the city government."[45]

Faced with continued congressional opposition, Johnson moved forward with home rule on his own. He issued Reorganization Plan 3 of 1967, which replaced the three-man commissioner form of government that had ruled the city since 1874 with a nine-person City Council headed by a single Mayor/Commissioner. He framed the measure as a way to create "a better organized and more efficient government" that could combat growing crime, but he also saw it as a step toward full home rule, even though all Council members were to be presidential appointees and Congress retained veto power over the city's budget and legislation. Conservatives on the congressional District Committees saw the reorganization as an attack on their power, while the local Board of Trade feared that it would lead to full home rule. Both vigorously opposed the reorganization but could not muster sufficient congressional opposition, and the plan went into effect in August 1967. Johnson subsequently appointed a Black majority to the Council and named a Black man, Walter Washington, to serve as Mayor/Commissioner.[46]

Johnson's reorganization spurred Congress to take its first step toward local self-government for the District in more than 100 years. A bill to establish an elected, 11-member school board sailed through both chambers of Congress in late 1967 with just three nay votes, becoming law shortly after the assassination of Martin Luther King Jr. in April 1968. That November, Washingtonians participated in their first local election in nearly a century as 64 candidates vied for the school board.[47]

Continuing the tradition of bipartisan reform, in 1969 President Richard Nixon proposed to re-establish the Non-Voting Delegate to Congress as an interim step toward full representation. Congress passed a bill creating the position in 1970. Though the delegate had no voting powers, the 1971 election for the position drew a crowded field. Rev. Walter Fauntroy, a civil rights activist and member of the appointed council, emerged victorious.[48]

Determined to dislodge the conservatives in the House who had been blocking home rule legislation for two decades, Fauntroy led a vigorous campaign to help unseat Rep. John McMillan (D-SC), the segregationist chair of the House District Committee. Fauntroy sent dozens of organizers to McMillan's district in 1972, rallying Black voters (who made up 28% of the district) and highlighting McMillan's racist record. McMillan suffered a stunning defeat. Asked to explain his loss, he groused, "The colored people were bought out."[49]

McMillan's ouster cleared the way for home rule in D.C. His successor as chair of the House District Committee was Charles Diggs (D-MI), a Black congressman with a long history of supporting greater D.C. autonomy. Diggs pushed the D.C. Home Rule Act through the House, and President Nixon signed it into law in December 1973 – 99 years after Congress first stripped

the city of self-government. The bill established an elected government with a mayor and a 13-member Council empowered to levy taxes, determine spending, and pass legislation.

Congress did not relinquish control entirely, however. To the dismay of self-determination advocates, all legislation passed by the Council remained subject to review and veto by Congress. Also, federal officials retained control of the courts, with all criminal violations prosecuted by the U.S. Attorney and all judges appointed by the President. These limitations lead local self-determination advocate and newspaper publisher Sam Smith to label the deal "participatory colonialism."[50]

Despite its limitations, the Home Rule Act marked a significant milestone in D.C. politics and was justly celebrated as both a major achievement of the civil rights movement and an exciting opportunity for city residents to wield power. The 1974 elections brought a host of home rule and civil rights veterans into office. After years of challenging city officials and pushing for change from the outside, they now stood as elected leaders with official responsibilities.[51]

D.C. activists gained bipartisan support for the D.C. Voting Rights Amendment in the mid-1970s, but it was defeated by New Right conservative opposition at the state level.

Having won (limited) home rule, self-determination activists planned a campaign for full voting representation in Congress to coincide with the nation's 1976 Bicentennial. It seemed a politically opportune time, as the Watergate scandal and increased Black voter turnout had thinned the ranks of conservative opponents of D.C. self-determination. Democrats, who since 1960 had endorsed a "Constitutional amendment giving the District voting representation in Congress," held huge majorities in the House and Senate. Del. Fauntroy introduced a D.C. Voting Rights Amendment (DCVRA) in Congress in 1975, imploring his colleagues to "mend a crack in the liberty bell." Self-Determination for D.C., a national advocacy group founded in 1971, coordinated an intense lobbying effort that inundated targeted members of Congress with phone calls, letters, and visits from professional lobbyists and citizen advocates.[52]

Human rights begins at home here in the nation's capital.

Their efforts bore impressive fruit. Both parties supported the amendment in their 1976 party platforms, and in March 1978 the House passed the measure by a margin of 289-127. The Senate soon followed suit, voting 67 to 32 to send the measure to the states for ratification. It even won support from conservative stalwarts such as Sen. Strom Thurmond (D-SC), who declared that "human rights begins at home here in the nation's capital."[53]

Despite this early success, the DCVRA soon ran into resistance from a rising "New Right" movement that would block its ratification and fundamentally change U.S. politics. The DCVRA generated fierce opposition from a powerful array of grassroots organizations, think tanks, and pressure groups such as the American Legislative Exchange Council (ALEC). ALEC and other

"New Right" organizations used a series of overlapping issue campaigns — including taxes, pornography, gay rights, affirmative action, and the Equal Rights Amendment — to mobilize supporters against the amendment. ALEC supplied research and talking points to dozens of conservative commentators who attacked the DCVRA as an effort to furnish "special privileges and power to Washington bureaucrats" and a scheme to elect "ultra liberal Democrats" who would support "federally financed abortions . . . gun control . . . labor law 'reform' and all other bills pushed by the union chieftains." The group's lobbying efforts decisively blunted the amendment's early momentum.[54]

Conscious that overt racial hostility had become politically unpalatable, New Right activists walked a tightrope of playing down the race issue when opposing the amendment, while simultaneously appealing to White middle- and working-class anxieties about "reverse racism." Patrick Buchanan found the balance. A combative D.C. native, Buchanan weaved White anger at liberal policies into a potent argument against the DCVRA. Though he privately conceded that D.C. residents had a "legitimate grievance," publicly he labeled the amendment an "affirmative action program" and implored Americans not to set aside "two centuries of constitutional government . . . just so [civil rights activist] Julian Bond can have a Senate chair."[55]

Facing concerted conservative opposition, the drive to pass the DCVRA sputtered. By late summer 1980, only ten states had ratified the amendment, while nine states had rejected it by wide margins. Advocates secured only six more states before the amendment expired in 1985. Not a single Republican-controlled chamber of a state legislature ratified the amendment.[56]

The campaign to defeat the DCVRA fundamentally changed the Republican Party's position on D.C. self-determination. The federal elections in November 1980 propelled to power the New Right insurgents who had spearheaded opposition to the DCVRA. In 1980, the GOP, for only the second time since 1948, adopted a platform without a plank for D.C. voting rights after D.C. GOP Delegates decided not to offer the plank at the Republican National Convention for fear that the Platform Committee would take a stand against increased D.C. self-determination. The change endured — for the next 32 years the party either remained silent on the issue or opposed any expansion of D.C. self-determination.[57]

In the late 20th century, D.C. residents embraced statehood as their favored vehicle for winning representation in Congress.

Until the late 20th century, the idea to turn D.C. into a state had limited appeal. The first D.C. resident to campaign for statehood was A. E. Redstone, a prominent white labor leader who formed the Home Rule Committee in 1893 and called for the establishment of a state of "Columbia." Redstone, however, generated only meager support for the idea. For the next eight decades, residents focused on securing either home rule or representation in Congress.[58]

Statehood reemerged in the late 1960s among Black and New Left activists frustrated with the slow pace of liberal reform. In 1969, several activists created the D.C. Statehood Committee and vowed to make Washington the 51st state "by any means necessary." The next year, the Capital

East Gazette published "The Case for DC Statehood," which outlined a plan to achieve "unfettered, uncompromised, self-determination" by shrinking the federal District to encompass only the federal buildings ringing the National Mall and turning the rest of the city into an autonomous state. Civil rights activist and former school board member Julius Hobson embraced the idea in his unsuccessful 1971 Statehood Party campaign for non-voting delegate to Congress.[59]

Statehood struggled to gain traction in the 1970s as advocates for D.C. self-determination focused on passing and ratifying the D.C. Voting Rights Amendment. Hobson worked with Ronald Dellums (D-CA) and Fred Schwengel (R-IA) to introduce a statehood bill in the House in 1971, and with Sen. George McGovern (D-SD) on a Senate version in 1972. Both were tabled without debate. Elected to the D.C. Council in 1974, Hobson introduced a bill in 1976 calling for a citywide referendum on statehood, but the Council rejected it.[60]

As the DCVRA faltered in the states, the statehood movement blossomed. A 1980 local ballot initiative written by Statehood Party member Ed Guinan outlined a four-step process to win statehood: a statehood referendum, a constitutional convention, ratification of a constitution, and an application to Congress for admission as the 51st state. D.C. voters supported the referendum with nearly 60% of the vote, making statehood their chosen strategy for gaining self-determination. Support for statehood grew stronger in subsequent decades, reaching 86% in a 2016 referendum.[61]

Support for statehood grew stronger in subsequent decades, reaching 86% in a 2016 referendum.

Like the DCVRA, statehood faced a robust, national grassroots campaign of opposition. Backed by an emerging conservative media, Citizens United Against D.C. Statehood lobbied fiercely against the effort to give D.C. full representation in Congress. In one mailer, Citizens United asked, "Do you want a U.S. Senator who applauds Castro? . . .[W]ho embraces Arab terrorists? Or Black Muslim hatemongers?"[62]

Statehood advocates found little support in Congress. Republican opposition to increased D.C. self-determination hardened, while Democratic support remained lukewarm. Del. Walter Fauntroy pushed a 1987 bill that was voted out of the House District Committee, a historic first, but it never received a vote on the floor. After being elected D.C.'s "Shadow Senator" in 1990, Jesse Jackson joined with newly elected Del. Eleanor Holmes Norton on a high-profile campaign that culminated in a statehood bill that reached the House floor in November 1993. The bill suffered a crushing defeat, 277-153, as 105 Democrats joined all but one Republican in opposition.[63]

After the demise of the 1993 statehood bill, Del. Norton changed tactics. Though she remained a vocal advocate of statehood and introduced statehood bills each session, she focused on incremental expansions in city authority and the powers of her office. In 2007, she worked with Republicans such as Tom Davis (R-VA) and Chris Cannon (R-UT) on a compromise bill to replace

D.C.'s non-voting delegate position with a voting representative and to create an additional, at-large House seat for dependably Republican Utah ahead of the 2012 redistricting. The bill passed the House but was filibustered by Minority Leader Mitch McConnell (R-KY) in the Senate.[64]

The failure of the D.C. Voting Rights Amendment and various statehood measures between 1978 and 2007 underscored the discouraging political reality that stymied statehood supporters. In a polarized era when control of the Congress was tightly contested, Republicans simply refused to support expanding voting rights for a city that had become heavily Democratic. As Ohio Governor John Kasich, a Republican, explained during his 2016 presidential bid, Republicans opposed D.C. statehood because "they know that's just more votes for the Democratic Party." Statehood supporters came to believe that no moral pleas or political inducements could convince more than a handful of Republicans to support their calls for representation in Congress.[65]

In the face of near united Republican opposition, statehood advocates such as D.C. Mayor Muriel Bowser focused their energies on winning Democratic support. She called a convention that drew up a new statehood constitution and submitted it to the voters in 2016. With Democrats expecting to maintain control of the presidency and perhaps gain control of Congress, Mayor Bowser wanted the city to capitalize on a favorable political environment. She gained overwhelming local support, including from the business community. On Election Day 2016, however, the plan collapsed. Though 86% of District voters approved the new statehood constitution, Republicans secured the presidency and both houses of Congress. In an election postmortem, Mayor Bowser promised to continue pressing for statehood, noting "part of our strategy was to be ready for when we had like-minded people elected in the White House and in Congress. We are... ready for that day, when it comes."[66]

Conclusion

"We are legislating for posterity as well as for ourselves," Augustus B. Woodward implored members of Congress as they debated the Organic Act in late 1800. Fearing that in their zeal to exercise "exclusive legislation" over the capital the lame-duck Federalist majority would ignore the principle of "no taxation without representation," he appealed to their sense of duty as stewards of an infant republic whose actions would set precedents for generations to come. "It is all important in all affairs to begin right, to take a comprehensive view, to build the mound, to lay out the channel, before the great tide rolls in, unexpected and unimaginable."[67]

But the Federalists ignored Woodward's warning. More concerned about embedding their political philosophy into the machinery of government before the opposition took control, they hurriedly passed the Organic Act, stripping residents of the federal District of the right to vote for representatives in the national legislature. D.C. has since grown into a great city that is home to more than 720,000 people, not one of whom has voting representation in the Congress that rules over them. The tide, to use Woodward's metaphor, has long since rolled in.

In the 220 years since Congress set the precedent of taxation without representation, District residents have repeatedly demanded a return of the democratic rights that they considered their birthright.

In the 220 years since Congress set the precedent of taxation without representation, District residents have repeatedly demanded a return of the democratic rights that they considered their birthright. In the early 19th century, they called for and received the right to local self-government. After a brief flowering of interracial local democracy during Reconstruction, Congress revoked all voting rights, imposing an appointed government by commission that lasted for nearly a century. D.C. residents continued lobbying for home rule, as well as for representation in the national legislature, but their efforts were frustrated for a century by segregationists in Congress and a distorted memory of Reconstruction that generated fears of Black political empowerment.

Buoyed by the civil rights movement, in the 1960s and 1970s District residents and their supporters in Congress secured the right to vote in presidential elections, won back local self-government, and secured a non-voting delegate in the House of Representatives. They have since sought full voting representation in the Congress, working with a broad national coalition to pass a D.C. Voting Rights Amendment in 1978 (which expired without ratification in 1985) and a statehood bill in 2019. More than two centuries since Congress took up residence in the federal district, Washingtonians and their supporters nationwide are still working to construct a new mound, a strong barrier capable of protecting the principles of both "exclusive legislation" *and* "no taxation without representation."

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info@statehoodresearchdc.org
1310 L Street, NW, Suite 325, Washington, DC 20005

June 18, 2021

Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Peters, Ranking Member Portman and Members of the Senate Committee on Homeland Security and Governmental Affairs.

On behalf of the National Active and Retired Federal Employees Association (NARFE), I write to express NARFE's support for S. 51, the Washington, D.C. Admission Act, and ask that the members of the committee support this legislation that would extend statehood to most of the territory of the current District of Columbia. Statehood would ensure that the residents of the District of Columbia, including tens of thousands of federal employees and annuitants, have the right of self-government and full voting representation in Congress like all other Americans do.

Self-government, including proper representation, is a bedrock principle upon which our nation was founded, enshrined in the Declaration of Independence. That founding document boldly identifies self-government as the guarantor of our unalienable rights – life, liberty and the pursuit of happiness: "That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Yet, for the past 220 years, American citizens living in the District of Columbia have not had the right to self-government enjoyed by those living in the 50 states. They are instead subjected to congressional overreach, wherein Congress holds the power to amend or deny funding (paid by local taxes) or even overturn laws passed by the local elected government of Washington, DC. Even worse, none of the more than 700,000 residents of the District of Columbia have any voting representation in the very Congress that holds power to govern them – both locally and nationally.

There are 144,565 active federal employees working in the District of Columbia, many of whom live there, and 43,255 District of Columbia residents who are federal annuitants. These men and women have served our nation with distinction, yet are not afforded the same rights and privileges to self-government as the citizens they have served. It is past time they are.

S. 51 corrects a longstanding blight on America's democracy by admitting the District of Columbia to the Union, thereby granting its citizens the ability to control their own local governance, along with two Senators and one Representative in Congress. The new state would exclude certain territory for the purpose of maintaining the seat of the federal government. The federal government would still retain control of its relatively small footprint while granting residents of the newly admitted state the rights that are principle to our country.

Statehood requires only passage in each chamber of Congress and the president's signature. All states are admitted on an equal footing, and statehood is the only form of self-government that Congress cannot amend or take away. With passage of statehood in the House, the time has come

for the Senate to exercise its authority and correct the inequity that has been placed on the residents of the District of Columbia.

For these reasons, I urge you to support the Washington, D.C. Admission Act to correct this longstanding injustice. Thank you for your consideration of our views. If you have any questions or comments, please contact NARFE's Staff Vice President, Policy and Programs Jessica Klement at 571-483-1264 or jklement@narfe.org.

Sincerely,

Ken Thomas
National President

Homeland Security & Government Affairs Committee
Hearing: Examining D.C. Statehood
June 22, 2021

Testimony Submitted by Josh Burch, Neighbors United for D.C. Statehood

My name is Josh Burch and I'm the founder of Neighbors United for D.C. Statehood, an all-volunteer citizen advocacy group that focuses on grassroots organizing, community engagement, and on the Hill advocacy focused on making D.C. the 51st state. I wanted to provide testimony on behalf of our group in support of S. 51, the Washington, D.C. Admission Act.

Neighbors United for D.C. Statehood fully supports S. 51 because the bill is morally just, it reflects the will & vote of the 700,000 people in D.C., it is constitutionally sound, and it is good for American democracy by working toward a more perfect union. Below I want to touch on the key points on why our group firmly believes that D.C. statehood is right for the people of D.C. and right for our democracy.

D.C. Statehood is Morally Just

Senator Carper often cites the Golden Rule when discussing the D.C. statehood bill: Do unto others as you would have done unto you. It really is that simple. Statehood for the people of D.C. gets us the same local political status and rights along with equitable national political rights. Statehood achieves fairness for the people of D.C. by ensuring that we are treated the same as Americans living in the 50 states.

The District presently operates under a system of limited Home Rule whereby the people of D.C. elect our mayor and a 13 member Council as well as other local governing positions. Our elected leaders, however, do not have the same authority of leaders fulfilling similar roles in the 50 states. When our local leaders pass laws and our budget, a body where we have no voting representation known as Congress, must approve it. That simply is not fair.

In the 50 states, state legislatures pass bills and governors sign them into law. No state laws or budget come to Congress for approval. That is simply what we in D.C. want. Fairness.

It has been said over and over again but it must be stated until it is ended: Taxation without Representation is wrong. It is unfair and it is unjust. Our founders fought a war against such a system therefore it remains a scar on the American experiment that it still exists today.

The founders wrote that ‘among free men government derives its power from the consent of the people’ but our national government has never allowed for the people in D.C. to provide our consent to the passage of laws, to executive branch nominees, to federal and local judges most prominently being Supreme Court nominees, nor to proclamations of war. If our tax dollars are being used to run the government, to invest in our communities, to help run a country, and to help it be a leader in the world then we deserve to have equitable representation in Congress to our neighbors in the 50 states.

Statehood for the people of D.C. is what our founders wanted: providing more free people with the ability to consent to the power of the government. An equal vote, a vote with equal power to our neighbors in the states, is what is fair and what we deserve. Statehood is what we have done unto the people of the 50 states and it is what should be done unto the people in D.C.

D.C. Statehood Reflect the Will of the People

In 2016, 86% of D.C. voters approved a referendum on D.C. statehood. That overwhelming vote in favor came at the end of a several month process where residents and our legislature debated a state name and constitution. Not everyone agreed on every part of either the process or content of that state constitution but in the end the voters in D.C. decided that statehood was overwhelmingly what we wanted thus voted in favor of the referendum.

In the early 1980s, there was also a state constitutional convention and at that time voters approved that referendum with 60% of the vote. That too was overwhelming but the vote in 2016 showed clearly what the people of D.C. wanted and in growing numbers.

In 1960, D.C. residents could not vote for school board members, a local legislature, a mayor, a Representative in the House, our own U.S. Senators, or even the President of the United States. Congress debated and then passed the 23rd Amendment which was then ratified by the states granting the “federal district” 3 electoral votes. That was the first time in almost 90 years the people in D.C. could vote for anyone. For almost 90 years the people of D.C. were barred from voting for any local or federal offices.

As the Civil & Voting Rights Movement swept through positive change throughout our country its spirit and intent inspired the people of D.C. to push for more. Some people began pushing for statehood back then but Congress was only willing to give the people of D.C. a little bit of democracy at a time, as if we did not deserve equal treatment in our democracy. In 1968, the people of D.C. were given the right to vote for School Board which is the first local election District residents could participate in since 1874. Then in 1973, Congress passed the Home Rule Act which gave the District Home Rule government with limits and conditions on it.

In the mid-late 1970s, a constitutional amendment was passed by two-thirds majorities in the House & Senate to give the people of D.C. equal congressional representation but not full on statehood. Under that constitutional amendment the limited Home Rule government would still be in place. Only 14 states ratified that constitutional amendment and thus it never was fully ratified.

Throughout the efforts to get D.C. residents the right to vote for School Board, or Home Rule, or federal representation via a constitutional amendment there was an underlying truth that statehood is the only thing that will put us on equal footing in the American democracy. We are the United States of America thus only statehood status puts us on equal footing.

In the 1980s, D.C. residents tired of failed half efforts embraced the push for full-on statehood and passed a referendum in favor of it with 60% of the vote. In the 1980s and 1990s the push for statehood continued. In the late 1990s Congress revoked most of the District's Home Rule after a period of financial mismanagement. Then in the early 2000s as Home Rule was restored residents again began to push for more democracy in D.C. After failed efforts to get a vote in the House and to get full budget autonomy residents began once again to galvanize around that same underlying truth that only statehood would make us equal.

When our group started in 2011, we began by doing a series of living room statehood talks about why the movement should focus on statehood and only statehood. Time after time participants in our talks agreed. Why push for something less than equality? Why ask for lesser rights? Why asked to be treated differently, unfairly, and inequitably? It made no practical, moral, or democratic sense. Clarity for the people in D.C. is statehood.

After decades of failed efforts to get Congress to treat the people of D.C. better even incrementally failed and after decades of Congress abusing its power over D.C. by overturning our local laws the people of D.C. are done with half steps and half measures. We are Americans and we deserve equal treatment in our democracy.

In 2016, the voice of the people in D.C. could not have been any clearer as our votes reflected overwhelming support for D.C. statehood. 86% is clear, it is overwhelming, and it is an expression of the will of the people of D.C. that we should become a state and Congress has a duty to act on it.

D.C. Statehood is Constitutionally Sound

In 2014, I had the honor of attending the last Senate hearing on D.C. statehood and sat in awe as then Prof. Viet Dinh (former George W. Bush Justice Department Appointee and now Fox

News Chief Legal Counsel) laid out the constitutional case for D.C. statehood. His words and research were clear, thorough, and decisive. His words have since been back up by dozens of legal and constitutional scholars such as Prof. Primus who also provided testimony for this hearing.

The case that Viet Dinh, Prof. Primus, and dozens of constitutional scholars have made are pretty straight forward. First, Congress has explicit constitutional authority to admit new states as they've done 37 times by simple legislation. Second, there is nothing in Article I Section 8 that prevents the residential and commercial portion of D.C. from becoming a state. That portion of the constitution commonly known as the District Clause provides an upper limit for the size of the federal district, not a lower limit. As such, the Washington, DC Admission Act meets constitutional standards. And finally, the people of D.C. approved a referendum overwhelmingly seeking statehood. In that referendum D.C. voters confirmed that they were meeting past standards for statehood admission by agreeing to a republican form of government, state borders, a state name, and a state constitution.

Professor Primus, Viet Dinh, and dozens of constitutional scholars have all laid out the constitutional case for the Washington D.C. Admission Act so I will defer to and endorse their more detailed explanations.

D.C. Statehood is Good for American Democracy

America began with 13 states. Over two centuries we have added 37 more. The fact that American democracy continued to grow over two centuries is a testament to the sustaining power and inspiration of our country. Adding another state, for the people in D.C., or elsewhere is good for our democracy and it demonstrates its enduring strength.

Image if in the 1790s and early 1800s our founders and the generation after them said "no, we're good. Thirteen is a prime number and that is good enough for our union." Separating Kentucky from Virginia and making it a state was good for our country, good for our democracy, and most importantly good for the people of Kentucky. Separating West Virginia from Virginia and making it a state was good for our country, good for our democracy, and good for the people in West Virginia. Adding states is good for our country and its people.

Adding states shows the strength of our democracy while it also helps ensure that power is derived from where it should be: the people. Adding new states allows a group of people bounded by a common sense of identity and within defined borders to have their own political identity. Statehood is the essence of the American democratic experiment. Our country is the United States of America, not the United Territories of American, nor the United Districts of

America. States have the power in our country and the people in those states give each state their power backed by the constitutional delegating powers to the states.

As residents of the federal district we are on unequal footing not just in name but in practice. We seek statehood for ourselves, for our neighbors, and yes, for our country. We believe that adding another state is not just good for us but good for American. Representative government is best enhanced when more people have representation. Making Ohio, Utah, Arizona, Oklahoma, Maine, West Virginia, and all the other states into the union after the original thirteen was not just good for the people in those states, it was good for our country.

We wholeheartedly believe that statehood for the people in D.C. is good for us but also good for our country. We should not be limiting representative government to our fellow citizens but working to expand and ensure it. Statehood status is the fundamental equalizer in American democracy and we, the people in DC, deserve equality.

I want to thank Chairman Peters and Senator Carper for their leadership on this issue. I want all members of this committee to look at this issue from a moral, constitutional, and personal perspective. The people of D.C. are Americans just like in your states but we are treated differently and inequitably. It does not have to be that way. You all have the power to do what's been done only 37 other times in our history: admit a new state.

As a lifelong Washingtonian, father of two, and true believer in the American democratic experiment I implore the members of this committee to meet this moment in our history and help form a more perfect union by admitting the people of D.C. as the 51st state in the union. D.C. statehood is morally just, constitutionally sound, and fundamentally the right thing to do for our country & our democracy.

Thank you,

Josh Burch
Founder
Neighbors United for D.C. Statehood

Homeland Security & Governmental Affairs Committee
Hearing: Examining D.C. Statehood
June 22, 2021

Statement Submitted by Joanna Pratt and Jacqui Lieberman, NOPE for DC Statehood

Our names are Joanna Pratt and Jacqui Lieberman. We are co-leaders of the DC Statehood arm of the local Washington DC group, NOPE, Neighbors Defending Democracy. NOPE's mission is to defend our country's democracy: we say "nope" to those who seek to disrupt democracy through lies, violence, discrimination, and exclusion. Our volunteer leaders and members have worked tirelessly for the past five years to support candidates and grassroots community groups that are fighting for voting rights, racial justice, and equality.

NOPE supports the passage of S. 51, the *Washington, D.C. Admission Act*, because it will ensure that the 700,000 residents of the District of Columbia can fully participate in our democracy for the first time since Congress passed the *District of Columbia Organic Act of 1801*. It is way past time to address the lack of representation, voter suppression, and racial injustice to which DC residents have been subjected for the past 220 years.

DC Statehood Will Strengthen our Country's Democracy
DC residents are similar to the residents of the 50 states: we pay our taxes; we serve in the military; we work in many economic segments; and we have schools, commerce, industry, parks, and faith communities. But unlike the residents of the 50 states, we do not have representation in Congress. Indeed, Congress has control over our own local laws. It must approve all legislation passed by our city council, which means that Congress can and does nullify our local laws and limit what we do with our locally raised taxes. We never know when Congress might decide to further limit our rights, as it did when it treated DC as a territory rather than a state when allocating relief under the 2020 *Coronavirus Aid, Relief, and Economic Security (CARES) Act*.

The US has a reputation as a leader of all democratic nations and yet we are the only democratic country that does not extend full representation to the citizens of its capital city.

This situation is remindful our country's early rallying cry of "No Taxation without Representation!" Giving DC representation in Congress will not only enable DC residents to participate fully in our democracy, it will also benefit residents of the 50 states by providing an important new perspective on many issues that Congress is confronting, such as health care, climate change, and voting rights.

DC Statehood Will Improve Racial Equality in our Country
A majority of Washington DC residents are Black or Brown. DC's lack of representation in Congress, coupled with decisions by Congress to nullify our local laws is evidence of the systemic racism that tarnishes our country.

Making DC the 51st state would be an important step in recognizing the rights of ALL citizens and in giving a larger voice to the issues that are critical to all Americans of color.

DC Statehood does NOT Require a Constitutional Amendment
Many constitutional law experts, with a wide variety of backgrounds and areas of expertise, have determined that DC statehood does not require a constitutional amendment. In 2014, Professor Viet D. Dinh, former Assistant Attorney General under George W. Bush and currently Chief Legal and Policy Officer of Fox Corporation, presented testimony to the Senate Homeland Security and Governmental Affairs Committee regarding the constitutionality of the New Columbia Admission Act. He concluded that courts "...would likely hold that the Act is constitutional."

On May 22, 39 constitutional experts (including Laurence Tribe of Harvard Law School, Erwin Chemerinsky of University of California, Berkeley School of Law, Larry Sabato of the University of Virginia, and Leah Litman of the University of Michigan Law School) informed Congressional leaders that Congress has the authority to make DC a state. The scholars analyzed the three primary constitutional provisions at play in the statehood debate — the Admissions Clause, the District Clause, and the Twenty-Third Amendment — and determined that there is no constitutional barrier to the passage of the Washington, D.C. Admission Act.

US Citizens - Within DC and in the 50 States - Support DC Statehood
Support for DC statehood is widespread across the country. In 2016, 86% of D.C. voters approved a referendum in support of D.C. statehood. Three recent surveys, all conducted by different pollsters and with different sponsors, have found more Americans favor than oppose statehood for Washington, D.C. There is evidence that support for D.C. statehood has increased over time, with one pollster finding a 9-point increase from January 2019 to September 2020.

As we have talked to visitors to DC and traveled to the states, we have learned that many Americans do not realize that DC residents have no representation in Congress. They are shocked when we explain the ways that DC residents are disenfranchised. Our efforts to educate our fellow Americans about DC statehood have led us to create this video, illustrating enthusiastic support for statehood in all 50 states.

On a personal note, the two of us have lived in DC for a combined total of more than 70 years. Our five children were born and raised in DC. Our hope for them is that they can live in a DC where they are treated as equal to their relatives and friends in the 50 states.

Thank you Chairman Peters, Ranking Member Portman, and members of the Homeland Security and Government Affairs Committee for holding the June 22 hearing on S. 51. We urge you to make the right decision for democracy and admit Washington, Douglass Commonwealth as the 51st state of the United States of America.

Thank you,

Joanna Pratt and Jacqui Lieberman
Co-Leaders, NOPE for DC Statehood



DAVE YOST
OHIO ATTORNEY GENERAL

June 22, 2021

The Honorable Gary C. Peters
Chairman
United States Senate Committee on Homeland Security & Governmental Affairs
724 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Rob Portman
Ranking Member
United States Senate Committee on Homeland Security & Governmental Affairs
448 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Peters & Ranking Member Portman,

I write to provide written testimony regarding my serious concerns with the Washington, D.C. Admission Acts, H.R.51 and S.51. I have two categories of concerns. The first are constitutional in nature—Congress lacks the power to pass these laws. The second set of concerns are policy oriented. I will address them in turn.

Constitutional Concerns

Our Constitution vests each branch of the federal government with specific and enumerated powers. Among Congress's powers is the power to admit new States into the Union. Specifically, Article IV, Section 3, Clause 1 provides:

> New States may be admitted by the Congress into this Union; but 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.

Notwithstanding this broad grant of authority, Congress has no authority to admit *D.C.* as a State. I will highlight two reasons why.

First, admitting D.C. would violate the Twenty-Third Amendment. That amendment says:

> The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District

> would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the
>
> District and perform such duties as provided by the twelfth article of amendment.

The meaning of a constitutional provision depends on "the ordinary public meaning" of the provision's terms at the time of its ratification.[1] And when the People ratified the Twenty-Third Amendment in 1961, the phrase "The District constituting the seat of Government of the United States" referred to a particular place—it referred to the District of Columbia. What does the Twenty-Third Amendment tell us about that place? Relevant for present purposes, it tells us that the District of Columbia is not a State—otherwise, there would be no need to say that D.C. obtained whatever electors it would be entitled to "*if it were* a State." In recognizing D.C. as a non-State, the Twenty-Third Amendment constitutionalized D.C.'s non-State status. In other words, it establishes that a particular place—the District of Columbia—is not a state as a constitutional matter. The only way to make D.C. a State, therefore, is to amend the Constitution. As long as the Twenty-Third Amendment remains in place, D.C. is a constitutionally designated non-State—Congress cannot override the Constitution's designation with a law.

Second, even without the Twenty-Third Amendment, D.C.'s non-state status would remain as a constitutional matter. The reason is Article I, Section 8, Clause 17, which provides for the creation of a purely federal district with cession of particular States. Specifically, the provision states:

> 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.

With this provision, Congress was "given exclusive jurisdiction over *the district* which was to 'become the seat of government of the United States,' not merely over the seat of

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[1] *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

government, wherever that might happen to be."[2] Nothing permits Congress to relinquish this power. "As Attorney General Robert F. Kennedy stated in 1963, commenting on a bill that would have retroceded the District to Maryland, "while Congress' 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."[3] Attorney General Kennedy went on to note: "In this respect the provisions of Art. I, Sec. [8], cl. 17 are comparable to the provisions of Art. IV, Sec. 3 which empower Congress to admit new states but make no provision for the secession or expulsion of a state."[4] Because nothing empowers Congress to turn this constitutionally designated "District" into a State, Congress lacks the power to do so.

One might object that, if the foregoing is true, Congress acted unconstitutionally by retroceding a portion of D.C. to Virginia in 1846. But the retrocession does not appear to have been challenged, meaning its legality was never tested. And regardless, the fact that Congress acted unconstitutionally in 1846 provides no justification for doing so again today.

Policy Considerations

Even if the above constitutional concerns are not accounted for, and they should be, there are significant policy concerns that creating an independent state almost entirely surrounding the nation's capital creates. James Madison noted in Federalist 43 that a federal territory is an "indispensable necessity of compleat authority at the seat of government."[5] Forcing such a federal territory to rely on a singular state for support could create perverse incentives for that state to bribe the federal government to adopt its preferences. Giving the District control over the security, utilities, and taxation authority of the area in which Members of Congress, the Executive Branch, and the Supreme Court and their staffs reside part- or full-time would give the District undue influence on the legislative process. This is the reason the Founding Fathers identified a need for a federal district in the first place.

But let's put history and the law aside, because no one involved in this hearing actually believes that those have anything to do with the push for D.C. statehood. This is about

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[2] U.S. Department of Justice, Office of Legal Policy, *Report to the Attorney General: The Question of Statehood for the District of Columbia* 18 (April 3, 1987) (emphasis added).
[3] *Id.* at 19 (quoting Letter and Memorandum of Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Committee on the District of Columbia, Dec. 13, 1983, *reprinted in Home Rule, Hearings on H.R. 141 Before Subcommittee No. 6 of the House Committee on the District of Columbia*, 88th Cong., 1st Sess. 341, 345 (1964)) (alteration adopted).
[4] *Id.*
[5] The Federalist No. 43, p.288 (Madison, J.) (Cooke ed., 1961).

power, pure and simple. One party, which right now has unified control of the legislative and executive branches, believes that it can solidify its control by giving D.C. reliably Democratic seats in Congress. The arguments regarding the unfairness of denying D.C. the benefits of statehood are theatre and nothing more. After all, if the statehood movement has anything to do with a principled concern for non-representation in Congress, where are the calls for the admission of Guam, the Northern Mariana Islands, and so on? Why does a single city have a better claim to being underrepresented than those territories? Indeed, given that every Member of Congress works in the one city that some want to make a State, and given that many representatives and senators *live in* that city, D.C. in one sense is the best represented locale in America. Tell the factory worker in Youngstown or the nurse in Dayton that Congress cares too much about the rest of the country and too little about D.C. I can assure you, the claim will not go over well. And understandably so. D.C. gets more than enough attention in our political system—attention that inures to the tremendous benefit of the D.C. metro area's economy.[6] And the only reason to admit it to the Union would be to help the party that D.C. residents prefer exert power over other Americans.

Congress does not further our shared goal of achieving a more perfect Union by admitting a State in hopes of making it easier for one faction of Americans to dominate another politically. The admission of D.C. is a terrible idea, and the statehood bills must not move forward.

Conclusion

Thank you for allowing me to provide my perspective on this critical issue. Consideration of an additional state joining our Union is a critical one. Consideration of taking our constitutionally created federal territory and turning it primarily into a new state is even more critical. I urge this committee to reject this blatant power grab and focus on the serious issues facing our country.

Yours,



Dave Yost
Ohio Attorney General

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[6] *See* Aaron Gregg, *While federal employment shrinks in D.C., government contractors are on a hiring spree*, Washington Post (July 22, 2018), https://perma.cc/L2VA-WTT4.

Dear Homeland Security and Governmental Affairs Committee,

Please accept this testimony (also submitted via website contact form) in support of the Washington, DC Admission Act (S.51).

My name is Wren Patton and I've been a volunteer organizer with the DC hub of the Sunrise Movement for the last two and a half years. We are a local youth-led organization fighting for climate, economic, and racial justice.

I have moved frequently in my life and have called many places home, but I feel more connected to DC than anywhere else because of the time I've spent building community with DC residents. I have met so many caring and compassionate people who are working to make our city and our world a better place, and I find it appalling that my neighbors and I are denied representation in our federal government.

When DC becomes the 51st state it will be the first Black-plurality state in the country. Continuing to deny voting rights to the residents of DC is rooted in systemic racism and this historic wrong must be made right this year. It is not only the morally just thing to do for DC residents but for American democracy as a whole. I want to live in a democracy where every citizen has the right to vote for House and Senate leaders to represent us. The future of this country is a multiracial working class democracy where the will of the people is more important than special interests, but we will not win that future without bold leadership. I pray that those bold leaders are in our government right now and that they make history by making DC the 51st state.
Very truly yours,

Wren Patton

ALAN WILSON
ATTORNEY GENERAL

April 13, 2021

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

The Honorable Nancy Pelosi
Speaker of the House
United States House of Representatives
Washington, D.C. 20515

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
Washington, D.C. 20515

The Honorable Chuck Schumer
Majority Leader
United State Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
United State Senate
Washington, D.C. 20510

Dear Mr. President and Congressional Leaders,

As the chief legal officers of our states, we write to you regarding our serious concerns about recent reports indicating this Congress's and the Biden Administration's interest in passing the unconstitutional "Washington, D.C. Admission Act" (H.R.51 and S.51). If this Congress passes and President Biden signs this Act into law, we will use every legal tool at our disposal to defend the United States Constitution and the rights of our States from this unlawful effort to provide statehood to the District of Columbia.

While Article IV, section 3 of the Constitution provides that "[n]ew States may be admitted by the Congress into this Union[,]" the Constitution's provision of exclusive authority over the District of Columbia to the United States Congress cannot be wiped away simply by ordinary legislation. Rather, the only lawful way to provide statehood to the District of Columbia is to amend the Constitution.

The District of Columbia's creation traces to Article I, section 8, clause 17 of the Constitution, which says that Congress shall have the power:

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> 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 Government of the United States....

Congress can no more abdicate its Article I authority over the District of Columbia to a new state via simple legislation—composed of the same territory, of course—than it can abdicate its authority over taxation. The reference to the maximum size of the District simply described how large it could be at its initial creation and does not provide authority for Congress to unilaterally alter the size of the District through simple legislation, much less create an entirely new state.

Accordingly, not only does Congress lack the authority to create an entirely new state out of the District, but it also does not have the authority to reduce the size of the District to the equivalent of a few federal buildings and surrounding parks.[1] Article I, section 8, clause 17 does not simply state that Congress has exclusive authority over the "*Seat* of Government," but "over *such District* as may . . . become the Seat of Government of the United States [.]" U.S. Const. art. I, § 8, cl. 17 (emphasis added). Indeed, if it were so easy, there would have been no need for the Twenty-third Amendment to the Constitution, which provides for the electors of President and Vice-President to "[t]he District constituting the seat of Government of the United States."

While we could write more about our concerns with the unconstitutionality of the Washington, D.C. Admission Act,[2] we assure you that we will challenge any attempt to provide the District of Columbia with the actual benefits of statehood if Congress passes it and the President attempts to sign it into law.

But beyond the Washington, D.C. Admission Act's blatant unconstitutionality—and setting aside the practical problems that would come with statehood and the interaction with the federal government on things like utilities and the provision of basic services—it is bad policy. Its enactment would be antithetical to our representative democratic republic, and it would constitute an unprecedented aggrandizement of an elite ruling class with unparalleled power and federal access compared to the existing fifty states in the Union.

It was no accident that our Founding Fathers set aside an exclusive federal district to serve as the location for the seat of government, nor was it accidental that they did not provide for it to be converted into a state. They explicitly considered and rejected this idea. There are myriad reasons why they chose the structure that they did. Among them, as James Madison noted in Federalist 43, is the "indispensable necessity of complete authority at the seat of government." He further noted:

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[1] Admittedly, the County of Alexandria was retroceded back to the Commonwealth of Virginia in 1846. But that retrocession was not meaningfully challenged at the time, and the transferring of territory to an *existing state* does not provide a constitutional foundation for creating an *entirely new state* through simple legislation.

[2] For example, it does not address the potential conflict with the requirements 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." U.S. Const. art. IV, § 3. Maryland may have ceded some of its territory for the creation of a new federal District, but it is not clear that Maryland ceded its territory with the intention of that territory someday becoming a state of its own.

> Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to [the other States].

The Federalist No. 43 (J. Madison). Those reasons are still true today and perhaps even more so now than at the Nation's founding.

The Washington, D.C. Admission Act rejects more than two centuries of history by changing the title District of Columbia—its name, of course, derived from Christopher Columbus—to the "State of Washington, Douglass Commonwealth." Providing statehood would create a state that would not be one among equals, but rather, a super-state that would have primacy over all others. Furthermore, for over two centuries, the District's residents have all willingly lived there with an understanding of its unique nature.

The Act mandates that residents of the new State of Washington, Douglass Commonwealth who might be qualified to vote in another State must be permitted to vote absentee in the elections of those other States, and it dictates the time during which those other States must accept voter registration applications. It also directs other States to treat residents of the State of Washington, Douglass Commonwealth in a manner superior to residents of their own State, including by waiving voter registration requirements for them, expediting the processing of their voting materials, and mailing absentee ballots to them at the earliest opportunity. In other words, residents of the new State of Washington, Douglass Commonwealth become the most privileged residents of any State in the Union—yet another example of their status as an elite ruling class. We reject all these troublesome results of providing statehood to the District of Columbia.

In short, the Washington, D.C. Admission Act is unconstitutional, represents unsound policy, and, if allowed to take effect, would create a super-state with unrivaled power. If the bills are enacted and provide statehood to the District of Columbia, we will challenge the Act in court.

Sincerely,

Alan Wilson
Attorney General for South Carolina

Christopher M. Carr
Attorney General for Georgia

Jeff Landry
Attorney General for Louisiana

Jason R. Ravnsborg
Attorney General for South Dakota

Ken Paxton
Attorney General for Texas

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Attorney General for Kansas

Mark Brnovich
Attorney General for Arizona

Mike Hunter
Attorney General for Oklahoma

Wayne Stenehjem
Attorney General for North Dakota

The Honorable Gary Peters
Chairman
Homeland Security and Governmental Affairs Committee
United States Senate
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Rob Portman
Ranking Member
Homeland Security and Governmental Affairs Committee
United States Senate
340 Dirksen Senate Office Building
Washington, DC, 20510

Dear Chairman Peters, Ranking Member Portman, and the other members of the HSGAC committee,

Please accept this testimony in support of the Washington, DC Admission Act (S.51). We want to thank you and the committee for taking the time to consider this important legislation and encourage you to swiftly move it through the committee.

The 700,000 Americans living in Washington, DC -- who are mostly Black and brown -- pay taxes and raise their families. Yet, they are denied the same voting rights and congressional representation as Americans living in all 50 states. They have waited 230 years for full voting rights; they should not wait one more.

The denial of voting rights is rooted in systemic racism. It is time to end this now, and grant D.C. Statehood. We stand with the majority of Americans and the residents of D.C. in supporting righting this historic wrong.

Sincerely,

Kate Finman, Rose Ippolito, and Marco McDiarmid
on behalf of Sunrise DC

MURIEL BOWSER
MAYOR

August 13, 2021

The Honorable Gary Peters
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Peters,

Attached please find post-hearing responses to questions asked of me by Senators Sinema, Johnson, and Lankford after the June 22, 2021, hearing of the Committee on Homeland Security and Governmental Affairs titled "Examining D.C. Statehood."

Please do not hesitate to reach out to me or my Senior Advisor, Beverly Perry for additional information at beverly.perry@dc.gov or 202-724-7173.

Sincerely,

Muriel Bowser
Mayor

Post-Hearing Questions for the Record
Submitted to the Honorable Muriel E. Bowser
From Senator Kyrsten Sinema

1. **During your testimony, you discussed how the District of Columbia (D.C.) was denied its proper share of CARES Act funding because it was treated in the same manner as other territories like Guam and America Samoa. However, D.C. is different from the other territories because of its history, the Constitution, and location. D.C. is unique in that while it has some autonomy, such as its own police force and Council, it is ultimately overseen by Congress. In addition to the funding and response to the various 2020 events you mentioned in your testimony, what are some of the challenges the District has experienced from this unique set-up.**

   Congress invokes the District Clause of the Constitution (Article 1, Section 8, Clause 17) to exercise authority over the District of Columbia's local affairs. Congress reviews all DC legislation before it can become law and, if it opts to do so, modifies or overturns such legislation. Congress imposes new and unwanted laws on the District. It retains authority over the District's local budget, most of which is funded only by taxes levied by the District on its residents. Even though we have governed our local affairs in a stellar manner, which has proven to be fiscally sound, we do not have self-governance or local autonomy in the District of Columbia. Two key differences between the District and the territories are that the District is required to advance funds for First Amendment activities attributed to federal jurisdiction that have gone unreimbursed in recent years and the District lacks control over the local court system and criminal justice system.

   Members of Congress also routinely impose their own personal political agendas on the District and its residents; including some agendas that are not laws or enforced in the jurisdictions they represent. Recent examples include:

   - Expanded federally-funded private and religious school voucher programs, the only federally funded voucher program in the country.
   - Barred District spending to offset the costs of abortions for low-income residents.
   - Challenged DC's medical marijuana program, even though many states administer similar programs and prohibited DC from taxing, regulating and commercializing marijuana sales, which undoubtedly drives illegal sales.
   - Obstructed DC's efforts to control gun violence.
   - Blocked needle-exchange programs in spite of proven evidence that these programs reduce the spread of HIV/AIDS and save lives.
   - Threatened to repeal DC marriage equality laws.
   - Challenged DC's Death-with-Dignity laws.
   - Threatened to intervene in a successful citizen initiative to raise the minimum wage for tipped workers.
   - Attempted to block DC from implementing affordable health care for residents.

   While opinions may vary on these issues, the relevant problem is that Congress, without the consent or election connectivity of the governed, routinely acts to circumvent DC's democratically enacted laws and budgets. Every State in the Union enjoys the right to manage its local affairs consistent with the laws of the land and free from Congressional interference. The District of Columbia seeks no more and deserves no less.

2. **Can you provide us with any example of benefits for maintaining the status quo?**

   None. There is no substitute for the Constitutional guarantee of full democracy for all American citizens. The 700,000 District residents have voiced their opinion and cast their vote with an overwhelmingly 86% of voters voting for DC Statehood to achieve full democracy.

   We operate our own school system, manage our own SNAP and Medicaid programs, and receive federal block grants that are typically awarded to states (e.g., workforce training grants, Community Development Block Grants for housing, Ryan White funding to combat HIV and Violence Against Women Act grants).

   We have a $17.5 billion budget and a AAA bond rating, a rating higher than 35 states. We pay federal taxes, —in fact, more per capita than any state and more total federal taxes than 22 states. We have passed 24 consecutive balanced budgets funded mostly by locally raised revenues.

   However, despite being fiscally independent and having a $17.5 billion local budget, we are still subjected to the Congressional appropriations process and riders that allow any member of Congress to impose their will on District residents. Congress has veto power of all laws passed by DC's locally elected Mayor and Council, and they have the power to block any law they oppose.

3. **In your testimony, as well as in the comments from other speakers, you discussed the needs of your constituents. Are there parts of your anti-child poverty agenda that you haven't been able to implement because D.C. does not have the same powers as a state government? If so, can you briefly provide details on how you are limited? How as Governor would you address the wealth gap and funding initiatives within the District that you are unable to do now?**

   No, the District has implemented a robust maternal and infant health and anti-child poverty agenda. For Fiscal Year 2022, the Council recently imposed a high earners tax to afford childcare programs for children from birth to three years of age, as well as funding for an increased earned income tax credit.

4. **D.C. has a vibrant identity and history that is distinct from any other state. I am sure D.C. residents want to protect that identity and history. One of the chief proposals to resolve the D.C. voting rights and federal representation issues is to merge D.C. back into Maryland. This retrocession is portrayed as a method to provide virtually all D.C. residents a vote by having them return to Maryland and become full residents of the State, just as what happened with Alexandria, VA, in 1846. In your opinion, does retrocession protect the unique history and identity of D.C. residents? How would reverting to Maryland impact the story and lives of native D.C. residents?**

   The people of Alexandria elected to leave the District and retrocede to Virginia within the first 50 years of our nation. Some 220 years later, residents of the District of Columbia have indicated their preferred path for representation in the House and Senate by voting specifically for DC Statehood. In 2016, most DC residents (86%) voted for Statehood. Retrocession would be inconsistent with the 2016 vote, and at odds with our preferred method of attaining full voting rights for our residents, DC Statehood. Unlike Maryland, which was founded with a

state constitution, Washington was founded without a local governance structure and developed a culture and identity as the population increased.

- The parcel of land currently known as Washington, DC, was originally ceded to the federal government by Maryland in 1790. This transaction severed the ties between the District of Columbia and the State of Maryland, and they are now only linked in history and geography.
- The conditions for Washington, DC to retrocede to the State of Maryland currently do not exist. The District's return to Maryland would require the consent of the legislature of Maryland, which has not occurred. In fact, based on the political comments of its leaders, Maryland residents are more inclined to support DC Statehood. Maryland's highest-ranking member of the US House of Representatives, Majority Leader Steny Hoyer (D-MD), is a co-sponsor of HR 51 which passed the House in the 116th and 117th Congresses. Leader Hoyer has even penned a Washington Post op-ed in strong support of DC Statehood and is in lock step with the large number of Maryland elected officials who support DC Statehood.
- Maryland's two largest counties, Montgomery County and Prince George's County, are the District's closest neighbors, both sharing boundaries and key access points to the District. Both have also passed recent resolutions indicating their support for DC Statehood in February and April 2021 respectively.
- Also, in April of this year, the Metropolitan Washington Council of Governments voted unanimously to support DC Statehood. The Metropolitan Council of Governments is comprised of 24 of the National Capital Region's state and local governments and their governing officials from both the legislative and executive branches.

Post-Hearing Questions for the Record
Submitted to The Honorable Mayor Muriel E. Bowser
From Senator James Lankford

5. **Medicaid covers abortions only in rare cases. Since 1976, federal funding for Medicaid has been passed by Congress with a prohibition on federal dollars from funding abortion except in instances of rape, incest, or danger to the life of the mother. Unfortunately, some states have chosen to use their own state funds to pay for the abortions of women enrolled in Medicaid, but under the Hyde Amendment, this funding must be maintained separately from the federal Medicaid program. Currently, the District of Columbia is prohibited from funding abortion by the Dornan Amendment, a D.C. version of the Hyde amendment that blocks District tax dollars from funding abortion. In 2009 and 2010, a pro-abortion Congress passed D.C.'s budget with a weakened version of the Dornan Amendment, allowing the District to use its own funds for abortion. During that time, D.C. funded approximately 300 abortions.**
   If D.C. became a state, is it your intention and belief that it would join the list of states that use state tax dollars to fund abortions for women enrolled in Medicaid?

   As a state, the executive will administer any program authorized and funded by the legislature.

6. **The "Death with Dignity Act of 2016" (Act 21-577) became law in the District of Columbia on December 19, 2016. This law allows an adult who has been diagnosed as terminally ill (defined as having less than six months to live) to receive a prescription for medication to end his or her life. D.C. now joins six states that have enacted such laws.**

As I have communicated to you in the past, the law has insufficient safeguards. The definition of "terminal illness," for example, is too broad; many diseases, such as diabetes or HIV, can be considered "terminal" if left untreated. Further, there is a possibility for error in prognosis; for even the most experienced doctors, it is extremely difficult to establish a six-month life expectancy. Additionally, there is no requirement in the law to screen for mental illness, no requirement for a medical attendant to be present at the time of ingestion in event of medical complications, and no precautions are required to ensure the lethal medication is used as intended after it leaves the pharmacy. Last, compliance with the bill's limited safeguards is difficult to track because it directs the physician to list the cause of death as the underlying condition without reference to their death by assisted suicide, and the reporting requirements in the bill are not subject to the Freedom of Information Act.

Congress has expressly forbidden the use of government funds for purposes related to assisted suicide under the Assisted Suicide Funding Restriction Act of 1997 (Pub. L. No. 105-12). The D.C. law puts our nation's most vulnerable—people who are elderly, disabled, or fighting mental illness— at risk.

If D.C. became a state, is it your intention and belief that it would use state tax dollars to fund physician-assisted suicide?

As a state, the executive will administer any program authorized and funded by the legislature.

7. **During the COVID-19 pandemic, you implemented a policy of restricting socially-distanced and masked outdoor worship services to one hundred people while letting other, larger open-air gatherings continue. This limit on outdoor religious gatherings was one of the strictest in the country. In fact, 42 states had *no* cap on outdoor worship at all. Per a Court injunction, churches were allowed to gather outdoors, masked, and socially distanced beginning in October. Nevertheless, in November, just before Advent, you subjected houses of worship to an arbitrary 50-person attendance cap regardless of capacity even though houses of worship, included the Archdiocese of DC had held thousands of Masses since June without a single known COVID outbreak. In response to a lawsuit, you raised the cap to 250 persons or 25% capacity limit, whichever was smaller, which still forced many congregations to limit attendance, meet outside of city limits or forego gathering. As you undoubtedly know, Congress nearly overwhelmingly agreed when it passed the Religious Freedom Restoration Act in 1993 that governments needed a compelling interest to restrict the free exercise of religion *and* it had to do so in the least restrictive means possible.**

Please explain why you saw fit to limit gatherings for Houses of Worship during the COVID-19 pandemic more substantially than other gatherings.

This question was raised during the hearing. I gave the following response and I have nothing further to add:

"*Well, certainly. The limits were—you know, the COVID restrictions were for everybody, and I do not have to tell you that we faced a 100-year pandemic, and I am very proud of D.C. residents, businesses, houses of worship who followed health guidance and allowed us to crush this virus. That is why I can sit here today with D.C. fully open, and I know that we saved lives by flattening the curve, keeping people out of the hospital and intensive cares, and making sure*

our first responders could respond to the virus. So, I am proud of the work that we did. Certainly what health guidance told us, Senators, was that some indoor spaces were more of a risk for transmission of the virus than others, and unfortunately churches were among them. And believe me, I have had this debate. I have had this debate with my own church, in court. And we came to many compromises. It was always our intent to make sure that people of faith and houses of worship all across the District could practice their faith, but also practice it safely. I do not have to remind you our very first case in the District was in a church, and we saw the spread of the virus, and we learned a lot about the spread of the virus from case number one. So the work that we did was important, it was necessary, and the compromises that we made were also good ones,"

8. **If D.C. became a state, is it your intention and belief that it would protect religious exercise and treat people of faith fairly in allowing houses of worships and faith-based organizations to operate in accordance with their sincerely held religious beliefs without fear of government intervention or discrimination on the basis of the organization's religious motivation, character, affiliation, or exercise?**

   As a state, we will commit to protect First Amendment rights in accordance with law, health, and safety guidance. We appreciate the District's proximity to the center of government, as well as the First Amendment activities and responsibilities that come with our location.

Post-Hearing Questions for the Record
Submitted to the Honorable Muriel E. Bowser
From Senator Ron Johnson

1. **What is the estimated cost of the property damages that occurred in Washington, D.C. during the riots in the spring and summer of 2020?**

   No District government property was damaged and no private property owners reported their damages to the District.

2. **In your testimony, you stated that during the summer of 2020, "we had one night of rioting in the district." How did you determine that there was only one night of rioting in the district in the summer of 2020? What was the date of that "one night" that you referred to in your testimony?**

   When I said there was one night of riots, I was referring to the night of May 31, 2020. There were other nights with protests and other nights with unrest which were technically designated by the DC Metropolitan Police Department as a riot for the purposes of mobilizing additional resources if necessary.

3. **How many individuals were arrested in Washington, D.C. for allegedly committing crimes associated with protests in the spring and summer of 2020?**

   During the summer of 2020 (May – August), 541 individuals were arrested for crimes associated with protests. More than half of the arrests (53%) were for curfew violations the night of June 1, 2020.

4. **You testified that you do not know how many of those individuals are still being detained. Please provide that information.**

No individual arrested in connection with the protests that occurred during the summer of 2020 is currently detained in DC Jail.

5. **How many of these individuals are or were placed in solitary confinement?**

The DC Department of Corrections (DOC) does not have or maintain solitary confinement housing units. Rather, DOC maintains three distinct types of housing units: general population, administrative restrictive housing, and disciplinary restrictive housing units. It is the policy of DOC that residents whose behavior or circumstances threaten the safety or security of other residents, staff, or the orderly operation of the facility, or who pose a risk of escape, or who require protective custody (a subset of administrative restrictive housing) be housed separately from the general population.

6. **What was the average amount of consecutive days such individuals were in solitary confinement?**

Not applicable.

7. **As I requested at the hearing, please provide my office with your response to Ranking Member James Comer's April 19, 2021 request for information regarding solitary confinement in D.C. jails.**

In March/April 2020, to prevent the spread of COVID-19 and to promote social distancing, DOC, in consultation with its medical care provider and DC Department of Health, implemented a 14-day enhanced monitoring unit for all new intakes within its facility. All new resident intakes were tested for COVID-19 during initial intake and within 7 days after intake into DOC. Additionally, a medical stay in place policy, which required 23 hours of in-cell time with one hour of out-of-cell recreation time was also implemented. The enhanced monitoring at intake and the medical stay in place played a significant role in helping to prevent the spread of COVID-19 within DOC.

In May 2021, DOC modified its medical stay in place and began expanding out-of-cell time. Currently, all DOC residents receive up to five hours of out of cell time per day and receive outdoor recreation time each week. DOC remains committed to preventing the spread of COVID-19 in its facilities, therefore the 14-day enhanced monitoring at intake remains in effect.

Post-Hearing Questions for the Record
Submitted to the Honorable Marc Morial
From Senator Kyrsten Sinema

"Examining D.C. Statehood"
June 22, 2021

1. *During your testimony, you mentioned District of Columbia (D.C.) voting rights as the next step in improving voting rights in the country since doing so would remedy the original exclusion of most of the D.C. population. Can you explain the differences and similarities of S. 51 to previous efforts such as the one Senator Lieberman introduced in 2003, The No Taxation Without Representation Act (S. 617) that would have allowed D.C. to have two Senators and the bipartisan Lieberman/Hatch District of Columbia House Voting Rights Act of 2009 (S. 160)?*

Similar to S.51, the *Washington, D.C. Admission Act*, both of the aforementioned bills attempt to provide congressional representation for D.C. residents. However, neither of these measures or other previous attempts to attain D.C. Statehood provide complete enfranchisement. S.51 is a complete solution to the deprivation of full representation for nearly 700,000 Americans.

The *No Taxation Without Representation Act of 2003* would have provided congressional representation to District of Columbia residents by putting in place two Senators and one Representative.[1] However, it failed to address the fact that, unlike a state, the D.C. government does not have control of its laws or budget and is instead subject to Congress's oversight. S.51 would make D.C. a state with all of the powers and independence associated with statehood.

In addition, many legislative provisions limit necessary funding and resources to states. This was the case for relief initially provided under the *CARES Act*. Because it was considered a territory and not a state, D.C. was originally denied $755 million in critical funding that it needed to provide direct relief to its residents.[2]

The *District of Columbia House Voting Rights Act of 2009* would have also failed to provide full representation to D.C residents. In addition to not providing D.C.

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[1] *No Taxation Without Representation Act of 2003*, S. 617, 108th Cong. (2003).
[2] 42 USC 801. (Mar. 27, 2020); *See* Meagan Flynn, *D.C. was denied $755 million in coronavirus relief last year. Now it may get that money*, WASH. POST (Feb. 12, 2021 3:59 PM), https://www.washingtonpost.com/local/dc-politics/district-covid-relief-maryland-virginia/2021/02/12/c2e051cc-6cad-11eb-9ead-673168d5b874_story.html.

statehood, the bill would have only provided the District with a voting member in the House of Representatives.[3] It would not have provided representation in the Senate.[4]

The bill would have also conditioned the addition of the D.C. representative on the inclusion of a representative from Utah. An argument is often made, based on perceived partisan divisions, that in order to prevent a "power grab" by Democrats, a jurisdiction that traditionally votes Republican needs to be afforded congressional voting rights at the same time as D.C. However, partisan and political games are not sufficient reasons to continue to disenfranchise almost 700,000 Americans. This quest for statehood is not new - this has been a longstanding fight for enfranchisement.

In addition, previous attempts of this practice have proven to be unsuccessful. When Alaska and Hawaii were admitted as states, it was assumed that Alaska would be a Democratic state and Hawaii would be a Republican state. That is not the case today, with party preferences switching in both states.[5]

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[3] *District of Columbia House Voting Rights Act of 2009*, S.160, 111th Cong. § 2(a)(2) (2009).
[4] *Id.*
[5] Barbara Sprunt, *Simmering Disputes Over Statehood Are About Politics and Race. They Always Have Been*, NPR (Aug. 21, 2020 4:36 PM), https://www.npr.org/2020/08/21/902334807/simmering-disputes-over-statehood-are-about-politics-and-race-they-always-have-b.

Post-Hearing Questions for the Record
Submitted to Roger Pilon
From Senator Kyrsten Sinema

"Examining D.C. Statehood"
June 22, 2021

1. In your testimony, you are explicit that the Founders did not want the District of Columbia (D.C.) to be a state *because of concerns of a state having power over the seat of government*; specifically it is noted that while in Philadelphia, Congress was not protected against a potential insurrection.

   Answer. (emphasis added above). Actually, the concern about independence went both ways. In my June 22 written testimony, after quoting Madison from *Federalist* No. 43, I summarized the Framers' concern about independence as follows: "Independency runs through Madison's explanation: It was imperative that the federal government not be dependent on any one of the states, and equally that no state be either dependent on the federal government or disproportionately influential on that government. Neither of those objectives would be met under this bill." In 1783, the Continental Congress, acting under the Articles of Confederation, was meeting in Philadelphia when a mob attacked the meeting. Local officials declined to intervene, forcing members to flee to Princeton. That incident was fresh on the Framers' mind when they drafted the Enclave Clause. It helps to explain why they provided for a district "not exceeding ten Miles square" to become the seat of the federal government, over which Congress would exercise exclusive jurisdiction.

   If D.C. should forever remain a territory and not a state, why should D.C. residents be taxed the same as those in states instead of territories? Should D.C. residents pay federal personal income tax as if they are a State instead of a territory, when they have the same *Congressional rights* [did you mean "*constitutional rights*" or perhaps "*congressional representation*"?] as territories and not States? If Congress decides D.C. should remain a territory similar to Guam and American Samoa, are there other financial obligations D.C. residents should be relieved of to reflect their lack of a vote in Congress on how those funds are allocated?

   Answer. The District of Columbia is not a "territory" in the ordinary sense of that term. As the seat of the federal government, it is a *sui generis* entity, created and regulated under Article I, Section 8, Clause 17 (the Enclave Clause) of the Constitution, not under Article IV, Clause 3 (the Admissions Clause), pursuant to which U.S. territories like Guam and American Samoa are regulated. In this part of question 1, you have posed several policy questions concerning taxation and representation. I am a constitutional scholar. I have no particular expertise in tax law or policy. Let me say simply this. At present the District's interests are "represented" in the House by a non-voting member. The District is not represented in the Senate except by two "shadow senators" because the

"Great Compromise" at the Constitutional Convention between large and small states resulted in representation in the House by population and in the Senate by state, with each state having two senators. Because the District is *not* a state, it does not have senators. Nevertheless, as a practical matter, District residents do have certain advantages over residents in other states in the matter of bringing their concerns to members of Congress. For example, as compared to residents in other states, many more District residents work in the federal government, including in Congress. And of course it is much easier for District residents to demonstrate and to appeal in other ways to members of Congress than it is for citizens living far from the nation's capital. To some extent, therefore, those and other such factors mitigate the absence of direct representation. And, of course, since ratification of the Twenty-Third Amendment, District residents have had the presidential vote.

2. Your testimony indicates that the cleanest way to provide D.C. residents the right to vote would be to ask the State of Maryland to take back its land gift. D.C. has a vibrant identity and history that is distinct from any other state. I am sure D.C. residents want to protect that identity and history. This idea of retrocession back into Maryland is something you mention in your testimony. How does retrocession protect the unique history and identity of D.C. residents?

   Answer. Retrocession of the District to Maryland would likely take a toll over time on the unique history and identity of the District and its residents. One can only speculate on what that toll might be. Retrocession is not currently favored by supporters of S. 51 because, in addition to compromising the District's unique history and identity, it would not give the District two senators. Moreover, Maryland's consent to retrocession would seem to be required pursuant to Article IV, and it isn't clear that Maryland would give its consent, even if retrocession were otherwise constitutional, which is also not clear.

Post-Hearing Questions for the Record
Submitted to Dr. Roger Pilon
From Ranking Member Rob Portman

"Examining D.C. Statehood"
June 22, 2021

1. Article 4 of the Constitution includes a mechanism to admit new states, including forming new states out of existing states. Article I, Section 8, Clause 17 creates a special independent federal district designated the "seat of Government." Please discuss the inherent tension between these two constitutional provisions. Do you think it is possible to use the Article 4 process to create a new state out of the District of Columbia?

   Answer. Properly read, Article IV, Section 3's Admissions Clause and Article I, Section 8, Clause 17's Enclave Clause are not in tension. The two clauses grant Congress discrete powers for discrete purposes. Located in separate articles of the Constitution, the two clauses are best read in light of their purposes. Article I's Enclave Clause grants Congress the power to acquire a district separate from any one of the states to become the seat of the new federal government. Our first Congress exercised that power, creating the District of Columbia, over which Congress has exercised exclusive jurisdiction ever since. By contrast, Article IV's Admissions Clause grants Congress the power to admit new states to the Union. It provides for forming new states from existing *states*, with the consent of the latter, but says nothing further about the source of new states other than to mention federal territory. One imagines the Framers contemplated what history has demonstrated, that new states would be admitted mainly from lands located at the time in the vast Northwest and Southwest Territories and from territory subsequently acquired, like the Louisiana and Gadsden Purchases. It strains credulity to contend that the Framers, having provided in Article I for seating the new federal government in a federal enclave separate from any state, would have meant for Congress to be able to use its Article IV power to create a new state from that enclave. Because the District of Columbia is not a state—thus Article IV's consent requirement does not arise—nor a "territory" in the ordinary sense but rather a unique entity created pursuant to Article I's Enclave Clause, it is unlikely that Article IV's process can properly be used to create a new state from the District.

2. Please describe some practical problems posed by D.C. statehood.

   Answer. I have no particular expertise on the matter of Congress's past and present funding of District of Columbia governmental and other activities, but it strikes me as a matter for serious consideration if most of today's District were to be made a separate state and Congress's authority were to be reduced to covering only a tiny enclave around the National Mall. In my written June 22 testimony, and especially in *Federalist* Nos. 43 and 51, a number of practical problems posed by DC statehood are discussed. I would add only this. Although advocates of DC statehood have focused on the Enclave Clause's "not exceeding ten Miles square" language as implying that nothing in the clause requires a district of that size to be the seat of the federal government, they have generally failed to address why the Framer's may have fixed on that particular size for the District. It was, in part, from a deep concern ranging over many issues that the federal government itself, as well as its physical seat, not

become too large. But equally, especially when conjoined with their concern that the new government be apart from any one state, that the enclave be large enough to be independent of any one state. Were the seat of the federal government to be reduced to this tiny enclave, surrounded by this new untested "city state," the government, as a practical matter, would be dependent on that state for all manner of services.

3. Some scholars argue Congress should pass a law to direct how the Capitol's three electoral votes are cast in the event the Twenty-Third Amendment is not repealed. Isn't that supposed "solution" unconstitutional? Why?

   Answer. As I wrote in my June 22 testimony, if S. 51 were to be enacted, and the Twenty-Third Amendment were not repealed, there would still be voters in the federal enclave with a constitutional right to vote for electors pledged to vote in the Electoral College for one of the presidential tickets, as provided for in the amendment. Insofar as Congress were to direct electors *how* to vote, it could do so only as a reflection of how voters *in the District* voted. Contrary to what some scholars have proposed, Congress could not direct District electors to vote for the ticket that received the most Electoral College votes *nationwide* or that won the *national* popular vote, because that would undercut the very point of the amendment—to give *District* residents a voice in presidential elections. As the example I gave in my written testimony illustrated, the scholars' proposal could lead to perverse results where District voters went overwhelmingly for one ticket but because a different ticket won the national vote, District electors would be required to ignore both the District vote and their own pledges. And from a larger constitutional perspective, such a proposal would undercut the federalism that infuses our Electoral College system for electing presidents and vice presidents. In the Electoral College we vote *by state* (or District, pursuant to the amendment), not nationally. Despite inroads on federalism over the years, we are still a constitutional republic, not a pure democracy.

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Post-Hearing Questions for the Record

U.S. Senate Committee on Homeland Security & Governmental Affairs

"Examining D.C. Statehood"

June 22, 2021

Professor Derek T. Muller

University of Iowa College of Law

August 13, 2021

From Ranking Member Rob Portman

1. *One common pro-statehood talking point is the supposed outsized influence wielded in Congress by states with lower populations like Vermont or Wyoming. S.51 creates an even larger problem in that it would grant three electoral votes under the Twenty-Third Amendment to a handful of residents in the Capitol Zone, including the incumbent President and residents of the White House. Please discuss some of the practical implications of that.*

Response: As my testimony indicates, I estimate that between 30 and 60 inhabitants would reside in Capital. A subset of that population would be eligible to vote—it is not clear how many children, non-citizens, or otherwise ineligible inhabitants would reside there. The Capital Zone would be roughly 1/20,000th the size of Vermont or Wyoming.

In the event the District becomes a state, there would be 541 electoral votes. Three electoral votes would be about 0.5% of the total number of electors, and about 30 to 60 people would control those electors. Exceedingly narrow Electoral College margins are not unheard of, and three votes may make the difference in an election.

Presidential elections should not turn on a handful of Capital residents. For instance, in 2000, George W. Bush received 271 votes in the Electoral College, needing 270 votes to secure a majority. In 1876, Rutherford Hayes received 185 votes in the Electoral College, the minimum number of votes to secure a majority.

The White House would be a part of Capital. The President typically does not change residency to the White House but remains registered in his previous place of residence. It is entirely possible that a future President and any family members who reside with that President might choose to move to the White House simply to exert more control over these electoral votes. Given how few eligible voters would reside in Capital, it would take little effort to alter the outcome of Capital's electoral votes—and perhaps alter the outcome of a presidential election.

These are serious practical problems. It is a reason why S.51 anticipates that the Twenty-Third Amendment must be repealed.

2. *Although S.51 creates an "expedited procedure" to repeal the Twenty-Third Amendment, that applies only to Congress. Will that have any effect on how quickly states move to ratify (or not) such an amendment? Is it a guarantee that states would ever ratify?*

S.51 instructs Congress to consider repealing the Twenty-Third Amendment on an expedited basis. While Congress must consider repeal quickly, there is no guarantee that it receives two-thirds support in each chamber of Congress. As my testimony indicates, as long as there is a genuine outstanding legal controversy about whether the District could become a state, both supporters and opponents have an incentive to wait for the legal process to play out. If a federal court finds that statehood is unconstitutional, then I assume District residents would prefer to retain the Twenty-Third Amendment. Litigation takes time, and it is not clear that Congress would move on an expedited basis while litigation is pending.

S.51 also does not compel states to consider the amendment on an expedited basis. It is up to state legislatures to decide whether to ratify an amendment, if at all. There is no guarantee that three-fourths of the state legislatures would ever ratify the amendment.

3. *Please discuss what it means to be "represented" and to "have representation." Does it always require voting representation in Congress?*

"Representation" is a complex concept. Indeed, the Constitution itself includes several different ways of thinking about "representation." The House of Representatives awards seats to states on the basis of total population, regardless of voter eligibility, and many non-voters like children and non-citizens "count" for purposes of being "represented" in the House. The Senate awards membership on the basis of statehood, regardless of population, ensuring that large states and small

states each have equal representation. The Electoral College includes a combination of these features in the choosing of the president. We might think of these more as allocations of power than "representation."

Sometimes we think about representation as voting for our representative, Senators, or presidential electors. In elections with districts, redistricting often occurs around "communities of interest," or some sense that voters have shared values. Even among voters, however, we may not "feel" represented if our preferred candidate loses. Or voters may choose a preferred candidate, but that candidate may caucus with the minority party in the legislature and may have less influence in the political process.

Non-voters have ways of participating in democracy to make their voices heard. Out-of-state citizens or other non-voters can contribute to any federal campaign through time or money. They can exercise their First Amendment rights to speak about federal officials and petition them, even if they are not from their place of domicile. Political parties also conceptualize representation differently in their choices of presidential candidates, as they choose nominating convention delegates from states and non-states alike.

Elected officials are ideally responsive to all constituents, voters and non-voters alike. And elected officials are, at least arguably, supposed to represent both their own constituents and the greater collective good. Edmund Burke's "Speech to the Electors of Bristol" in 1774 puts it best: as he looks at the many interests stretching across the British Empire, he reflects, "All these widespread interests must be considered; must be compared; must be reconciled, if possible."

In short, "representation" takes many forms, and it is best to think precisely about the kinds of representation at stake. "Representation" in voting membership in Congress is one way.

4. *Some scholars argue Congress should pass a law to direct how the Capitol's three electoral votes are cast in the event the Twenty-Third Amendment is not repealed. Isn't that supposed "solution" unconstitutional? Why?*

As my testimony indicates, that proposal is not in S. 51. It is difficult to argue with a proposed solution in the abstract. But there are different constitutional problems depending on the law Congress might enact.

If Congress enacts a new law awarding Capital's electors to the winner of the Electoral College and or to the winner of the national popular vote, they face a constitutional problem. The proposals emphasize Congress's power to "direct" the "manner" of appointing presidential electors. That power is undoubtedly broad. But it is only one clause of a two-clause directive. The Twenty-Third Amendment

provides, "The District . . . shall appoint," and "Congress" "may direct" the "manner." The first is the who. The second is the how.

If Congress directs that it will award Capital's electors based on the popular vote of the inhabitants of France, it would be hard to say that "the District" has appointed the electors. In the same way, if Congress chooses a manner that awards electors based on what happens in the rest of the United States, it is hard to say that "the District" has appointed anyone. Every choice of presidential electors in American history has been based on some sort of election *within* the state, not outside the state. For more on this point, see Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional,* 2012 B.Y.U. L. REV. 1523, 1540, 1572–73, 1581–83.

Relatedly, the Supreme Court in *Chiafalo v. Washington* approved a fine levied by the State of Washington on electors who cast votes inconsistent with state law, which required electors to vote for the candidate they had pledged to support. The electors' candidate had won the statewide popular vote. The Court emphasized that Washington had broad discretion over how to handle electors' discretion, and the Constitution did not take away the power to do what Washington did.

Chiafalo certainly speaks broadly about how states may control electors. But it says nothing about the predicate question: the selection of electors in the first place. Once a state holds a popular election, and the people choose a presidential candidate who carries the popular vote in a state, electors can be bound to vote for that candidate. But *Chiafalo* does not authorize legislatures to compel electors to vote for anything the legislature wants.

The proposal to award Capital's electors to the winner of the "national popular vote" suffers from Equal Protection problems. Voter eligibility rules vary (or may vary in the future) from state to state—incarcerated felons can vote in some states, but ex-felons are prohibited in others. Voting procedures vary, from strict photo voter identification laws to no identification laws at all. Polling places are open in Hawaii well after the polls close in Kentucky. Ballot access standards vary from state to state. How can we assemble a "national popular vote" when Americans aren't even looking at the same ballot? While some variance of election procedures is inevitable, other variations are so broad that they implicate the Equal Protection Clause.

Again, none of these proposals has been introduced in Congress, and they are not in the text of S. 51 as it has been presented before you today. But even these proposals, presented as "solutions" to the Twenty-Third Amendment dilemma, do not withstand constitutional scrutiny.

From Senator Kyrsten Sinema

1. *All three of the Constitutional scholars on the panel agree the 23rd Amendment is one of the primary barriers for admitting the District of Columbia as a state in the same legislative manner the last 37 states have been added. You mentioned that one legislative option could be requiring that if the population of the Federal district drops below a certain number, it will automatically nullify the Electoral College provisions of the 23rd Amendment and resolve other aspects about Congressional powers on local elections. In your opinion, can this solution be legislated as part of S. 51 or must it follow the traditional path as any constitutional amendment? Would this path be any more likely to succeed than repealing the 23rd Amendment directly?*

Everyone agrees that the Twenty-Third Amendment would need to be repealed. S.51 anticipates that the Twenty-Third Amendment should be repealed. The only debate is over how and when.

The proposals I suggested must follow a traditional path of any constitutional amendment. The Twenty-Third Amendment guarantees Capital three electoral votes. The only way to undo that guarantee is by constitutional amendment, and all other proposals are lacking for the reasons I explain in my testimony.

S.51 only allows for expedited consideration of a straight repeal of the Twenty-Third Amendment, not alternatives like I suggest. *See* Section 224(a)(2). It would be possible to amend S.51 to allow for alternatives, including the alternative I suggest. But the problem remains that if S.51 is enacted, there would still need to be repeal of the Twenty-Third Amendment, regardless of what form it takes.

Whether alternatives, including trying to amend the Constitution before enacting S.51, could be more successful is an open question. It may well be that many in Congress or state legislatures refuse to such a proposal because it would open the door to D.C. statehood, which some oppose on the merits. Alternatives solve one problem with S.51 but create a different political question.

