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DC Statehood: Constitutional Considerations for Proposed Legislation

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SUMMARY

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Mainon A. Schwartz
Legislative Attorney

DC Statehood: Constitutional Considerations for Proposed Legislation

Legislative proposals to create a new state from land previously designated as the seat of federal government raise constitutional questions that have not been directly answered by the judicial branch. The District Clause—Article 1, Section 8, clause 17 of the Constitution—gives Congress the authority "[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 the Government of the United States."

Scholars disagree over whether the District Clause poses a constitutional barrier to Congress's ability to exercise its Admissions Clause powers—the powers that enable Congress to admit new states to the Union—over a portion of the District of Columbia. Some argue, for example, that once the District has been established, it should be permanent, and that a minimum size is necessary to carry out the functions the Framers envisioned. Others point out that those restrictions are not found in the Constitution's text, and may reflect policy judgments rather than constitutional objections. Another challenge may arise under the Twenty-Third Amendment, ratified in 1961, which directs "the District constituting the seat of Government of the United States" to appoint electors that will be considered as "electors appointed by a State" for the purpose of electing the President and Vice President in the Electoral College.

Novel legislation is likely to invite legal challenges raising issues of first impression. The interplay among these constitutional provisions has rarely been raised in federal court, so there is little judicial guidance; the most relevant Supreme Court decision is almost 150 years old. The outcome of any constitutional challenges to District statehood cannot be predicted with any certainty. There is also a possibility that courts would decline to hear such a challenge altogether under justiciability doctrines.

This report discusses the constitutional provisions that would be implicated by legislative efforts to change the District's political status. Using H.R. 51 (the Washington, D.C. Admission Act, which passed the U.S. House of Representatives in June 2020) as a case study, this report analyzes constitutional considerations related to District statehood proposals, identifying legal issues Congress may consider when evaluating legislative proposals affecting the District's status.

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The District of Columbia (District) is an entity like no other; in legal terms, it is *sui generis*—literally "of its own kind."[1] Beyond its unique position as the United States' capital city and seat of government, the District is also constitutionally distinct from other U.S. states and territories. In practical terms, this means that when Congress considers changes affecting the District's political status, the extent of Congress's powers has not been well-defined by judicial precedent.

Congress has considered various proposals affecting the District's political status with some regularity since the District was first established, including proposals to (1) reincorporate (legally, retrocede) part of the District into the State of Maryland (retrocession), (2) allow District residents to vote in Maryland for representatives to the House and Senate (semi-retrocession), (3) define the District as a congressional district for the purpose of voting representation in the House of Representatives, (4) provide voting rights to the District by means of a constitutional amendment, and (5) admit the District or parts of the District into the Union as the 51st state.[2]

In June 2020, the U.S. House of Representatives voted to pass the Washington, D.C. Admission Act, H.R. 51. That vote marked the first time in history that either house of Congress passed a bill that would confer statehood on a portion of the District. Given H.R. 51's recency, and the magnitude of the legal changes it proposed, it provides a salient case study for examining constitutional implications of changes to the District's political status.

Specifically, H.R. 51 would

- grant admission of Washington, Douglass Commonwealth (Douglass Commonwealth) into the United States as the 51st state, on equal footing with the other states;[3]
- provide for the Mayor of the District of Columbia to issue a proclamation for the first elections to Congress of two Senators and one Representative for Douglass Commonwealth;[4]
- apply current District of Columbia laws to Douglass Commonwealth and continue pending judicial proceedings;[5]
- specify that Douglass Commonwealth consists of all current District of Columbia territory, with specified exclusions for federal buildings and monuments, including the White House, the Capitol Building, the U.S. Supreme Court Building, principal federal monuments, and the federal executive, legislative, and judicial office buildings located adjacent to the National Mall and the Capitol Building;[6]
- designate current District of Columbia territory that is excluded from Douglass Commonwealth as the Capital and the seat of the federal government;[7]

[1] *Sui generis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[2] For a summary of recent legislative efforts to afford District residents voting representation in Congress, see CRS In Focus IF11443, *District of Columbia Statehood and Voting Representation*, by Joseph V. Jaroscak.

[3] Washington, D.C. Admission Act, H.R. 51, 117th Congress § 101(a) (2021).

[4] *Id.* § 102(a)(1).

[5] *Id.* § 114.

[6] *Id.* § 112.

[7] *Id.* § 111(b).

- prohibit Douglass Commonwealth from imposing taxes on federal property except as Congress permits;[8]
- maintain federal authority over military lands and certain other property within Douglass Commonwealth;[9]
- provide for expedited consideration of a joint resolution to repeal the Twenty-Third Amendment to the Constitution;[10]
- continue certain federal authorities and responsibilities, including employee benefits, agencies, courts, and college tuition assistance, until Douglass Commonwealth certifies that it is prepared to take over those authorities and responsibilities;[11] and
- establish a Statehood Transition Commission to advise the President, Congress, District, and Commonwealth leaders on the transition.[12]

To comport with the Constitution, H.R. 51 or any District statehood bill must fall within Congress's constitutional powers. If the conferral of statehood on a portion of the District through legislation is outside the scope of powers granted to Congress,[13] or if implementation of such legislation would violate a constitutional provision, constitutional challenges to its enactment would likely be upheld by the courts. As a general matter, courts have been guided by this principle: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[14]

H.R. 51 appears to rely principally on two constitutional provisions for support: the Admissions Clause (also known as the New States Clause) in Article IV, Section 3, clause 1; and the Enclave

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[8] *Id.* § 123.

[9] *Id.* § 201(a).

[10] *Id.* § 224. The Twenty-Third Amendment provides:

> **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.

U.S. CONST. amend. XXIII. *See also* Cong. Rsch. Serv., *Twenty-Third Amendment: Presidential Electors for District of Columbia*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/amendment-23/ (last visited May 11, 2022).

[11] H.R. 51, 117th Cong. §§ 301–326.

[12] *Id.* § 402.

[13] This includes powers expressly enumerated in the Constitution as well as those that are necessary for the exercise thereof. The Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, supplements Congress's enumerated powers and provides the legislative branch the power to adopt measures that assist in the achievement of ends contemplated by other constitutional provisions. *See* McCulloch v. Maryland (M'Culloch v. State), 17 U.S. 316, 405, 411–12 (1819); United States v. Comstock, 560 U.S. 126, 133–34 (2010) (describing the Necessary and Proper Clause as giving Congress the "broad power to enact laws that are 'convenient, or useful' or 'conducive' to" a more specific constitutional authority's "beneficial exercise" (quoting *McCulloch*, 17 U.S. at 413, 418)).

[14] *McCulloch*, 17 U.S. at 421.

Clause (also known as the District Clause) in Article I, Section 8, clause 17.[15] It is likely that other District statehood proposals would invoke the same constitutional authorities. The Twenty-Third Amendment, which in some ways is premised on a state-like Federal District, may pose an independent consideration in deliberations over any District statehood proposals.

This report discusses these constitutional provisions that would be implicated by legislative efforts to change the District's political status. Using H.R. 51 as a case study, the report analyzes constitutional considerations related to District statehood proposals, identifying legal issues Congress may consider when evaluating legislative proposals affecting the District's status. The report concludes with a discussion of the justiciability of potential legal challenges to legislative proposals in this area.

The Constitution's Admissions Clause

The Admissions Clause provides that:

> 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.[16]

This commits to Congress the process of admitting new states to the Union, a power that Congress has exercised through legislation 37 times.[17]

Some commentators have posited that conferring statehood upon part of the current District of Columbia would violate the Admissions Clause because the District of Columbia comprises land that was once part of the State of Maryland, and the consent of Maryland's legislature has not been obtained.[18] Using H.R. 51 as an example, the primary rebuttal to this argument might be that Douglass Commonwealth would not be formed "within the Jurisdiction of any other State," because no part of the District of Columbia is *presently* within Maryland's jurisdiction. Congress currently retains plenary legislative authority over the District of Columbia.[19]

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[15] 167 CONG. REC. H52 (daily ed. Jan. 4, 2021) (establishing constitutional authority for H.R. 51).

[16] U.S. CONST. art. IV, § 3, cl. 1. *See also* Cong. Rsch. Serv., *ArtI.S8.C17.1.1 Power over the Seat of Government: Historical Background*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C17-1-1/ALDE_00001079/ (last visited May 11, 2022).

[17] *See, e.g.*, Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1223 (9th Cir. 1978) (noting "[t]hirty-seven States have previously been admitted to the Union by action of Congress"). Much of this enabling legislation imposes criteria that a would-be state must satisfy before admission. However, the U.S. Supreme Court has ruled that the Constitution prohibits enforcing such criteria *after* statehood if they would result in the new state being on an unequal footing with her sister states. *E.g.*, Coyle v. Smith, 221 U.S. 559, 573 (1911) (declining to enforce a restriction on the location of the new state's capital found in the enabling legislation) ("[W]hen a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished . . . by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.").

[18] *See, e.g.*, R. HEWITT PATE, THE HERITAGE LECTURES NO. 461, D.C. STATEHOOD: NOT WITHOUT A CONSTITUTIONAL AMENDMENT 5 (1993), http://thf_media.s3.amazonaws.com/1993/pdf/hl461.pdf (last visited Mar. 15, 2021) (discussing the New Columbia Admission Act, H.R. 51, 103d Cong. (1993)).

[19] *See* U.S. CONST. art. I, § 8, cl. 17. *See also* Cong. Rsch. Serv., *ArtIV.S3.C1.1.1.1 Admission of and the Rights of New States: Historical Background*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C1-1-1-1/ALDE_00001170/ (last visited May 11, 2022).

The District Clause

In relevant part, the District Clause provides that Congress has 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 Government of the United States . . . .[20]

The original Federal District comprised 10 miles square,[21] chosen by President George Washington to encompass the ports of Georgetown and Alexandria, duly ceded by Virginia and Maryland,[22] and accepted by Congress as the seat of government.[23]

Congress later reduced the size (and changed the shape) of the Federal District. By the 1840s, a move for retrocession peaked among the District of Columbia residents south of the Potomac (that is, on the land previously ceded by Virginia).[24] On July 9, 1846, Congress determined it did not require the land ceded by Virginia for the seat of government.[25] Congress authorized the land's retrocession to Virginia, contingent on first obtaining "the assent of the people of the county and town of Alexandria"[26]—that is, of the individual residents who would be affected by retrocession—notwithstanding that the Commonwealth of Virginia had already given its consent.[27] The voters of Alexandria County assented; President James K. Polk proclaimed the retrocession shortly thereafter.[28]

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[20] *Id.*; Palmore v. United States, 411 U.S. 389, 397 (1973) ("Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress 'may exercise within the District all legislative powers that the legislature of a state might exercise within the State . . . so long as it does not contravene any provision of the constitution of the United States.'" (quoting Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899))).

[21] Ten miles square is 100 square miles. *See, e.g.*, Memorandum from Thomas Jefferson (Aug. 29, 1790), https://founders.archives.gov/documents/Washington/05-06-02-0176 (noting Jefferson's presumption that legislation enabling selection of "a territory not exceeding 10 miles square" meant "100 square miles in any form").

[22] 1798 Md. Acts, ch. 2, *ratified by* 1791 Md. Acts ch. 45, § 2 (quoted in Adams v. Clinton, 90 F. Supp. 2d 35, 58 (D.D.C.) (2000)); 13 William W. Hening, LAWS OF VIRGINIA 43, ch. XXXII (1789).

[23] *See* Residence Act, 1 Stat. 130 (1790) (authorizing the President of the United States to appoint and direct commissioners to survey and acquire land for the Federal District).

[24] *See* Amos B. Casselman, *The Virginia Portion of the District of Columbia*, 12 RECORDS COLUMBIA HIST. SOC'Y, WASH., D.C. 115, 123–34 (1909), https://www.jstor.org/stable/40066996; Mark David Richards, *The Debates Over the Retrocession of the District of Columbia, 1801–2004*, 16 WASH. HIST. 55, 59–62, 66–68 (2004), http://www.dchistory.org/wp-content/uploads/2020/03/10-Debates-Over-Retrocession-by-Mark-David-Richards-16-1.pdf/.

[25] Act of July 9, 1846, ch. XXXV, 9 Stat. 35. The Act provided:

> Whereas, no more territory ought to be held under the exclusive legislation given to Congress over the District which is the seat of the General Government than may be necessary and proper for the purposes of such a seat; and whereas, experience hath shown that the portion of the District of Columbia ceded to the United States by the State of Virginia has not been, nor is ever likely to be, necessary for that purpose . . . .

[26] *Id.* § 4 ("*And be it further enacted*, That this act shall not be in force until after the assent of the people of the county and town of Alexandria shall be given to it in the mode hereinafter provided.").

[27] *Id.* pmbl. ("[W]hereas, the State of Virginia, by an act passed on the third day of February, eighteen hundred and forty-six, entitled 'An act accepting by the State of Virginia the County of Alexandria, in the District of Columbia, when the same shall be receded by the Congress of the United States,' hath signified her willingness to take back the said territory ceded as aforesaid . . . .").

[28] Announcement of Vote to Retrocede the County of Alexandria to the State of Virginia, Proclamation No. 48 (Sept. 7,

A case presenting a constitutional challenge to the 1846 retrocession, *Phillips v. Payne*, eventually made its way to the U.S. Supreme Court in 1875,[29] but was dismissed without an examination of the merits of the constitutional arguments. Central to the Court's holding was the fact that after retrocession, both Virginia and the federal government uniformly treated Alexandria County as once again a part of Virginia for all intents and purposes. The Court stated: "A government *de facto*, in firm possession of any country, is clothed, while it exists, with the same rights, powers, and duties, both at home and abroad, as a government *de jure*."[30] Noting that more than 25 years had elapsed, and neither Virginia nor the United States had complained of the retrocession, the Court held that the displeased resident of Alexandria County who raised the constitutional challenge was estopped from doing so:

> He cannot, under the circumstances, vicariously raise a question, nor force upon the parties to the compact an issue which neither of them desires to make.
>
> In this litigation we are constrained to regard the de facto condition of things which exists with reference to the county of Alexandria as conclusive of the rights of the parties before us.[31]

This case, however, pre-dated the development of modern justiciability doctrine (discussed below), and it is therefore difficult to imagine the present-day Supreme Court using the same line of reasoning if faced with a challenge to H.R. 51. Accordingly, the precedential value of *Phillips v. Payne*'s central holding seems limited, especially given the nearly 30-year delay in that case's resolution and the factual distinctions of retrocession in contrast to statehood.

Constitutional challenges to H.R. 51 may still arise from the District Clause, which some commentators read as limiting Congress's power to change the seat of government once it is established. For example, some argue that "[t]he plain meaning of Article I is that 'the Seat of Government of the United States' comprises all the land supplied for that purpose,"[32] but this understanding is not specified in the Constitution's text and appears inconsistent with historical practice. As noted, the current District of Columbia is already substantially smaller than the original Federal District, because much of "the land supplied for [the] purpose" of the District was retroceded to Virginia more than a century ago. If the Clause is read to include all land supplied for use as the seat of government, the District of Columbia would seemingly still include Alexandria County.

Congress's anticipated power to fix the seat of government "permanently" was raised by Charles Pinckney, a South Carolina delegate to the Constitutional Convention, but no such wording was incorporated into the Constitution's final text.[33] The Framers chose to set a maximum size for the Federal District, but no other size-related restrictions.[34] The Federal District's precise size and location remained unsettled for some time after the constitutional text was sent to the states for

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1846).

[29] Phillips v. Payne, 92 U.S. 130 (1875).

[30] *Id.* at 133.

[31] *Id.* at 134.

[32] *E.g.*, Jeff Jacoby, Opinion, *The Constitution Says No to DC Statehood*, BOS. GLOBE, (June 21, 2020), https://www.bostonglobe.com/2020/06/21/opinion/constitution-says-no-dc-statehood/.

[33] "There is also an authority to the National Legislature, permanently to fix the seat of the general Government . . . ." Charles Pinckney, *Letter to the Federal Convention, in Philadelphia, on the 28th of May, 1787, in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 122 (Max Farrand ed., 1911), https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-3 .

[34] U.S. CONST. art. I, § 8, cl. 17.

ratification. At least two states besides Maryland and Virginia (Delaware and New Jersey) passed resolutions authorizing Congress to choose an appropriate site (also "not exceeding ten miles square") for the seat of government from within their borders.[35] It is therefore conceivable that the Federal District could have been much smaller and located in Delaware or New Jersey had Congress chosen to accept one of those states' offers.[36] During the Virginia ratification debates, James Madison—who played a significant role in the drafting of the Constitution while a delegate to the Constitutional Convention—noted that the District Clause grants Congress "the power of legislating over a small district, which cannot exceed ten miles square, and may not be more than one mile."[37]

A different but related argument is that the seat of government became permanently fixed not by the Constitution in Article I, but by Congress's legislative acceptance of Maryland's and Virginia's cession for that purpose. The Residence Act of 1790 used terms of permanence, providing:

> a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted *for the permanent seat of the government* of the United States.[38]

This view is reflected, to some extent, in an opinion arguing against the constitutionality of the 1846 Alexandria County retrocession, memorialized in a letter submitted by a legal scholar to the Senate in January 1910.[39] The letter avers that the Federal District, once created, could not be altered. Accordingly, "[t]he nation can only be protected against" an annulment of the entire Federal District "by a judgment of the Supreme Court of the United States declaring the act of retrocession of 1846 to be null and void."[40] Whatever merit this argument might have in theory,

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[35] *Delaware Convention Proceedings*, MD. J., (Dec. 14, 1787), https://www.consource.org/document/delaware-convention-proceedings-maryland-journal-1787-12-14/; *New Jersey Convention Proceedings*, TRENTON MERCURY, (Dec. 20, 1787), https://www.consource.org/document/new-jersey-convention-proceedings-trenton-mercury-1787-12-20/.

[36] *See also Speech of the Hon. R. M. T. Hunter, of Virginia, On the Subject of the Retrocession of Alexandria to Virginia* (May 8, 1846), https://hdl.handle.net/2027/hvd.hne9lw?urlappend=%3Bseq=12:

> The constitution provides that the territory ceded for [the seat of government] shall not exceed ten miles square. Mr. Madison, in the debates upon the Federal Constitution in the Virginia Convention, said that Congress might take one square mile or ten miles square, as they saw best. . . . Now suppose, Mr. Chairman, that they had taken at first only one square mile, and that had proved insufficient, will any man doubt but that they might have taken more by a subsequent cession, provided they did not exceed the quantity limited by the constitution[?]

[37] *Proceedings of the Virginia Convention, June 14, 1788*, *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1836), https://oll.libertyfund.org/title/elliot-the-debates-in-the-several-state-conventions-vol-3/ [hereinafter *Proceedings of the Virginia Convention*].

[38] Residence Act, 1 Stat. 130 (1790) (emphasis added).

[39] Letter From Hannis Taylor to Hon. Thomas H. Carter, U.S. Sen., Rendering an Opinion as to the Constitutionality of the Act of Retrocession of 1846 (Jan. 17, 1910), https://hdl.handle.net/2027/loc.ark:/13960/t1gh9s15c?urlappend=%3Bseq=3 (referred to the Committee on the District of Columbia). Mr. Taylor opined that the 1846 retrocession, together with the cessions from Virginia and Maryland and 19 individual landowners, created a quadrilateral contract foreclosing any possibility of altering the Federal District once established. *Id.* at 12–13.

[40] *Id.* (applying principles of contract law to reach this conclusion). "If that attempted recession upon the part of the United States and Virginia is valid, then the contract as a whole fails. *Neither party is bound unless all are bound.* If the United States and Virginia, as a matter of law, actually annuled [sic] the quadrilateral contract, then Maryland and the representatives of the 19 proprietors can justly and legally claim every foot of land embraced in the limits of the District as now defined." *Id.*

however, the continued recognition of the Federal District since the act of retrocession some 175 years ago undercuts its persuasive authority.[41]

To a certain extent, then, the retrocession of Alexandria County to Virginia may provide a historical blueprint for H.R. 51. Congress evidently determined on that occasion that shrinking the Federal District's physical size was not inconsistent with either the constitutional form or the practical function of the seat of government.[42] However, the 1846 retrocession was subject to decades of debate, and its constitutionality has never been subject to final judicial determination.[43]

Some commentators have framed their constitutional objections to statehood somewhat differently, objecting to a reduction in the Federal District's size because the District's diminished size would make it impracticable for what they view as the District's intended purpose.[44] The drafting of the District Clause was likely informed by the Continental Congress's experience in Philadelphia just a few years before the Constitutional Convention.[45] Though the British surrendered at Yorktown in 1781, the 1783 Treaty of Paris would not formally end the war between Britain and the former colonies until its ratification in 1784.[46] The Continental Army and associated state militias were still deployed, but many were owed back pay.[47] On June 21, 1783, as many as 400 disgruntled militia members gathered outside the Pennsylvania state house, which was both the usual meeting place of the Continental Congress and the chambers of Pennsylvania's state leaders.[48] That evening, the Continental Congress, "having been . . . grossly insulted by the disorderly and menacing appearance of a body of armed soldiers" at the Congress's meeting place, demanded that Pennsylvania take immediate action to protect the peace.[49] If Congress was not assured it could expect "adequate and prompt exertions of

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[41] Opponents of proposals involving retroceding the District of Columbia's residential portions to Maryland (*see, e.g.*, District of Columbia-Maryland Reunion Act, H.R. 472, 11th Cong. (2021)) may note that Congress's action to retrocede Alexandria County followed—and expressly cited—the Virginia legislature's prior affirmative act to accept retrocession. Act of July 9, 1846, ch. XXXV, pmbl., 9 Stat. 35 ("[W]hereas, the State of Virginia, by an act passed on the third day of February, eighteen hundred and forty-six, entitled 'An act accepting by the State of Virginia the County of Alexandria, in the District of Columbia, when the same shall be receded by the Congress of the United States,' hath signified her willingness to take back the said territory ceded as aforesaid . . . .").

[42] Act of July 9, 1846, 9 Stat. 35 (concluding the "portion of the District of Columbia ceded to the United States by the State of Virginia has not been, nor is ever likely to be, necessary" for use as the seat of government).

[43] *See supra* note 29 and accompanying text (discussion of Phillips v. Payne, 92 U.S. 130 (1875)).

[44] *E.g.*, U.S. DEP'T OF JUSTICE, OFF. OF LEGAL POL'Y, REPORT TO THE ATTORNEY GENERAL: THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA 57–58 (Apr. 3, 1987), https://www.ojp.gov/pdffiles1/Digitization/115093NCJRS.pdf.

[45] *Id.* at 53 ("In explaining the genesis of the District[,] reference is inevitably made to the Philadelphia Mutiny which took place in June of 1783.").

[46] Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, 8 Stat. 80 (1783); *see also* 26 JOURNALS OF THE CONTINENTAL CONGRESS 23 (1784), https://memory.loc.gov/cgi-bin/.ampage?collId=lljc&fileName=026/lljc026.db&recNum=28.

[47] *See Whereas: Stories from the People's House: Chasing Congress Away*, U.S. HOUSE OF REPRESENTATIVES HISTORY, ART & ARCHIVES (June 1, 2015), https://history.house.gov/Blog/2015/June/6-1-Chasing-Congress/ [hereinafter *Chasing Congress Away*]; *see also generally* Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 PA. MAG. OF HIST. & BIOGRAPHY 419 (1977), https://journals.psu.edu/pmhb/article/view/43383/43104.

[48] *Chasing Congress Away*, *supra* note 47. It is unclear whether the militia members chose that location because of Congress's presence; at least some of the militia leaders were apparently meeting with the state leaders, who were more directly responsible for promised financial payments.

[49] 24 JOURNALS OF THE CONTINENTAL CONGRESS 410 (1783), https://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=024/lljc024.db&recNum=417.

[Pennsylvania] for supporting the dignity of the federal government," Congress authorized its next meeting to be held in New Jersey.[50]

Based on these historical events, one might argue that the Federal District's size was intended to be large enough to sustain its own police force or other security. This argument is supported by James Madison's writings in *The Federalist No. 43*, wherein he emphasizes "[t]he indispensable necessity of complete authority at the seat of government," stating:

> 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.[51]

Madison believed his argument extended equally to federal buildings throughout the United States: "The necessity of a like authority over forts, magazines, etc., established by the general government, is not less evident."[52] Those federal enclaves, however, seem not to have prompted arguments that they must be a minimum size, nor objections to their reliance on state resources for power and other resources. Accordingly, Madison's concern appears more relevant to the federal government's independent *authority* to provide security for federal areas, rather than a concern over size or physical independence.

Whether a smaller-sized Federal District would raise new or different security concerns than the current Federal District, however, is subject to debate. The Pentagon is already located in Virginia, and many federal troops are stationed outside the District's boundaries. Nor is there any current statutory requirement that members of the Capitol Police or D.C. National Guard live in the District of Columbia rather than in Maryland or Virginia.[53] Nonetheless, it is possible that there is some size of Federal District too small to carry out the essential functions of government, but drawing the line between "sufficient" and "too small" would seem to depend on policy judgments rather than constitutional text—judgments that the District Clause seems to commit to Congress when setting forth its "exclusive" legislative authority over the nation's seat of government.[54]

In the modern era, arguments that Congress lacks constitutional authority to reduce the Federal District's size seem targeted at preserving the Federal District's current size following the 1846 reduction.[55] There seem to be few suggestions that the District of Columbia must be restored to its original dimensions to comply with the Constitution. Current objections appear related to a potential reduction's scale, rather than to an alleged lack of underlying power to effect that reduction.[56] Given the Constitution offers no specific guidelines for the Federal District's size—

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[50] *Id.*

[51] THE FEDERALIST NO. 43 (James Madison).

[52] *Id.*

[53] *But see* Zach Smith, Commentary, *D.C. Statehood Bill is Constitutionally Dubious and Pragmatically Flawed*, HERITAGE FOUND. (July 5, 2020), https://www.heritage.org/the-constitution/commentary/dc-statehood-bill-constitutionally-dubious-and-pragmatically-flawed ("The federal government shouldn't be dependent on local authorities for its safety and security.").

[54] U.S. CONST. art. I, § 8, cl. 17.

[55] *See, e.g.*, Smith, *supra* note 53; Roger Pilon, *Testimony Re: H.R. 51: Making DC the 51st State*, CATO INST. (Sept. 19, 2019), https://www.cato.org/testimony/testimony-re-hr-51-making-dc-51st-state/.

[56] *E.g.*, Roger Pilon, Commentary, *D.C. Statehood is a Fool's Errand*, CATO INST. (June 5, 2016), https://www.cato.org/commentary/dc-statehood-fools-errand/ (citing the mention of "ten Miles square" and subsequent

other than to set a 10-mile-square maximum size—it is difficult to find a textual basis in the Clause to distinguish between permissible and impermissible reductions in size.[57]

The Twenty-Third Amendment

Congress passed a Joint Resolution proposing the Twenty-Third Amendment in June 1960.[58] The Amendment permits the "District constituting the seat of Government of the United States" to appoint electors for President and Vice President "in such manner as the Congress may direct" with no more electors than the least populous state, but otherwise the number of electors to which it would be entitled if it were a state.[59] Approximately nine months later, 38 of the 50 states had ratified the Amendment,[60] thereby fulfilling the Constitution's Article V requirement that amendments or repeals must be ratified by three-fourths of the states.[61] Six months after ratification, Congress exercised its power under Section 2 of the Twenty-Third Amendment to enact Public Law No. 87-389, establishing the mechanics of voting for President and Vice President in the District of Columbia.[62]

In the context of H.R. 51, because it would reduce (rather than eliminate) the "District constituting the seat of Government of the United States" primarily to the federal buildings in present-day downtown DC, it seems likely that the Twenty-Third Amendment would continue to operate as written, potentially giving state-like electoral power to the greatly limited population of the reduced Federal District, should there be any such population and should those residents choose to exercise that power.[63]

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establishment of a ten-square-mile district as "strong evidence" against an "enclave scheme" similar to H.R. 51's establishment of Douglass Commonwealth, but not suggesting that the District of Columbia's current size is unconstitutional).

[57] James Madison explained during the Virginia constitutional ratification debates that the Federal District could be as small as one mile square. *Proceedings of the Virginia Convention*, *supra* note 37.

[58] Joint Resolution Proposing an Amendment to the Constitution of the United States, S.J. Res. 39, 74 Stat. 1057 (1960).

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

[60] Thirty-nine state legislatures ratified the Twenty-Third Amendment in the following order: Hawaii, June 23, 1960; Massachusetts, August 22, 1960; New Jersey, December 19, 1960; New York, January 17, 1961; California, January 19, 1961; Oregon, January 27, 1961; Maryland, January 30, 1961; Idaho, January 31, 1961; Maine, January 31, 1961; Minnesota, January 31, 1961; New Mexico, February 1, 1961; Nevada, February 2, 1961; Montana, February 6, 1961; Colorado, February 8, 1961; Washington, February 9, 1961; West Virginia, February 1961; Alaska, February 10, 1961; Wyoming, February 13, 1961; South Dakota, February 14, 1961; Delaware, February 20, 1961; Utah, February 21, 1961; Wisconsin, February 21, 1961; Pennsylvania, February 28, 1961; Indiana, March 3, 1961; North Dakota, March 3, 1961; Tennessee, March 6, 1961; Michigan, March 8, 1961; Connecticut, March 9, 1961; Arizona, March 10, 1961; Illinois, March 14, 1961; Nebraska, March 15, 1961; Vermont, March 15, 1961; Iowa, March 16, 1961; Missouri, March 20, 1961; Oklahoma, March 21, 1961; Rhode Island, March 22, 1961; Kansas, March 29, 1961; Ohio, March 29, 1961; and New Hampshire, March 30, 1961. Cong. Rsch. Serv., *Ratification of Amendments to the Constitution*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/intro.5/ALDE_00001236/ (last visited Mar. 17, 2021). Arkansas rejected the Amendment; the remaining states took no action. *See* Senate Committee on Rules and Administration, U.S. SENATE MANUAL 582 n.14, 116th Congress (2020), https://www.govinfo.gov/content/pkg/SMAN-116/pdf/SMAN-116.pdf.

[61] U.S. CONST. art. V. (providing, in pertinent part, that "Amendments . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States").

[62] An Act to Amend the Act of August 12, 1955, Pub. L. No. 87-389, 75 Stat. 817 (Oct. 4, 1961).

[63] *See, e.g.*, Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 189 (1991) (arguing that this presents more of a theoretical problem than a realistic one, and challenging whether anyone would have standing to lodge a legal objection); *but see* Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality and*

H.R. 51 appears to address the likelihood of this outcome by providing for expedited consideration in both the House and Senate of a joint resolution proposing repeal of the Twenty-Third Amendment.[64] The expedited consideration includes calendaring immediately upon introduction, as well as waived points of order against the joint resolution and consideration thereof.[65] That said, the Bill's provision for fast-track consideration of a resolution to repeal the Twenty-Third Amendment does not guarantee that both houses would ultimately vote in favor of a proposed amendment, or that three-fourths of states would promptly ratify the repeal.[66]

The Justiciability of a Constitutional Challenge

Should H.R. 51 or similar legislation be enacted, there are at least two legal scenarios in which courts might find a constitutional challenge to the implementation of such legislation nonjusticiable, thereby declining to consider or resolve the challenge on the merits.

First, a party bringing such a challenge would need to satisfy standing requirements. The Supreme Court has articulated a three-part test for meeting the constitutionally rooted "standing" doctrine.[67] To establish standing, a party must show it has a genuine stake in the relief sought because it has personally suffered, or will suffer, (1) a concrete, particularized, actual or imminent injury-in-fact that (2) is traceable to the allegedly unlawful actions of the opposing party and (3) is redressable by a favorable judicial decision.[68]

In the context of H.R. 51, it is unclear whether conferring statehood on Douglass Commonwealth would necessarily result in a cognizable injury-in-fact to, for example, other states.[69] The Supreme Court has in other cases dismissed for lack of standing cases brought by individual congressional representatives who "have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," but claim that an "Act causes a type of institutional injury . . . which necessarily damages all Members of Congress . . . equally."[70] Such claims are also "based on a loss of political power, not loss of any private right."[71] Similarly, a

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Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 GEO. WASH. L. REV. 475, 479 (1991) (stating that "obtaining D.C. statehood without a constitutional amendment would require that the remaining, drastically reduced District of Columbia be entitled to its constitutionally-mandated three electoral votes for president. However, this result is politically and civically irresponsible").

[64] H.R. 51, 117th Cong. § 224 (2021).

[65] *Id.*

[66] *See, e.g.*, Meagan Flynn, *In Faraway State Houses, A Battle Brews Over Making D.C. the 51st State*, WASH. POST (Feb. 26, 2021) (noting both South Dakota and Arizona had, at the time of the article's publication, passed resolutions opposing D.C. statehood).

[67] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[68] *Id.*

[69] Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (denying, for lack of standing, the State of Texas's motion for leave to file a bill of complaint against Pennsylvania). This denial issued notwithstanding Texas's claim that its standing derived from threats to its constitutional guarantee of "equal suffrage in the Senate" and to "its citizens' rights of suffrage in presidential elections." Plaintiffs' Reply in Support of Motion for Preliminary Injunction and Temporary Restraining Order 7–8, Texas v. Pennsylvania, No. 22O155 (Dec. 11, 2020), https://www.supremecourt.gov/DocketPDF/22/22O155/163498/20201211111125165_TX-v-State-MPI-Reply-2020-12-11.pdf.

[70] Raines v. Byrd, 521 U.S. 811, 821 (1997) (dismissing constitutional challenge brought by Members of Congress who voted against the Line Item Veto Act).

[71] *Id.*; *but see* Clinton v. City of New York, 524 U.S. 417, 429–36 (1998) (holding that city and health care providers suffered sufficiently immediate and concrete injury from President's exercise of line item veto against certain tax

claim brought by individual Members who oppose H.R. 51 would likely involve allegations of generalized institutional harm.[72] That said, determination of standing would ultimately depend on the plaintiff's identity and the articulation of alleged harm in a particular case. For instance, a private individual could potentially allege an injury caused by a law or measure of the new state that would not have occurred if the District remained under federal jurisdiction. But whether the case would compel a court to reach the constitutional question—or whether, as in *Phillips v. Payne*, the court would have a basis to resolve the case without reaching the constitutional issues—is difficult to predict.[73]

Perhaps more significantly, courts could determine that a change in the District's political status is a "political question" unsuited for resolution by the judicial branch. The concept of the political question doctrine has been described as "more amenable to description by infinite itemization than by generalization,"[74] but one of the classic characteristics of a political question is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"—that is, a power constitutionally granted to one of the nonjudicial branches of government.[75] As discussed, both the admission of new states and the power of exclusive legislation over the District of Columbia are textually committed to Congress in the Admissions and District Clauses, respectively. Thus, courts arguably could refuse to resolve a challenge to the District's statehood on the ground that it represents a political question textually committed to Congress.[76]

On one hand, there is some support for the argument that a constitutional challenge to District statehood is likely to present a nonjusticiable political question. First, although Congress has extended statehood to new states 37 times since the Constitution's ratification,[77] the federal courts have never upheld a constitutional challenge to the exercise of Congress's powers under the Admission Clause. Second, the case most directly analogous to a challenge to District statehood, *Phillips v. Payne*,[78] arguably suggests—albeit in dictum—that Congress's retrocession of Alexandria County to Virginia may have presented what would today be considered a political

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waivers to have standing to challenge constitutionality of Line Item Veto Act).

[72] *See Raines*, 521 U.S. at 829 ("[A]ppellees have alleged no injury to themselves as individuals . . . [and] the institutional injury they allege is wholly abstract and widely dispersed . . . and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.").

[73] If a statute can be fairly construed so that its validity can be sustained against a constitutional attack, a rule of prudence is that it should be so construed. *E.g.*, Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

[74] Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 933 (D.C. Cir. 1988) (quoting CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 75 (4th ed. 1983)).

[75] Baker v. Carr, 369 U.S. 186, 217 (1962); *see also* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 96 (2d ed. 1988) (distinguishing the textual commitment rationale as the "classical" version of the political question doctrine).

[76] For more detailed analysis of how applicability of the political question doctrine appears to have waxed and waned over the past several decades, see Cong. Rsch. Serv., *Political Question Doctrine: Current Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-2-8-3/ALDE_00001209/ (last visited Mar. 15, 2021).

[77] *See supra* note 17. The first of these was Vermont in 1791. *See* An Act for the Admission of the State of Vermont Into This Union, ch. VII, 1 Stat. 191, 1st Congress (1791). The last was Hawaii in 1959. *See* An Act to Provide for the Admission of the State of Hawaii Into the Union, Pub. L. No. 86-3, 73 Stat. 4, 86th Congress (1959).

[78] Phillips v. Payne, 92 U.S. 130 (1875).

question. In that case, the Supreme Court noted: "In cases involving the action of the political departments of the government, the judiciary is bound by such action,"[79] citing several previous cases in which the judiciary declined to second-guess a determination by the political branches.[80] As recently as 2019, the Supreme Court has invoked the political question doctrine to refuse merits review of constitutional challenges to certain voting and representation issues.[81]

On the other hand, none of these points is definitive. Congress has never before conferred independent statehood on a portion of the Federal District, so any attempt to do so would necessarily be novel legislation to some extent, and it is impossible to predict with any certainty how courts may decide issues of first impression. The *Phillips v. Payne* dictum is not binding. Other recent decisions may indicate that the Supreme Court is sometimes willing to render decisions in cases that arguably presented political questions.[82] As the Court recently reaffirmed: "No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts."[83]

Nevertheless, if a District statehood bill were enacted and faced legal challenges, but courts either determined that challengers lacked standing or their claims presented nonjusticiable political questions, Congress itself would have the final word.

Conclusion

To date, no legislation has ever conferred statehood on a portion of land previously dedicated as the seat of federal government. Novel legislation is intrinsically likely to invite legal challenges raising issues of first impression. Many of the constitutional questions discussed in this report have not yet been raised in federal court, and even fewer have proceeded to a binding resolution on the merits. Accordingly, this report is intended to inform legislative debate, rather than predict any particular outcome.[84] Congress may desire to consider the constitutional implications of District statehood or other proposals that would affect the District's political status, and to weigh those implications along with appropriate policy considerations when evaluating legislative action.

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[79] *Id.* at 132 (concluding, however, that the Court need not "invoke [the] aid" of that principle).

[80] *E.g.*, Williams v. Suffolk Ins. Co., 38 U.S. 415, 422 (1839) (holding, insofar as the American Executive concluded "that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres [sic]," the courts lacked authority to consider any claim to the contrary).

[81] Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding "partisan gerrymandering claims present political questions beyond the reach of the federal courts"). The Court also quoted from a previous case: "Sometimes, however, 'the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.'" *Id.* at 2494 (quoting Vieth v. Jubelirer, 541 U.S. 267, 277, (2004) (plurality opinion)).

[82] *E.g.*, Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189 (2012); Bush v. Gore, 531 U.S. 98 (2000).

[83] *Zivotofsky*, 566 U.S. at 196–97 (alteration in original) (overturning two lower courts' rulings that the case presented a nonjusticiable political question) (quoting INS v. Chadha, 462 U.S. 919, 941–42 (1983)).

[84] *Compare* Letter from 39 Law Professors to Congress Regarding Washington, D.C. Admission Act (May 22, 2021), https://www.dropbox.com/s/ghtdagoapnlzowf/Letter%20to%20Congressional%20Leaders%20on%20Constitutionality%20of%20Statehood%20for%20Washington%20D.C.%20May%2022%202021.pdf?dl=0 (concluding no constitutional barriers to H.R. 51), *with* Letter from 22 State Attorneys General to the President and Congress (April 13, 2021), https://ago.wv.gov/Documents/DC%20Statehood%20letter%20as%20sent%20(02539672xD2C78).PDF (concluding that District statehood may be established only by constitutional amendment).

Author Information

Mainon A. Schwartz
Legislative Attorney

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