



Statement of

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Before

Committee on Oversight and Reform  
U.S. House of Representatives

Hearing on

**“H.R. 51, the Washington, D.C.  
Admission Act”**

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Chairman Cummings, Ranking Member Jordan, and Members of the Committee:

My name is Ken Thomas. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress. I would like to thank you for inviting CRS to testify today regarding the Committee's consideration of H.R. 51, the Washington, D.C. Admission Act.<sup>1</sup> My testimony today will address whether Congress has the constitutional authority to implement H.R. 51, which would create a state called Washington, Douglass Commonwealth (Douglass Commonwealth) from a portion of the District of Columbia. I will not address whether creation of this new state is consistent with historical practices or any policy considerations Congress might evaluate in examining this bill.

## Background

Residents of the District of Columbia have had limited representation in Congress.<sup>2</sup> Over the years, however, various approaches have been suggested to provide representation to DC residents in the House and the Senate. For instance, an effort was made over forty years ago to amend the Constitution for that purpose.<sup>3</sup> In 1978, H.R.J. Res. 554 was approved by two-thirds of both the House and the Senate, and was sent to the states. The proposed constitutional amendment provided, in part, that “[f]or purposes of representation in the Congress, election of the President and Vice President, and Article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.”<sup>4</sup> Sixteen states ratified the Amendment, but it expired in 1985 without winning the support of the requisite thirty-eight states.<sup>5</sup>

Since the proposed amendment expired, Congress has considered other proposals to give the District of Columbia representation in Congress. In general, these proposals would avoid the more procedurally difficult route of amending the Constitution, but would instead be implemented by statute. Thus, for instance, Members of Congress have introduced bills (1) to grant the Delegate for the District of Columbia authority to vote in the House of Representatives;<sup>6</sup> (2) to retrocede a portion of the District to the State of Maryland;<sup>7</sup> or (3) to allow District residents to vote in Maryland elections for Senate and

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<sup>1</sup> H.R. 51, 116th Cong. (2019).

<sup>2</sup> The District has never had any directly elected representation in the Senate, and has been represented by a nonvoting Delegate in the House of Representatives for a short portion of its over 200-year existence. In 1871 to 1874, Congress established a territorial form of government for the District and provided for a non-voting delegate to represent the District in the House. An act to provide a Government for the District of Columbia, ch. 62, 16 Stat. 419 (1871). These provisions were repealed three years later. An act for the government of the District of Columbia, and for other purposes, ch. 337, 18 Stat. 116 (1874). In 1970, Congress created the current position of Delegate to the House. An act to establish a Commission on the Organization of the Government of the District of Columbia and to provide for a Delegate to the House of Representatives from the District of Columbia, Pub. L. No. 91-405, 84 Stat. 845 (1970).

<sup>3</sup> Arguments have been made that a constitutional amendment is preferable to the granting of statehood to the District. *Representation for the District of Columbia: Hearing on H.R. Res. 139, 142, 391, 554 and 565 Before the Subcommittee on Civil and Constitutional Rights of the H. Comm. On the Judiciary*, 95th Cong. 126 (1977) (statement of Patricia Wald, Assistant Att’y General of the United States) (Statehood for the District “presents practical and even theoretical problems.”); *District of Columbia Representation in Congress: Hearing on Joint Resolution S.J. Res. 65 Before the Subcommittee on Civil and Constitutional Rights of the H. Comm. On the Judiciary* 17 (1978) (statement of John M. Harmon, Assistant Att’y General of the United States) (Statehood for the District “would present both legal and practical problems.”).

<sup>4</sup> H.R.J. Res. 554, 95th Cong. (1978).

<sup>5</sup> *Adams v. Clinton*, 90 F. Supp. 2d 35, 98 n.42 (D.D.C. 2000), *aff’d*, 531 U.S. 941 (2000).

<sup>6</sup> *See, e.g.*, District of Columbia House Voting Rights Act of 2007, S. 1257, 110th Cong. (2007).

<sup>7</sup> *See, e.g.*, District of Columbia Retrocession Act of 1990, H.R. 4195, 101st Cong. (1990).

House representatives.<sup>8</sup> Efforts to pass these bills have been unsuccessful, with some arguing that these approaches raise constitutional and/or policy concerns.<sup>9</sup>

H.R. 51 would admit the District of Columbia's populated portions to the Union as a new state—the Douglass Commonwealth—and raises novel questions implicating the Constitution's Admissions Clause,<sup>10</sup> District and Federal Enclaves Clause,<sup>11</sup> and Twenty-Third Amendment.<sup>12</sup>

## The Admissions Clause

The Constitution commits the statehood admission process to Congress's discretion. The Admissions 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.

There have been no significant challenges to Congress's grants of statehood and the Supreme Court has stated *in dicta* that the judiciary may generally not review a state's territorial composition.<sup>13</sup> The Admissions Clause does not specify a procedure for granting statehood, and Congress's methods for admitting states have varied dramatically.<sup>14</sup> The only significant prerequisite for admission of a state appears to be its adoption of a constitution, thus ensuring compliance with the Constitution's requirement that the United States "guarantee to every State in this Union a Republican Form of Government."<sup>15</sup> Further, the one explicit textual limitation in the Constitution to admission of a state - that no new state be formed or erected within the jurisdiction of any other state<sup>16</sup> - does not appear to be relevant here.

The Admissions Clause also requires that, if a new state is to be comprised of "Parts of States," the state whose land is being used must consent to the admission. As this requirement only applies to "Part of States," it appears not to apply here, as the area that would form the Douglass Commonwealth would

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<sup>8</sup> See, e.g., National Capital Civil Rights Restoration Act of 1990, H.R. 4193, 101st Cong. (1990).

<sup>9</sup> See, e.g., Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 310-68 (2008); Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 788-96 (2009); Philip G. Schrag, *The Future of District Of Columbia Home Rule*, 39 CATH. U.L. REV. 311, 318-20 (1990); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1668-72 (1991).

<sup>10</sup> U.S. CONST. art. IV, § 3, cl. 1.

<sup>11</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>12</sup> U.S. CONST. amend. XXIII. This memorandum does not address the constitutionality of allowing the Douglass Commonwealth only one Representative before the next reapportionment of the House of Representatives. H.R. 51, 116th Cong. § 102(f) (2019).

<sup>13</sup> *Phillips v. Payne*, 92 U.S. 130, 132 (1875) ("In cases involving the action of the political departments of the government [regarding acquisition of sovereignty], the judiciary is bound by such action.").

<sup>14</sup> See PETER B. SHERIDAN, BRIEF HISTORY OF STATEHOOD ADMISSION PROCESS (April 2, 1985) (Congressional Research Service memorandum), reprinted in 131 CONG. REC. 8554 (1985). Although the Admissions Clause does not define the procedure by which a territory becomes a state, the usual procedure for admission is: (1) the people of the territory through their territorial legislature petition Congress; (2) Congress passes an "enabling act" that, when signed by the President, authorizes the territory to frame a constitution; (3) the territory passes a constitution; and (4) Congress passes an act of admission approved by the President. *Id.* Some states, however, have followed different procedures. Under the alternative "Tennessee Plan," territories draft a constitution and elect "Senators" and "Representatives" without any authorization from Congress. Statehood is then affirmed by congressional vote. *Id.* This was the process used by Tennessee, Michigan, Iowa, Oregon, Kansas, and Alaska. *Id.*

<sup>15</sup> U.S. CONST. art. IV, § 4.

<sup>16</sup> U.S. CONST. art. IV, § 3, cl. 1.

come from the federal government, not a state. However, because Maryland ceded the lands comprising the District of Columbia for use as the seat of the federal government,<sup>17</sup> Maryland might possibly be able to reclaim the ceded land, if the federal government does not use it for that purpose. 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 (found in section 8 of Article I).

If Maryland has a reversionary interest in the land that would comprise the Douglass Commonwealth,<sup>18</sup> Maryland would have to agree to the creation of the Douglass Commonwealth under the Admissions Clause.<sup>19</sup> (There appears to be no constitutional bar to Maryland transferring any reversionary interest it retains in the District of Columbia to the federal government to establish the Douglass Commonwealth.) A court might not, however, find Maryland’s statute ceding land to the federal government pursuant to the District and Federal Enclaves Clause to create a reversionary interest because the statute does not explicitly provide one.<sup>20</sup> Maryland’s statute states:

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 forever 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....<sup>21</sup>

Several commentators have analogized Maryland law regarding real property transfers to Maryland’s cession of the District of Columbia land, noting that Maryland law does not favor implied reversionary interests.<sup>22</sup> As one Maryland court stated, “[c]onditions subsequent are not favored in the law, because the breach of such a condition causes a forfeiture and the law is averse to forfeitures.”<sup>23</sup> The Maryland Court of Appeals has gone to “great lengths” to avoid finding that a property transfer implies a condition subsequent that would result in forfeiture.<sup>24</sup> To avoid this, the court insists on “words indicating an intent that the grant is to be void if the condition is not carried out.”<sup>25</sup> It is unclear, however, if a court would find Maryland’s statute ceding land to the federal government to be analogous to Maryland law governing real property transfers and, consequently, indicative of whether Maryland intended to retain a reversionary interest in the land.

## The District and Federal Enclaves Clause

The Constitution’s District and Federal Enclaves Clause establishes the procedure for creating a federal seat of government and other federal enclaves within the United States that are suitable for military bases or other government facilities. The District and Federal Enclaves Clause provides that:

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<sup>17</sup> 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 58 (hereinafter OLP Report).

<sup>18</sup> *Id.*; see Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 179-83 (1991).

<sup>19</sup> OLP Report, *supra* note 17, at 58.

<sup>20</sup> Raven-Hansen, *supra* note 18, at 180-83.

<sup>21</sup> 1791 Md. Acts ch. 45, § 2 (quoted in part in *Adams*, 90 F. Supp. 2d at 58).

<sup>22</sup> Raven-Hansen, *supra* note 18, at 177-83; Schrag, *supra* note 9, at 348; Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional, Legal And Practical Impediments to Statehood for the District Of Columbia*, 13 D.C.L. REV. 1, 35-36 (2010).

<sup>23</sup> *Gray v. Harriet Lane Home for Invalid Children*, 64 A.2d 102, 108 (Md. 1949).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

[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 be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.<sup>26</sup>

The District and Federal Enclaves Clause provides that Congress has “exclusive legislation in all Cases whatsoever” over the enclaves. Based on this language, courts have concluded that Congress has plenary power over these places<sup>27</sup> and that some ordinary constitutional restrictions do not operate. For instance, when creating courts of local jurisdiction in the District, Congress acts pursuant to its legislative powers under the District and Enclaves Clause, so it does not need to create courts that comply with Article III requirements.<sup>28</sup>

Commentators have raised concerns as to whether Congress has authority under the District and Federal Enclaves Clause to dispose of a significant part of the District of Columbia, arguing that Congress must maintain a minimum size for the District of Columbia to achieve the purposes of the District and Federal Enclaves Clause.<sup>29</sup> The District and Federal Enclaves Clause, however, does not expressly prevent Congress from reducing the size of the District of Columbia or other federal enclaves. Further, no case law suggests that the District of Columbia has a minimum size, and Congress has reduced the District of Columbia’s borders from time to time.<sup>30</sup> The District and Federal Enclaves Clause only explicitly limits Congress from establishing a district larger than ten square miles, and the express establishment of an upper limit suggests that no lower limit exists. That the Constitution provided Congress flexibility to choose not only the location, but also the size of the seat of government, suggests that the Founding Fathers intended to allow Congress to determine the appropriate size and place of the District of Columbia.

The history of the Constitutional Convention suggests that the Founding Fathers anticipated that Congress might need to change the District of Columbia’s size or location after its establishment. During the Constitutional Convention, Charles Pinckney of South Carolina proposed that the Committee on Detail report out language authorizing Congress “to fix and permanently establish the seat of Government of the [United States].”<sup>31</sup> Although part of his proposal was eventually incorporated into what became the District and Federal Enclaves Clause, the word “permanently” was dropped in committee.<sup>32</sup>

Congress has previously modified the District of Columbia’s boundaries. In 1791, the First Congress, which included James Madison and other framers of the Constitution, amended the act of acceptance to change the District of Columbia’s southern boundary<sup>33</sup> to include land that is now part of Anacostia and

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<sup>26</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>27</sup> *Palmore v. United States*, 411 U.S. 389, 397 (1973); *O’Donoghue v. United States*, 289 U.S. 516, 518 (1933); *Atlantic 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. (12 Pet.) 524, 619 (1838).

<sup>28</sup> *Palmore*, 411 U.S. at 410; *see also Swain v. Pressley*, 430 U.S. 372, 382-83 (1977).

<sup>29</sup> OLP Report, *supra* note 17, at 23-25.

<sup>30</sup> *See infra* notes 33-41.

<sup>31</sup> JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES* 420 (Gaillard Hund & James Brown Scott eds., 1920).

<sup>32</sup> Raven-Hansen, *supra* note 18, at 168.

<sup>33</sup> Act of March 3, 1791, ch. 17, 1 Stat. 214.

Alexandria.<sup>34</sup> The Supreme Court has recognized that acts passed by the first Congress, which contained many framers of the Constitution, have special significance in discerning constitutional meaning.<sup>35</sup>

In 1846, Congress altered the District of Columbia's boundaries more significantly. Alexandria residents, based on a variety of factors, including economic stagnation exacerbated by the decision not to locate federal buildings across the Potomac River, sought to retrocede that portion of the District formerly within Virginia's borders.<sup>36</sup> Congress subsequently passed a bill to retrocede close to one-third of the District of Columbia to Virginia.<sup>37</sup> The Supreme Court considered the retrocession's constitutionality in *Phillips v. Payne*,<sup>38</sup> holding that the passage of thirty years from the retrocession to the constitutional challenge "estopped" the plaintiff and prevented the Court from reaching the merits of the case.<sup>39</sup>

The District and Federal Enclaves Clause also provides that Congress shall "exercise like Authority" over the District as it exercises "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." Further, Article IV, Section 3, Clause 2 provides that Congress shall have "[p]ower to dispose of . . . Property belonging to the United States," and the United States has retroceded jurisdiction over other federal enclaves numerous times.<sup>40</sup> Many of these transfers involved only partial retrocession of jurisdiction for purposes such as allowing states to police highways in enclaves.<sup>41</sup> The federal government, moreover, has ceded all legislative jurisdiction over a federal enclave to a state several times,<sup>42</sup> and the Supreme Court has suggested that there are few limits on how states and the federal government may allocate authority over a federal enclave.<sup>43</sup> Arguably, if Congress has significant discretion in acquiring and disposing of other federal enclaves, a court might find it has "like authority" regarding the District of Columbia.

Finally, commentators have argued that transferring populated areas of the District of Columbia to the proposed Douglass Commonwealth contravenes the intent of the District and Federal Enclaves Clause by making the federal government dependent on a state's infrastructure and services to protect the health and

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<sup>34</sup> Raven-Hansen, *supra* note 18, at 169.

<sup>35</sup> *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

<sup>36</sup> Mark David Richards, *The Debates over the Retrocession of the District of Columbia, 1801-2004*, WASH. HIST., Vol. 16, No. 1 at 54, 60-62 (Spring/Summer 2004).

<sup>37</sup> Act of July 9, 1846, ch. 35, 9 Stat. 35.

<sup>38</sup> *Phillips v. Payne*, 92 U.S. 130, 132 (1875).

<sup>39</sup> *Id.*

<sup>40</sup> See U.S. INTERDEPARTMENTAL COMM. FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, 2 JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES: A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION, Pt. 2, 87-88, 90-93 (1957) (Federal Enclave Report).

<sup>41</sup> *Id.* at 93-94.

<sup>42</sup> *Id.* at 89 (citing Pub. L. No. 77-56, 55 Stat. 183 (1941) and Pub. L. No. 80-83, 61 Stat. 124 (1947)); see Pub. L. No. 66-395, 41 Stat. 1439 (1921) (retroceding jurisdiction over land acquired by the United States to house government employees to Virginia); Pub. L. No. 81-14, 63 Stat. 11 (1949) (retroceding jurisdiction over Los Alamos Atomic Energy Commission area to New Mexico); Public Law No. 83-703, ch. 19, § 3, 68 Stat. 961 (1954) (retroceding jurisdiction over Atomic Energy Commission land at Sandia Base, Albuquerque to New Mexico).

<sup>43</sup> *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525, 541-42 (1885). In *Lowe*, the Court stated that:

[T]he state and general government, may deal with each other in any way they may deem best to carry out the purposes of the constitution. It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state.

safety of federal employees, officers, and elected officials.<sup>44</sup> It has been argued the Framers intended the District and Federal Enclaves Clause to remove the new federal capital completely from the control of any state in order to avoid repeating the humiliation that the Continental Congress suffered on June 21, 1783 when some eighty soldiers physically threatened and verbally abused the Members in Philadelphia. Neither municipal nor state authorities protected the Members of Congress,<sup>45</sup> forcing them to flee the city.<sup>46</sup>

An evaluation of the infrastructure and services that the District of Columbia provides the federal government or that the Douglass Commonwealth would provide under H.R. 51 is beyond the scope of this testimony. The federal government has authority to provide for its own infrastructure and services, and has already done so to some extent.<sup>47</sup> However, it might be difficult or impractical to replicate the infrastructure or services that the District of Columbia currently provides.

Beyond establishing a geographical enclave with a public health and safety infrastructure, the Founding Fathers appear to have anticipated that the District of Columbia would have permanent residents. Writing in *The Federalist*, James Madison assumed that the inhabitants of the capital would have “their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed them. . . .”<sup>48</sup> The text of the Constitution, however, does not require the seat of government to be inhabited.

There appears to be little case law addressing whether federal courts would consider the size of the District of Columbia as being within their purview. Whether courts would defer to a decision by Congress to reduce the District of Columbia’s size under the District and Federal Enclaves Clause or what standards they would use to make such an evaluation is unclear. It is possible that courts would defer to a determination by Congress that a smaller District of Columbia could provide sufficient infrastructure and services to avoid unnecessary dependence on surrounding states.

## The Twenty-Third Amendment

Granting D.C. statehood might be incompatible with the Twenty-Third Amendment, which provides for the District of Columbia to appoint electors to vote in national elections for President and Vice President of the United States. The Twenty-Third Amendment provides:

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; 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

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<sup>44</sup> See, e.g., OLP Report, *supra* note 17, at 23-25.

<sup>45</sup> JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789*, at 112-113 (1888); WILLIAM TINDALL, *THE ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA*, at 31-36 (1903).

<sup>46</sup> Thus, Madison noted that:

“[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it. . . . 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 government, for protection in the exercise of their duty, might bring on the national council an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy.”

THE FEDERALIST, No. 43 at 288-89 (J. Cooke ed. 1961).

<sup>47</sup> See, e.g., 2 U.S.C. § 1901 (Capitol Police); 18 U.S.C. § 3056 (Secret Service); 28 U.S.C. § 561 (U.S. Marshals Service).

<sup>48</sup> THE FEDERALIST, No. 43 at 289 (J. Cooke ed. 1961).

electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

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

The Twenty-Third Amendment provides for the District of Columbia to choose presidential electors to select who, with state electors, select the President and Vice President, and gives Congress authority to enforce the amendment through legislation. As the associated House Report notes, the Twenty-Third Amendment was intended to “perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.”<sup>49</sup>

Arguably, H.R. 51 would appear to make the Twenty-Third Amendment a “dead letter.” H.R. 51 would repeal the existing implementing legislation for the Twenty-Third Amendment, eliminating the mechanism Congress established for the District of Columbia to choose electors.<sup>50</sup> Further, admitting the Douglass Commonwealth as a state would appear to deprive the District of Columbia of a significant local voting population.

However, some current residents of the District of Columbia whose residence would be outside of the Douglass Commonwealth, such as those living in the White House, would appear to remain residents of the District of Columbia. Further, H.R. 51’s provision requiring states to provide absentee ballots to residents of the reduced District of Columbia, who had been previously domiciled in that state and were otherwise qualified to vote in that state, might not avoid the application of the Twenty-Third Amendment.<sup>51</sup> Although H.R. 51 would repeal the District of Columbia’s current electoral mechanism, the Twenty-Third Amendment would still provide the District of Columbia three electoral votes notwithstanding the creation of the Douglas Commonwealth. Consequently, a court would likely find that the Twenty-Third Amendment would continue to provide the District of Columbia, although smaller in size and population, three electoral votes.

## Conclusion

Whether Congress can create a state from the District of Columbia raises novel constitutional questions, and there is little case law directly on point. The various arguments that have been raised against such a proposal—invoking the Admissions Clause, the Federal District and Enclaves Clause, and the Twenty-Third Amendment—suggest that legal challenges would likely be brought if H.R. 51 passes.

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<sup>49</sup> H.R. REP. NO. 1698, 86th Cong. 2d Sess. 3 (1960).

<sup>50</sup> H.R. 51, 116th Cong. § 205 (2019).

<sup>51</sup> *Id.* § 204. Commentators have argued that an analogous law, the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20310, which allows eligible voters that have left the United States to vote in federal elections in the states in which they were last resident, is unconstitutional. *See, e.g.,* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 457, 462-463, 478 (2016) (arguing that, notwithstanding the Fourteenth Amendment, states have the authority to define their electorate regarding overseas voters).



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