

D.C. Statehood: Not Without A Constitutional Amendment

By R. Hewitt Pate

Statehood proposals for the District of Columbia have been around for years. Today, however, we have a President pledged to support D.C. statehood. Congress is controlled by the Democrats, whose platform supports statehood. Eleanor Holmes Norton, the so-called non-voting delegate to the House of Representatives from D.C., has introduced a statehood proposal in the current session of Congress.¹ Jesse Jackson, the "Shadow Senator" from the District, was recently arrested while leading a group of pro-statehood protesters blocking an intersection near the Capitol.² And readers of *The Washington Post* received an Independence Day issue of the *Post's* Sunday magazine devoted to the statehood cause.³ In short, statehood matters may be coming to a head in the political arena.

What most statehood proponents ignore, however, is a fundamental question that should precede their political campaign: even if it *were* a good idea, can Congress make D.C. a state without a constitutional amendment? As a partisan matter, support for statehood is almost exclusively Democratic, as would be New Columbia's congressional delegation. As a constitutional matter, however, the Justice Department under both Democratic and Republican administrations has consistently agreed that statehood for the District requires a constitutional amendment; it cannot be done by mere majority vote in Congress. A review of the District's history, the terms of the Constitution, and the practicalities of making D.C. a state, reveals that statehood legislation is ill-conceived at best.

The Political History of the District

As most of us learned in grade school, the District was created in 1790 from ten square miles of land ceded to the federal government by Maryland and Virginia.⁴ The purpose of the District is stated in Federalist No. 43. The Framers of the Constitution believed that the federal government needed to have control over the seat of government—over the place where it was to conduct its business—so that it would not find itself beholden to a particular state government for its day-to-day needs. The states, after all, are (or at least were then) independent sovereigns jealously guarding their political power against federal intrusion from Washington.

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- 1 H.R. 51, "To provide for the admission of the State of New Columbia into the Union" (introduced January 5, 1993).
 - 2 Jenkins & Efundade, *Statehood Protest Results in 32 Arrests*, *The Washington Post*, July 2, 1993 at C1.
 - 3 *Washington Post Magazine*, July 4, 1993.
 - 4 The history and rationale of the District's creation, as well as a thorough review of the legal issues surrounding statehood, can be found in a report issued by the Justice Department in 1987. See Office of Legal Policy, *Report to the Attorney General: The Question of Statehood for the District of Columbia* (1987) [hereinafter *Report to the Attorney General*]; see also Cochran, *District of Columbia Statehood*, 32 *How. L.J.* 413 (1989); Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, Part II, 46 *Geo. L.J.* 207 (1957-58), Part II, 46 *Geo. L.J.* 377 (1958); Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 *Fordham Urb. L.J.* 479 (1979); Perry, *The State of Columbia*, 9 *Geo. L.J.* 13 (1921); Raskin, *Domination, Democracy, and the District: The Statehood Position*, 39 *Cath. U.L. Rev.* 417 (1990); Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 *Geo. Wash. L. Rev.* 101 (1991); Schrag, *The Future of District of Columbia Home Rule*, 39 *Cath. L. Rev.* 311 (1990).

During the District's early period, it was governed for a time by five separate local jurisdictions—Washington, Georgetown, Alexandria, and the unincorporated Washington County and Alexandria County.⁵ In 1871, Congress created a territorial form of government for the District with its own governor and assembly, and the District held a three-day celebration of its "new era."⁶ But after three years of corruption, wanton spending, debt, bankruptcy, and public outcry, Congress abolished the territorial government without debate.⁷ It was replaced with an appointed commission form of government which remained in place until 1967.⁸ The rationale for this form of local government was Congress's view that the small District, sparsely populated by persons connected to the new federal government, could as easily be administered by Congress itself.

After the seat of the national government was moved to the District in 1800, District residents were not allowed to vote in national elections.⁹ This reflected Madison's view that the proximity of the District's citizens was enough in itself to ensure that their concerns were well represented to the Congress and President.¹⁰ Residents of the District would probably have a greater say than citizens of a distant state, such as Georgia or Rhode Island, that could send voting representatives. Today the same observation might be made in comparing the influence of District residents—whose local paper is Congress's local paper, and who might greet the President on Georgia Avenue—with that of rural North Dakotans.

By the 1950s, support for some form of local and national representation for the District's residents began to swell. President Eisenhower supported Home Rule—the grant of certain powers of local administration to officials elected from the District.¹¹ In 1961, the states ratified the 23rd Amendment, giving District residents for the first time the right to vote for President and Vice President.¹² The District was granted Home Rule in 1974, and Walter Washington, previously the Commissioner of the District, became its first modern elected mayor.¹³

The most significant modern initiative to provide national voting rights for the District occurred in 1978. A constitutional amendment was proposed, not to make D.C. a state, but rather to grant it a state's full voting strength in Congress while retaining its legal status as the federal seat of government. The proposed amendment was passed by Congress with the required two-thirds margin and sent to the states for ratification. During the seven-year ratification period, however, only sixteen states approved, so the amendment failed.¹⁴ Eleanor Holmes Norton has

5 See *Report to the Attorney General at 9; Voting Representation in Congress for the District of Columbia: Hearings on H.J. Res. 46; H.J. Res. 253; H.J. Res. 470 Before Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess. 232, 234-35 (1971)* [hereinafter *1971 House Hearings*]. After 1820, the mayor of Washington, which originally had been appointed, became a popularly elected official. *Report to the Attorney General at 8 n. 28.*

6 C. Green, *Washington, Village and Capital, 1800-1878* 336, 338 (1962).

7 *Id.* at 357-62.

8 *Report to the Attorney General at 9-10* (citing Act of June 20, 1874, 18 Stat. 116; Act of June 11, 1878, 20 Stat. 102).

9 C. Green, *supra* at 24.

10 See *Federalist* No. 43; 12 *Papers of James Madison* 329 (C. Hobson & R. Rutland eds. 1981).

11 *New Columbia Admission Act*, H.R. Rep. No. 909, 102d Cong., 2d Sess. 9 (1992) [hereinafter *1992 House Report*].

12 *Report to the Attorney General at 11.* The 23rd Amendment figures prominently in the District's present constitutional status.

13 See *District of Columbia Self-Government and Governmental Reorganization Act*, Pub. L. No. 93-198, 87 Stat. 774 (1973); *1992 House Report at 9.*

14 See *Report to the Attorney General at 12; Hatch, Should the Capital Vote in Congress? A Critical Analysis of*

sponsored the most recent bills, which seek to grant full statehood without an amendment: H.R. 4718 in the last Congress, and the now-pending H.R. 51.

The Mechanics of Statehood

Statehood proponents correctly point out that Article IV, Section 3 of the Constitution provides that the *Congress* may admit new states to the Union. That has obviously been done 37 times since the Constitution was adopted. Twenty of these 37 added states achieved admission after first obtaining an enabling act from Congress giving congressional approval of the plan. Enabling acts allowed Congress to examine whether the territory seeking admission had the economic viability and the other attributes that made statehood appropriate. Following this endorsement, the process of drawing up a state constitution, having it ratified, and creating a structure of state government went forward.¹⁵

The District has pursued a different path, one taken by only six of the 37 states admitted to the Union after the Constitution was ratified. This process of seeking statehood is known as the "Tennessee Plan." Traditionally, the Tennessee plan involves four steps. First, a state constitutional convention is convened and a constitution drafted. Second, the constitution is put to a vote and ratified by the voters of the territory seeking admission. Third, a petition is sent to Congress requesting statehood. Finally, "shadow" senators and representatives are elected to lobby Congress, in hopes of a congressional vote for admission.¹⁶

The District's Tennessee Plan approach, however, has now run off the rails. A proposed constitution was ratified by D.C. voters in 1982. But this 1982 constitution came under attack, not least from the ACLU.¹⁷ It contained extraordinarily broad antidiscrimination language forbidding any kind of exclusive groups or clubs, even if entirely private. Not only would the proposed constitution have outlawed all-male or all-female clubs, it would have equally proscribed a black pre-law club at local universities or a gay men's chorus. Even more astonishing was a prohibition against discrimination based on wealth, which as written would have barred a movie theater from "discriminating" against anyone who could not afford a ticket.¹⁸

Criticism of these problems got the attention of the D.C. City Council, which has amended the constitution and deleted some of the more troubling provisions.¹⁹ The problem is that the current constitution has never been ratified by the voters, so D.C. is now seeking admission without a ratified state constitution. But this may not be a serious obstacle in Bill Clinton's Washington given the historical precedent. Since 1821, only Arkansas has been admitted to the Union without a popularly ratified constitution.²⁰

Constitutional Barriers to Legislated D.C. Statehood

The District's mechanical problems with its statehood drive are not, of course, the critical issue. The fundamental barriers facing the current proposals to make the District a state by legislation arise from the federal Constitution. Basically, there are three.

the Proposed D.C. Representation Amendment, 7 Fordham Urb. L.J. 479 (1979).

15 See 1992 House Report at 59 (Minority Views).

16 *Id.* at 20-21.

17 See *id.* at 60-63 (Minority Views) (citing 1986 hearing before the Subcommittee on Fiscal Affairs and Health of the House Committee on the District of Columbia).

18 See *id.* at 60-61 (quoting testimony of Arthur Spitzer, Legal Director of the National Capital Area ACLU).

19 *Id.* at 61-63.

20 *Id.* at 62 n. 10 (Minority Views).

Article 1, Section 8: Permanent Congressional Power

Article I, Section 8 of the Constitution gives the Congress plenary authority over the District. The exact language reads:

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....

The Supreme Court has construed this clause as giving Congress permanent and plenary power over the District.²¹ Congress can delegate various powers of home rule, as it has done in the past, but remains free to resume full control of the District at any time. What problem does this create for legislated D.C. statehood? Once a district becomes a state, statehood is permanent. It can never be revoked, as the Supreme Court recognized in shortly after the Civil War in *Texas v. White*.²² Making the District a full state, therefore, would be an abrogation of power that the Constitution explicitly assigns to Congress alone. This was the constitutional problem that Attorney General Robert Kennedy found most troubling when a proposal to retrocede the District to Maryland was advanced in the early 1960s.²³

To address the apparent permanence of the Constitution's grant of total congressional authority over the District, statehood proponents point to the fact that Congress has already apparently given up part of the District. In 1846, the Congress gave back the part of the District ceded by Virginia—what is now Alexandria and Arlington.²⁴ Statehood supporters suggest that a Supreme Court case from the 1870s, *Phillips v. Payne*,²⁵ validates the retrocession to Virginia.²⁶

There are at least a couple of interesting points to be made about *Phillips*. First, the plaintiff taxpayer sued seeking to be considered a resident of the District instead of Virginia so he could take advantage of the District's lower taxes. The irony is apparent to anyone who has lived in the District. Second, the taxpayer's challenge in *Phillips* was brought over 25 years after the retrocession. The Court held that plaintiff was estopped to bring such a late claim. It did not rule on the merits. So the validity of the retrocession (and Congress's ability to reassert control) remains an open question, at least in theory. As a practical matter, of course, it is hard to imagine that Congress would try to take back the Virginia part of the District.

21 See *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953).

22 74 U.S. (7 Wall.) 700, 726 (1868), *overruled on other grounds*, *Morgan v. United States*, 113 U.S. 476, 496 (1885).

23 Letter and Memorandum of Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Committee on the District of Columbia, Dec. 13, 1963, *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).

24 An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).

25 92 U.S. 130 (1875).

26 See Raskin, *A Constitutional Path to a New Columbia*, *Washington Post*, December 16, 1992 at A27 ("The constitutional authority of Congress to redraw the District was hotly debated—and resolved. Both Congress and President Polk, who signed the bill, agreed that Congress has such power, and the Supreme Court later refused to overturn to retrocession.")

Article IV, Section 3: Maryland's Permission

Statehood's second constitutional problem is 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 permission.²⁷ Under this clause, doesn't Maryland need to give permission before a state can be created out of the District? It gave the territory that became the District to the federal government for use as the seat of government, not for making a new state.

The technical legal aspects of this argument have been thoroughly addressed by one of statehood's biggest advocates, a George Washington University Law Professor named Peter Raven-Hansen.²⁸ He dismisses the need for Maryland's consent. Professor Raven-Hansen argues that Maryland's grant of the land to the federal government was full, complete, and final, without any reservation concerning the future use of the land.²⁹

But in the 1791 ratification of cession upon which Professor Raven-Hansen relies, Maryland said it was granting the territory "pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States."³⁰

Even textually, therefore, it is hard to sustain Professor Raven-Hansen's argument. As for Maryland's intent, no one questions the fact that Maryland gave this territory to the federal government for the special purpose of a government district. It was not contributing land for a new state.³¹

Whether or not Maryland would today give approval to statehood is an interesting question. Governor Schaefer has said he would be willing to take the District back as part of Maryland. Judging from the makeup of Maryland's congressional delegation, they might like to have the Democratic colleagues that New Columbia would likely send to Capitol Hill. But matters are not so simple. One of the first things the District government has suggested it will do following statehood is impose a commuter tax on suburban residents who work in Washington, including those who live in Maryland.³² Whether the people of Maryland (and their state legislators) would support statehood is surely open to doubt.

The Twenty-third Amendment

Perhaps the most difficult constitutional problem facing the District is its very own constitutional amendment. The 23rd Amendment, passed in 1961, states that

27 The provision reads:

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. U.S. Const, Art. IV, 3, cl. 1.

28 See Raven-Hansen, *supra* note 3.

29 *Id.* at 120.

30 The act of cession provides:

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....

2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800).

31 See Raven-Hansen, *supra*, at 122 ("Maryland's intent was to cede land for the seat of government, not a new state.").

32 See, e.g., Henderson, *Kelly to Propose Taxing Suburban D.C. Workers*, Washington Post, Feb. 3, 1993 at A1.

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....

The language of the amendment obviously recognizes an existing district of government of a particular size. And it refers to the District as a permanent constitutional entity. Legislated D.C. statehood would be an oddity to say the least when the Constitution itself refers to the area "*as if it were a State.*"

The 23rd Amendment also raises a conflict concerning the number of electors to which a state of New Columbia would be entitled. Every existing state is entitled under Article II, Section 1 of the Constitution to electors in proportion to its congressional representation. Yet the terms of the 23rd Amendment provide that D.C.'s electoral votes would be capped at the number granted to the state with the lowest population (currently three), regardless of D.C.'s own future population. Of course, this problem may be somewhat abstract, since D.C.'s population continues to decline.³³

The Consistent Justice Department Position

If you had to try and find an issue on which Robert Kennedy, Pat Wald, and Ed Meese all agreed, you might be surprised to find it is the constitutionality of legislated D.C. statehood. Every 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.³⁴ Each administration has addressed different proposals and emphasized different constitutional problems, but the unanimity remains. The legality of D.C. statehood, as opposed to its wisdom, simply is not a partisan issue.

Current D.C. Statehood Proposals

Many statehood proponents say that it is easy to take constitutional potshots at statehood in the abstract, but that recent statehood bills cure the problems. The currently pending H.R. 51, for example, aims to shrink the District rather than turn the whole thing into a state. The "District of Columbia" would become a tiny enclave, an area now known as the National Capitol Services

33 See *Report to the Attorney General* at 60 (District population was 802,000 in 1950; 764,000 in 1960; 757,000 in 1970; 638,000 in 1980; 626,000 in 1986). In 1991, the figure was 598,790. See *World Almanac and Book of Facts* 647 (1993).

34 See Letter and Memorandum of Attorney General Robert F. Kennedy to Hon. Basil Whitener, House Committee on the District of Columbia, Dec. 13, 1963, 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) reproduced as Appendix J to the *Report to the Attorney General*; *Representation for the District of Columbia: Hearings on Proposed Constitutional Amendment to Provide for Full Congressional Representation for the District of Columbia Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 127 (testimony of Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs); Testimony and Statement of Stephen J. Markman, Assistant Attorney General, submitted to the Subcommittee on Fiscal Affairs and Health of the House Committee on the District of Columbia.

Area. Essentially, this area incorporates the major federal buildings and monuments, including the White House, Capitol, and Supreme Court, as well as an area in and around the Mall. The remainder of what is now the District would then become the state of New Columbia. Despite its clever maneuvering, however, this shrinkage approach leaves major constitutional objections.

First, shrinkage doesn't remove the problem of Article I, Section 8. The language of the Constitution refers to the District in a manner that suggests a fixed entity. True, the Constitution does not mandate a particular size for the District as an initial matter, but allows acceptance by Congress of a District of "not more than" ten miles square. Once accepted, however, there is no indication that the Constitution contemplates a District expandable and contractible at Congress's whim.

Even if the Constitution did not define the District as a fixed entity, the Framers clearly intended a District large enough to accomplish the purpose of giving the national government control over its place of business.³⁵ The plans for shrinking the District leave just a little sliver of land. This federal enclave could not function as a self-contained entity. It is inextricably connected by sewer systems, water systems, roads, and other services to the rest of what would become New Columbia.

Dependence on the New Columbia for fire protection, police protection, and the like would raise any number of jurisdictional problems. Indeed, the federal government would become dependent on a state for the protection and hospitality extended to other countries' embassies. This is exactly the sort of unseemly dependence the Framers sought to avoid.

The second constitutional problem, the need for Maryland's permission, remains about the same under the shrinkage proposal. The suggestion has been made that since part of the Maryland land would continue to be a federal enclave, Maryland's intent in conveying the land to the federal government for purposes of a capital would not be violated. The problem, of course, is that the bulk of the land that Maryland ceded *would* become a State. If Maryland's permission is needed at all, it is needed for this.

Finally, the 23rd Amendment problem under the shrinkage plan becomes perhaps even more disturbing. Without a constitutional amendment repealing the 23rd Amendment, the literal handful of residents in the shrunken "District constituting the seat of government" would control their own three electoral votes. For those who depict statehood as a matter of "fair representation," this is a little embarrassing.

Professor Raven-Hansen has argued that if Congress legislates D.C. statehood, then the 23rd Amendment would become "moot."³⁶ This idea of mooting a constitutional provision is certainly novel. Professor Raven-Hansen points for support to the several provisions of the Constitution that are no longer operative, such as the fugitive slave provisions. The distinction, of course, is that these provisions of the Constitution have been "mooted" by constitutional amendment, not mere legislation passed by Congress.

Professor Raven-Hansen acknowledges this, and offers yet another proposal—that residents of the federal enclave be defined by statute as residents of New Columbia for voting purposes.³⁷ Of course, the residents of the enclave might well enjoy their right to control three electoral votes (and the resulting attention at presidential campaign time). Since that right is a constitutional

35 See *Report to the Attorney General at 23-24; Kennedy Memorandum at 347.*

36 Raven-Hansen, *supra* note 3 at 125.

37 *Id.* at 127.