



# The Conservative Caucus Foundation

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## TCCF POLICY BRIEFING

### STATEHOOD FOR THE DISTRICT OF COLUMBIA ANALYSIS OF HR 1 AND S 1

This bill was introduced on January 4, 2021, by Del. Eleanor Holmes Norton and had 216 cosponsors when it passed the House on April 22. The identical Senate bill, S. 51, was introduced by Sen. Thomas Carper and had 44 cosponsors as of April 23.

The legislation would create a new state, “Washington, Douglas Commonwealth”, from the greater part of the current US capital district while carving out a small capital district containing the US Capitol, the White House, the Mall, and some additional Federal buildings. Two additional senators would increase its size to 102 while the House of Representatives would be permanently increased to 436 members.

Since the remaining capital district would inherit the 23<sup>rd</sup> Amendment’s ability to choose three electors in presidential elections, the bill provides expedited rules for congressional consideration of repeal of the 23<sup>rd</sup> amendment (which would then have to be ratified by thirty-nine states in order to take effect prior to the 2024 election).

The bill raises two significant questions.

First, does Congress have the constitutional authority to transform part of the existing Federal District into a state? If it has that authority, would making most of the District a state be consistent with the intention and purposes for which the District was originally created?

Article I, Section 8 of the Constitution grants Congress the authority “. . . 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 . . . .” This certainly allows Congress to establish a Federal District to serve as the US capital, but does not provide any clear authority to give up any of that territory (not to surrender all of it and move the capital to a new location).

If giving up a part of the district is not among the enumerated powers, it could only exist as an implied power, but that possibility also falls short. As James Madison explained in Federalist 44, implied powers are necessary since it was impossible to list in the Constitution

everything that Congress might find it necessary to do in order to carry out its enumerated functions (most of them listed in Article I, Section 8). However, the implied powers only exist to carry out what is enumerated. There is nothing in Article I, Section 8, that would justify giving up a portion of the district.

This question has been dealt with when considering whether some portion of the District of Columbia could be retroceded to Maryland, which originally transferred the land to the Federal government. A December 13, 1963 memorandum by Attorney General Robert Kennedy concluded that “its power to create the District by acceptance of cession contemplates a single act. The Constitution makes no provision for revocation of the act of acceptance, or for retrocession.”

Congress recognized this difficulty in 1978 when it chose the alternative of amending the Constitution to allow the District of Columbia to have representation without becoming a state. (The amendment was rejected by the states.)

Some might say that an argument in favor of giving up part of the District can be found in the 1846 retrocession of the Virginia portion to that state. However, a look at the Supreme Court’s 1875 decision in *Phillips v. Payne* proves that to be a forlorn hope.

The second question, regarding whether giving up most of the District and leaving only a small Federal District remaining would fulfill the constitutional purpose of the District, also provides a strong argument against statehood.

The major purpose in giving Congress “exclusive jurisdiction” over the capital was avoid a repeat of what had happened to Congress in Philadelphia in 1783. Pennsylvania soldiers, demanding to receive their back pay, surrounded the building in which Congress was meeting. According to James Madison, a member of Congress at that time, the soldiers were “uttering offensive words and wantonly pointing their muskets to the Windows of the Hall of Congress.” The government of Pennsylvania refused to take any action to protect Congress from the threatening mob (the soldiers, of course, were voters who would remember at the next election if their state officials interfered).

Congress found itself with no choice but to hasten away from Philadelphia, beginning a period in which it bounced from one location to another. Members became convinced that the United States should have a permanent capital, with Congress rather than any state being in full control, and enforcing law and order in its own environs. The “ten miles square” for the district would ensure a large enough area around the government buildings themselves.

Recent events have validated this concern. The Federal government must be able to defend itself against violent or threatening mobs. Its jurisdiction must extend well beyond the tiny area that would remain after creating the new state. A state government sympathetic to the mob could allow it to gather just outside the Federal District, then swarm in and overwhelm the defenders. That is exactly what the creation of a capital district was intended to prevent. Indeed, one could argue that the retrocession of Arlington and Alexandria to Virginia has left the Pentagon and other Federal facilities vulnerable in a way that the authors of the Constitution intended to prevent.

Another concern brought up during the Constitutional Convention was that if the capital were in a state, that state would have greater influence than others. A capital city of as much as 100 square miles would be a neutral territory for representatives of all the states to gather on equal terms. The tiny Federal District proposed by the statehood bills would violate this goal, since it would for most practical purposes be a part of the new state.

Dealing with embassies of foreign governments could also be a problem. As part of the Federal District, Congress has been able to protect them from discriminatory legislation, but that would not be the case within the boundaries of the new state. It could even lead to a repeat of one of the humiliating incidents that led men to believe that the Articles of Confederation must be replaced by a new constitution.

The Twenty-third amendment is also a problem. It grants the Federal District the right to participate in presidential elections, giving it the same number of electors as the least populous state. Unless repealed, this would leave those electors to be chosen in whatever manner Congress should choose.

HR 51/S 51 provide for an expedited process to get repeal through Congress and on its way to the states, but that is no guarantee that it will pass Congress, much less that 39 states will ratify. If residents of the White House were to be the only legal voters in the District, it would be very tempting to delay the amendment long enough to allow Biden three more electoral votes in 2024. Given what Federal courts have ruled concerning voting by the homeless, it is not inconceivable that they could control those three votes, which would also give the party promising greater aid to the homeless an incentive to keep those electoral votes in play. Finally, it is possible that that Democratic-controlled Congress would chose the electors itself, just as the state legislatures have the right to choose their states' electors. The existence of the Twenty-third amendment is an invitation to mischief.

Is there any strong need to make the District a state? The authors of the Constitution expected it to become a large city, inhabited by people who would find that the benefits of residence would outweigh the disadvantage of no representation in Congress. It is obvious that they were correct in expecting such benefits. Anyone in Washington who wishes representation can simply move a short distance, a few miles at the most, into Maryland or Virginia. Some have done so, many have chosen to stay.

Taxation without representation is often cited as making statehood imperative. That overlooks the fact that, when the American colonies made that their slogan, they were calling for no taxation, and rejected the idea of representation in Parliament. If residents of Washington wish to follow through on that approach, it may well be that a solution is possible. They could, for example, be exempted from Federal income tax and also disqualified from the programs for which those taxes pay. If the residents of Washington really believe that they would be better off under those terms, they could begin working on legislation.

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*Charles Orndorff serves on the Board of Trustees of The Conservative Caucus, and formerly was the Vice President of TCCF. Mr. Orndorff is a life-long scholar of American history and the Constitution of the United States.*  
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