

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

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

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

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

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

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

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

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

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

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

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

Part I: Constitutional Rules

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

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

A) The Admission Clause

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

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

¹ See Article IV, Section 3.

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

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

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

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

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

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

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

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

B) The Twenty-Third Amendment

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

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

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

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

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

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

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

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

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

Option 1: “At each election for President and Vice-President of the United States, the Archivist of the United States [or some other non-partisan federal official] shall appoint persons to act as Electors for the Seat of Government under the Twenty-Third Amendment. The persons so appointed need not be residents of the Seat of Government. The Electors for the Seat of Government shall cast their votes for President for the person earning the most votes for President from among the Electors appointed by the States of the Union, and they shall cast their votes for Vice-President for the person earning the most votes for Vice-President from among the Electors appointed by the States of the Union.”

Option 2: “At each election for President and Vice-President of the United States, the Archivist of the United States [or some other non-partisan federal official] shall appoint persons to act as Electors for the Seat of Government under the Twenty-Third Amendment. The persons so appointed need not be residents of the Seat of Government. The Electors for the Seat of Government shall cast their votes for President for the person earning the largest share of the popular vote for President, and they shall cast their votes for Vice-President for the person earning the largest share of the popular vote for Vice-President.”

Option 3: “At each election for President and Vice-President of the United States, the Archivist of the United States [or some other non-partisan federal official] shall appoint persons to act as Electors for the Seat of Government under the Twenty-Third Amendment. The persons so appointed need not be residents of the Seat of Government. The Electors for the Seat of Government shall cast their votes for President for George Washington, of Virginia, and they shall cast their votes for Vice-President for John Adams, of Massachusetts.”

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

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

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

C) The District Clause

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

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

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

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

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

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

Part II: Constitutional Principles

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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