NATIONAL REVIEW

# The Real Constitutional Difficulty with D.C. Statehood

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In the *New York Times*, former UN ambassador and national security adviser Susan E. Rice urges Congress to pass a bill giving the District of Columbia statehood. Whatever one thinks of her arguments from a purely political standpoint, there is some constitutional difficulty with the idea. Rice gives the back of her hand to "specious legal arguments" without stating what all of them are, let alone rebutting them.

Her link for the allegedly specious arguments is to a 2016 piece by the Cato Institute's Roger Pilon, who had several arguments. The only one Rice notices is his weakest, that the intention of the founders was to have a sizable district over which the federal government has exclusive jurisdiction. Pilon may be right about that intention, but it would not violate the letter of Article I, section 8, clause 17 (giving Congress power to establish the "seat of government") for most of the present District to be made a state in its own right.

A stronger argument by Pilon that Rice does not notice is this:

Just as the original creation of the District required the consent of the contributing states, so too, as with all agreements, does any change in the terms of that grant require the consent of the parties—and Maryland has given no indication that it would consent to having a new state created on its border from what was formerly part of the state.

That might be right—though it too is not clearly dictated by the letter of the Constitution. But by far the strongest constitutional argument is the one Pilon saved for last. Making the District a state—leaving behind a tiny "federal district" in which only a handful of people reside—would seem to necessitate the repeal of the Twenty-third Amendment, ratified in 1961 to give the District the same number of electors in presidential elections as the least populous state. If the residents of the tiny rump that is left to be called the "seat of government" are just those living in the few residences left there, they will have an absurdly outsized power to choose three presidential electors.

H.R. 51, the bill Ambassador Rice champions, deals with this problem in a wholly inadequate way. According to the bill's text, the majority of D.C. would become the "State of Washington, Douglass Commonwealth"—a name that adds something to distinguish the new state from the

other Washington out in the northwest, that pays tribute to Frederick Douglass, long a Washington resident and public official, and that enables the retention of the abbreviation "Washington, D.C." The name "District of Columbia," under H.R. 51, would now be attached to the very small area immediately around the Mall, Capitol, White House, and other principal federal buildings—an area whose metes and bounds are described in great detail in the bill.

Recognizing that some few people will reside even in this tiny area, the bill would permit (but not require) them to vote in the state that was their most immediate previous domicile. The bill further eliminates the inclusion of the District of Columbia as a "state" in the chapter of the U.S. Code governing the electoral college. But that still doesn't solve the problem of the Twenty-third Amendment, which says the "District constituting the seat of government of the United States *shall appoint*" presidential electors (my emphasis).

So H.R. 51 takes the trouble to set out an expedited process for the two houses of Congress to take up a joint resolution to repeal the amendment—complete with a superfluous section on what to do if the president vetoes the resolution, which he cannot do (or at least would not, since it takes a two-thirds vote in each house to pass such a resolution). But here's the problem when all is said and done: H.R. 51 *does not* make its own execution, with the admission of the new "State of Washington, Douglass Commonwealth," *contingent on the repeal* of the Twenty-third Amendment. And that, to use the most appropriate lawyerly characterization, is nuttier than a fruitcake.

The Twenty-third Amendment gives Congress the responsibility to determine how the District's electors are appointed. At present the method is by the election of D.C. residents, who choose a winner-take-all partisan slate of three electors. There is no reference in H.R. 51 to the elimination of such voting rights on the part of the residents of the seat of government. And if that election were eliminated, the three electoral votes belonging to the radically shrunken District would still exist, and presumably would have to be cast by someone, and counted. Even the much more sensible idea of retroceding most of the present District to Maryland faces the same problem of what to do about the Twenty-third Amendment.

Ambassador Rice rightly recognizes that H.R. 51 will not get through the Senate, even if it passes in the House. And President Trump would surely veto it. But it would serve her cause better if she recognized that there really is at least one serious constitutional difficulty to overcome. Ironically, the adoption almost 60 years ago of the Twenty-third Amendment, which gave D.C. residents some say in presidential elections, practically foreclosed almost any chance of the District's becoming a state, or even becoming largely part of Maryland once again.