**Statement**

**of**

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**before the**

**Committee on Oversight and Reform**
**United States House of Representatives**

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**RE: H.R. 51: Making DC the 51st State**

Mr. Chairman and members of the committee:

My name is Roger Pilon. I'm vice president for legal affairs emeritus at the Cato Institute where I hold Cato's B. Kenneth Simon Chair Constitutional Studies. I want to thank you Mr. Chairman for inviting me to testify today; and I want to thank ranking member Jordan in particular for inviting me to offer a discordant note on H.R. 51, proposing an Act providing for the admission into the Union of a new, 51st state called "Washington, D.C." or "Washington, Douglass Commonwealth." This new state would be created from the present District of Columbia, leaving in place as the "District of Columbia" a tiny federal enclave constituted by the National Mall and the land and certain buildings immediately adjacent to the Mall.

Let me begin on two practical notes. First, given the history of proposals on this subject, this bill has little chance of reaching the president's desk. Accordingly, in deference to the committee's time and mine, I'll keep my comments short and to the point.

Second, given that history and the much longer history during which the District of Columbia has existed in its present form for well over 200 years, save for the small Virginia portion retroceded in 1847, there must at this point in time be a strong presumption *against* the kind of radical changes envisioned by this bill. In a word, it strains credulity to believe that the Framers, when they drafted the Constitution's Enclave Clause, imagined anything like the arrangements contemplated by this bill.

Let me turn, then, to a quick summary of the four-step process by which this bill purports to turn most of the District of Columbia into a state. I'll list these steps chronologically, as contemplated by the bill. In truth, they're interlarded variously in the bill.
Start with the first step, found in the bill's very last provision, sec. 302: The president certifies to the mayor of the District of Columbia that the bill has been enacted.

Now go back to sec. 102(a): There, the mayor issues a proclamation for the first elections for two senators and one representative in Congress.

Then in sec. 102(b)(2), the mayor certifies the election results to the president. (Sec. 102(d) provides, interestingly, that "Upon the admission of the State into the Union, the Mayor, members of the Council, and the Chair of the Council at the time of admission shall be deemed the Governor, members of the Legislative Assembly, and the Speaker of the Legislative Assembly of the State, respectively.")

Finally, at sec. 103(a), the president issues a proclamation announcing the election results and, upon that, at sec. 103(b), the state is "deemed" admitted to the Union.

**Constitutional Objections to H.R. 51**

**The textual objections**. In short, it appears, with several noteworthy exceptions, that this bill is patterned after the process through which federal *territories* have been admitted as states to the Union. If so, the problem is that the District of Columbia is not and never has been a "federal territory." It is a sui generis entity, expressly provided for by the Constitution, in clear contemplation of its becoming the seat of the new federal government, which it has been for well more than 200 years. It is provided for by Article I, section 8, clause 17 of the Constitution, the Enclave Clause, not by Article IV, section 3, which provides for the admission of new states from federal territory and, prior to any admission, the regulation of federal territory.

But the bill's constitutional problems do not end there. Like the stillborn S. 132, the "New Columbia Admissions Act of 2013," then before the 113th Congress, this bill looks implicitly to the Enclave Clause, of all things, to justify reducing the District of Columbia to a tiny area around the National Mall. In relevant part, that clause reads as follows:

> 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....

Seizing on the fact that the Framers did not set a *minimum* size for the District, statehood proponents believe they can carve out this tiny enclave from what for over 200 years has been the seat of the federal government and turn the rest of today's District into a new state—and all without amending the Constitution.

To be sure, the Framers did not set a minimum size for the district. But their mention of "ten Miles square," together with Congress's nearly contemporaneous 1790 creation of the District from land, ten miles square, ceded to the federal government by Maryland and Virginia, is strong evidence of what they intended—and strong evidence, too, against this enclave scheme.

Beyond this plain language and its implications, however, this bill would strip Congress's present authority over today's District of Columbia simply by redefining "the District." Notice too that Congress was granted exclusive authority not simply over the *seat* of the government but over the *district* in which the government is seated, which for over 200 years has been far larger than the small area in which "the government" is literally "seated." This bill leaves Congress with authority over only that tiny area on which the government literally sits.

But the bill's constitutional problems go beyond that text and its implications. They go especially to a core constitutional principle, the doctrine of enumerated powers, which holds that Congress has only those powers that the people delegated to it as enumerated in the Constitution, mainly in Article I, section 8.[1] Search as you wish among those enumerated powers and you will find none authorizing Congress to carve out a 51st state from the present District of Columbia.

That point was stated somewhat differently in 1963 by Attorney General Robert F. Kennedy, commenting on a bill that would have retroceded the District to Maryland:

> While Congress' power to legislate for the District is a *continuing* power, 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. (emphasis added)[2]

Since then, variations of that point have been repeated by every Justice Department that has addressed DC statehood and related questions. All, with one exception, have concluded that Congress has no authority to alter the status of the District *legislatively*. That one exception was Attorney General Eric Holder. After receiving a similar opinion in 2009 from the department's Office of Legal Counsel regarding a DC voting rights bill then pending in Congress, Holder "rejected the advice and sought the opinion of the solicitor general's office. Lawyers there told him that they could defend the legislation if it were challenged after its enactment."[3] The ambiguity is precious: Of course the solicitor general's office "can defend" the legislation; it's the job of that office "to defend" all legislation, no matter how unconstitutional it might turn out to be.

Regarding the 1847 retrocession of the small Virginia portion of the original District, that offers no real support for this bill since the Supreme Court, when finally asked to rule on the question nearly 30 years later in a private taxpayer suit, declined to declare the retrocession unconstitutional because so ruling would have resulted in dire consequences given all that had transpired over those years.[4]

**The consent of Maryland is likely necessary for the creation of Washington, D.C. from the present District of Columbia**. As the Enclave Clause contemplates, the District was created through the consent of both Congress and the states that ceded land for its creation. And the *purpose* of the cession was made clear in the initial act that gave the Maryland delegation in the House of Representatives authority "to cede to the congress of the United States, any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States."[5] Here again we have a single act, for a single purpose. Maryland did not cede the land for the purpose of creating a new state on its border.

Were Congress to put that land to a different purpose, therefore, the terms of the original cession would be violated. Indeed, that would be crystal clear were it to have happened initially rather than more than 200 years later. It would have been sheer political mischief if Congress and Maryland had agreed to the cession for the purpose of creating the District and then Congress turned right around and carved out a separate state from that grant. Congress cannot do in two steps, simply from the passage of time, what it could not have done in one fell swoop initially, a conclusion that is further buttressed by 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 consent. Whether Maryland would consent to the creation of "Washington, D.C." is an open question, of course. There are numerous practical objections that would arise, a few of which I will address below. Suffice it to say here that past efforts in this direction have received little support from the free state.

**Practical Objections to HR. 51**

James Madison, the principal author of the Constitution, explained in *Federalist* No. 43 why we needed a "federal district," separate and apart from the territory and authority of any one of the states, where Congress would exercise "exclusive" jurisdiction:

> The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. 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 the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy.

Independency runs through Madison's explanation: It was imperative that the federal government not be dependent on any one of the states, and equally that no state be either dependent on the federal government or disproportionately influential on that government. Neither of those objectives would be met under this bill.

Today, Congress has authority over the entire District of Columbia, albeit delegated in large measure to the District government. That authority would cease under this

bill. Congress would have exclusive authority over only the tiny sliver of land outlined in the bill—essentially the White House, the Capitol, the Supreme Court, and the area close to the National Mall. That would make the federal government dependent on this new independent state, "Washington, D.C.," for everything from electrical power to water, sewer, snow removal, police and fire protection, and so much else that today is part of an integrated jurisdiction under the ultimate authority of Congress. Nearly every foreign embassy would be beyond federal jurisdiction and dependent mainly on the services of this new and effectively untested state. Ambulances, police and fire equipment, diplomatic entourages, members of Congress, and ordinary citizens would be constantly moving over state boundaries in their daily affairs and in and out of jurisdictions, potentially increasing jurisdictional problems exponentially.

But neither would this new state be independent of the federal government. In *Federalist* No. 51 Madison discussed the "multiplicity of interests" that define a proper state, with urban and rural parts and economic activity sufficient and sufficiently varied to be and to remain an independent entity. That hardly describes the present District of Columbia. Washington is an urban, one-industry town (though not as much as it used to be), dependent on the federal government far in excess of any other state. This new state, our first "city-state," would be no different. Moreover, as a state, no longer under the exclusive authority of a Congress that would now be dependent on it, as just outlined, this state would be in a position to exert influence on the federal government far in excess of that of any other state. The potential for "dishonorable" influence, as Madison noted, is palpable. And a tiny new "District of Columbia," compressed as it would be under this bill, would be unable to effectively control its place of business, rendering it susceptible to such influence.

**The Constitution Again**

Let me conclude by returning to the Constitution, where the strongest arguments against this bill are to be found. As this bill seems to contemplate, the 23rd Amendment, ratified in 1961, would need to be repealed. In relevant part, the 23rd Amendment provides that:

> The *District* constituting the seat of government 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; ... (emphasis added)

Plainly, those who wrote and ratified the 23rd Amendment envisioned a district of a certain size. In fact, the amendment speaks of the District as "if it were a State," granting it the number of presidential electors it would be entitled to "if it were a State." But under this bill, the "District" would be a tiny enclave where perhaps a handful of voters will live—including the presidential family. Empowered to select the three electors presently allotted, their votes would then be vastly weightier than those of their fellow citizens. Moreover, the amendment authorizes Congress to direct the *manner* in which the District appoints

electors; it does not allow Congress to *eliminate* the District's constitutional power to appoint those electors. Neither those *constitutional* rights nor that *constitutional* power may be taken away by mere statute.

Recognizing that, apparently, this bill offers a convoluted way to preserve those rights, if not that power. Sec. 204 requires each state, including the new state of Washington, D.C., to permit "individuals residing in the new seat of government [i.e., the tiny District of Columbia] to vote in federal elections in [their] state of most recent domicile." Sec. 204(b) expresses "the sense of Congress" that States *should* waive registration requirements for absent District of Columbia voters," etc. And sec. 205 purports to strike the District of Columbia from the definition of a state for the purpose of choosing electors, effective upon Washington, D.C.'s admittance to the Union.

If passed standing alone, sec. 205 would plainly be unconstitutional. In the context of this bill, it remains so. The repeal is not sensibly pegged to the repeal of the 23rd Amendment or even to the last (51st) state's adoption of absentee procedures. Congress presumes in this section that it can undo what it took a constitutional amendment to do. Indeed, if all of this would do the trick, why the need for sec. 206, appropriately titled, "Expedited procedures for consideration of constitutional amendment repealing 23rd Amendment."

The word "expedited" (to say nothing of the procedures that follow) speaks volumes about the what is going on here. This bill cannot stand unless the 23rd Amendment is repealed by the provisions of Article V of the Constitution. But the chances of that are infinitesimally small. As we saw when an amendment to afford greater representation for the District was put before the nation in 1978, only 16 states had signed on by the time the allotted period for ratification had concluded in 1985. Outside the Beltway there is little support for even that kind of change. I submit that so radical a change as is contemplated by this bill—reducing the nation's capital to this tiny enclave—will meet with even less support. In fact, as a July 15 Gallup poll showed, even among Democrats, support for DC Statehood stands at only 39 percent, with 51 percent opposed. Among Americans generally, 29 percent support DC Statehood, 64 percent oppose it.[6]

Which brings me to this: With a national debt at $22 trillion dollars and growing, with entitlement programs facing near-term insolvency under demographic pressures and unrealistic assumptions, why are we spending time debating a bill with so little prospect of succeeding and with problems galore if it did? The Framers knew what they were doing when they provided for the seat of government that we have. It has served us well for over two centuries. There are more pressing issues before this chamber.

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[1] For my Senate testimony on the doctrine of enumerated powers, see Roger Pilon, The United States Constitution: From Limited Government to Leviathan, Economic Education Bulletin, American Institute for Economic Research (Dec. 2005), available at https://object.cato.org/sites/cato.org/files/articles/CT05.pdf.

[2] Letter and Memorandum from 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).

[3] Carrie Johnson, Some in Justice Department See D.C. Vote in House as Unconstitutional, Wash. Post, April 1, 2009, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html.
[4] Phillips v. Payne, 92 U.S. 130 (1875).
[5] An Act to Cede to Congress a District of Ten Miles Square in this State for the Seat of Government of the United States, 2 Kilty Laws of Md., Ch. 46 (1788).
[6] https://news.gallup.com/poll/260129/americans-reject-statehood.aspx