Statement

of

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"Examining D.C. Statehood"

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

My name is Roger Pilon. I am vice president for legal affairs emeritus at the Cato Institute and the founding director emeritus of Cato's Center for Constitutional Studies. I now hold Cato's B. Kenneth Simon Chair in Constitutional Studies. I want to thank Chairman Peters and Ranking Member Portman for inviting me to testify at today's hearing to discuss the merits of the proposed Washington, D.C. Admission Act (S. 51)

If enacted, S. 51 would create a 51st state from the present District of Columbia, save for a tiny enclave around the National Mall that would then be the seat of the federal government. The bill raises novel constitutional questions implicating the Constitution's Admissions Clause, Enclave Clause, and, especially, Twenty-Third Amendment. Accordingly, it is unclear how courts would rule if the bill were enacted and challenged, as it certainly would be. In fact, in an April 13 letter to President Biden and the congressional leaders, 22 state attorneys general stated clearly that they would bring constitutional challenges to such a statute.[1] That was followed in turn by a May 22 letter to the congressional leaders from 39 constitutional scholars, mostly law professors, assuring Members that the Admissions Act would pose "a classic political question, which courts are highly unlikely to interfere with, let alone attempt to bar."[2] I will respond to the scholars' letter as I discuss the bill.

For the reasons I set forth below, I believe that DC Statehood can be achieved only by amending the Constitution, as others have long thought, including Justice Departments from the

[1]Press Release, Off. Atty. Gen. Tex., Washington D.C. Statehood Violates the Constitution, Is Bad for Texas and America (Apr. 13, 2021) (https://bit.ly/3q2G4ON) .
[2] Sahil Kapur, "Dozens of Constitutional Scholars Tell Congress It Has Power to Make D.C. a State," NBC News, May 24, 2021, https://nbcnews.to/3xxgHH4.

time of Attorney General Robert F. Kennedy.[3] In fact, when the Twenty-Third Amendment was ratified in 1961, providing presidential electors for DC residents, and when an amendment providing congressional representation for DC residents was sent to the states for ratification in 1978 (only 16 states had ratified by the 1985 expiration date),[4] few thought that either of those goals could be achieved other than by constitutional amendment.

Given the more than 200-year history during which the District of Columbia has existed in its present form—save for the small Virginia portion retroceded in 1847, the constitutionality of which has often been doubted but never tested—there must be a strong presumption by now against the kind of radical changes envisioned by this bill. It simply strains credulity to believe that the Framers, when they drafted the Constitution's Enclave Clause, imagined anything like the arrangements this bill contemplates.

Constitutional Objections to S. 51

Congressional authority. Both this bill and the scholars locate Congress's authority to create this new state under Article IV, Section 3, of the Constitution, the Admissions Clause. That would be fine if this were a normal admission as has happened 37 times in our history, either with the consent of the state from which new states like Vermont and Maine were created, or, most often, from federal territory like the Northwest Territory or the Louisiana Purchase. But here, the framing of the question is crucial. This is not a simple question of whether Congress has the authority to create a state from territory acquired in clear contemplation of creating states from it. Rather, the question here is whether Congress has the authority to carve out, create, and admit to the Union a new state from territory that our first Congress acquired from two other states, pursuant to Art. I, sec. 8, cl.17, for the *express* purpose of becoming the seat of the federal government, which it has been for well over 200 years. The District of Columbia is not and never has been "federal territory" in the Article IV sense, territory acquired primarily to be the source of new states. The District is unique. It is a *sui generis* entity, *expressly* provided for not under Article IV but under Article I, the Enclave Clause, in clear, unmistakable contemplation of its becoming the seat of the new federal government. Because this is not an ordinary admissions question, and because it gives rise to other questions not found in ordinary admissions, courts may well want to weigh in, contrary to the scholars' contention that what we have here is a "classic political question."

One such further question is whether Congress has authority to reduce the District over which it has exclusive jurisdiction to this tiny enclave around the National Mall. The Enclave Clause reads, in relevant part:

> 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.…

[3] Letter and Memorandum from Atty. Gen. Robert F. Kennedy to Hon. Basil Whitener, H. Comm. on the District of Columbia (Dec. 13, 1963), reprinted in Home Rule, Hearings on H.R. 141 Before Subcomm. No. 6, H. Comm. on the District of Columbia, 88th Cong., 1st Sess. 341, 345 (1964).
[4] H.R.J. Res. 554, 95th Cong. (1978).

Seizing on the fact that the Framers did not set a *minimum* size for the District, proponents of the bill believe Congress can carve out this new state and leave the federal government seated in this tiny enclave, 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 evidence, too, against this scheme. Yet this bill would strip Congress of its present authority over today's District, leaving its authority to extend over just this tiny enclave. I will address some of the policy implications of that shortly; but here, the "Power To exercise exclusive Legislation in all Cases whatsoever, over such District" surely was not meant to entail, as some have argued, a power to create a new state from that District.

In fact, that raises a fundamental 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 document, mainly in Article I, Section 8.[5] I realize that there are some who have nearly read that doctrine out of the Constitution[6]—much like the post-New Deal Supreme Court has done—but insofar as it has salience, as more recent Courts have demonstrated in still very limited ways,[7] search as you will among Congress's enumerated powers, 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)[8]

And addressing the question of statehood for the District of Columbia in 1987, Attorney General Edwin Meese made a similar point: "The Constitution appears to leave Congress no authority to redefine the District's boundaries, absent an amendment granting it that power."[9]

True, the scholars note that Congress made minor adjustments to the District's southern boundary in 1791, but that was virtually contemporaneous with the original act. More seriously, in 1846 Congress retroceded the Alexandria portion back to Virginia, reducing the original

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[5] For my Senate testimony on the doctrine of enumerated powers, see Roger Pilon, The United States Constitution: From Limited Government to Leviathan, Econ. Educ. Bulletin, Am. Inst. Econ. Research (Dec. 2005), https://bit.ly/3iTCSmT.

[6] See, e.g., Richard Primus, "Herein of 'Herein Granted': Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers," 35 Const. Comment. 301 (2020).

[7] E.g., United States v. Lopez, 514 U.S. 549 (1995). Chief Justice Rehnquist: "We start with first principles. The Constitution creates a Federal Government of enumerated powers."

[8] Letter and Memorandum from Atty. Gen. Robert F. Kennedy to Hon. Basil Whitener, H *supra*, note 3.

[9] Rep. to the Atty. Gen., The Question of Statehood for the District of Columbia, April 3, 1987, 19, https://bit.ly/2S8jbNi.

District by almost a third. And the scholars cite a House committee as holding at the time that the District Clause places no mandate on the minimum size of the seat of government. But that does not address the question, which President Lincoln and others would raise,[10] of whether Congress had the *power* to make that retrocession. Not until 1875 did the question come before the Court in a private taxpayer suit. The Court declined to declare the act unconstitutional because so ruling would have resulted in dire consequences, given all that had transpired over the 30 some years since the retrocession.[11] In short, the question remains unresolved.

I would add only that every Justice Department that has addressed the question of whether Congress has the power to do what is contemplated here, or to do variations of it, has found that Congress lacks such power—with one exception. In 2009, after the department's Office of Legal Counsel reached a similar conclusion regarding a District voting rights bill then before Congress, Attorney General Eric 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."[12] The ambiguity here is precious: of course the solicitor general's office "can defend" the legislation; it is the job of that office to defend all federal legislation, no matter how unconstitutional it might turn out to be.

To be sure, the Constitution does not expressly *prevent* Congress from reducing the size of the District of Columbia or other federal enclaves, as some have argued. But that view turns the doctrine of enumerated powers on its head, contending that all that is not prohibited is permitted. The Constitution's theory of legitimacy is just the opposite—all that is not permitted is prohibited. That is implicit in the document's Preamble together with its first sentence, where limited powers are "granted" by the people through the Constitution; and the principle is made explicit in the Tenth Amendment.

The consent of Maryland is likely necessary for the creation of a new state 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."[13] 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.

To the contention that Maryland's consent will be required to create this new state, the scholars write:

> This objection mistakenly presupposes that Maryland retains revisionary interest in the territory currently composing the District of Columbia, which Maryland ceded to the

[10] See Mark David Richards, "The Debates Over the Retrocession of the District of Columbia, 1801-2004," Washington History, 55 (Spring/Summer 2004).
[11] Phillips v. Payne, 92 U.S. 130 (1875).
[12] Carrie Johnson, "Some in Justice Department See D.C. Vote in House as Unconstitutional," Wash. Post, Apr. 1, 2009 (link no longer available; hard copy available with author).
[13] 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).

> federal government when the District was established in 1791. In fact, Maryland expressly relinquished all sovereign authority over the territory at issue when the federal government accepted it. The express terms of the cession statethat the territory was "for ever ceded and relinquished to the congress and government of the United States, in *full and absolute right*, and *exclusive jurisdiction* …."[14]

Considered as a simple real property transfer, this argument has merit. But as then-CRS attorney Kenneth R. Thomas testified in the House on Sept. 19, 2019, despite the express terms of the cession,

> The Maryland statute ceding the land made the cession 'pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States,' suggesting that Maryland transferred the land *for the limited purpose of creating the District of Columbia under the District and Federal Enclaves Clause*."[15]

Thomas went on to analyze the issue, concluding that it is unclear how a court would rule on the question.

What is clear, however, is that Maryland did not cede the land for the purpose of creating a new state on its border—nor is it likely that Maryland would have done so for that purpose. Indeed, were Congress to have put that land to a different purpose immediately after the cession, rather than more than 200 years later, Maryland would certainly have objected that the terms of the cession had been violated. It would have been sheer political—and likely legal—mischief for Congress to have done that. If so, Congress cannot now do in two steps, separated by 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. Again, Maryland did not consent to creating a new state from its sovereign land. Whether it would do so now 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 S. 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

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[14] Quoting from prepared Statement of Viet D. Dinh, Before the Committee on Homeland Security and Governmental Affairs of the United States Senate (Sept. 14, 2014) ("Dinh Statement") (quoting 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), quoted in Raven-Hansen, The Constitutionality of D.C. Statehood, 60 Geo. Wash. L. Rev. 160, 179 (1991) (emphasis added).

[15] Kenneth R. Thomas Before H. Comm. on Oversight and Reform Hearing on "H.R. 51, the Washington, D.C. Admission Act" September 19, 2019. https://bit.ly/3q4foNu.

> 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 to a significant extent to the District government. That authority would cease under this bill. As noted above, 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 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 substantially.

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 this 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.

Much of the Framers' thinking on these issues was colored by their experience in 1783 when members of the Continental Congress, meeting in Philadelphia, had to flee the city after the Executive Council of Pennsylvania refused to stop a mutiny threatening the members. With the recent, January 6 storming of the Capitol in mind, some are saying that an independent state surrounding the Capitol would have been able to intercede more quickly and effectively than happened under today's multiple jurisdictional authorities. That is far from clear, however, especially if the point is freighted with political considerations. This is a complex practical issue that should carry limited weight in the larger deliberations. If anything, members' concern for

their own physical security would hardly seem to be served by drastically reducing the geographical range of Congress's authority.

The Constitution Again: The Twenty-Third Amendment

The Twenty-Third Amendment poses the greatest problem for this bill. Ratified in 1961, it gives the District three Electoral College votes "[as] if it were a State." The problem is that there will still be some residents in this tiny enclave, including the first family, and they will have outsized influence on presidential elections. Yet their voting rights, guaranteed by the amendment, cannot be taken away by mere statute. The bill provides for "expedited procedures" for repealing the amendment, suggesting that proponents sense that there is a problem, but repeal is a longshot, given the ratification hurdles, so the bill also provides for repealing the *statutory* provision that enables residents to vote.

That, of course, would amount practically to extinguishing the enclave's residents' right to vote, so we do indeed have a problem here—and the scholars' letter airs their disagreement among themselves about how to address it. One camp reads the Twenty-Third Amendment as self-enforcing and therefore as mandating the appointment of electors. The other reads it as requiring enabling legislation and so, absent such legislation, there is no way for those residents to vote—and those scholars appear to be perfectly satisfied with that result. Indeed, they claim that because the District's residents will be few, they would not have standing to sue; moreover, this bill provides that they can vote in their last "state" of residence, which of course would little avail life-long District residents.

But even if the self-enforcement argument were accepted, the scholars continue, and the District were required to appoint electors "in such manner as the Congress may direct," as the amendment reads, both camps claim that Congress could replace the current law, which mandates that electors vote in accordance with the outcome of the District's popular vote, with one that mandates that they vote in other ways: in favor of the ticket that got the most Electoral College votes nationwide, for example, or for the winner of the national popular vote. In other words, these scholars read "manner" as referring not simply to procedures needed to effect voting but to legislation allowing Congress to direct electors *how* to vote.[16]

The current statute does that too, but it's perfectly consistent with the whole point of the Twenty-Third Amendment—to enable District *voters* to select electors based on which ticket the electors are pledged to vote for in the Electoral College. Enacted prior to any election, such a statute surely cannot direct *voters* how to vote; but neither could it rightly direct *electors* how to vote, except as a reflection of the popular vote *in the jurisdiction*; for otherwise the amendment would effectively be negated. Yet that is precisely what the scholars' two examples come to. Thus, if District voters went overwhelmingly for the Democratic ticket's electors—a likely outcome given recent District voting patterns—while in the rest of the country the Republican ticket received the most Electoral College votes or won the national popular vote, the District's voters would effectively count for nothing since the electors they selected would be required to ignore how they voted. That would surely raise constitutional issues.

[16] Citing Chiafalo v. Washington, 140 S. Ct. 918 (2020), the scholars claim that Congress could so bind the District's electors. But *Chiafalo* involved a very different issue: *faithless* electors who ignored their pledge.

It's one thing to bind electors to vote in the Electoral College in accordance with the outcome of the popular vote in their own state (or in the District), quite another to bind them to vote in accordance with the overall vote of the Electoral College or the national popular vote. If I may conclude on a larger note, we have here, like the ongoing movement by many to create a National Popular Vote Interstate Compact,[17] a small corner of the larger movement now going on in the country to nationalize elections; to reduce the role of the Electoral College; more broadly to reduce the role of states in our federal system; and, at bottom, to convert the nation from a constitutional republic to a nationwide majoritarian democracy, precisely what the Constitution's Framers sought to avoid, and for good reason, individual liberty.

[17] National Right to Vote, https://bit.ly/35u51cv (last visited June 17, 2021).