STATEMENT

of

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before the

Committee on Homeland Security and Governmental Affairs
United States Senate

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Re: S. 132, the New Columbia Admission Act of 2013

Mr. Chairman and members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies. I want to thank you Mr. Chairman for inviting me to testify today; and I want to thank Senator Coburn in particular for inviting me to offer a discordant note on S. 132, the New Columbia Admission Act of 2013, which proposes the admission of a new, 51st state, "New Columbia," created from the present District of Columbia, leaving in place as "the District" a tiny federal enclave constituted by the National Mall and the land and certain buildings that immediately surround it, which I shall call "New Washington."

Let me begin on two practical notes. First, at this point in the 113th Congress, with mid-term elections only weeks away, I think it safe to say, especially given the history of legislation on this subject, that this bill has little chance of reaching the president's desk. Accordingly, in deference to the committee's time and mine, I will 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 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 Enclave Clause, imagined anything like the arrangements contemplated by this bill.

Let me turn, then, to substantive issues, starting with that clause, after which I will raise three constitutional objections to this bill, followed by a few practical objections.

Constitutional Objections to S. 132

1. The textual objection. The Enclave Clause of Article I, Section 8, reads in relevant part 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 ….

Clearly, the Framers did not set a *minimum* size for the seat of the new government. Proponents of this bill have seized upon that point by way of claiming that a constitutional amendment is not required for the bill to pass constitutional muster.

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 creation of the District in 1790 from ten square miles of land ceded to the federal government by Maryland and Virginia, is strong evidence of what they intended—and evidence against the tiny enclave envisioned by this bill's proponents. Moreover, notice 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 literally sits. Yet this bill would strip Congress of that authority, leaving it with authority over only that tiny area in which the government literally sits.

A further textual objection is rooted in nothing less than the very foundation of the Constitution, the doctrine of enumerated powers,[1] which holds that Congress has only those powers that have been delegated to it by the people as enumerated in the document—and Congress has no power to do what this bill contemplates it doing. The point was well stated in 1963 by then 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. In this respect the provisions of Art. I, Sec. 3, cl. 17 are comparable to the provisions of Art. IV, Sec. 3 which empower Congress to admit new states but make no provision for the secession or expulsion of a state. (emphasis added)[2]

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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 http://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).

Regarding the 1846 retrocession of the small Virginia portion of the original District, that offers no real support for this measure 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.[3]

I would add only that every Justice Department from the Kennedy administration on that has addressed the D.C. statehood question has concluded that Congress has no authority to alter the status of the District legislatively—although Attorney General Eric Holder, after receiving a similar opinion in 2009 from the department's Office of Legal Counsel regarding a D.C. voting rights bill then pending in Congress, "rejected the advice and sought the opinion of the solicitor general's office, where lawyers told him that they could defend the legislation if it were challenged after its enactment."[4]

2. The consent of Maryland is likely necessary for the creation of New 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 be 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 created a state from that grant. Congress cannot do in two steps, simply from the passage of time, what it cannot do 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. Although the Supreme Court has not ruled on a case quite like this, its 8-1 "rails-to-trails" decision just this year rejected a similar effort to make an end run around the terms of an original grant.[6]

Whether Maryland would consent to the creation of "New Columbia" 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.

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[3] Phillips v. Payne, 92 U.S. 130 (1875).
[4] 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/wpdyn/content/article/2009/03/31/AR2009033104426_pf.html#.
[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] Marvin Brandt Revocable Trust v. United States, 572 U.S. ___ (2014).

3. The 23rd Amendment would need to be repealed. The 23rd Amendment, ratified in 1961, provides that:

> The *District* constituting the seat of government shall appoint in such *manner* as the Congress may direct:
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> 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 remember, under this bill the "District" we're talking about is the tiny enclave I've called "New Washington," where will live perhaps a handful of voters—including the presidential family—who would be empowered to select the three electors presently allotted consistent with the amendment's provisions. The votes of such people, vastly more weighty than those of their fellow citizens, cannot be taken away. They are guaranteed by the Constitution. To be sure, Section 205 of S. 132 purports to strike the amendment's implementing legislation; but no mere statute can extinguish those *constitutional* rights. The 23rd 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.

Practical Objections to S. 132

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 that explanation: It was imperative that the federal government not be dependent on any one of the states, and equally important 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.[7] Congress would have exclusive authority over only

[7] *See* Coyle v. Smith, 221 U.S. 559 (1911).

the tiny sliver of land outlined in the bill—essentially the White House, the Capitol, the Supreme Court, and the area including and fairly close to the National Mall. That would make the federal government dependent on an independent state, New Columbia, for everything from electrical power to water, sewers, 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 state of New Columbia 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 District of Columbia. Washington is an entirely urban one-industry town, dependent on the federal government far in excess of any other state. And New Columbia would be no different. Moreover, as a state, no longer under the exclusive authority of the Congress that would now be dependent on it, as just outlined, New Columbia 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. A district so compressed as "New Washington" would be under this bill would be unable to effectively control its place of business, rendering it susceptible to such influence.

Let me conclude, however, on a note on which I began. 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 so tiny an enclave—would garner even less support if it were more widely proposed. Which brings me to this: With a national debt at seventeen trillion dollars and growing once inflation kicks in, with our entitlement programs facing insolvency under demographic pressures and unrealistic assumptions, with an internal revenue system fraught with both irrationality and scandal, and with international crises weighing upon us, why are we 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.