39 professors wrestle with DC statehood and the 23rd Amendment

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With the Senate Homeland Security and Governmental Affairs Committee holding hearings today on S. 51, a bill to turn most of the nation's capital into our 51st state, it's no surprise that exactly one month after the House passed a similar bill on a straight party-line vote, 39 scholars sent congressional leaders a letter explaining why a constitutional amendment will not be required, contrary to what many others have long thought, including Justice Departments since the time of Attorney General Robert Kennedy.

Signed mostly by law professors, the letter claims that Congress can create this new state from the present District of Columbia, leaving the capital as a tiny enclave around the National Mall, as if the District were not constitutionally mandated to be the seat of the federal government under Article I but were territory from which to create new states under Article IV. And they claim that Maryland's consent will not be needed, as if Maryland in 1791 would have ceded the land for the purpose of creating a new state, even as its legislation effecting the cession stated expressly that it was done pursuant to Article I's mandate.

But the letter focuses especially on the troublesome 23rd Amendment. 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, but that's a longshot, given the ratification hurdles, so it 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 have a problem here — and the letter airs the scholar's disagreement about how to solve it.

One camp reads the 23rd Amendment as self-enforcing and therefore as mandating the appointment of electors. The other reads it as requiring enabling legislation and so, absent that, there's no way for those residents to vote — and those scholars appear perfectly happy with that result. Indeed, they claim that because the residents are 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 letter continues, 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 execute voting but to legislation allowing Congress to direct electors *how* to vote.

The current statute does that too, but it's perfectly consistent with the whole point of the 23rd Amendment — to enable District *voters* to choose electors pledged to their preferred ticket. Congress surely can't direct *voters* how to vote. But neither could Congress direct *electors* how to vote, except as a reflection of the popular vote *in the jurisdiction*. Otherwise the amendment would amount to nothing.

Yet that's precisely what the scholars' two examples come to. Thus, if District voters went overwhelmingly for the Democrat ticket's electors, while in the rest of the country the Republican ticket got the most Electoral College votes or won the national popular vote, the District's voters would effectively count for nothing, for the electors they selected would be *required* to ignore how they voted. That would surely raise constitutional issues. 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.

Let's be clear, what we have here, like the ongoing movement by many to create a National Popular Vote Interstate Compact, is a small corner of the larger movement 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.

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