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A Word On the Left's Anti-Federalism Agenda

Roger Pilon

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On Tuesday, as Senate Democrats were falling short of passing S. 1, their 800-page voting bill dubbed the "For the People Act," I found myself testifying before the Senate Homeland Security and Governmental Affairs Committee against a not unrelated bill, S. 51, the "Washington, D.C. Admission Act." Aimed at turning most of the nation's capital into our 51st state, S. 51, like S. 1, has earned the support of not a single Senate Republican (or House Republican concerning H.R. 51).

What links the two bills? The nationalization of elections, the reduced role for states in elections, and that's only a start. Here's a primer.

A month ago, 39 scholars, mostly law professors, sent a letter to congressional leaders assuring them that S. 51 faced no constitutional problems, contrary to what others have long thought, including Justice Departments from the time of Attorney General Robert Kennedy. Even the hurdles presented by the 23rd Amendment, which enables D.C. residents to vote for presidential electors, could be overcome, the scholars averred.

Not so fast. S. 51 would create this new state from today's District of Columbia by reducing the District—the seat of the federal government, as provided for under the Constitution's Enclave Clause in Article I, Section 8—to a tiny enclave around the National Mall. But there will still be some residents living there, including the first family, and this "District" will still have three outsized Electoral College votes, pursuant to the 23rd Amendment, votes that cannot be taken away by a mere statute like S. 51.

So the scholars propose repealing the long-standing statute that enables District voters to vote. That, of course, would amount to extinguishing their ability to vote. Alternatively, and more consistent with the amendment, they admit, the scholars contend that Congress could change the current enabling statute, which mandates that the District's electors cast their votes in the Electoral College in accordance with the outcome of the District's popular vote.

Instead, they continue, Congress could mandate that District electors vote not for the ticket that won *in the District* but in favor of the ticket that got the most Electoral College votes *nationwide*, or for the winner of the *national* popular vote, even if the District went overwhelmingly in the

other direction. (Remember, in the last few elections, the Democratic presidential ticket won over 90 percent of the District's votes.) In that case, of course, the *District's* voters would count for nothing—indeed, in the Electoral College, their electors would vote opposite their interests.

Back now to the Senate hearings, my written testimony focused on the scholars' letter, especially on their approach to solving the 23rd Amendment problem. But it concluded on a larger note:

… we have here [in S. 51], like the ongoing movement by many to create a National Popular Vote Interstate Compact, 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.

After submitting my written statement a few days before the hearings, as is required, I went back to the scholars' letter. There, all but in passing, was mention of two Columbia Law School professors, Jessica Bulman-Pozen and Olatunde Johnson, who had argued that the Supreme Court, in its decision last term in *Chiafalo v. Washington*, had implicitly allowed for a mandate like the one the scholars were proposing. That struck me as odd: *Chiafalo* held that states could sanction *faithless* electors who voted in the Electoral College contrary to the outcome of the presidential vote *in their state*. It had nothing to do with states ordering their electors to vote for the ticket that got the most Electoral College votes *nationwide*, or for the winner of the *national* popular vote.

So I went to the site where the two Columbia Law professors had posted their argument, and sure enough, not only did they stretch the Court's opinion well beyond its holding, but they weren't at all reluctant to set forth their larger agenda:

Beyond better reconciling D.C. statehood with the text of the 23rd Amendment, this legislative fix would be a small step toward making presidential elections *more democratic*. It would not stand in the way of *more far-reaching Electoral College reform*. For example, the National Popular Vote Interstate Compact or a constitutional amendment could make the winner of the national popular vote President-elect. The fix we propose would be unlikely to influence an election, but it would introduce into American law—for the very first time—*a truly national vote*. With a revised H.R. 51, the moment of statehood could also be *a broader moment of nationhood*. (emphasis added)

They're not trying to hide behind their finger—give them credit for that. Progressives have long had trouble with the states *as states*, as separate sovereigns, for that allows "a race to the bottom." Indeed, if people can vote with their feet, as competitive federalism allows, where will it all end? By contrast, modern cooperative federalism, as Judge James Buckley explained in his wonderful 2014 book, *Saving Congress from Itself: Emancipating the States & Empowering Their People*, enables Congress to work hand-in-hand with the states to create one nation under rule from Washington. At last, we can all be in this together. Wouldn't that be wonderful?

S. 1 and S. 51 are of a piece. We need to recognize what that piece is. It is not the one the Founders had in mind.