

Testimony Of Thomas M. Smith

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Before the Council Of The District Of Columbia

Committee on Government Operations and the Environment

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Thank you for the opportunity to present testimony today on the readiness of the DC Board of Elections and Ethics (BOEE) for the November, 2010 General Election and to address provisions in Bill 18-894 – the Corrupt Election Practices Amendment Act of 2010 – and Bill 18-822 – the District of Columbia Board of Elections and Ethics Membership Expansion Act.

I am here to testify today in my capacity as Chair of the Ward Three Democratic Committee. As you know, the Ward Three Democratic Committee is the official ward organization affiliated with the Democratic National Committee. Our membership base is strong and growing and we have a distinguished history of political activism in our city and beyond. As a political organization, we are as committed to do all we can to ensure the integrity of the elections process in DC as we are about winning elections. As activists who continue to believe we have a right to full representation in Congress, not just a single vote for a single delegate, we have a long record of working over the years to guard and protect our local franchise vigilantly – a hard earned right of home rule (albeit still limited) that many of our current members fought to win not so many years ago.

As an ANC Commissioner and a candidate for reelection, I also want to share with you some of my own recent experiences that highlight why the Ward Three Democratic Committee questions the readiness of the BOEE for the November 2 elections and how some of the changes made in our voting system this past year by DC Council have contributed to the situation.

First, let me applaud this committee for its leadership in tackling several issues over the last year designed to create more opportunities for DC residents to vote in the September 14 primary elections. 2,000 more Democrats went to the polls in Ward 3 in this last primary election than four years ago when we had competitive Mayor, Council Chair, and Ward 3 Council races. We reversed a decade-long decline in Democratic voter participation in our ward in the September primary elections. This increase can be attributed to an energized constituency in Ward 3 and the hard work of grassroots political activists, like those in the Ward Three Democratic Committee, who worked so hard for many candidates and succeeded in getting out the vote. I would be negligent if I did not credit this increase also in part to some of the changes put in place by the DC Council to make voting more convenient, including early voting, no-excuse absentee ballot rules, and same day voter registration.

Given all the problems reported in other parts of the city with faulty machines or polling places that did not open on time, our experiences in Ward 3 were significantly better. But, we also were not without incident. In fact, many of the changes incorporated by the Council have raised new concerns among many of our Committee members about new threats to the integrity of our voting system; and we think they need immediate attention – to protect voters' franchise this November. Although the changes

incorporated by the Council were intended to engage more voters in the elections process, we believe the Council may have erred in failing to strike the proper balance and exposed our elections process in DC to greater potential for fraud and mischief.

So, let me outline two major concerns raised by members of our Committee dealing with (1) early voting at the satellite centers and (2) same day registration – both of which were designed to increase the ease of voting.

1. The Committee applauds the decision to allow early voting at satellite centers. Our turnout certainly benefitted by locating an early voting site in Chevy Chase. However, it our strong view that a satellite center should be established in each ward of the city, so that all residents – no matter where they live – have equal access to early voting. If it is not possible to have a satellite voting location in every ward, our Committee believes there should then be no early voting at satellite centers. This is critical for ensuring that no geographic area of the city has an undue advantage in the elections process.
2. The filing of provisional ballots – mostly as a result of same day registration – created confusion at the polling places. Inaccurate information was being communicated about same day registration – sometimes by campaigns and sometimes by the Board of Elections and Ethics (BOEE). Workers were not trained adequately to deal with the issue at the polling places. The result was a back-up even at some of our smallest precincts. At my precinct, Precinct 9, one of the smallest voting precincts in the city, there were 22 same day registrants who cast provisional ballots. This may not seem like much, but it was enough to create some momentary confusion at the polling place.
3. Precinct captains also were ill-prepared to deal with challenges filed by election observers and watchers.

But, our concerns with same day registration are even more pronounced. We believe same day registration opens our voting system unnecessarily to fraud and abuse. We also believe same day registration gives advantage to campaigns that are well-funded and have a heavy number of volunteers or other campaign resources. Small campaigns or campaigns for offices, like ANCs, are put at a distinct disadvantage. In short, we do not believe the benefits gained from same day registration outweigh the importance of conducting fair elections, and we think you should reconsider allowing same day registration in future elections. If we had our way, we would prefer its extinction to have been on September 15.

Following are some of our concerns with same day registration:

- It is too easy for people to register to vote fraudulently, especially those who do not choose to make DC their domicile;
- Campaigns must commit more resources to protect against voter fraud, and many campaigns simply do not have the resources to ensure that our checks and balances system has an opportunity to work;

- Candidates should be able to communicate directly with voters in advance of the election; same day registration denies candidates that opportunity;
- The DC voter registry is in disarray with too many people listed who no longer live here or in some cases are no longer alive making monitoring the elections all that more challenging for candidates.

I cut my political teeth on Philadelphia Democratic machine politics. In those days, it was not unusual for dead people to vote in elections. Given difficulties in ensuring an accurate voting roster in DC, the elections process is open to such mischief – and some people are more motivated by winning than playing fair. Even during the recent Pennsylvania Democratic presidential primary in April, 2008, I had an opportunity to vote in Philadelphia if I wanted to – and I could have engineered the same opportunity for those in my group who hailed from Florida, California, and Alabama. DC is not immune to such mischief, especially because of the state of our voter registry.

Our voting system works in large part because of the checks and balances that are built in – if somebody is thought to be voting illegally, there is an opportunity for a campaign to challenge that voter. Well-funded campaigns, like those we saw in this last election, and even some Council campaigns, have the resources available to monitor the integrity of the voting process. The same is not true of poorly funded campaigns or in races, like an ANC race, where the available funding and the volunteer base are minimal. Yet, it is in those races where a shift of only a few votes can make a difference in the outcome.

This prompts some concerns with Bill 18-894. Although it is generally good legislation, recent events in my own ANC election, now make me think the bill does not go far enough to weed out corrupt election practices. The legislation establishes penalties for those convicted of giving false information to establish eligibility to register to vote.

Recently, students at American University have initiated a voter registration drive with the explicit purpose being to unseat me in an SMD that is a combination of three student dorms (comprised mostly of freshmen and sophomores) and Spring Valley and Wesley Heights residents. Organized by the AU Student Government, student leaders have been encouraging students to change their registrations from their place of domicile to DC for this one time only so that students can have a vote on the ANC on the AU Campus Plan. There is some question as to whether AU administrators have encouraged this or offered at least indirect support for these efforts.

The 1997 *Scolaro* case – dealing with a similar, but not identical, effort by Georgetown students – hinged on the voter registration form and whether signing that form was sufficient to demonstrate that students had chosen to make DC their domicile. Students who change their voter registration for a one-time only election in DC would, in effect, be flaunting the city’s voting eligibility requirements. Individuals who register to vote in DC should be required to demonstrate their commitment to make DC their domicile. In my race, residents who have made the commitment to domicile in DC face being disenfranchised because students may be seeking to overwhelm their votes by registering to vote in DC without the intent of making this their domicile.

The BOEE has added to the confusion of this situation. BOEE officials were quoted in the AU student newspaper as saying your domicile is where you say it is. That seems a misreading of *Scolaro*

and DC law. *Scolaro* opened a hole in our elections process in this city that needs some reasoned action by the Council to provide more direction to the Board of Elections and Ethics on what should be required to demonstrate domicile in DC. Nevertheless, *Scolaro* did not create the type of automatic right implied by BOEE statements in the student newspaper. While acknowledging the right to vote is a fundamental constitutional right, *Scolaro* also recognized that the right to vote includes the right of qualified voters not to have their franchise diluted by unqualified voters. It further held that elections officials may take a “reasonable” look behind the declaration of residency to determine whether actual facts and circumstances confirm a voter’s declaration.

Efforts to pack the voter registry with folks who do not meet the residential requirement of domicile are as fraudulent – if not more so – than paying people to vote. I would encourage the Council to use Bill 18-894 to provide more guidance to the BOEE on what minimally constitutes DC domicile – and that the Council insist that the minimal criteria be a photo ID issued by a local government agency or a US passport with a DC address.

The same day registration legislation indicated that anybody meeting certain federal criteria could vote on election day if they showed an appropriate voter ID. The same day registration law suggests that even a bank statement can be used to verify whether somebody meets voter registration requirements – although it seems to give the BOEE great discretion to determine who is an eligible voter. A bank statement alone should not be sufficient to register in DC and the Council should make this clear. There is nothing in federal law that prevents you from imposing stricter requirements. A bank statement should be valid only if accompanied by a second form of ID outlined in the statute.

BOEE could promulgate rules to protect the voter registry against those who would choose to make mischief by registering to vote to influence the outcome of a single election. But, the Council also can prod the BOEE with legislative language to provide better guidance on legislative intent.

After now being in the middle of some elections controversy because of the ANC race, my dealings with the BOEE suggest a more systemic problem that needs to be addressed if we are to be able to ensure our elections process operates with fairness and integrity – even on November 2. In fact, some of my experiences with BOEE make me wonder how we even have elections in this city – let alone do it relatively successfully. It is a testament to the hard-working efforts of the rank and file workers at BOEE. Nevertheless, there are problems that need to be addressed.

For example, AU students are registered to vote in my SMD but actually do not live in the boundaries of my SMD. This is not a new issue. This is an issue that I raised two years ago. AU administrators and the DC Office of the ANC also raised this concern with BOEE. The source of the problem is that the BOEE does not have information for the specific dorms in which the students reside. Three dorms are in my district; five other campus dorms are in another district. All students, however, use the main mailing address of AU which falls in my district. Since March, 2010, the BOEE has instituted a new system in which students must include the dorm name and their 9-digit zip code to register. If they do not, the registration is to be rejected. But, those on the voter registry prior to March, 2010, do not have the same requirement. And many who registered after March, 2010 do not include

complete addresses. In the last few weeks, I have learned at least 11 students registered to vote in my SMD are actually living in another SMD.

This is where the checks and balances system comes into play. I have had an opportunity to review the registry and where I have been able to identify errors, BOEE has been responsive in making the adjustment. But, even the BOEE does not have information to determine in which SMD nearly 50 students should vote. DC law requires that registered voters must provide adequate information to make this determination. Why this issue wasn't addressed more thoroughly last March when BOEE put forward new requirements is confounding and frustrating. Same day registration provides an added burden on me to ensure that observers are in place to challenge voters whose addresses might not be complete, but who may have the intent of trying to shape the outcome of the election. And this will surely add even more confusion at the polling place.

Have you ever tried to get a straight answer from the BOEE on election laws and rules? Good luck. I have been trying to find out information about residency requirements for eligibility to run for ANC. Why? Because AU Student Government has designated a freshman to run against me. DC code specifies that a qualified elector is eligible to serve as an ANC Commissioner if they have resided in the SMD 60 days prior to the deadline for submission of petitions to gain access by ballot. That would require somebody to reside in the SMD around July 5. I have received different answers from within BOEE and there is some confusion also at the Office of the ANC's about whether a write-in candidate must meet the same residency requirement. One person at BOEE has told me a write-in candidate must live in the SMD 60 days before the September 3 petition deadline. Another has told me that a write-in would only have to live in the SMD 60 days before filing the Affidavit of Write-In, which, if the write-in is successful, does not need to be until a week after the November election. There is no language in the Official Code or the DCMR on this. Yet, it is hard for me to believe that DC law or regulations would create two separate residency requirements for eligibility to serve as an ANC Commissioner or any public office. In addition to being unfair, it seems, frankly, ludicrous.

If somebody is determined to seek office, despite being ineligible because of failing to meet appropriate residency requirements, then those write-in votes should not be counted no matter how many are cast in the election.

It seems to me that these types of issues should not be subject to the interpretation of elections officials as the circumstances arise. These are some basic, fundamental questions.

Members of our Committee recognize that some of these concerns are unlikely to result in major chaos in a city-wide race or perhaps even a ward contest. The greatest impact could be felt at the ANC level where a single vote can truly affect the outcome. But, that is no reason to dismiss these concerns as cavalier. The larger issue is the efficiency and integrity of our voting system. We need to be able to trust that we have rules that guide the process and that our voting franchise is not diluted either by corrupt practices or inadequate or incomplete rulemaking.

The Committee also believes the Council should provide more specific language in Bill 18-894 on what constitutes an illegal payment for voting or registering to vote. This language could be included in the statute or the Council could direct the BOEE to develop more specific language through regulation.

The Committee also believes such language should not preclude routine campaign activities, such as paying poll workers, feeding poll workers, and transporting people to the polls. We realize that reaching consensus on such specific language may be difficult. Even members of our Board differ on whether monetary payments should be considered in the same way as meals or other refreshments.

Nevertheless, the bill is good and there should be collective thinking in the city on how to make this language better either through statute or regulation.

Additionally, the Ward Three Democratic Committee is very supportive of Bill 18-822 that would expand the membership of the BOEE.

So, in conclusion, our message to you today is to move forward with strengthening the laws and the rules for ensuring our voting system works; we should not disrupt the checks and balances system that protects the integrity of our right to vote; and we should not create more chaos at the polls. Furthermore, we believe the Council should reconsider same day registration and cut off registration prior to election day. And we believe early voting is an enhancement of our system, but we believe it should be equally accessible throughout the city – that each ward should have an early voting center – no matter the cost. Absent that, early voting should be confined to the Board of Elections.

The Committee looks forward to partnering with you in examining other elections issues. It would be impolite for me to say how many years of experience our members have collectively in working on elections and campaigns. Our members have worked in campaigns and elections in jurisdictions across the country. We will have a delegation going to Pennsylvania in a couple of weeks to work in the Sestak Senate campaign and we are working to organize a group to campaign to help Democrats retain the Senate seat in West Virginia. We know something about elections from the most practical perspective you can imagine and we have some practical understanding and appreciation of how our system compares to other states. We hope you will choose to take advantage of this expertise as you consider other elections-related legislation in the coming year.

Thank you.