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A P P E L L A T E L A W

Should Pa. Amend Its Constitution to Elect Appellate Judges by Region?

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Special to the Legal

On Jan. 13, the judiciary committee of the Pennsylvania House of Representatives voted 13-12 to send to the House floor H.B. 38, a bill that proposes a constitutional amendment to replace statewide elections of appellate court judges with a system of electing appellate judges by geographic districts.

In Pennsylvania, constitutional amendments must be approved by both the House and the Senate in two consecutive terms before they can be presented to the voters as a referendum. As an identical bill, H.B. 196, already passed both houses, the proposed constitutional amendment could be put to the voters in a referendum at the May primary.

Under the current system, Pennsylvania voters participate in statewide elections for the Supreme, Superior and Commonwealth courts. The proposed constitutional amendment would replace statewide elections with regional elections. Instead of voting on all 31 appellate court judges, voters could only vote for three—one for each court.



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A redistricting commission selected by the state legislature would divide the state into seven Supreme Court districts, nine Commonwealth Court districts, and 15 Superior Court districts. The districts would be apportioned by population.

Proponents of the amendment argue that regional elections of appellate judges will increase the diversity of the appellate bench. Rep. Russ Diamond, R-Lebanon, the principal sponsor of H.B. 38, claims that the Pennsylvania courts do not reflect the commonwealth because 21 of the 39 elected appellate court judges hail from either Philadelphia or Allegheny County.

In a memorandum to all House members dated Dec. 1, 2020, Diamond argued: “Pennsylvania is a diverse

commonwealth, and our appellate courts ought to reflect that diversity. This proposal will also go far in improving the chances that voters can identify with candidates for appellate court seats.”

Rep. Tim Briggs, D-Montgomery, Democratic chair of the House Judiciary Committee, a critic of the proposal, stated: “This bill would have a devastating effect on the balance of power in our government. It shows a fundamental lack of understanding of the independent role of our judiciary and further politicizes our courts.”

The Pennsylvania Bar Association, Pennsylvanians for Modern Courts, the League of Women Voters, the Committee of Seventy and the Philadelphia Bar Association have all opposed the regional election of appellate court judges.

Although H.B. 38 has been the subject of partisan rancor and division, the intent of this article is to put aside politics and provide the perspective of an appellate lawyer whose sole concern is the quality and integrity of the appellate bench.

JUDGES DO NOT HAVE CONSTITUENTS

The proposal to elect appellate court judges in regional rather than statewide

elections is based on a flawed premise, which is that judges have constituents. Legislators have constituents. Judges do not.

Judges have a duty to the law. Judges' sole duty to the voters is to uphold the law and conduct themselves in a manner befitting their office.

Canon 2 of the Pennsylvania Code of Judicial Conduct states that "a judge shall perform the duties of judicial office impartially, competently, and diligently." Rule 2.4 states that "a judge shall not be swayed by public clamor or fear of criticism" and "a judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."

The comment to Rule 2.4 describes a judge's duty of impartiality as follows: "An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences."

In a Jan. 12 memo from the Pennsylvania Bar Association to the House Judiciary Committee, David E. Schwager, president of the PBA, stated the bar association's opposition to H.B. 38.

Schwager contrasted judges with legislators, saying "judges should not have constituencies. They should be devoted to and constrained by the law, derived from the Constitution and statutes, and to no one or nothing else.

... House Bill 38 goes exactly in the wrong direction by compounding the error of judicial elections statewide by making discrete districts that will cause even more pressure for judges to respond to constituents, not the law."

The absence of a constituency is particularly important for appellate court judges, whose decisions create statewide precedent. Unlike trial court judges, who apply the law to resolve disputes between parties who live and work in their county, appellate court judges decide cases that affect everyone in the commonwealth.

The proposal of dividing the appellate courts into regions suggests that judges from different regions will construe

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the law differently. But judges' sworn obligation to uphold the law requires them to put aside their personal biases and apply the law without regard to "family, social, political, financial, or other interests or relationships."

A core function of the appellate courts is to ensure consistency in the application of the law. Appellate court judges are better able to apply the law fairly and consistently throughout the commonwealth if they are elected by all Pennsylvanians, not just those in a particular region.

Pennsylvania's current system of partisan elections makes it difficult for thoughtful and well-intentioned appellate judges to avoid accusations of bias and partisanship when they issue a controversial decision, even when the accusations are unfounded. Replacing statewide elections with regional elections will only give more credence to the false belief that judges have constituents.

The proposed constitutional amendment will not advance the public interest in a fair and impartial judiciary. It will instead further politicize Pennsylvania's appellate courts and undermine public perception of the integrity of the judiciary.

VOTER DISENFRANCHISEMENT

Proponents of regional elections of appellate judges argue that regional elections will give rural Pennsylvanians more say in selecting judges. To the contrary, the proposal will disenfranchise all Pennsylvania voters, including voters from rural areas.

Under the current system of statewide elections, voters are eligible to vote whenever there is a vacancy on any of the three appellate courts. Voters now have a say in selecting all 31 appellate court judges—seven Supreme Court justices, 15 Superior Court judges, and nine Commonwealth Court judges.

Under the proposal for regional elections, instead of voting in 31 different elections, voters would only be able to participate in the election of three appellate court judges—a 90% reduction in their voting power. Although elected by a small segment of the

commonwealth, the elected appellate court judges would nevertheless decide cases that affect all Pennsylvanians, not just the residents of their region.

Since appellate judges hold 10-year terms, a voter who participates in electing a judge or justice for one of the three appellate courts will need to wait 10 years before having another opportunity to participate in electing a judge for that court.

Regional elections of appellate court judges will thus disenfranchise millions of Pennsylvania voters by denying them an opportunity to participate in the election of every appellate court judge.

REDUCING THE APPLICANT POOL FOR APPELLATE JUDGES

The proposal will also dramatically and unnecessarily reduce the quality of the appellate bench by limiting the pool of candidates for an open seat to lawyers and judges from a particular geographic region.

Diamond argues that rural residents are unfairly underrepresented on the appellate court bench and that regional elections will create opportunities for rural lawyers who might otherwise not run for appellate judge. In support, Diamond points out that although more than 60% of the 31 appellate court judges are from Philadelphia or Allegheny counties, 80% of the state's population lives in the other 65 counties.

Sen. Joseph Scarnati, R-Jefferson, another supporter, also focused on the legislature's desire to change the geographic makeup of the appellate courts: "Rural Pennsylvanians deserve to have an equal voice to individuals who live

in suburban and urban areas of our commonwealth. ... Our judicial branch of government should not be made up primarily of individuals from big cities—it should fairly serve all regions of our commonwealth."

Supporters of the amendment seem to assume that rural lawyers are underrepresented on the appellate bench because they are somehow frozen out of the process of selecting candidates to run statewide for the appellate bench. But there is no evidence that rural lawyers lack opportunities.

The perceived underrepresentation of rural lawyers on the appellate bench may arise from a simple fact—there are not many rural lawyers in Pennsylvania. And there are likely even fewer who are trial lawyers with appellate experience.

In 2019, there were 49,249 resident and active lawyers in Pennsylvania. A high percentage of those lawyers live near where the jobs are—Philadelphia and Pittsburgh.

The Legal Intelligencer's 2020 Report on the Legal Profession includes maps showing active lawyer licenses and the attorney-to-population ratio by county. In 2020, the largest county, Philadelphia, had 14,193 licensed lawyers. The next highest were Allegheny (9,102), Montgomery (5,037), Dauphin (2,478), Chester (2,378) and Bucks (1,691).

By comparison, Lebanon County, the home of the bill's sponsor, Diamond, had 132 lawyers. Other rural counties had even fewer lawyers, including Bedford (22), Cameron (5), Clinton (30), Elk (26), Forest (2), Fulton (5), Huntingdon (23), Juniata (15), Montour (34), Potter (12) and Sullivan (6).

Not only are there fewer lawyers in Pennsylvania's rural counties compared to its urban and suburban counties, but there are also substantially fewer lawyers per capita.

In Philadelphia in 2020, there was one attorney per 111 residents. Allegheny reported one attorney per 134 residents. The Philadelphia suburban counties were similarly lawyer-dense: Montgomery (1 per 164), Chester (1 per 218), Delaware (1 per 249) and Bucks (1 per 371).

By comparison, many of Pennsylvania's rural counties—Adams, Armstrong, Bedford, Bradford, Clarion, Clinton, Elk, Fayette, Forest, Franklin, Fulton, Huntingdon, Juniata, Lebanon, McKean, Mifflin, Northumberland, Potter, Perry, Snyder, Susquehanna, Sullivan, Union and Wyoming—reported only one attorney per 1,000 or more residents.

Despite the small number of lawyers in Pennsylvania's rural counties, many appellate court judges call those counties home, including Supreme Court Justices Thomas G. Saylor (Somerset) and Sallie Updyke Mundy (Tioga); Superior Court Judges Jack Panella (Northampton), Victor Stabile (Dauphin) and Deborah Kunselman (Beaver); and Commonwealth Court Judges Mary Leavitt (Dauphin), Renee Cohn Jubelirer (Centre), Kevin Brobson (Dauphin) and Andrew Crompton (Cumberland).

Furthermore, although many appellate court judges now live in or near Philadelphia and Allegheny counties, they may have grown up in rural areas and moved to the cities for law school or work. That is even more likely for lawyers in appellate practice, a

niche practice area not common in other parts of the commonwealth. But while some appellate court judges may no longer live in rural areas, it does not mean they abandoned their small-town values when they took the bench.

By creating districts based on total population, without considering the number of lawyers per capita in any district, the proposal gives an unfair advantage to judicial candidates who reside in sparsely populated areas and seriously disadvantages judicial candidates who currently live in lawyer-dense areas in and around Philadelphia and Pittsburgh.

CHANGING THE BALLOTS

At the Pennsylvania Bar Association midyear meeting in January 2020, Sen. Jake Corman, a supporter of the proposed amendment, argued that statewide elections are inherently unfair because voters are swayed by notations on the ballot of candidates' counties of origin, which gives an unfair advantage to candidates from Philadelphia and Pittsburgh.

But the remedy for regional bias is not a constitutional amendment to elect appellate judges by region. Instead, the legislature could simply require that ballots include judicial candidates' names but not their counties of residence.

REDUCING LAWYERS' INFLUENCE ON JUDICIAL ELECTIONS

Advocates of the regional election proposal also claim that they seek to reduce the influence of large law firms and interest groups on judicial

elections. But the proposed constitutional amendment will do nothing to further that goal.

Pennsylvania, one of 21 states that elect judges, does not cap campaign contributions to judicial candidates from individuals or PACs. Judicial elections in Pennsylvania are heavily funded by lawyers and law firms. From 2009 to 2019, the legal industry spent more than any other business sector on appellate court campaigns. Attorneys and law firms made up 34% of the contributions to appellate court campaigns.

Although regional elections may reduce the total cost of running for appellate judge, there is nothing in the legislation to prevent substantial campaign contributions from the same law firms and advocacy groups that currently support appellate court candidates.

Indeed, in a regional election, the CEO of a large regional employer, or the largest law firm in a region, could have inordinate influence over the outcome of an appellate judicial race with statewide repercussions.

Regional elections could make appellate court candidates appear to be more—not less— beholden to large donors. The proposal runs the risk of lowering rather than raising public perception of the judiciary.

CONCLUSION

Pennsylvania's system of electing judge is imperfect, but the proposed constitutional amendment will exacerbate, not ameliorate, the problems associated with electing appellate judges.

Regional appellate court elections will disenfranchise voters and reduce by 90% their power to select appellate

judges. It will also dramatically reduce the pool of qualified appellate court candidates by imposing geographic constraints on who may run. And it will do nothing to eliminate the power of law firms and interest groups to influence judicial elections.

Those who seek a qualified and non-partisan judiciary should join the PBA, Pennsylvanians for Modern Courts, the Pennsylvania Association for Justice, Common Cause, the Committee of Seventy and the Philadelphia Bar Association and oppose this amendment.

As long as Pennsylvania has an elected judiciary, local bar associations throughout the commonwealth should encourage the best and brightest lawyers and judges to run for appellate court judge.

All Pennsylvanians benefit when intelligent and experienced lawyers choose to serve by becoming appellate judges, regardless of where they call home. •