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PENNSYLVANIA
Budget and Policy Center

MEMO

To: Legislators, legislative staff, editorial board members, columnists, other interested parties

From: Marc Stier, Director, Pennsylvania Budget and Policy Center

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Subject: Judicial Districts and Judicial Independence

HB38, sponsored by Rep. Russ Diamond, proposes a constitutional amendment to elect the appellate court judges who sit on the Supreme Court and the two second-level courts, the Commonwealth Court and Superior Court, by districts rather than in statewide elections. This proposal is the same as that contained in HB 196 last year which means that if it passes the House and Senate this year it will go to the voters.

This constitutional amendment is deeply problematic for four reasons.

First, given the role judges play in our constitutional government, district election is unnecessary. We elect legislators by district because it is important that regional interests be accounted for in the process of enacting legislation. But there is no regional way to interpret the statutes or Constitution of our Commonwealth. In addition, there is already a fair amount of geographic diversity on the courts, especially if we consider where our justices and judges were born, raised, and educated.

Second, electing judges in districts can make it more difficult to put the best-qualified judges on the bench. We want appellate courts judges with the legal experience in appellate matters and / or judicial experience to sit on these courts. Men and women with that kind of experience are more likely to be found in the urban, commercial centers of the state, even if they grew up elsewhere. And the record shows that people with such experience from the more rural counties are able to secure places on the appellate courts, as well as in our row offices.

Third, the amendment would, in two ways, give the General Assembly far more influence over the courts than is appropriate in a government that respects the separation of powers. By

gerrymandering judicial districts and by using the transition process to prevent the current judges from running in retention elections, the General Assembly would be able to influence both the partisan and individual composition of the courts in ways that undermine judicial independence.

Fourth, electing justices and judges in districts rather than statewide, would make it more likely that they hold more partisan and, possibly, extreme views.

And, fifth, a successful effort to gerrymander the appellate courts would further partisan division in our state as a whole.

The Different Powers of Government and the Selection of Judges

To understand why this constitutional amendment is deeply problematic, it helps to start with first principles. Going back to the 17th century, American constitutional thought has long held that, because different branches of government carry out different functions of government, their members should be chosen in different ways. The difference between the legislative and judicial functions is especially acute.

Legislators are meant to represent the people, both as a whole and in part. The founders knew that the country, as well as each state, was divided into regions that had somewhat different interests. And they wanted legislators who represented the interests of particular regions while also being able to recognize the state or national interest. They could do the latter by understanding the underlying interests shared by all parts of the country, by each state or by finding some workable compromise between regional / local interests. Finding the general interest is not possible if the voices of local interests were not part of the general debate. That's why it is a fixed principle of our constitutional thought that legislators should be elected by districts.

The function of the courts is very different from that of legislators. The task of the court is to interpret the statutes and Constitution. To do that well the process by which we select judges is meant to give us judges who are (1) well-trained and experienced in the law and (2) are independent of the other branches of government and both partisan and popular opinion. Judges need the kind of specialized training in the law that legislators do not need. And, especially when defending the principles of the Constitution, they should be focused on not what their party or public opinion holds at any moment but on the principles that animate our constitution.

The importance of judicial independence has become much more obvious in the last six months. At a time when Republican legislators were repeating the lies of former President Trump about the election, Republican judges including those appointed by Trump rejected them again and again.

Federal and state governments have chosen different paths to attain these two goals. Some rely on executives—that is the president or governors—to nominate judges who are then confirmed by the legislature. Ten states elect judges to their highest court on the grounds that this makes judges even more independent of the other branches of government. When judges

are elected, however, they are almost always elected statewide, especially when it comes to the highest court in the state. Of the ten states, including Pennsylvania, that elect judges to the highest court, only Louisiana and Illinois do so in judicial districts. [1]

There are four reasons we don't find judicial districts in the states that elect judges to their highest courts.

No Need for Judicial Elections

The first is simply that there is no reason to do so. The interpretation of law and justice should not vary by region of a state. There is no Montgomery County or Lebanon County or Elk County way to interpret statutes and the Pennsylvania Constitution. Thus, there is no special reason to ensure that judges, as opposed to legislators, are drawn from all regions of the state. Indeed, given that regional disputes may occasionally wind up in court, it is important that regional influences on the decisions of the court be limited.

District Elections and Judicial Qualifications

Second, judicial districts can make it more difficult to put the best-qualified judges on the courts. Rep. Diamond's memo in support of his amendment states that Philadelphia and Allegheny Counties are over-represented by population on the appellate courts. But what we should be comparing is not the ratio of appellate judges to the population of different counties, but the ratio of appellate judges to the number of lawyers in each county and, even more importantly, to the lawyers who have the relevant experience to serve on our appellate courts. It is likely that urban counties have far more lawyers per capita than rural counties. State data is not available on this question, but nationwide data clearly show that lawyers per 10,000 residents range from 73.7 in the more urban Mid-Atlantic states to 35.3 in the Plains states and 29.8 in the states of the Southwest, both of which are far more rural than our region. [2]

It's not just the sheer number of lawyers per county that is important. Also critical is where we find lawyers with experience in dealing with the kinds of cases that are adjudicated in the appellate courts and judges who serve on lower courts with broad caseloads. Given that Philadelphia and Allegheny Counties are the commercial centers of the state, as well as the counties with the highest populations and the largest number of lower court judges, we are sure to find that they are also where the most experienced lawyers and judges are located.

A well-trained and experienced lawyer and lower-court judge from any part of the state should be considered by the electorate for elevation to our appellate courts. And Representative Diamond's data shows that lawyers from 24 of our counties, including some of the most rural counties in the state, have served on the appellate courts since 1969. But, given the importance of relevant experience in serving on the appellate courts, we should not be surprised or disheartened that more of our judges come from the centers of commerce and law in our Commonwealth.

District Elections Undermine Judicial Independence

The third reason that states have elected their highest court judges through statewide rather than district elections is that we seek to avoid the kind of partisan chicanery and undue legislative influence over the courts that is likely to arise through the drawing of judicial district lines.

To see why this is true, let's consider how the Diamond amendment would enable the General Assembly to exert undue influence over judicial elections.

Gerrymandering Judicial Districts

Electing political officials through districts opens up the possibility for gerrymandering in order to give one party or another a political advantage. The history of gerrymandering in this state is well-known. The congressional districts drawn by the Republican-controlled General Assembly were so egregiously gerrymandered that they, and especially the old 7th congressional district, became poster children for the unfairness of partisan gerrymandering. Earlier in this decade, a Republican-majority Supreme Court overturned a state legislative districting plan that was gerrymandered in favor of the Republicans. (The current map, however, is not much better.)

Given this history, why should any Pennsylvanian or fair-minded member of the General Assembly support a constitutional amendment that would give the General Assembly much of the power to draw judicial district lines? And again, the issue is not just that the General Assembly could draw lines to benefit one party or another, although that is certainly possible. It would be possible, for example, to pack Democratic voters into three Supreme Court districts with one centered on Pittsburgh and two centered on Philadelphia and its suburbs, and then to spread Republican voters among the other four Supreme Court districts with the hope of creating a permanent 4-3 Republican majority on the Supreme Court. The deeper problem, however, is that giving the General Assembly power to draw district lines would give the legislative branch of government far too much authority over the judicial branch, thereby sacrificing the independent judiciary that is a vital part of our constitution. Supreme Court justices and other judges, who all serve ten-year terms and often serve for more than one term, would have to be looking over their shoulder at the General Assembly in fear that the next redistricting would make it impossible for them to be reelected.

Chicanery in the Transition Period

And there is a second, even more sinister way in which the General Assembly could gain control over the Court, by using the transition process to judicial districts to benefit either their own party and particular justices and judges rather than others.

Under the current constitutional rules, when our appellate court judges' ten-year terms end, they must run in a retention election in which voters decide whether or not to keep them on. They are almost always retained—only once in recent decades has a justice of the Supreme Court lost his effort to be retained.

Under the Diamond amendment, when the terms of the current justices or judges who have been elected statewide come to an end, they do not run in a retention election but must run for reelection in one of the new districts. (Once the justices and judges are elected in a district election, however, they do run in a retention election at the end of their term.) The Diamond amendment gives the General Assembly the power to decide where each new judicial district will be created. This creates the potential for a great deal of chicanery.

(In what follows, I'm going to focus on the shenanigans made possible by the Diamond amendment for Supreme Court elections, but much the same can happen for Commonwealth and Superior Court elections.)

Republican Chief Justice Saylor's term ends in 2021 when he turns 75. At that point, if it is still dominated by Republicans, the General Assembly can decide where the first Supreme Court judicial district will be located and will no doubt make that a district that a Republican would be overwhelmingly likely to win.

And when Democratic Justice Baer's term ends in December 2022 when he reaches 75, the Republicans can decide where to hold a second regional judicial election to elect a new justice. And they can again draw the lines any way they want and presumably will create another judicial seat with lines that make it impossible for a Democrat to win.

And they can keep doing this, election after election, because there is no prohibition on a General Assembly majority changing the district lines for every judicial election. Until all the judicial districts are created, every time a judicial term ends, the General Assembly can redraw the lines so that the open seat is one that only a member of the majority party can win.

When it comes to current justices who under the current rules would be up for a retention election, more shenanigans are possible. For example, Democratic Justice Kevin Dougherty, who is from Philadelphia, is up for retention in 2025. Under the Diamond amendment, Justice Dougherty would have to run in a competitive election in a judicial district. And, if the General Assembly decided that the new judicial district created that year is, for example, centered in Erie, Justice Dougherty would simply be unable to run for reelection at all—unless he had moved to Erie. (And, even then, it is possible that the timing of residence rules and the drawing of election districts would make it impossible for him to do that.)

We could go much further in describing the possible ways a General Assembly could draw and redraw district lines to help one party and hurt another or to help one justice win reelection during the transition period to judicial districts and at each decennial redistricting. But let's leave the head-spinning details behind and just conclude that by allowing the General Assembly to draw and redraw judicial district lines, the Diamond amendment creates enormous potential for the General Assembly to decide who is on the Court. That also means that the Supreme Court justices, who would be aware of the potential for mischief, are likely to feel a great deal of pressure to not challenge the General Assembly.

That is how judicial independence, which is so important to government in America, would be compromised by the Diamond amendment. And it's not a sufficient answer to the threat to judicial independence to say that the governor will have to sign any law drawing judicial

districts. We don't always have divided government in the state. And we have had circumstances in which one party is able to enact laws over a gubernatorial veto. So the governor's role in drawing district lines doesn't necessarily reduce the threat to judicial independence posed by electing appellate court judges in districts.

Extremism on the Courts

The experience of recent weeks points to another systemic problem with judicial districts—the smaller the electorate the more likely that extremists will be elected. This problem has been well known to political scientists, but as partisan division has become greater in America and Pennsylvania, this problem has become more far more obvious to all.

The smaller the electoral district the more homogeneous it is likely to be both politically and demographically. The more homogenous it is, the more dominant one party is likely to be. And the more dominant one party is, the more likely that the extremists in the party, who tend to vote at far higher rates in party primaries, will determine the party nominee and thus who is elected to office. In large, heterogeneous districts, the party balance tends to be closer and both parties have a shot to win a general election. Parties that nominate extremists in large districts tend to lose general elections.

That is why both U.S. and Pennsylvania senators who are elected in larger districts tend to be far less extreme than members of the House. In the vote to reject the presidential electors chosen by Pennsylvania voters, 121 of 199 (or 72%) of Republican House members, including eight of nine from Pennsylvania, stood with former President Trump. The Senate vote was far different—only 7 of 51 (or 13%) of Republicans supported the challenge to the electors chosen by the voters of Pennsylvania, and Senator Toomey was adamant in rejecting it.

We have long seen a similar phenomenon in Pennsylvania state government. In the last few years, on issues ranging from the state budget to a shale tax to raising the minimum wage, Democrats and Republicans in the Senate have been able to reach a compromise agreement only to see the extremists in the House Republican caucus block action in that body.

No matter which party one belongs to, it is not in our interest to see courts—and especially our highest court—become even more partisan than it is today. Far more than in a legislative body, the courts need to aim for the middle of the road, for nonpartisanship, and above all for consistency. The rule of precedent—stare decisis—is critical in interpreting constitutions and statute because a legal system only functions well when the requirements of the law are predictable and reliable.

The Impact on the Constitutional Amendment on Pennsylvania Politics

Finally, the problems created by judicial gerrymandering could have a deleterious effect on our politics even beyond the courts.

Imagine a Republican-controlled legislators actually succeeding in packing most Democrats into a few court districts centered around Pittsburgh, Philly, and their suburbs, Republicans in these regions would find no path to be elected to the appellate courts. That might drive

Republican lawyers in these regions—who are usually prominent political activists and contributors—to change parties, which would, in turn, undermine the Republican Party in these regions.

Those of us who believe that democracy requires two vigorous, competitive parties—and for years have bemoaned the lack of two vigorous parties in Philadelphia—may be concerned about the consequences judicial gerrymandering for the Republican Party in Democratic areas of the state. But what is one more bug in this constitutional amendment for me might actually be a feature for extremists like Diamond who want the Republican Party to move further to the right and are not concerned with the losing more moderate Republicans in Southeast and Southwest Pennsylvania.

Whatever the intentions of its prime sponsor, those of us who want the state to take a step back from partisan division and extremism, and who welcome vigorous party competition in every part of the state, should be wary of the long-term consequences of this amendment.

Conclusion

We've examined and evaluated Representative Diamond's amendment on its own terms here and find it wanting when set against the criteria for selecting judges that are found in American constitutional thought. It creates a process for selecting judges that is unnecessary, that would make it harder to put men and women with the right experience and training on the court, and that would give the General Assembly an undue influence over the judiciary.

Given these flaws, why would anyone support this amendment? The reason, we fear, is that there are other, troubling, motives for putting forward this amendment. After the Supreme Court overturned our congressional districts, Representative Diamond and other Republicans in the General Assembly called for the impeachment of the Democratic members who upheld that ruling.

This is not the first time that the Republicans have complained about the Supreme Court. They decried the Court's demand that legislative districts be redrawn as well. They complained about the Voter ID law being overturned by the courts as well.

In light of that history, it is hard not to conclude that the Diamond amendment is motivated by the very goal we believe will be fulfilled if his proposal is adopted—to limit the independence of the Pennsylvania Courts. And that is one more reason to reject it.

[1] Data on the selection of state judges is from the National Center for State Courts; http://www.judicialselection.us.

[2] Number of Active and Resident Lawyers per Capita; https://www.lawyersofdistinction.com/lawyers-per-capita-by-state/.

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