



MEMORANDUM

TO: Pennsylvania House Judiciary Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: January 12, 2021

RE: OPPOSITION TO HOUSE BILL 38 P.N. 17 (DIAMOND)

Background

[House Bill 38](#) (PN 17) is a proposed amendment to the Pennsylvania Constitution that would create judicial districts for the purpose of electing judges and justices to Pennsylvania's appellate courts. While judges and justices on the Commonwealth, Superior, and Supreme Courts are currently elected at-large across the state, the proposed amendment would allow the legislature to draw geographic districts based on population. The stated reason for this amendment is to create a more geographically diverse judiciary and limit the number of judges and justices from Allegheny and Philadelphia counties.¹ Proposed constitutional amendments must pass with identical language in two consecutive sessions. Having passed last session, if HB 38 passes for a second time this session, it could be placed on the ballot for ratification as early as the May primary. If approved by a simple majority vote of electors, it would become part of the Pennsylvania Constitution.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 38 (PN 17).

Bill Summary

House Bill 38 would:

- Create seven districts for the election of Supreme Court justices, one for each justice on the Court;
- Create judicial districts for the election of Superior Court judges, in a number determined by the legislature;²
- Create judicial districts for the election of Commonwealth Court judges, in a number determined by the legislature;
- Require that all judicial districts provide residents with "approximately equal representation on a court," be "composed of compact and contiguous territory as nearly equal in population as practicable," and divide counties or municipalities only if "absolutely necessary";
- Give the General Assembly the power to:
 - Draw all judicial districts for the Commonwealth, Superior, and Supreme Courts, *without* the advice and consent of the Supreme Court;³ and
 - Determine how the "transition" from statewide courts to judicial districts should proceed, including which individual judges and justices are eligible to seek retention.

¹ See Co-sponsorship Memorandum from Rep. Russ Diamond,

<https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20210&cosponId=32798>

² The co-sponsorship memorandum suggests there would be 15 Superior Court and 9 Commonwealth Court districts, although this is not reflected in the actual proposed amendment.

³ The reference in HB 38 to having certain judicial district boundaries established by the legislature "with the advice and consent of the Supreme Court" would apply only to courts of common pleas and not magisterial district court or appellate court boundaries.

The entire amendment would be put to the voters “as a single ballot question” reading:

Shall sections 2, 3, 4, 11 and 12 of Article V of the Pennsylvania Constitution be amended to require that judges and justices of the Supreme Court, the Superior Court and the Commonwealth Court be elected from judicial districts established by the General Assembly which must be compact, contiguous and nearly equal in population as practicable and to require that all justices, judges and justices of the peace to be residents of their judicial districts for one year preceding election or appointment and during service?

HB 38 poses a direct threat to the independence of the judiciary and the separation of powers

The judicial branch of government is independent in order to insulate its members from punitive or coercive actions by the legislative and executive departments of the government and to protect it from the sway of electoral or partisan politics. If the judiciary is independent, then it can make fair decisions that uphold the rule of law, an essential element of any genuine constitutional democracy.⁴

HB 38 is the legislature’s most recent attempt to exert partisan, legislative control over Pennsylvania’s judiciary. In addition to the majority party’s vocal grievances with the role of the courts in the 2020 election, HB 38 follows other proposed amendments that sought to impeach members of the Pennsylvania Supreme Court for their role in other decisions unpopular with the majority party, including:

- [HR 1044](#) (2020) — A [resolution](#) introduced by Rep. Frank Ryan to impeach Pennsylvania Supreme Court Justice David Wecht for his majority decision in [Wolf v Scarnati](#) that upheld the governor’s use of his executive emergency power to close businesses at the start of the COVID-19 pandemic.
- [HR 766](#), [HR 767](#), [HR 768](#), and [HR 769](#) (2018) were introduced as a series of resolutions to impeach five Pennsylvania Supreme Court justices — Max Baer, David Wecht, Debra Todd, Christine Donohue, and Kevin Dougherty — for their decision in the 2017 case [League of Women Voters v. the Commonwealth of Pennsylvania](#), which invalidated Pennsylvania’s 2011 congressional map as an unconstitutional partisan gerrymander under the state constitution.

HB 38 is specifically crafted to take power away from the more liberal justices by providing the legislature with a mechanism to force most of these justices off the Court in a way that the legislature has failed to do through its impeachment power. It is no small irony that this party holds absolute power over the legislature, despite representing a minority of the state’s voters, due to partisan gerrymandering of their own legislative districts. This is a direct attack on the independence of the judiciary and would represent a fundamental shift in separation of powers in Pennsylvania, posing a grave threat to the ACLU’s mission of protecting individual rights and liberties.

HB 38 threatens the civil liberties of marginalized people and unpopular viewpoints

HB 38 assumes that judges provide “representation on a court” to the people who vote for them. But this faulty assumption reflects a fundamental misunderstanding of how judicial independence works. For states like Pennsylvania, where the appellate judiciary is chosen by election, it is essential that the process by which the judges are selected and continue to hold office is both democratic and affords the judiciary maximum independence of judgment when deciding cases. Judicial independence is critical because the judiciary’s role, unlike the executive and legislative branches that represent constituents’ policy preferences when making decisions, is to impartially interpret and apply the law even — and for the ACLU, especially — when it protects marginalized communities and the politically unpopular. And any attempt, like HB 38, to remake the courts as entities responsive and beholden to the views of their constituents undermines the court’s ability to protect civil rights and civil liberties against the tyranny of the political majority.

⁴ See Alexander Hamilton, *Federalist* No.78, in *The Federalist Papers*, https://avalon.law.yale.edu/18th_century/fed78.asp

HB 38 amounts to an unprecedented judicial gerrymander

HB 38 has been crafted to give the legislature maximum power over the makeup of the courts. It grants an enormous amount of discretionary authority to the legislature that will have a significant impact on the composition of Pennsylvania courts with limitations so vague as to be largely meaningless.

HB 38 would allow the legislature to carve the state into 31 new judicial districts of varying size. By requiring one judge or justice per district with nearly equal population in each district, the bill guarantees that all parts of the state will have “representation” on the appellate courts. Critically, however, the proposed amendment does not guarantee that all voters will have an equal opportunity to elect their preferred jurists. On the contrary, the lack of strict mapping criteria or any protections for racial and language minorities — combined with a total lack of transparency in the mapping process — amounts to an open invitation to legislators to engage in partisan gerrymandering in order to increase the likelihood that candidates of their political party will be elected to the courts.

HB 38 also gives the legislature the power to decide **how** the transition to new districts will work and also **which judges** can stand for retention elections in the new districts. This would permit the legislature to specifically target individual judges and justices in the transition process, removing them from the courts by deciding which can stand for retention elections and at what time. Both this power to create districts and the terms of the transition to statewide districts would give the legislature complete and independent autonomy, dramatically expanding its power at the expense of the judiciary.

Judicial independence checks executive and legislative power; judges represent law, not a geographic area. HB 38 would grant the legislature the power to draw judicial districts — a power that it has repeatedly shown it cannot wield responsibly without enacting partisan gerrymanders that disenfranchise vast swaths of Pennsylvanians. HB 38 would subject appellate courts to undue influence by the General Assembly and would inject partisan advantage into the system. In so doing, HB 38 poses a grave threat to the separation of powers and to the independence of Pennsylvania’s judiciary.

For these reasons, we urge you to oppose House Bill 38.