



DAVID E. SCHWAGER

DATE: January 12, 2021
TO: The House Judiciary Committee
FROM: The Pennsylvania Bar Association
SUBJECT: Pennsylvania Bar Association Opposes House Bill 38, P.N. 17

I write to express the Pennsylvania Bar Association's opposition to House Bill 38, Printers Number 17, sponsored by Representative Russ Diamond.

The Pennsylvania Bar Association opposes this legislation on several grounds. First and foremost, the Pennsylvania Bar Association has a long history of supporting the non-partisan appointment of appellate court justices and judges since 1947. Merit selection would provide for high quality judicial candidates who no longer must engage in campaign fundraising and removes the appearance of bias based on financial contributions. Merit selection also promotes public trust that our appellate courts act impartially and without improper motive when issuing orders and opinions. This type of public trust and confidence promotes the rule of law, which is essential to a healthy democracy. A judiciary which possesses institutional and decisional independence, removed from influences of the political process, is central to the success of a republican form of government.

Furthermore, judges should not have constituencies. They should be devoted to and constrained by the law, as derived from the Constitution and statutes, and on no one or nothing else. Government executives and legislators have constituents. We live in a *representative* democracy, and it is through those officials the laws are properly created. Therefore, those officials should answer to those constituents they *represent*. These officials *represent* the *will* of the people.

Alexander Hamilton famously wrote that judges have "neither FORCE nor WILL, but merely judgment." If this is to be true, and in a proper representative democracy it must be true, then judges must be governed and responsive only to the law.

Elections, which we oppose for appellate judges, have at their very essence, the object of being chosen to *represent* citizens. Candidates for office seek to *represent* a constituency. Constituents, quite properly, place demands on their representatives. Their primary demand is that elected officials do their *will*.

Judges must, if they are to properly carry out their duties to our Nation and the Commonwealth, be responsive to the *law* and not to the momentary demands of a constituency. Their job is to follow and apply the law without taking into account the views of a constituency. 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.

Pennsylvania remains one of a minority of states that continues to elect judges at all levels of the state judiciary. The time has come for this Commonwealth to join the majority of states that provide for an appointment process for appellate judges based upon judicial qualifications with voter input in the form of retention elections. Accordingly, the Pennsylvania Bar Association asks for your support in opposing House Bill 38. Thank you for considering our perspective on this legislation. If you have any questions on this matter, please do not hesitate to contact PBA's Director of Legislative Affairs, Fred Cabell, at 717-525-1579 or fred.cabell@pabar.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "David E. Schwager". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David E. Schwager, President
Pennsylvania Bar Association