



MEMORANDUM

TO: The Pennsylvania House Judiciary Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: March 30, 2022

RE: OPPOSITION TO HB 1910 P.N. 2168 (KEEFER)

Bill summary: [HB 1910](#) (PN 2168) is a proposed amendment to the Pennsylvania Constitution that would amend [Article V, Section 10\(c\)](#) to limit the rule making authority of the Pennsylvania Supreme Court.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 1910.

HB 1910 would undermine the separation of powers between the judiciary and legislature.

The 1968 Constitution created a clear divide between substantive law and procedural law: the legislature decides substantive matters, and the Court, through its rule-making process, makes procedural rules governing how the courts operate and the courts effectuate those substantive matters. This was a key part of the overhaul that, for the first time, made the Supreme Court the administrative head of all courts in Pennsylvania and gave the Commonwealth a unified court system. It reflects an understanding of separation of powers that allows the judiciary to manage court operations without legislative interference.

This change also acknowledged the difference between the knowledge and expertise of each branch. The Pennsylvania Supreme Court has [eight rules committees](#) that consist of people who have direct experience with the procedures they address. For example, the Rules of Criminal Procedure and Rules of Evidence enshrine and codify rights for defendants and victims throughout the criminal process. These evidentiary and procedural rules establish the fundamental rules governing our criminal process protecting everything from bail and speedy trial rights to hearsay and appeals. Appointed members typically serve six year terms and have experience with state criminal practice in Pennsylvania or possess trial court experience. Subjecting procedural rules to a legislative veto would needlessly and dangerously muddle the roles and lanes of each branch—the procedural legal knowledge, experience, and expertise of judges and practicing attorneys and the substantive policy knowledge, experience, and expertise of state legislators.

HB 1910 would introduce procedural chaos and conflict.

If this amendment were to go into effect, it would create immediate chaos because it fails to clarify what should happen in the event there is a conflict between an old, existing statute and a modern court rule. Presumably, the intent of the amendment would be for the statute to trump the court's rule, but that is not what HB 1910 says. Instead, it says that unless the legislature determines otherwise, the court has rule-making authority—which is not the same as saying that legislative enactments automatically control.

HB 1910 would eliminate current constitutional language which directs that "All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions" and inserts "Except as provided by law..." This would have the effect of creating two sets of competing, existing procedures: one set includes the court's current procedural rules and the other includes existing statutes still on the books, which, importantly, were not repealed—only suspended.

For example, here is the [list of provisions in Rule 1101 suspended](#) by court's current Criminal Rules. Under (4), part of the Public Defender Act of 1968 was suspended because the statute originally allowed public defenders to determine whether or not they would take a case. The court's rules now permit judges to appoint counsel in order to ensure that an indigent defendant is represented. Under (5), part of the Wiretapping and Electronic Surveillance Control Act of 1978 was suspended because it only required the state to provide discovery to defense counsel 10 days before trial. The court's rules now permit defense counsel to request discovery much earlier in the proceeding. If HB 1910 is adopted, which of these rules should the court follow—the rules under existing statute or the current Rules of Criminal Procedure? The amendment is silent, and offers no way to resolve conflicts between these differing sets of rules.

Finally, it is worth noting that the process of changing these rules is conducted in a public, accountable, and transparent way. In her [co-sponsorship memo](#), the bill sponsor argues that “[the court’s] rules must be consistent with the will of the People of Pennsylvania acting through their duly elected representatives.” All judges, including the justices who sit on the Supreme Court of Pennsylvania, are duly elected representatives to the judiciary. Moreover, the court’s committees are required to post their recommendations for public comment so that the public has direct input on any new changes before being adopted by the Supreme Court. In fact, the Criminal Procedure committee recently completed its public comment period for its [proposed changes to bail and detainer rules](#).

HB 1910 is a legislative attempt to undermine court rules and the separation of power between the branches. The procedural conflict it invites would not only be disruptive and chaotic, but could also threaten the constitutional protections enshrined in the court's current rules.

For these reasons, we urge you to oppose House Bill 1910.