

**PRESERVING “THE CHARACTER OF MERCY”:  
*COMMONWEALTH v. WILLIAMS* AND THE 300-YEAR HISTORY  
OF THE REPRIEVE POWER IN PENNSYLVANIA**

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In the seventeenth century, the English Government considered Quakers so heretical that it imprisoned, beat, and shamed thousands of Quakers for their views.<sup>2</sup> But persecution was costly and troublesome, so it naturally occurred to the royal court that the Quakers should join their heretical brethren in the American colonies.<sup>3</sup>

Among the Quakers’ eccentric views was a then-novel opposition to the death penalty, which was the punishment for more than 200 crimes in England.<sup>4</sup> In 1681, when King Charles II granted a charter for a new colony to William Penn, a well-connected and well-educated Quaker, the King countered the anti-death-penalty tendencies of Quakerism by limiting the colonists’ power to pardon death sentences in cases of murder and treason.<sup>5</sup> For these most serious crimes, the royal charter delegated only the power to postpone the death sentence for up to a year to give royal officials time to decide whether a pardon was merited.<sup>6</sup> For the many “lesser” but still-capital crimes like horse stealing and highway robbery, the colonial authorities could pardon death sentences at will.<sup>7</sup> The charter delegated the powers:

[T]o remit, release, pardon and abolish, whether before judgement or after, all crimes and offenses whatsoever committed within the said country against the said laws, treason and wilful and malicious murder only excepted; and

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<sup>1</sup> This historical record was collected by the authors in cooperation with attorneys from the Pennsylvania Office of General Counsel, who represented the governor in *Commonwealth v. Williams*. Their contributions to this research were indispensable, and this article is published with their knowledge and consent.

<sup>2</sup> See, e.g., E. DIGBY BALTZELL, *PURITAN BOSTON & QUAKER PHILADELPHIA* 85 (1996).

<sup>3</sup> See *id.* at 114 (describing how William Penn petitioned the King for a grant of land in America as payment for a debt owed to his father, and how he launched his “holy experiment” in Pennsylvania).

<sup>4</sup> See STEPHEN WADE, *BRITAIN’S MOST NOTORIOUS HANGMEN* 9, 139 (2009) (noting how fifty crimes in 1688, nearly 200 by 1776, and 220 by the end of the eighteenth century were punishable by death).

<sup>5</sup> See NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *CLEMENCY IN PENNSYLVANIA* I.24 (1973).

<sup>6</sup> See *id.* at I.24-25.

<sup>7</sup> See *id.* at I.24, I.27.

in those cases to grant reprieves until our pleasure may be known therein . . . .<sup>8</sup>

The executive power “to Grant Reprieves” thus entered Pennsylvania law at the beginning.<sup>9</sup>

Fast forward to 2015. Philadelphia District Attorney Seth Williams was determined to execute condemned inmate Terrance Williams, who was sentenced to death for his role in a 1984 Philadelphia murder.<sup>10</sup> The District Attorney’s effort was aided when Pennsylvania Governor Tom Corbett, in his last week in office, signed a warrant for Mr. Williams to be executed on March 4, 2015.<sup>11</sup>

However, upon taking office on January 20, 2015, newly elected Pennsylvania Governor Tom Wolf postponed any executions until he received an overdue legislative report on problems with Pennsylvania’s death

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<sup>8</sup> NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 5, at I.24-25.

<sup>9</sup> As discussed *infra*, when Pennsylvania joined the American Revolution in 1776, its new constitution took all the clemency powers unto itself, granting most of them to the “Supreme Executive Council.” See *infra* Part I.C. The 1776 Constitution continued to contemplate oversight in murder and treason cases by providing that, in those cases, the Supreme Executive Council was empowered “to grant reprieves, but not to pardon, until the end of the next sessions of assembly . . . .” PA. CONST. of 1776, ch. II, § 20. This provision was subsequently interpreted as requiring only the opportunity for legislative input before pardons were issued in such cases, not as providing for any legislative veto or control over pardons or reprieves. See *infra* Part I.D.

When Pennsylvania drafted a new Constitution in 1790 after the Articles of Confederation were abolished, the Reprieves Clause did away with any distinctions between murder, treason, and lesser crimes, and likewise eliminated any role for the legislative branch. See *infra id.* Article II, Section 9 delegated to the governor the unqualified “power to . . . grant reprieves . . . , except in cases of impeachment.” PA. CONST. of 1790, art. II, § IX. The 1790 Constitution did not otherwise mention reprieves. Since 1790, the Reprieves Clause has not been altered. PA. CONST., art. IV, § 9.

<sup>10</sup> Terrance Williams’s case had been, and continues to be, a highly publicized and controversial one. See generally Katie Halper, *This Man Is on Death Row for Killing His Alleged Rapist*, VICE (Feb. 29, 2016, 12:00 AM), [https://www.vice.com/en\\_us/article/this-man-is-on-death-row-for-killing-his-alleged-rapist](https://www.vice.com/en_us/article/this-man-is-on-death-row-for-killing-his-alleged-rapist). Most recently, the United States Supreme Court vacated a decision of the Pennsylvania Supreme Court because the state court’s chief justice, in his earlier position as District Attorney of Philadelphia, participated in Mr. Williams’s prosecution, then later presided over his post-conviction appeal. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016). The chief justice’s dual role as prosecutor—who approved the decision to seek the death penalty—and judge violated due process and required the Pennsylvania Supreme Court to reconsider the appeal *de novo*, without his participation. See *id.* As of the date of this article’s publication, the case is again before the Pennsylvania Supreme Court on the Commonwealth’s appeal from a lower court ruling that the Philadelphia District Attorney’s Office had for decades suppressed evidence indicating that Mr. Williams’s murder victim had sexually molested boys, including Mr. Williams himself. See *id.*

<sup>11</sup> Exec. Order No. 2015-01, Death Warrant, Governor’s Off. of the Commw. of Pa. (Jan. 13, 2015).

penalty system.<sup>12</sup> Drawing on his reprieve power, which remained as of 2015 as it had been written in the 1790 Constitution as an unqualified gubernatorial power to “grant reprieves,”<sup>13</sup> Governor Wolf issued a reprieve to Mr. Williams, postponing his execution “until I have received and reviewed the forthcoming report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment, and any recommendations contained therein are satisfactorily addressed.”<sup>14</sup>

District Attorney Williams promptly sued Terrance Williams, and eventually sued Governor Wolf directly in the Pennsylvania Supreme Court, where he asked the court to invoke its wide-ranging “King’s Bench” jurisdiction to strike down the governor’s reprieve as unconstitutional.<sup>15</sup> The District Attorney argued that the reprieve was overbroad because it could last for an indefinite time period and was not tied to the particulars of Terrance Williams’s case.<sup>16</sup>

For the first time in its nearly 300-year history, the Pennsylvania Supreme Court was being asked to define the contours of a reprieve, a seldom-discussed and poorly understood form of clemency.<sup>17</sup> This was more than an academic exercise; for Terrance Williams, his life hung in the balance. In completing its task, the court looked between the bookends of the 1681 Penn Charter and the District Attorney’s lawsuit to a colorful but previously uncollected history of reprieves that had, at least temporarily, saved the lives of hundreds of condemned Pennsylvanians.<sup>18</sup> In deciding whether to accept or reject the District Attorney’s grave challenge to “promptly negate” the reprieve of Terrance Williams, the court was presented with joint appendices of documents, recently gathered by the parties’ counsel, setting forth that centuries-long but never-before-chronicled history.<sup>19</sup>

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<sup>12</sup> Joseph A. Slobodzian & Angela Coulombis, *Wolf Halts Death Penalty in Pa.*, PHILLY.COM (Feb. 14, 2015, 1:08 AM), [http://www.philly.com/philly/news/politics/20150214\\_Wolf\\_halts\\_death\\_penalty\\_in\\_Pa\\_.html](http://www.philly.com/philly/news/politics/20150214_Wolf_halts_death_penalty_in_Pa_.html).

<sup>13</sup> PA. CONST. of 1790, art. II, § IX.

<sup>14</sup> Exec. Order No. 2015-02, Reprieve, Governor’s Off. of the Commw. of Pa. (Feb. 13, 2015) (Reproduced at page 230 in the joint appendices [hereinafter JA], which were identified as “Respondents’ Appendix” (filed June 17, 2015) and “Supplement to Respondents’ Appendix” (filed August 7, 2015) in *Commonwealth v. Williams*, 129 A.3d 1199 (Pa. 2015)).

<sup>15</sup> *Williams*, 129 A.3d at 1202-03.

<sup>16</sup> *Id.* at 1207 (noting that the District Attorney’s “primary argument is that the Governor’s reprieve power pursuant to Article IV, Section 9 does not encompass the power to grant Williams a reprieve for an unlimited duration and absent a particular purpose relating to the individual circumstances of the case”).

<sup>17</sup> *See id.* at 1217.

<sup>18</sup> *See id.* at 1215-17.

<sup>19</sup> Because reprieves in Pennsylvania have always been issued by the executive to the executive branch sheriffs and wardens who conducted executions, reprieves rarely became part of official court records. The joint appendices submitted to the Pennsylvania Supreme Court were therefore gathered from a variety of historical collections at the Pennsylvania State

Part I summarizes the historical record presented to the court.

Part II briefly recounts why, after reviewing the historical record, the Pennsylvania Supreme Court rejected the District Attorney's claim that the reprieve was invalid or overbroad.

Part III offers a brief conclusion.

## I. THE HISTORY OF REPRIEVES IN PENNSYLVANIA

### A. Reprieves at Common Law

At common law, a reprieve "signifie[d] the withdrawing of [a] sentence for an interval of time, and operate[d] in delay of execution."<sup>20</sup> In England, reprieves could be issued by judges or the King.<sup>21</sup> Judicial reprieves—the forerunners to today's judicial stays of execution—could be issued in three circumstances: (1) "*ex arbitrio judicis*," in the judge's discretion, as where the indictment or verdict was flawed; (2) "*ex necessitate legis*," due to legal necessity, as where the condemned was pregnant; and (3) when the condemned was "*non compos*," i.e., insane.<sup>22</sup> A royal reprieve had no such constraints and was "*ex mandato regis*," meaning "from the mere pleasure of the Crown . . . ."<sup>23</sup>

### B. Reprieves in the Colonial Era, 1681-1776

As described above, on March 4, 1681, King Charles II issued a charter granting the territory of Pennsylvania to William Penn delegating most governmental powers, including the royal clemency power, to him and his

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Archives, and from archives published by the Pennsylvania legislature between 1838 and 1935. The joint appendices reproduced hundreds of reprieves and related papers.

<sup>20</sup> 2 JOHN BOUVIER, A LAW DICTIONARY 358 (1839); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 757 (1819); see also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 387 (1772) ("A reprieve, from *repandre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended."); 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 412 (1736) (noting that reprieves are "stays of judgment or execution"); 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (unpaginated) (1828) (defining a reprieve as "[t]he temporary suspension of the execution of sentence of death on a criminal").

<sup>21</sup> See BLACKSTONE, *supra* note 20, at 387-89.

<sup>22</sup> See *id.* at 387-88.

<sup>23</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 394 (1857); see also BLACKSTONE, *supra* note 20, at 392-93 (recounting that after the Jacobite rebellion of 1715, the King granted reprieves to rebel leaders); WILLIAM W. SMITHERS, TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 78 (1909) (explaining that "the reprieve *ex mandato regis* . . . [was] bound by no technical rules and [included] reprieve[s] issued indefinitely or on condition").

assigns.<sup>24</sup> Among the clemency powers was the issuance of reprieves that would last until the Crown’s wishes were known in murder and treason cases, which initially were the only capital crimes in provincial Pennsylvania.<sup>25</sup>

Reprieves were an element of provincial law throughout the colonies, but not every royal charter delegated the power under the same terms. In the Province of Eastern New Jersey during the late seventeenth century, a reprieve could be issued only for one month.<sup>26</sup> In Massachusetts, a reprieve could initially last “until the next quarter or General Court,” but that provision was later dropped and replaced with one similar to that of the Penn Charter.<sup>27</sup> Provincial authorities in other colonies, including North Carolina, Georgia, and Maryland, were granted unrestricted clemency powers.<sup>28</sup>

Historical records of the Provincial Council of Pennsylvania memorialize a number of reprieves.<sup>29</sup> In 1718, “one Martha Underdown, a single Woman, having . . . been Condemned for murdering her Bastard Child,” was considered “a fit object of mercy,” and it was thus recommended that the governor “[r]eprieve her for such time as he shall think fit.”<sup>30</sup> The governor thereafter issued a reprieve “for the space of Twelve months,” provided that the reprieve would terminate if the council received contrary word from “his Majesties Pleasure Relating thereunto . . . .”<sup>31</sup>

As in the case of Ms. Underdown, provincial authorities seldom spelled out the reasoning for a reprieve, beyond stating that the condemned was “a fit object of mercy,” or the like.<sup>32</sup> A 1771 reprieve was issued simply because the condemned man was “an Object of Compassion,”<sup>33</sup> and a 1772 reprieve was similarly granted because the condemned men were “Objects of Pity and Compassion . . . .”<sup>34</sup>

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<sup>24</sup> The term “clemency” refers to the bestowal of mercy on criminal defendants and includes pardons, commutations, reprieves, and remissions of fines. *Herrera v. Collins*, 506 U.S. 390, 411 n.12 (1993).

<sup>25</sup> See NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 5, at I.24.

<sup>26</sup> See William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 499 (1977).

<sup>27</sup> See *id.* at 497-98.

<sup>28</sup> See *id.* at 498-500.

<sup>29</sup> The powers granted in the Penn Charter were subsequently delegated to and exercised by Pennsylvania’s governors, lieutenant governors, and Provincial Council. See CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* 8 (1922) (“[T]he granting of clemency was placed in the hands of the Executive Council of the province.”).

<sup>30</sup> 3 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 45 (1852).

<sup>31</sup> *Id.* The authors have not located any cases in the records of the Provincial Council where a King or Queen intervened after the provincial government issued a reprieve.

<sup>32</sup> *Id.*

<sup>33</sup> 9 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 779 (1852).

<sup>34</sup> 10 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 44 (1852).

Underlying many reprieves and pardons, however, was the provincial government's perception that criminal laws were inappropriately harsh.<sup>35</sup> As a result of discord with royal authorities in Britain, who retained veto authority over Pennsylvania's provincial laws, the provincial government in 1718 agreed to redefine sixteen lesser offenses, including burglary, robbery, and horse stealing, as capital crimes.<sup>36</sup> In the wake of the new laws, the provincial government granted reprieves and pardons to avoid what were considered inappropriately harsh sentences.<sup>37</sup>

For instance, in 1739, two women condemned for burglary, "one of [whom] pleaded guilty and appeared very penitent, and the other [of whom was] very aged," were granted a reprieve.<sup>38</sup> The reprieve was to remain in effect for an indefinite time period and "upon Condition that they would transport themselves out of the Province and not return to it again . . . ."<sup>39</sup>

In 1748, the provincial council raised the question of whether "indefinite" reprieves were in fact authorized by law. The council requested an opinion from the attorney general, and the council minutes reported: "[H]aving consulted the Attorney General on the words of the Royal Charter relating to Reprieves . . . it was his opinion the Council might Reprieve for a definite or indefinite time, as they should think proper . . . ."<sup>40</sup> Based on the attorney general's advice, the council issued a reprieve for a condemned prisoner, directing the sheriff of Philadelphia to "abstain [from conducting the execution] until our Pleasure be further known."<sup>41</sup>

The council issued other reprieves for indefinite time periods, both before and after receiving the attorney general's opinion. Reprieves issued in 1747 and 1757 directed the Philadelphia sheriff to "abstain" from executions without setting a time limit.<sup>42</sup> Near the end of a five-month reprieve in 1769, the governor issued an additional, indefinite reprieve to persist "during Pleasure."<sup>43</sup> In 1772, the governor likewise granted a reprieve to three

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<sup>35</sup> See NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 5, at I.26-27.

<sup>36</sup> See *id.* at I.27.

<sup>37</sup> *Id.* at I.26-27 ("Like most laws not in concert with the sentiments of the people whose actions they are intended to regulate, the sanguinary provisions of the Compromise Act of 1718 were irregularly enforced and frequently mitigated by other means, especially executive clemency.").

<sup>38</sup> 4 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 329-30 (1851).

<sup>39</sup> *Id.* at 330; see also 9 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 626 (1852) (describing how the governor granted an indefinite reprieve in a burglary case).

<sup>40</sup> 5 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 293 (1851).

<sup>41</sup> *Id.* at 294.

<sup>42</sup> *Id.* at 163-64; 2 PAPERS OF THE GOVERNOR, 1747-1759, at 777-78 (George Edward Reed ed., 1900).

<sup>43</sup> 9 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 626 (1852).

condemned men “during his Pleasure.”<sup>44</sup> On other occasions, provincial authorities granted reprieves for specific time periods.<sup>45</sup>

As in the 1739 case of the two women who received a reprieve, the council and governor sometimes issued reprieves that would remain effective in perpetuity so long as the condemned citizens left and did not return to Pennsylvania.<sup>46</sup> In 1771, the council issued another such reprieve to a condemned robber “on Condition that he remove from this Province, and never more return into it.”<sup>47</sup>

When the governor and council were issuing these reprieves in the 1760s and 1770s, council members included historic figures who made significant contributions to the development of Pennsylvania’s legal system both before and after the Revolution. For example, Benjamin Chew, the most prominent lawyer in Pennsylvania in the mid-eighteenth century, was one of the councilmembers at the time of the 1769, 1771, and 1772 indefinite reprieves.<sup>48</sup> Chew served as Pennsylvania Attorney General from 1755 to 1769, Chief Justice of the Pennsylvania Supreme Court from 1774 to 1777, and President of the High Court of Errors and Appeals from 1791 to 1808.<sup>49</sup> Edward Shippen IV was a councilmember when the 1771 and 1772 reprieves were issued.<sup>50</sup> He was Prothonotary of the Pennsylvania Supreme Court from 1762 to 1777, a justice on the Pennsylvania Supreme Court from 1791 to 1799, and Chief Justice of the Pennsylvania Supreme Court from 1799 to 1804.<sup>51</sup>

### *C. Reprieves under the Supreme Executive Council, 1776-1790*

The Pennsylvania Constitution of 1776 vested executive power in the Supreme Executive Council (SEC) and gave the SEC clemency powers, including authority in cases of treason and murder “to grant reprieves but not

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<sup>44</sup> 10 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 44 (1852); *see also* Commonwealth v. Hill, 39 A. 1055, 1056 (Pa. 1898) (recounting a colonial-era case where reprieve was issued “until further order”).

<sup>45</sup> *See, e.g.*, 2 PAPERS OF THE GOVERNOR, 1747-1759, at 176-77 (George Edward Reed ed., 1900) (reprieve issued for one week); 3 PAPERS OF THE GOVERNOR, 1759-1785, at 344-45 (George Edward Reed ed., 1900) (reprieve issued for one year).

<sup>46</sup> *See* 4 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 329-30 (1851).

<sup>47</sup> 9 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 778-79 (1852).

<sup>48</sup> *Id.* at 626, 778-79 (1852); 10 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 43 (1852).

<sup>49</sup> *See generally* BURTON ALVA KONKLE, BENJAMIN CHEW, 1722-1810: HEAD OF THE PENNSYLVANIA JUDICIARY SYSTEM UNDER COLONY AND COMMONWEALTH 98-285 (1932).

<sup>50</sup> 9 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 778-79 (1852); 10 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 43 (1852).

<sup>51</sup> *See* G.S. ROWE, EMBATTLED BENCH: THE PENNSYLVANIA SUPREME COURT AND THE FORGING OF A DEMOCRATIC SOCIETY, 1684-1809 202, 226-27 (1994).

to pardon, until the end of the next sessions of assembly . . . .”<sup>52</sup> Under the new constitution, the SEC continued to issue reprieves for varied time periods and varied reasons. In 1779, the SEC ordered that “a reprieve be issued for George Harding until further order, and that the Sheriff be directed to permit him to go out of Prison until further orders.”<sup>53</sup> The council granted some reprieves that would last “until the end of the next Sessions of the General Assembly.”<sup>54</sup> The council granted an indefinite reprieve for another condemned man but ordered the sheriff “not to make [the reprieve] known to him until he be taken under the gallows.”<sup>55</sup> Other indefinite reprieves were granted “until further orders” from the SEC.<sup>56</sup> The council granted still another reprieve because the condemned man’s mother had “taken ill of a fever, and it is apprehended that she cannot survive the execution of her son should it take place to-morrow . . . .”<sup>57</sup>

As the provincial council had done, the SEC sometimes issued multiple reprieves in the same case. In February 1783, the SEC granted a thirty-day reprieve to convicted burglar John Dorset.<sup>58</sup> Then, in March 1783:

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<sup>52</sup> PA. CONST. of 1776, ch. 2, § 20. The 1776 Constitution also created a Council of Censors, which was responsible for determining the constitutionality of government actions. PA. CONST. of 1776, ch. 2, § 47 (1776). In 1784, the Council adopted a compliance report about clemency. THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790 83, 105 (1825). The Council interpreted the constitution as *not* giving the legislature any authority to “intermeddle” in granting clemency. *Id.* at 105. Any such legislative actions were “unauthorised” and “infringements of the constitution.” *Id.* Rather, the clemency clause was intended only to give the SEC an “opportunity” to consult with legislators about a case. *Id.* The SEC retained complete executive authority over clemency, and the constitution “exclude[d] all interference therein . . . .” *Id.* The Council explained that it was “one of the great advantages of our frame of government, that there is in it a body so purely executive, that mercy can be extended in proper cases, without that solecism which must arise where those who make the laws, or those who judge, have the power of remission.” *Id.*

<sup>53</sup> 12 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 149 (1853).

<sup>54</sup> *E.g.*, 15 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 136 (1853); Reprieve, Supreme Exec. Council of the Commw. of Pa. (May 2, 1787) (JA at 128); Reprieve, Supreme Exec. Council of the Commw. of Pa. (Dec. 22, 1786) (JA at 128); Reprieve, Supreme Exec. Council of the Commw. of Pa. (May 23, 1786) (JA at 127).

<sup>55</sup> 15 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 31 (1853).

<sup>56</sup> *Id.* at 229-30; Reprieve, Supreme Exec. Council of the Commw. of Pa. (June 22, 1787) (JA at 132); Reprieve, Supreme Exec. Council of the Commw. of Pa. (Apr. 23 1787) (JA at 129-30).

<sup>57</sup> 16 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 25 (1853).

<sup>58</sup> 13 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 506-07 (1853).

The Council taking into consideration that the reprieve lately granted to John Dorset, now confined in the old gaol, will shortly expire,  
*Ordered*, That the said John Dorset be reprieved for the further term of sixty days from the expiration of the first mentioned reprieve.<sup>59</sup>

The council did not indicate its reason for issuing either reprieve, except that it issued the second one because the first one was expiring.<sup>60</sup>

Unsurprisingly, the SEC was composed of men who shaped the Commonwealth’s legal system during and after the Revolution. Benjamin Franklin was President of the SEC from 1785 to 1788, during which several of the above reprieves were issued.<sup>61</sup> Thomas Mifflin succeeded Franklin as President of the SEC, then served as president of the state constitutional convention of 1789-90, and the first Governor of the Commonwealth under the 1790 Constitution.<sup>62</sup>

#### *D. Reprieves under the Pennsylvania Constitution of 1790*

In the wake of the Revolution, decentralized government proved inadequate in Pennsylvania and the nation as a whole. The federal constitutional convention in Philadelphia in 1787 thus sought to replace the confederacy with a union that would establish a centralized government with a strong executive.<sup>63</sup> The Federal Constitution as initially proposed gave the President clemency authority, including the unilateral power to grant reprieves and pardons.<sup>64</sup> During the debates, an amendment was introduced to limit the duration of presidential reprieves “until the ensuing session of the Senate . . . .”<sup>65</sup> The amendment was rejected by a vote of eight to one, with the Pennsylvania delegation voting in the majority.<sup>66</sup> As ultimately adopted, the Federal Constitution gave the President the “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”<sup>67</sup>

<sup>59</sup> 13 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 528 (1853).

<sup>60</sup> *Id.*

<sup>61</sup> 15 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 229-30 (1853).

<sup>62</sup> FRANCIS S. DRAKE, DICTIONARY OF AMERICAN BIOGRAPHY 619 (1879).

<sup>63</sup> NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 5, at 1.28-29.

<sup>64</sup> 5 JAMES MADISON, THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787 380 (1845).

<sup>65</sup> *Id.* at 480 (internal quotation marks omitted).

<sup>66</sup> *Id.* The Pennsylvania delegation included Franklin and Mifflin. *See id.*

<sup>67</sup> U.S. CONST., art. II, § 2 c1. 1.

Two years later, Pennsylvania convened its own constitutional convention in Philadelphia.<sup>68</sup> As with the federal convention, Pennsylvania sought to establish a stronger executive, as the SEC had proved unworkable.<sup>69</sup> Pennsylvania's convention thus decided to return executive authority, including clemency powers, to an individual governor.<sup>70</sup> In language mirroring that of the Federal Constitution, the new state constitution gave the governor the "power to . . . grant reprieves and pardons, except in cases of impeachment."<sup>71</sup>

Under the new constitution, governors continued granting reprieves similar to those granted in colonial and revolutionary times.<sup>72</sup> On December 23, 1797, after receiving recommendations from his jailers and "a great number of Citizens," Governor Mifflin issued a reprieve for convicted murderer Owen O'Hara, delaying his execution for one month.<sup>73</sup> The next month, Governor Mifflin granted O'Hara another reprieve for an additional six months in light of unidentified "circumstances appearing to justify the granting to him a further reprieve."<sup>74</sup> In July 1798, Governor Mifflin granted O'Hara, without explanation, "a further Reprieve" for six more months.<sup>75</sup> In January 1799, Governor Mifflin noted that "the last reprieve, which was granted to him is nearly expired," and thus "granted a further reprieve to him until the last Saturday in the year [1800]"—nearly two years later and a year after the end of Mifflin's third and final term.<sup>76</sup>

A comparable sequence occurred in the case of John Zimmerman, whose execution was reprieved in 1824 because of "divers reasons having occurred rendering it inexpedient to execute the sentence . . . ."<sup>77</sup> Governor Shulze then issued nine additional reprieves in October, November, and December 1824; in March, May, and November 1825; in May and October 1826; and in April 1827, the final reprieve extending until June 1828.<sup>78</sup> These reprieves

<sup>68</sup> NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 5, at 1.29.

<sup>69</sup> *Id.*

<sup>70</sup> See PA. CONST. of 1790, art. II, §§ I, IX.

<sup>71</sup> PA. CONST. of 1790, art. II, § IX.

<sup>72</sup> Although not a reprieve, the first noteworthy exercise of clemency under the 1790 Constitution came in 1795 during the wake of the Whiskey Rebellion. President Washington issued a pardon, in exchange for oaths of loyalty, to those who had broken federal laws by participating in the uprising. 2 PENNSYLVANIA ARCHIVES, SERIES No. 9, at 1006 (Gertrude MacKinney ed., 1934). Governor Mifflin wished "to pursue a like policy as well on account of its humanity as for the sake of preserving uniformity in the proceedings of the General and State Governments . . . ." *Id.* On August 26, 1795, Governor Mifflin accordingly granted, in exchange for oaths of allegiance, a pardon "to all persons" for any related state-law offenses committed in western Pennsylvania between July 14 and August 22, 1794. *Id.* at 1006-07.

<sup>73</sup> *Id.* at 1330-31.

<sup>74</sup> *Id.* at 1336-37.

<sup>75</sup> *Id.* at 1421.

<sup>76</sup> *Id.* at 1478.

<sup>77</sup> 8 PENNSYLVANIA ARCHIVES, SERIES No. 9, at 6157 (Gertrude MacKinney ed., 1934).

<sup>78</sup> *Id.* at 6165, 6173, 6200, 6239, 6273-74, 6366-67; 9 PENNSYLVANIA ARCHIVES, SERIES No. 9, at 6439, 6504, 6603-04 (Gertrude MacKinney ed., 1934).

were issued either without explanation or for the same unidentified “reasons which induced” the initial reprieve.<sup>79</sup>

Although the ten reprieves in the Zimmerman case were granted until specific dates, some nineteenth-century reprieves were open-ended, just as they had been in colonial and revolutionary times.<sup>80</sup> Thus, in October 1829, Governor Shulze reprieved a condemned man “until it shall be otherwise ordered by the Governor . . . .”<sup>81</sup>

### 1. The Constitutional Convention of 1837 and Its Aftermath

By 1837, the governor’s pardon powers had become a matter of controversy. It was widely believed that governors issued pardons to the well-connected for purely political reasons.<sup>82</sup> The constitutional convention recorded that there was “no part of the patronage of the Executive which was so much complained of as the exercise of the pardoning power.”<sup>83</sup> Delegates thus proposed various amendments to limit the governor’s clemency powers.

Delegate William Hiester proposed an amendment requiring the governor to “assign his reasons for all reprieves and pardons granted, and for the remission of all fines and forfeitures annually to the Legislature.”<sup>84</sup> Hiester believed that requiring the executive to report his reasons would provide public accountability and a “sufficient check” on the governor granting clemency “unless there were good and sufficient reasons for doing so.”<sup>85</sup>

An extensive debate ensued. Hiester’s amendment garnered support from some delegates who agreed that an accounting of reasons for reprieves and pardons would check what had previously been an unrestrained power.<sup>86</sup> Other delegates opposed the amendment, reasoning that clemency should remain in the hands of the executive without any interference, and stating: “Let it preserve the character of mercy—if extended, unmerited mercy. The moment you fix restraints, there is an end of it.”<sup>87</sup> Opponents were

<sup>79</sup> See 8 PENNSYLVANIA ARCHIVES, SERIES No. 9, at 6165, 6173, 6239 (Gertrude MacKinney ed., 1934).

<sup>80</sup> See, e.g., 9 PENNSYLVANIA ARCHIVES, SERIES No. 9, at 7048 (Gertrude MacKinney ed., 1934).

<sup>81</sup> *Id.*

<sup>82</sup> See NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 5, at I.36.

<sup>83</sup> 2 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, TO PROPOSE AMENDMENTS TO THE CONSTITUTION 420 (1837) [hereinafter PROCEEDINGS AND DEBATES].

<sup>84</sup> *Id.* at 400.

<sup>85</sup> PROCEEDINGS AND DEBATES, *supra* note 83, at 400-01. A second proposal would have precluded the governor from pardoning “offences punishable by imprisonment” except “with the advice and consent of the Senate.” *Id.* at 420. A third proposed amendment would have given the courts a formal role in the pardon process. *Id.* at 433. These proposals were rejected. *Id.* at 434, 438.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 421.

particularly skeptical that an accounting of a governor's reasons for clemency would even be feasible:

What is required by the amendment? That the Governor shall give his reasons. How long would it take him to throw out all his reasons? How many nameless circumstances may have operated upon him, which it would be difficult to place on paper? . . . Discretion must be vested somewhere. We must suppose the Governor to be a man of honor, that he may be trusted.<sup>88</sup>

Another opponent observed that the true check on the clemency powers lay in the democratic process, stating that if the public "were to be the judges of the conduct of the Governor, and, if they continued to elect him to the office, with a view to his competency for it, as long as the Constitution remained, so long would there be a sufficient check upon the exercise of this power."<sup>89</sup> After further debate, the convention rejected the Hiester amendment by a vote of sixty-seven to fifty-one.<sup>90</sup> The governor's clemency powers remained undisturbed, without any requirement that he state his reasons for granting a reprieve.<sup>91</sup>

The governor's reprieve power also remained unchanged in practice. Governors continued to issue reprieves for a variety of reasons. Governor Porter issued a reprieve on December 24, 1841, because "an effort is about to be made at the ensuing Session of the Legislature to abolish punishment by death," and various citizens were "earnestly requesting me to grant a respite to the said Thomas H. Shuster until the action of the Legislature shall be ascertained."<sup>92</sup> Governor Porter thus granted Shuster a five-month reprieve.<sup>93</sup>

On November 5, 1844, Governor Porter issued a two-month reprieve in another case because, according to various citizens, the condemned inmate was "by no means prepared to meet his maker."<sup>94</sup> The Governor postponed the execution "in the hope that, if more time be allowed, the teaching and prayers of his pious friends may better prepare him to meet his awful doom . . . ."<sup>95</sup>

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<sup>88</sup> PROCEEDINGS AND DEBATES, *supra* note 83, at 421-22.

<sup>89</sup> *Id.* at 433.

<sup>90</sup> *Id.* at 440.

<sup>91</sup> See PA. CONST. of 1838, art. II, § IX.

<sup>92</sup> Exec. Order No. 1841-12, Reprieve, Governor's Off. of the Commw. of Pa. (Dec. 24, 1841) (JA at 133-36).

<sup>93</sup> *Id.*

<sup>94</sup> Exec. Order No. 1844-11, Reprieve, Governor's Off. of the Commw. of Pa. (Nov. 5, 1844) (JA at 150-52).

<sup>95</sup> *Id.*

On April 10, 1848, Governor Shunk issued a six-month reprieve because "the jail of [Bradford] County is in an unfinished state, there being no yard inclosed by Walls, and consequently the sentence of the [prisoner] cannot be carried into execution according to law."<sup>96</sup> In September, the jail was "still in an unfinished state," and Governor Shunk granted another reprieve.<sup>97</sup> Other reprieves were issued because of concerns about the condemned prisoner's guilt;<sup>98</sup> because it was "believed that the arrest and trial [of a co-defendant] . . . might cast additional light on the case of [the condemned]";<sup>99</sup> or simply because "in [the Governor's] opinion, [it was] manifestly just and proper" to issue a reprieve.<sup>100</sup>

As in earlier times, governors sometimes issued reprieves of a specific and definite duration.<sup>101</sup> Governors also continued granting indefinite reprieves, using varied terminology to do so. Governor Porter issued a reprieve "until further direction be given."<sup>102</sup> Governor Bigler issued some reprieves "for the present."<sup>103</sup> Governor Pollock issued a reprieve "until such future period as may be fixed."<sup>104</sup> Governor Packer likewise granted a reprieve "until such future period as shall be fixed by me or other lawful authority."<sup>105</sup> Governor Curtin issued one reprieve "until such further period

<sup>96</sup> Exec. Order No. 1848-4, Reprieve, Governor's Off. of the Commw. of Pa. (Apr. 10, 1848) (JA at 155-56).

<sup>97</sup> Exec. Order No. 1848-9, Reprieve, Governor's Off. of the Commw. of Pa. (Sept. 1, 1848) (JA at 157-59).

<sup>98</sup> Exec. Order No. 1853-7, Reprieve, Governor's Off. of the Commw. of Pa. (July 7, 1853) (JA at 162-65).

<sup>99</sup> Exec. Order No. 1852-11, Reprieve, Governor's Off. of the Commw. of Pa. (Nov. 5, 1852) (JA at 160-61).

<sup>100</sup> Exec. Order No. 1861-6, Reprieve, Governor's Off. of the Commw. of Pa. (June 6, 1861) (JA at 178-81); *see also* Exec. Order No. 1865-8, Reprieve, Governor's Off. of the Commw. of Pa. (Aug. 10, 1865) (JA at 185) (Governor Curtin issuing reprieve because he was "satisfied . . . of the propriety" of doing so).

<sup>101</sup> *E.g.*, Exec. Order No. 1865-8, Reprieve, Governor's Off. of the Commw. of Pa. (Aug. 10, 1865) (JA at 185) (six-week reprieve); Exec. Order No. 1852-11, Reprieve, Governor's Off. of the Commw. of Pa. (Nov. 5, 1852) (JA at 160-61) (one-month reprieve); Exec. Order No. 1848-4, Reprieve, Governor's Off. of the Commw. of Pa. (Apr. 10, 1848) (JA at 155-56) (six-month reprieve).

<sup>102</sup> Exec. Order No. 1843-4, Reprieve, Governor's Off. of the Commw. of Pa. (Apr. 14, 1843) (JA at 142-49).

<sup>103</sup> Exec. Order No. 1854-7, Reprieve, Governor's Off. of the Commw. of Pa. (Jul. 9, 1854) (JA at 168-69); Exec. Order No. 1853-8, Reprieve, Governor's Off. of the Commw. of Pa. (Aug. 22, 1853) (JA at 166-67); Exec. Order No. 1853-7, Reprieve, Governor's Off. of the Commw. of Pa. (Jul. 30, 1853) (JA at 162-65).

<sup>104</sup> Exec. Order No. 1857-11, Reprieve, Governor's Off. of the Commw. of Pa. (Nov. 19, 1857) (JA at 170-72).

<sup>105</sup> Exec. Order No. 1858-9, Reprieve, Governor's Off. of the Commw. of Pa. (Sep. 29, 1858) (JA at 175-76).

as shall be fixed,"<sup>106</sup> and other reprieves "until such time as may be designated under further orders."<sup>107</sup>

## 2. The Constitutional Convention of 1872-73 and Its Aftermath

Continued dissatisfaction with pardons led to calls for reform during the constitutional convention of 1872-1873.<sup>108</sup> Early in the convention, delegates proposed a number of amendments to the clemency powers, some of which would have curtailed the governor's reprieve power.<sup>109</sup> These proposals were later dropped.<sup>110</sup> An amendment was nonetheless introduced that would have authorized the governor to issue reprieves, pardons, and commutations with only a recommendation from a committee of executive branch officials.<sup>111</sup> The provision would have required the committee to state its reasons for recommending clemency, though the governor was still not required to state his reasons.<sup>112</sup>

As in 1837, some delegates opposed any incursion into the governor's clemency powers, while others favored more severe restrictions. For example, one delegate proposed that the Chief Justice of the Pennsylvania Supreme Court have a seat on the committee.<sup>113</sup> In response, former Governor Curtin criticized those who were seeking to make clemency "inaccessible, except through difficult and tortuous ways."<sup>114</sup> He opposed court involvement because the pardoning power "is not a judicial proceeding. It is a subject which appeals solely to the conscience of the Executive, and its exercise does not require a judicial inquiry and decision."<sup>115</sup> The proposal was withdrawn.<sup>116</sup>

<sup>106</sup> Exec. Order No. 1861-6, Reprieve, Governor's Off. of the Commw. of Pa. (Jun. 26, 1861) (JA at 178-81).

<sup>107</sup> Exec. Order No. 1865-10, Reprieve, Governor's Off. of the Commw. of Pa. (Oct. 14, 1865) (JA at 188-89); Exec. Order No. 1863-10, Reprieve, Governor's Off. of the Commw. of Pa. (Oct. 22, 1863) (JA at 182-84).

<sup>108</sup> See 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, 1872-73 359-60 (1873) [hereinafter 1872-73 DEBATES].

<sup>109</sup> See generally 1 1872-73 DEBATES 112-13 (proposing to take clemency out of the governor's hands and give it to men "above the reach of temptation"); *id.* at 146 (proposing that "no reprieve or pardon shall be granted without the recommendation, in writing, of all the members of the court before whom the person applying for a reprieve or pardon was convicted, and of the Attorney General or district attorney who prosecuted for the Commonwealth").

<sup>110</sup> *Id.* at 113, 146.

<sup>111</sup> 2 1872-73 DEBATES, *supra* note 108, at 351.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> *Id.* at 353.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 355. The delegates also debated whether to restrict the issuance of pardons until after conviction. See *id.* at 362. The proposed restriction was rejected. *Id.* at 383.

A final proposal sought to remove reprieves from the purview of the amendment and instead leave the power solely in the governor’s hands.<sup>117</sup> Delegate Bailey explained that it was possible a governor would issue an execution warrant before learning of a defendant’s innocence and then would need to issue an emergency reprieve, but that the executive committee might not be able to act as quickly as circumstances required.<sup>118</sup> The convention accepted the proposal that kept the reprieve power solely in the governor’s hands, while adopting the amendment of the pardon and commutation powers.<sup>119</sup> The governor’s power to grant pardons and commutations, which remained solely in the province of the executive branch, was restricted to require a majority recommendation from the committee, which would later become the Board of Pardons.<sup>120</sup>

The 1874 Constitution, like the previous one, thus did not adopt any of the proposed limits to a governor’s reprieve power. And since 1874, no restrictions on the governor’s constitutional reprieve power have been formally proposed.<sup>121</sup> The Reprieves Clause continues to provide what it provided in 1790: “the Governor shall have power . . . to grant reprieves . . . .”<sup>122</sup>

Under the 1874 Constitution, governors continued to grant reprieves for varied reasons or no stated reason at all. Governor Hartranft issued a reprieve on May 21, 1878, because the condemned prisoner’s spiritual advisor believed that the time until the execution was “entirely too short for [the prisoner’s] preparation for death.”<sup>123</sup> Governor Hartranft issued a reprieve in 1877 to permit an inquiry into the condemned prisoner’s mental condition.<sup>124</sup> He issued others simply because he was “satisfied of the propriety of granting a Reprieve” in those cases,<sup>125</sup> while for other reprieves he gave no

<sup>117</sup> 2 1872-73 DEBATES, *supra* note 108, at 383.

<sup>118</sup> *Id.* at 384.

<sup>119</sup> *Id.*

<sup>120</sup> PA. CONST. of 1874, art. IV, § 9 (amended 1967).

<sup>121</sup> The clemency powers have been amended three times since 1874. *See* PA. CONST. of 1874, art. IV, § 9 (amended 1967) (establishing the Board of Pardons); PA. CONST. of 1968, art. IV, § 9 (amended 1975) (altering the method for confirmation of members of the Board of Pardons); PA. CONST. of 1968, art. IV, § 9 (amended 1997) (requiring unanimity for the commutation or pardon of an inmate under death or life sentence, and altering the composition of the board). These amendments concerned the executive branch’s pardon and commutation powers; none addressed the governor’s reprieve power.

<sup>122</sup> PA. CONST., art. IV, § 9.

<sup>123</sup> Exec. Order No. 1878-5, Reprieve, Governor’s Off. of the Commw. of Pa. (May 21, 1878) (JA at 194).

<sup>124</sup> Exec. Order No. 1877-9, Reprieve, Governor’s Off. of the Commw. of Pa. (Sep. 5, 1877) (JA at 192).

<sup>125</sup> Exec. Order No. 1878-2, Reprieve, Governor’s Off. of the Commw. of Pa. (Feb. 22, 1878) (JA at 193); Exec. Order No. 1877-8, Reprieve, Governor’s Off. of the Commw. of Pa. (Aug. 8, 1877) (JA at 191).

explanation at all.<sup>126</sup> Succeeding governors likewise issued some reprieves without indicating a reason.<sup>127</sup>

Governors at the end of the nineteenth century also continued granting reprieves for definite periods<sup>128</sup> or indefinitely, as with an 1882 reprieve that was granted “until our further command shall be made known.”<sup>129</sup> Governors continued issuing serial reprieves as well.<sup>130</sup>

### 3. Reprieves in the Modern Era

As extended appeals became commonplace in the twentieth century, serial reprieves were sometimes quite protracted. For example, condemned prisoner David Darcy received numerous reprieves in the 1950s, postponing his execution for years.<sup>131</sup> Edward Hough received at least thirty-three reprieves over nearly a decade.<sup>132</sup> Some governors issued indefinite reprieves to extend during appeals in lieu of serial definite reprieves.<sup>133</sup>

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<sup>126</sup> Exec. Orders No. 1878-12, Reprieve, Governor’s Off. of the Commw. of Pa. (Dec. 14, 1878) (JA at 195-96).

<sup>127</sup> *See, e.g.*, Exec. Order No. 1889-3, Reprieve, Governor’s Off. of the Commw. of Pa. (Mar. 20, 1889) (JA at 200-01) (reprieve by Governor Beaver); Exec. Order No. 1884-3, Reprieve, Governor’s Off. of the Commw. of Pa. (Mar. 20, 1884) (JA at 199) (reprieve by Governor Pattison).

<sup>128</sup> *E.g.*, Exec. Order No. 1884-3, Reprieve, Governor’s Off. of the Commw. of Pa. (Mar. 20, 1884) (JA at 199).

<sup>129</sup> Exec. Order No. 1882-1, Reprieve, Governor’s Off. of the Commw. of Pa. (Jan. 30, 1882) (JA at 197-98).

<sup>130</sup> Exec. Order No. 1896-6, Reprieve, Governor’s Off. of the Commw. of Pa. (Jun. 11, 1896) (JA at 202) (granting a five-week reprieve with no reason given); Exec. Order No. 1896-4, Reprieve, Governor’s Off. of the Commw. of Pa. (Apr. 15, 1896) (JA at 203) (granting a two-month reprieve with no reason given).

<sup>131</sup> Exec. Order No. 1954-11, Reprieve, Governor’s Off. of the Commw. of Pa. (Nov. 30, 1954) (JA at 206); Exec. Order No. 1953-11, Reprieve, Governor’s Off. of the Commw. of Pa. (Nov. 12, 1953) (JA at 207-08).

<sup>132</sup> Exec. Order No. 1954-11, Reprieve, Governor’s Off. of the Commw. of Pa. (Nov. 30, 1954) (JA at 209); Exec. Order No. 1953-11, Reprieve, Governor’s Off. of the Commw. of Pa. (Nov. 12, 1953) (JA at 210); *see also* Exec. Order No. 1956-5, Reprieves, Governor’s Off. of the Commw. of Pa. (May 29, 1956) (JA at 212-13) (listing twenty-eight reprieves issued to Harold Foster and Harry Zietz).

<sup>133</sup> *E.g.*, Exec. Order No. 2001-1, Reprieve, Governor’s Off. of the Commw. of Pa. (Jan. 10, 2001) (JA at 226-27) (Governor Ridge granting reprieve “until such time as the stay ordered by the [federal court] may be lifted”); Exec. Order No. 1987-2, Reprieve, Governor’s Off. of the Commw. of Pa. (Feb. 19, 1987) (JA at 222-23) (Governor Casey granting reprieve without an end-date); Exec. Order No. 1938-3, Reprieve, Governor’s Off. of the Commw. of Pa. (Mar. 14, 1938) (JA at 205) (Governor Earle granting reprieve “until the motion for new trial now pending . . . is finally disposed of and definite date for execution thereafter fixed by me”); Exec. Order No. 1936-7, Reprieve, Governor’s Off. of the Commw. of Pa. (July 23, 1936) (JA at 204) (Governor Earle, after granting a prior ninety-day reprieve, granting a reprieve “until the appeal now pending in the Supreme Court of Pennsylvania . . . has been finally determined and definite date for execution thereafter fixed by me . . .”); *see also* Exec.

Governors also recognized that reprieves could be used to impose moratoria on executions. In 1961, Governor Lawrence thus announced that he would establish a moratorium on executions while a legislative committee studied capital punishment and the legislature considered abolishing the death penalty.<sup>134</sup> Governor Shapp adopted the same policy during the 1970s.<sup>135</sup>

Governors in the modern era have also issued reprieves for unique reasons. On September 12, 2014, Governor Corbett issued a reprieve to Hubert Michael “until another warrant is issued.”<sup>136</sup> The reprieve explained that the Department of Corrections “must complete its acquisition of the injection agents required to carry out lethal injection as prescribed under Pennsylvania state law . . . .”<sup>137</sup> Governor Corbett thus ordered the Department of Corrections to provide written notice when it “has completed its acquisition of injection agents . . . .”<sup>138</sup> Governor Corbett rescinded the reprieve shortly before leaving office because Mr. Michael had been granted a stay of execution from a federal court.<sup>139</sup>

Order No. 1999-3, Reprieve, Governor’s Off. of the Commw. of Pa. (Mar. 10, 1999) (JA at 1999-3) (Governor Ridge granting reprieve without a stated end-date or reason).

<sup>134</sup> *Lawrence ‘Freezes’ Executions; Carroll Opposes Abolition*, THE PHILA. INQUIRER, Mar. 24, 1961, at 1, 10; *see also* Burton W. Siglin, *Death Penalty, A Governor Is Not Powerless*, SUNDAY PATRIOT-NEWS, Jan. 3, 1971, at B9 (“Lawrence’s dislike of capital punishment led him to use his gubernatorial powers to effect a two-year moratorium on executions in 1959-61.”).

<sup>135</sup> *Death Penalty Is Back, But Shapp Won’t Use It*, PHILA. DAILY NEWS, Jan. 22, 1971, at 3 (“I will grant respites throughout my term.”); Siglin, *supra* note 134, at B9 (discussing Shapp’s moratorium and explaining that “the Constitution gives him the power at all times and in all cases ‘to grant reprieves’”).

<sup>136</sup> Exec. Order No. 2014-9, Reprieve, Governor’s Off. of the Commw. of Pa. (Sep. 12, 2014) (JA at 228).

<sup>137</sup> *Id.* Since 1990, Pennsylvania law has required that the death penalty be inflicted by injecting a lethal combination of two types of drugs: “an ultrashort-acting barbiturate” and “chemical paralytic agents.” 61 PA. CONS. STAT. ANN. § 4304(a)(1) (West 2016). Ultrashort-acting barbiturates, including sodium thiopental, are no longer available for executions nationwide. *See Cook v. Food & Drug Admin.*, 733 F.3d 1, 4, 10-11 (D.C. Cir. 2013) (explaining that “[i]n 2009 the last domestic manufacturer of thiopental stopped making it,” and holding that the FDA was compelled by law to prohibit its importation); *Pavatt v. Jones*, 627 F.3d 1336, 1337 n.1 (10th Cir. 2010) (“[S]odium thiopental is now effectively unobtainable anywhere in the United States, thus requiring Oklahoma and [seventeen] other death-penalty states to revise their lethal injection protocols.”). Most states that had lethal injection laws similar to Pennsylvania’s therefore amended their statutes to provide a feasible means of execution. *See, e.g.*, OKLA. STAT. tit. 22, § 1014 (2015) (requiring that executions be conducted using a “lethal quantity of a drug or drugs,” and revised in 2011 to omit requirement of “an ultrashort-acting barbiturate in combination with a chemical paralytic agent . . .”). Pennsylvania has not revised its statute, although the lethal injection process is among the topics being studied by the Pennsylvania Task Force and Advisory Committee on Capital Punishment.

<sup>138</sup> Exec. Order No. 2014-9, Reprieve, Governor’s Off. of the Commw. of Pa. (Sep. 12, 2014) (JA at 228).

<sup>139</sup> *Id.* (JA at 229).

II. *COMMONWEALTH V. WILLIAMS*

In *Commonwealth v. Williams*, the Pennsylvania Supreme Court for the first time in its nearly 300-year history confronted the question of whether a governor had exceeded his constitutional powers in granting a reprieve.<sup>140</sup> Invoking the court's King's Bench jurisdiction,<sup>141</sup> the Philadelphia District Attorney put forth two primary arguments as to why Governor Wolf's reprieve was invalid.

First, the District Attorney contended that reprieves are valid only if issued for a fixed duration, such as a unit of time or until the occurrence of a particular event.<sup>142</sup> Second, the District Attorney argued that a reprieve must be issued for a reason specific to the prisoner's case, such as seeking clemency or pursuing an appeal.<sup>143</sup> According to the District Attorney's view, each of these proposed limitations served to prevent a governor from using the reprieve power to de facto commute death sentences without the required unanimous concurrence of the Board of Pardons.<sup>144</sup>

Mr. Williams and Governor Wolf responded that the history of the Reprieves Clause demonstrated that the citizens of Pennsylvania had consciously chosen not to place any limits on the power.<sup>145</sup> But just as importantly, both respondents argued, the historical practice from colonial times to the present day demonstrated that executives had used the reprieve power in a manner that belied the District Attorney's argument. Specifically, the historical record demonstrated that reprieves had long been issued for any or no reason, and for a fixed or indefinite duration.<sup>146</sup>

The court unanimously sided with Mr. Williams and Governor Wolf.<sup>147</sup> After noting the historically broad understanding of the reprieve power at common law, the court concluded that "the historical exercise of executive reprieve power in Pennsylvania is also consistent with the common law understanding of the term and suggests no limitations as to fixed duration or particular purpose . . . ."<sup>148</sup> The court rejected the District Attorney's description of indefinite reprieves and those not issued for a particular purpose tied to the offender's case as "aberrations."<sup>149</sup> Instead, the court noted, all parties agreed that governors had throughout Pennsylvania's

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<sup>140</sup> 129 A.3d 1199, 1201 (Pa. 2015).

<sup>141</sup> See PA. CONST. art. V, § 2; 42 PA. CONS. STAT. § 502 (West 2016). In a part of its opinion not discussed here, the court ruled that exercise of King's Bench jurisdiction was appropriate in this case. *Williams*, 129 A.3d at 1206.

<sup>142</sup> *Id.* at 1214.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1214-15.

<sup>147</sup> *Williams*, 129 A.3d at 1201.

<sup>148</sup> *Id.* at 1214-15.

<sup>149</sup> *Id.* at 1216.

history issued reprieves that did not fit within the District Attorney’s definition.<sup>150</sup>

The court also agreed with the respondents that the textual history of the Reprieves Clause supported their argument. The court found “no textual predicate for the Commonwealth’s assertion that the drafters and ratifying voters [at the constitutional conventions] intended the amendments to the pardon and commutation provisions to apply to the Governor’s reprieve power.”<sup>151</sup> The court noted that several other states, including Texas, Nevada, and Iowa, had adopted explicit provisions in their constitutions that imposed limits as to the duration and purpose of a reprieve.<sup>152</sup> Despite many opportunities, Pennsylvania never did.<sup>153</sup>

The court thus denied the District Attorney’s challenge to Governor Wolf’s reprieve of Mr. Williams.<sup>154</sup> The decision by implication sustained Governor Wolf’s policy of issuing temporary reprieves to any condemned prisoners under execution warrant while he awaits the report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment.

### III. CONCLUSION

Throughout Pennsylvania’s history, the reprieve power has served as a largely unchecked executive authority to postpone executions in a wide variety of circumstances. The power has never been understood to include temporal restrictions or limits based on the purpose for which it is used. It has served as a counterweight to punishments that seemed excessive in individual cases and has allowed governors to institute diverse policies with respect to the death penalty.

In granting a reprieve to Terrance Williams to allow for further study of capital punishment, Governor Wolf acted consistently with the historical understanding of the reprieve power. In upholding the reprieve in *Commonwealth v. Williams*, the Pennsylvania Supreme Court aligned its precedent with that historical understanding and reemphasized the use of historical practice as a guiding force in constitutional interpretation.

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<sup>150</sup> *Williams*, 129 A.3d at 1216.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See *supra* Part I.D.

<sup>154</sup> *Williams*, 129 A.3d at 1219.