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## Comment

### LONG LIVE THE KING: THE SUPREME COURT OF PENNSYLVANIA'S KING'S BENCH POWERS RIGHTFULLY CROWN IT AS KING OF THE COMMONWEALTH'S JUDICIARY

MICHAEL J. SCHWAB\*

“But, the availability of the power is essential to a well-functioning judicial system; and it appears that this is a point that is difficult to fully appreciate without having served on the Court.”<sup>1</sup>

#### I. THE SUPREME COURT OF PENNSYLVANIA'S KING'S BENCH POWERS KEEP BALANCE IN THE COMMONWEALTH'S JUDICIAL LANDSCAPE

The king of the Commonwealth of Pennsylvania's judiciary is the Supreme Court of Pennsylvania.<sup>2</sup> Being the head of the commonwealth's judiciary results in unique functions and responsibilities.<sup>3</sup> One of these capabilities is a grant of power originating from early English law—King's Bench.<sup>4</sup>

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\* J.D. Candidate, 2021, Villanova University Charles Widger School of Law; B.S. 2018, Lehigh University. This Comment is dedicated to my parents, Jolyne and Tony Schwab, and my brother, Anthony Schwab, for their continued support and encouragement throughout my studies. I will always be grateful for my family providing me the opportunity to achieve my goals in and out of the classroom. I would also like to thank the members of the *Villanova Law Review* who assisted me throughout the writing process.

1. *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014) (discussing Supreme Court of Pennsylvania's capability to exercise King's Bench jurisdiction to cure injustices in the judiciary while using powers cautiously). For a discussion of *In re Bruno* and the supreme court's analysis of King's Bench powers, see *infra* Section III.A.

2. See PA. CONST. art. V, § 2 (declaring Supreme Court of Pennsylvania as highest and most powerful court).

3. See Sean Mahoney & Ciaran Way, *King's Bench Petition Seeks to Consolidate All Pennsylvania COVID-19 Business Interruption Insurance Cases*, JDSUPRA (May 5, 2020), <https://www.jdsupra.com/legalnews/king-s-bench-petition-seeks-to-22336/> [<https://perma.cc/4BWA-Q3GH>] (discussing rare forms of the Supreme Court of Pennsylvania's jurisdiction, such as extraordinary jurisdiction and King's Bench, in context of global pandemic response in commonwealth's judiciary). The court holds the ability to assume jurisdiction whether a matter is pending or not using either extraordinary jurisdiction or King's Bench powers. See *infra* Sections II.A, C.

4. See 42 PA. CONS. STAT. § 502 (1976) (granting supreme court King's Bench powers). The text with regards to King's Bench powers states:

The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all

(677)

King's Bench is a rarely discussed form of jurisdiction the Supreme Court of Pennsylvania possesses, which allows the court to select and hear any issue at any stage in the commonwealth's court proceedings.<sup>5</sup> King's Bench not only enables the Supreme Court of Pennsylvania to exercise a broad range of oversight powers over other judicial bodies, but it also grants the court the ability to select, hear, and resolve issues proceeding through lower courts.<sup>6</sup> While states like Colorado, Delaware, Florida, New York, and New Jersey have briefly commented on the powers of the English King's Bench, those courts have not comparably used them like the Supreme Court of Pennsylvania.<sup>7</sup>

The court utilizes King's Bench sparingly and only for issues requiring timely intervention to cure injustice; this is comparable to its ability to invoke extraordinary jurisdiction, another form of jurisdiction allowing the court to adjudicate high-stakes issues.<sup>8</sup> For example, the court invoked King's Bench to remedy the unprecedented corruption resulting

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*intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.*

*Id.* (emphasis added).

5. See Max Mitchell, *In Freeing Meek Mill, Pa. Justices Flexed Rarely Used King's Bench Muscle*, LEGAL INTELLIGENCER (Apr. 27, 2018), <https://www.lambmcerlane.com/articles/in-freeing-meek-mill-pa-justices-flexed-rarely-used-kings-bench-muscle/> [<https://perma.cc/33V8-E6WE>] (outlining King's Bench powers). For a discussion of how broadly King's Bench powers can range over different issues, see *infra* Section III.A.

6. See, e.g., *Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426, 428 (Pa. 1948) (commenting on breadth of King's Bench powers over inferior courts in Commonwealth). The supreme court in *Carpentertown* believed the King's Bench powers to be "high and transcendent," and kept all lower tribunals within the Court's oversight. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES, \*37, \*42); see also Alexandra Makosky, Comment, *The King's Bench Power in Pennsylvania: A Unique Power That Provides Efficient Results King's Bench Power in Pennsylvania*, 101 DICK. L. REV. 671, 677-78 (1997) (explaining how supreme court views King's Bench powers and ability to oversee lower tribunals as an efficient use of judicial resources). The supreme court has the power "to prescribe general rules governing practice procedure and the conduct of all courts." Makosky, *supra*, at 677 (quoting *In re 24 Pa. C.S. § 1703*, 394 A.2d 444, 447 (Pa. 1978)).

7. See Bernard F. Sherer, *The Supreme Court of Pennsylvania and the Origins of King's Bench Power*, 32 DUQ. L. REV. 525, 535 n.67 (listing examples of other states' discussions of King's Bench powers). The Supreme Court of Pennsylvania has expanded the powers as a supervisory tool as time has progressed. See *infra* Part III (highlighting various cases supreme court has used King's Bench in, as well as other controversies).

8. Compare 42 PA. CONS. STAT. § 726 (1976) (amended 2004) (describing supreme court's extraordinary jurisdiction powers and ability to hear issues of public importance only if issues are pending in lower courts), with § 502 (explaining supreme court's King's Bench capabilities). See also 1 WEST'S PA. FORMS, CIVIL PROCEDURE § 1:5, Westlaw (database updated July 2019) (juxtaposing King's Bench and extraordinary jurisdiction). "Although in many respects . . . King's Bench powers is to the same effect as . . . extraordinary jurisdiction . . . the two are not identical." WEST'S PA. FORMS, CIVIL PROCEDURE, *supra*. For a further discussion of the differences between King's Bench and extraordinary jurisdiction, see *infra* Section II.C.

from the 2008 “Kids for Cash” scandal.<sup>9</sup> The scandal occurred when two judges accepted payments to fill a correctional facility and subsequently deprived thousands of juveniles access to fair adjudications.<sup>10</sup>

King’s Bench powers and extraordinary jurisdiction are distinct and both used infrequently.<sup>11</sup> Even if a party suffers a clear violation of rights, relief is not guaranteed under either form of jurisdiction.<sup>12</sup> The main difference between the two is that King’s Bench does not require a matter to be pending in a lower court for the supreme court to hear the case.<sup>13</sup> This means, hypothetically, the court can use King’s Bench to insert itself in matters where parties have yet to litigate in a lower court.<sup>14</sup>

The supreme court has selectively granted King’s Bench petitions and has denied more petitions than it has allowed.<sup>15</sup> The court has opted to use its King’s Bench powers when an issue rises to a level of public importance such that the court must step in and adjudicate.<sup>16</sup> Notably, the court relied on its King’s Bench authority in granting famous rapper Meek Mill’s bail request.<sup>17</sup> This exemplifies the court’s receptiveness to use ancient powers in modern-day situations—especially when the judiciary’s integrity is called into question.<sup>18</sup> As recently as 2020, the court exercised its

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9. See *infra* Section III.B (discussing “Kids for Cash” scandal).

10. For an analysis of the “Kids for Cash” scandal and how the court used its King’s Bench powers to remedy the issue, see *infra* Section III.B.

11. See 1 STANDARD PENNSYLVANIA PRACTICE 2D § 2:146, Westlaw (database updated March 2020) (explaining supreme court’s ability to cautiously invoke plenary jurisdiction); see also *In re Bruno*, 101 A.3d 635, 696–97 (Pa. 2014) (Saylor, J., concurring) (stating King’s Bench is reserved for only most unique and “extraordinary” situations). Justice Saylor reiterated this to prove there are other availabilities for remedying issues, and the supreme court does not always need to rely on King’s Bench. *In re Bruno*, 101 A.3d at 696–97 (Saylor, J., concurring).

12. See STANDARD PENNSYLVANIA PRACTICE, *supra* note 11 (detailing supreme court’s extraordinary jurisdiction is limited to circumstances where “the record clearly demonstrates the petitioner’s rights,” and noting even this showing would not entitle petitioner to relief).

13. 1 WEST’S PA. FORMS, CIVIL PROCEDURE § 1:5, Westlaw (database updated July 2019) (noting King’s Bench enables the court to hear a case at any stage in litigation).

14. See *id.*; Mahoney & Way, *supra* note 3 (highlighting court’s ability to hear matters not pending using King’s Bench).

15. Mitchell, *supra* note 5 (noting over two-year period the court denied fifty-seven petitions for King’s Bench review and granted only two). Review of rulings for whether to exercise King’s Bench are available publicly on the supreme court’s administrative website. See *id.*

16. See, e.g., *infra* Section III.D (discussing Mumia Abu-Jamal case court exercised King’s Bench for).

17. See Mitchell, *supra* note 5 (discussing court’s use of King’s Bench powers in rapper Meek Mill’s legal case due to public’s growing scrutiny and calls for criminal justice reform).

18. See *id.* (“[Meek Mill] also cited newly revealed evidence in his case, and relied heavily on references to Philadelphia Court of Common Pleas Judge Genece Brinkley’s handling of the case, saying she often took a prosecutorial stance in the case and at times took an unusually personal interest, given [Meek Mill’s] fame.”); see, e.g., *Commonwealth v. Williams*, 129 A.3d 1199, 1206–07 (Pa. 2015) (explain-

King's Bench authority to appoint a special master to review Philadelphia District Attorney Larry Krasner's role in famous death row activist and former Black Panther Mumia Abu-Jamal's case.<sup>19</sup>

Some critics have suggested stripping the powers from the court.<sup>20</sup> They have stated its use is a form of judicial activism, thus, granting the court the ability to circumvent normal procedure and delegitimize standard appellate processes.<sup>21</sup> For example, in 2020, high-profile litigants requested King's Bench relief to avoid adverse holdings they expected from typical procedural processes in some of the most controversial matters in the judiciary.<sup>22</sup>

This Comment argues King's Bench remains an efficient mechanism that the Supreme Court of Pennsylvania should continue using to cure judiciary defects, resolve injustices, and oversee lower tribunals.<sup>23</sup> King's Bench powers have stood the test of time and have been preserved in the

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ing court's decision to uphold Governor Wolf's reprieve for a death row inmate despite concerns governor encroached on judiciary's role to determine final judgment of case); *see also In re Bruno*, 101 A.3d 635, 671–72 (Pa. 2014) (discussing flexibility used in recent years with King's Bench powers over "Kids for Cash" scandal); Martin Guggenheim & Randy Hertz, *Selling Kids Short: How "Rights For Kids" Turned Into "Kids For Cash"*, 88 TEMPLE L. REV. 653, 656 (2016) (explaining King's Bench history in "Kids for Cash" scandal and highlighting initial petition to supreme court).

19. *See* Zack Needles, *Justices Tap Go-to Special Master to Probe Krasner's Office for Alleged Conflicts in Abu-Jamal Case*, LEGAL INTELLIGENCER (Mar. 3, 2020, 4:11 PM), <https://www.law.com/thelegalintelligencer/2020/03/03/justices-tap-go-to-special-master-to-probe-krasners-office-for-alleged-conflicts-in-abu-jamal-case/> [permalink unavailable] (noting concerns District Attorney Krasner and staff may be conflicted out for prior work done in support of Abu-Jamal).

20. *See* Bruce Ledewitz, *What's Really Wrong with the Supreme Court of Pennsylvania*, 32 DUQ. L. REV. 409, 411–12 (1994) (arguing rewriting of article V of the Pennsylvania constitution did not curtail King's Bench powers and is not unconstitutional because article V defines the supreme court's jurisdiction in the first place); *see also* Sherer, *supra* note 7, at 533–34 (discussing former Delegate Mattioni's argument that general assembly has ability to remove King's Bench power according to article II of Pennsylvania constitution). For further discussion of those critical of the supreme court's King's Bench powers and the ability for the general assembly to potentially revoke them, *see infra* Section II.B.

21. *See* Ledewitz, *supra* note 20, at 411–12 (advocating powers beyond what is prescribed by Pennsylvania constitution are altogether unconstitutional); *see also* Makosky, *supra* note 6, at 679–80 (opining about legislature's view of King's Bench powers). Even though some legislatures believe King's Bench is an encroachment on the legislature's ability to serve the commonwealth, commentators have suggested the legislature itself cannot fully comprehend the power of King's Bench. *See* Makosky, *supra* note 6, at 679.

22. For a discussion of the most recent controversy surrounding King's Bench and the capital punishment system, *see infra* Section III.C.

23. *See* Ruggero J. Aldisert, *The Honorable Cappy: Distinguished Keeper of the King's Bench Jurisdiction*, 47 DUQ. L. REV. 481, 486 (2009) (discussing enduring powers of King's Bench jurisdiction and supreme court's duty to utilize them to benefit people of the commonwealth); Makosky, *supra* note 6, at 695–96 (arguing Pennsylvania's ability to bring cases swiftly before supreme court can correct injustices and expedite appellate process when necessary).

Commonwealth of Pennsylvania's constitution—a constitution predating that of the United States.<sup>24</sup> If King's Bench did not exist, the Pennsylvania judiciary would be without an effective last resort remedy.<sup>25</sup> The Pennsylvania legislature should recognize that King's Bench is a beneficial avenue to resolve judicial issues even if the legislature believes the powers are not vested.<sup>26</sup> In applying King's Bench, the supreme court should adhere to the original purpose of the power by maintaining selectivity in accepting petitions, providing deference to other judicial bodies, and allowing lower courts to serve as fact finders.<sup>27</sup> Situations like the Abu-Jamal appeal, the “Kids for Cash” scandal, and the Meek Mill trial support the argument that the court should continue using King's Bench given the proper circumstances.<sup>28</sup>

Part II of this Comment provides a background of King's Bench, its origins in the Pennsylvania constitution, early cases involving King's Bench, the legislature's attempt to eliminate the powers, and differences between King's Bench and other versions of supreme court jurisdiction. Part III discusses recent supreme court decisions and situations where the court decided whether to exercise King's Bench. Part IV provides a critical analysis of King's Bench and argues the Pennsylvania legislature and judiciary should preserve this historically effective grant of power. It also argues the court properly exercised King's Bench in Mumia Abu-Jamal's death row appeal because it delegated fact-finding responsibilities to a different judicial body. Part V discusses the future impact of King's Bench in Pennsylvania.

## II. THE EARLIEST KINGS OF THE BENCH

Since the eleventh century, the King of England personally selected officers to participate on the King's Bench to represent the king in legal

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24. See Aldisert, *supra* note 23, at 485–86 (recognizing superintendency power of King's Bench over inferior tribunals dating back to early English law); see also Sherer, *supra* note 7, at 535–36 (recognizing other states' discussions of power similar to King's Bench, but acknowledging its specific advancements and functions within the Commonwealth). The Judiciary Act of 1722 created the Supreme Court of Pennsylvania, thus, its powers predated that of the United States Supreme Court's set forth in the United States Constitution. See PA. CONST. art. V, § 2. For a further discussion of the Pennsylvania legislature's adoption of King's Bench jurisdiction and origins from English law, see *infra* Section II.A.

25. See Makosky, *supra* note 6, at 700 (hypothesizing if King's Bench were to be eliminated or limited, then supreme court would not be able to expedite addressing important issues). Proponents of King's Bench argue for the preservation of the power, even though there are delegates in Pennsylvania that also seek large judicial reform. See *id.* at 696.

26. For an analysis on the inherent nature, or lack thereof, for King's Bench, see *infra* Part IV.

27. For an explanation on why the supreme court should carefully select issues to use King's Bench powers, see *infra* Part IV.

28. See *infra* Section IV.D.

affairs.<sup>29</sup> Resolution of legal matters changed after the Magna Carta reduced the amount of power the King of England could possess by ensuring everyone, including the King of England, must abide by the law.<sup>30</sup> Because the Magna Carta minimized the Bench's originally extensive powers, the Bench divided into two different divisions—one overseeing matters involving the King and any criminal cases, and the other overseeing improprieties in lower tribunals.<sup>31</sup>

Early English law gave the Bench authority to try cases with a jury or remand cases to other counties for trial.<sup>32</sup> The King's Bench powers gave supervisory authority to its members, but the House of Peers of England remained the court of last resort in early English law.<sup>33</sup> Thus, even after a decision by the King's Bench, a losing party had the ability to appeal to a higher tribunal.<sup>34</sup> The English judiciary officers designed their appellate court system with the King's Bench being solely responsible for appeals from lower tribunals.<sup>35</sup> Therefore, even though the Supreme Court of Pennsylvania is viewed as the court of last resort when exercising King's Bench, the English judiciary did not make the original King's Bench of England the most powerful court in England.<sup>36</sup>

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29. See *Commonwealth v. Balph*, 3 A. 220, 225 (Pa. 1886) (examining how former kings of England sat among King's Bench to hear arraignments of cases, but that kings never took part in decisions). To protect the crown, the king nominated members to King's Bench and attended some proceedings, but only to signify the importance of the Bench by appearing. See *id.* The members of the King's Bench assembled to give advice to the king. See Sherer, *supra* note 7, at 526 (tracking origins of King's Bench and its original purpose dating back to eleventh century's William of Normandy).

30. See *Magna Carta*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2019) (defining Magna Carta as King John's earliest adoption of guarantees for individual rights and privileges).

31. See *Commonwealth v. Ickhoff*, 33 Pa. 80, 81 (1859) (commenting on Pennsylvania King's Bench authority to remove a criminal case using certiorari from any lower court stemming from English King's Bench); Sherer, *supra* note 7, at 526–27 (stating the King's Bench had superintendency power over the Chancery, Common Pleas, and Exchequer courts of England).

32. See *Balph*, 3 A. 220 at 226 (explaining numerous texts and decisions accurately defined King's Bench as it existed in England). While the *Balph* decision stated the scope and power of the King's Bench is settled, its limitations have been subject to major dispute in Pennsylvania law well after the court decided the case. See, e.g., *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014) (highlighting when court typically calls on King's Bench powers).

33. See Sherer, *supra* note 7, at 527–28 (claiming King's Bench was subject to review by House of Peers of England, “the court of final recourse”).

34. See *id.* at 527 (“[T]he House of Peers became the court of final recourse.”).

35. See *id.* at 526 (analyzing court of England's redistribution of judicial power after enactment of Magna Carta); *id.* at 526 n.11 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES, \*37, \*39–40) (discussing how judicial officers sought to form checks on each other by designating different subject matters for different courts).

36. See *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (stating King's Bench is viewed as court of last resort allowing deviance from normal procedures).

The structure of the English judiciary impacted how early lawmakers modeled the Pennsylvania judiciary. For example, the commonwealth granted the Supreme Court of Pennsylvania similar powers as the original English King's Bench.<sup>37</sup> Parties seeking judicial recourse in Pennsylvania immediately challenged the extent of the court's King's Bench powers in a variety of matters.<sup>38</sup> Over time, the court subsumed even greater jurisdiction using King's Bench.<sup>39</sup> Legislators and commentators suggested alterations to the way King's Bench operates when the court began expanding the powers' reach.<sup>40</sup> Though the court's King's Bench authority has stayed the same, Pennsylvania provides other statutory ways for the court to exercise plenary jurisdiction.<sup>41</sup> These additional versions of jurisdiction serve a similar purpose as King's Bench, most notably, extraordinary jurisdiction.<sup>42</sup> Both are little known but effective ways for last resort parties to seek relief.

#### A. *The Supreme Court of Pennsylvania's Early King's Bench History*

In 1722, the Commonwealth of Pennsylvania created the Supreme Court of Pennsylvania, and with it, King's Bench.<sup>43</sup> Title 42, section 502 of the Pennsylvania Consolidated Statutes, which grants the court King's Bench powers, states that the supreme court has powers "as the justices of the Court of King's Bench . . . might do on May 22, 1722."<sup>44</sup> Before the American Revolution, the House of Peers of England's jurisdiction still superseded that of the supreme court.<sup>45</sup> After the Revolutionary War, the Pennsylvania general assembly created a High Court of Errors and Appeals with the intent to mimic the English House of Peers with its own similar version.<sup>46</sup> The Pennsylvania Court of Errors and Appeals quickly dis-

37. For information about the initial intent of King's Bench enactment in Pennsylvania, see *infra* Section II.A.

38. For an analysis of early challenges to the Supreme Court of Pennsylvania's King's Bench powers, see *infra* Section II.A.

39. For further discussion of cases where the Supreme Court of Pennsylvania subsumed greater power using King's Bench, see *infra* Section II.A.

40. For a discussion of later developments of King's Bench authority, including those disapproving of its extent, see *infra* Section II.B.

41. For information about another judicial function designed to cure defects within the Commonwealth's court system, see *infra* Section II.C.

42. For a comparison of the supreme court's King's Bench powers and extraordinary jurisdiction powers, see *infra* Section II.D.

43. See Sherer, *supra* note 7, at 528; see also *supra* note 4 (highlighting King's Bench statute).

44. 42 PA. CONS. STAT. § 502 (1976).

45. See Sherer, *supra* note 7, at 528 (stating court's ability to appeal to House of Peers of England disappeared after American Revolution). Some commentators might fail to recognize that the commonwealth never intended for King's Bench to be a court of last resort until the legislature eliminated the House of Peers. See *id.* at 535–36 (acknowledging English judicial review system never intended for King's Bench to be a court of last resort).

46. *Id.* at 528 (analyzing Pennsylvania High Court of Errors and Appeals' former structure). The general assembly of Pennsylvania directed those whose ap-



integrated, leaving the supreme court as the highest commonwealth appellate court.<sup>47</sup>

One of the first discussions of King's Bench in Pennsylvania came in the 1847 *Commonwealth v. Nathans*<sup>48</sup> opinion, a certiorari proceeding concerning a marital dispute.<sup>49</sup> The proceeding sought to resolve whether special jurisdiction the legislature created for the issue prevented the supreme court from adjudicating.<sup>50</sup> The court stated it would be an "act of usurpation" to hear the case when special jurisdiction is designated for another tribunal.<sup>51</sup> The court declined to strip jurisdiction from the Pennsylvania Court of Quarter Sessions because the legislature already gave the court authority to adjudicate.<sup>52</sup> The case served as the supreme court's first discussion of King's Bench powers after the abolishment of the Pennsylvania High Court of Errors and Appeals and demonstrated the court's initial hesitance to extend the powers past hearing a case of first impression.<sup>53</sup>

Twelve years later, the *Commonwealth v. Ickhoff*<sup>54</sup> decision answered another question of how far King's Bench powers extended and whether the justices could hear a high criminal appeal regarding jail deliveries.<sup>55</sup>

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peals had not been adjudicated by the King of England to refile them with the newly formed court. *Id.* at 529 (discussing "restored" link between Pennsylvania court and English court).

47. *See id.* at 528–29 (explaining general assembly's 1780 Act was designed to rectify absence of House of Peers Court to appeal to after American Revolution). The supreme court did not gain its broadest powers as a court of last resort until 1834 when it subsumed the duties of the Court of Errors and Appeals. *Id.* at 530.

48. 5 Pa. 124 (1847).

49. *Id.* at 126 (explaining defendant's wife submitted application for certiorari and wanted to be removed from defendant's estate); *see also* Sherer, *supra* note 7, at 530 ("[G]uardians of the poor [brought an action] to compel the maintenance of a wife and children by a deserting husband . . ."). A certiorari is a superior court's tool to command inferior courts to transfer pending proceedings. *Certiorari*, BLACK'S LAW DICTIONARY (10th ed. 2014).

50. *Nathans*, 5 Pa. at 125 (concluding court did not have power to "snatch" jurisdiction from another tribunal which previously had special jurisdiction). The court acknowledged it never performed this type of removal, and its power in the matter was "purely correctional." *Id.*

51. *Id.* at 125.

52. *Id.* at 125–26 (concluding legislature as proper vehicle for determining whether supreme court has authority to hear court proceeding); *see also* Sherer, *supra* note 7, at 530 (stating Chief Justice Gibson limited power to exercise King's Bench to first instance of cases). While the supreme court reemphasized its ability to remove a case through certiorari, the ability of the Court of Quarter Sessions to hear the case was given by statute. *See* Sherer, *supra* note 7, at 530.

53. *See Nathans*, 5 Pa. at 126 (stating supreme court has never exercised King's Bench powers to remove cases in manner requested by appealing party).

54. 33 Pa. 80 (1859).

55. *See id.* at 80–81 (demonstrating supreme court has jurisdiction spanning across commonwealth, thus, each justice is supreme justice of Oyer and Terminer and jail delivery). The supreme court in *Ickhoff* granted the request of a president judge who asked a member of the court to hear a case that the president judge could not hear. *Id.* at 80.

The court concluded it possessed the ability to send one of its justices to hear the case instead of the presiding president judge in the lower court.<sup>56</sup> The court, citing to the Judiciary Act of 1722, contended its jurisdiction to hear the Oyer and Terminer proceeding flowed naturally from the traditional exercise of King's Bench powers and provided it authority to hear the case.<sup>57</sup> In relying on King's Bench, the court exercised its power to hear cases when the legal issue prevented the presiding judge from making a decision.<sup>58</sup> Unlike *Nathans*, the court in *Ickhoff* relied on historical English King's Bench jurisprudence and focused on how the original bench provided the chief justice the ability to hear a criminal certiorari proceeding.<sup>59</sup>

It was not until *Commonwealth v. Balph*<sup>60</sup> in 1886 that the court exercised its powers in the removal of a traditional criminal proceeding.<sup>61</sup> The petition in *Balph* contended that the trial in a particular county could not be fairly adjudicated because of overwhelming prejudice in the community.<sup>62</sup> In making the decision to remove and promptly hear the case, the court provided a comprehensive overview of King's Bench powers at the

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56. *Id.* at 82 (ruling supreme court justice could be sent to hear case).

57. *Id.* (concluding history of King's Bench allows for one of court's justices to try case). The court studied the history of King's Bench and used its function in England as a way to exemplify how its powers should apply in Pennsylvania. *Id.* at 81–82. The Court clarified that Common Pleas judges have Oyer and Terminer power only within their own district, but the supreme court's powers were not as limited. *See Court of Oyer and Terminer*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining courts of Oyer and Terminer as capable of hearing high criminal appeals and possessing ability to try prisoners in criminal court).

58. *Ickhoff*, 33 Pa. at 80–81 (ruling supreme court could hear jail delivery proceeding even if it is not delegated by statute).

59. *See id.* at 81 (stating then-current Pennsylvania supreme court lacks distinction between chief justice and associate justices unlike original King's Bench).

60. 3 A. 220 (Pa. 1886).

61. *See id.* at 225 (concluding supreme court has power to remove criminal cases, where litigants sought transfer to another county, without controversy). In *Balph*, the petitioners requested removal of their conspiracy and assault criminal proceeding because the county they resided in made it impossible to have a fair trial. *Id.* at 221–22. The court agreed with the petitioners' argument that there was no possibility of a fair proceeding and concluded King's Bench jurisdiction gave the court ample authority to remove and quickly hear the case. *Id.* at 230 (asserting supreme court is responsible for ensuring all people have "fair and impartial trial[s]," and could use King's Bench powers to ensure this happened). The court believed the plain language of the Criminal Code of 1860, in conjunction with the historical practices of King's Bench, authorized it to act on the criminal proceeding. *Id.* at 224–25.

62. *Id.* at 221–22 (explaining two counties claimed to have requisite jurisdiction to hear relevant proceeding). The court sided with the petitioner's argument and explained how it has the capability to remove the proceeding from that particular county. *Id.* at 222 ("I say [the power] still exists, because no one doubts the power was lodged in this court up to and until the adoption of the present constitution. It has been not only asserted but exercised repeatedly.").

time the Pennsylvania legislature passed the Judiciary Act of 1722.<sup>63</sup> The majority opinion explained how King's Bench serves to "protect the liberty of the subject" and ensure the subject has a fair trial and adjudication.<sup>64</sup> Nevertheless, the dissenting opinion urged the court to strictly limit the powers of King's Bench to erroneously decided cases so that the supreme court only corrects the error.<sup>65</sup> It suggested that the justices' powers should be confined to those specified by law and using King's Bench too greatly expanded the court's powers.<sup>66</sup>

Only a few years later, *In re Pollard*<sup>67</sup> challenged the court to revisit its King's Bench oversight role over the Pennsylvania Court of Quarter Sessions and determine how far its jurisdiction extended.<sup>68</sup> The court reversed the decision of the Pennsylvania Court of Quarter Sessions regarding a liquor license and explained why it has jurisdiction when a petitioner submits a writ of certiorari.<sup>69</sup> The prior law for granting retail liquor licenses prevented the supreme court from having the ability to review a writ of certiorari, but after comparison of the prior and present laws, the court determined it could examine the lower court's decision.<sup>70</sup>

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63. *See id.* at 225 (explaining plenary powers of King's Bench and its duty to protect causes of crown and plea sides of court). After reviewing other states' decisions to use pseudo-King's Bench powers, the court reiterated the inherent nature of its power and the difficulty in removing it. *See id.* at 227 (believing court's decision to retain King's Bench power to be proper, considering other states' decisions based off same extent of powers as King's Bench); *see also* Sherer, *supra* note 7, at 531 (citing *Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426, 428 (Pa. 1948)) (highlighting supreme court's first instance of assuming superintendency over all jurisdictions through King's Bench). For a further discussion of the *Carpentertown* case and holding, *see infra* notes 72–77 and accompanying text.

64. *Balph*, 3 A. 220 at 225.

65. *See id.* at 233 (Trunkey, J., dissenting) (stating certiorari should not be decided by supreme court unless lower courts have made final judgment that was erroneous). Justice Trunkey opined that the decision allows the court to use King's Bench to void decisions of lower courts that have jurisdiction even when the lower courts do not make error. *See id.*

66. *See id.* at 234 (Trunkey, J., dissenting) (concluding supreme court should not extend its authority so far because it already has "abundant" power).

67. 17 A. 1087 (Pa. 1889).

68. *See id.* at 1090 (concluding supreme court has undeniable authority over Court of Quarter Sessions proceedings). The record before the supreme court showed no specific objection to the Court of Quarter Sessions' ruling, and the supreme court questioned whether the matter was still reviewable. *See id.* The court held that the Court of Quarter Sessions applied existing law for obtaining liquor licenses in an arbitrary manner. *See id.* at 1089. The only criteria the Court of Quarter Sessions should have used, according to the supreme court, was whether a citizen of good character provided a completed license application, and if so, that citizen should have had the right to the license. *See id.*

69. *See id.* at 1090 (recognizing supreme court's ability to simultaneously grant lower tribunal ample power but also ensure decisions are properly made in its oversight role).

70. *See id.* at 1088–89 (comparing differences in retail liquor laws and determining law in question required minimal qualifications for citizens to receive liquor licenses).

In total, early nineteenth century King's Bench jurisprudence left the Supreme Court of Pennsylvania primarily responsible for determining how far its own powers extended as opposed to the legislature dictating its boundaries.

In the twentieth century, the supreme court expanded its interpretation of King's Bench powers.<sup>71</sup> In *Carpentertown Coal & Coke Co. v. Laird*,<sup>72</sup> the court invoked plenary jurisdiction using King's Bench in response to a writ of prohibition submitted by Carpentertown Coal and Coke Company (the Company).<sup>73</sup> The Company submitted the writ in response to the Pennsylvania Turnpike Commission's failure to properly construct a bridge.<sup>74</sup> The court concluded that its authority to determine whether the State Mining Commission could compel the Company to show cause came from King's Bench authority; it believed its power over lower tribunals had never before been limited by any procedure.<sup>75</sup> Although the court did not grant the requested writ of prohibition, it provided significant clarification of the supreme court's oversight abilities and effectively broadened the scope of King's Bench powers.<sup>76</sup> The decision served as

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71. *See, e.g.*, *Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426, 428 (Pa. 1948) (assuming plenary jurisdiction over State Mining Commission case); *In re Petitions of Bell*, 152 A.2d 731, 734 (Pa. 1959) (asserting jurisdiction over proceeding improperly heard by Pennsylvania Superior Court).

72. 61 A.2d 426 (Pa. 1948).

73. *See id.* at 427 (stating the Company filed petition after Chairman of the State Mining Commission redecided its appeal). Even though the State Mining Commission originally ruled in favor of the Company regarding the Pennsylvania Turnpike Commission's right to damages, the State Mining Commission subsequently requested the Company show cause for why damages should not have been granted. *Id.* The State Mining Commission did not place a limit on the amount of minable coal the Company could excavate. *Id.* (detailing original action brought by Company was to determine how much coal can be mined around physical construction of Pennsylvania turnpike). Two years after an initial determination by the State Mining Commission, the Company petitioned the supreme court in response to the State Mining Commission compelling the Company and its lessor, Thaw Coke Trust, to show cause. *Id.* (emphasizing supreme court had already determined State Mining Commission had jurisdiction over issue). A writ of prohibition is used to "prevent an inferior judicial tribunal from assuming a jurisdiction with which it is not legally vested in cases where damage and injustice would otherwise be likely to follow from such action." *Id.* at 428.

74. *Id.*

75. *See id.* (explaining nature of writ of prohibition and its function of preventing another tribunal from deciding an issue it does not have jurisdiction over). The supreme court answered this question by using its King's Bench powers and its recognition of the ability to issue writs outside of its original jurisdiction powers. *See id.* at 428–29 (addressing Pennsylvania Turnpike Commission's argument and finding supreme court has no justification for issuing writs of prohibition).

76. *See id.* at 430 (refusing to grant the writ of prohibition and explaining how determinations on whether to grant writ involve discretionary choices on part of supreme court).

the first time the supreme court cited to the superintendency power King's Bench possesses.<sup>77</sup>

Approximately twenty years later, the court in *In re Petitions of Bell*<sup>78</sup> addressed the Superior Court of Pennsylvania's dismissal of claims in a case concerning police misconduct.<sup>79</sup> After the superior court reversed the decisions of three county courts that ruled against the accused police officers, the city of Philadelphia filed an amicus curiae brief arguing that the superior court did not have jurisdiction over the subject matter and incorrectly adjudicated the issue.<sup>80</sup> Because the superior court had already dismissed the cases, the supreme court reviewed the matter using King's Bench and held the lower court incorrectly concluded it possessed proper jurisdiction.<sup>81</sup> According to the statutorily prescribed procedure in the County Court of Allegheny County, the final orders designated no right to appeal to the superior court.<sup>82</sup>

As time progressed, the supreme court grew more comfortable using King's Bench powers and moved away from its initial reluctance in *Nathans*.<sup>83</sup> The court evolved from deferring to special jurisdiction created by legislation to assuming plenary jurisdiction in *Carpentertown*.<sup>84</sup> Initially, the court did not use King's Bench powers as a last resort option, but

77. See Sherer, *supra* note 7, at 531. References to the court's "superintendency over inferior tribunals" mean the court oversees and adjudicates decisions in all lower courts within its jurisdiction. *In re Petitions of Bell*, 152 A.2d 731, 734 (Pa. 1959). King's Bench assigns the Supreme Court of Pennsylvania as the "supervisor[]" of lower courts just like the original King's Bench of England. *Carpentertown*, 61 A.2d at 428–29.

78. 152 A.2d 731 (Pa. 1959).

79. See *id.* at 733 (commenting on superior court's disposal of claims).

80. *Id.* at 733–34 (reviewing superior court's decision to consolidate three separate county court appeals and issue single order reversing all three decisions).

81. See *id.* at 739 (holding superior court's decision must be reversed due to error in hearing case). In assuming King's Bench powers, the supreme court clarified the superior court does not possess any powers like King's Bench and has jurisdiction only provided by law. See *id.* at 734 (explaining how King's Bench powers provide supreme court with appellate review even though not statutorily prescribed); see also Sherer, *supra* note 7, at 532 (calling supreme court's usage of King's Bench powers in *In re Bell* "[t]he most evident assertion of the . . . power of superintendence . . .").

82. See *In re Bell*, 152 A.2d at 733 (asserting procedure in place did not statutorily provide opportunity to appeal from county court's final orders). The county court's decision to affirm came after lengthy testimony and admittance of evidence from one of the other policemen. See *id.*

83. See, e.g., *Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426, 428 (Pa. 1948) (concluding supreme court can use King's Bench to issue writ prohibition); *In re Pollard*, 17 A. 1087, 1088–89 (Pa. 1889) (using King's Bench to reverse Court of Quarter Session decision); *Commonwealth v. Balph*, 3 A. 220, 225 (Pa. 1886) (removing case using King's Bench). For an analysis of the supreme court's decision not to exercise King's Bench powers in *Nathans*, see *supra* Section II.A.

84. Compare *Commonwealth v. Nathans*, 5 Pa. 124, 126 (1847) (deferring to Court of Quarter Sessions), with *Carpentertown*, 61 A.2d at 427 (reviewing petition asking supreme court to decide an issue already designated for State Mining Commission).

nevertheless used the powers in different lower court cases.<sup>85</sup> Because using King's Bench effectively distorted the standard procedures of the cases, critics became more skeptical of how far-reaching King's Bench powers actually were.<sup>86</sup>

B. *The 1968 Constitutional Convention Questions King's Bench Authority*

Almost a decade after *Bell*, the general assembly of the Commonwealth of Pennsylvania gathered for the 1968 Constitutional Convention (Convention).<sup>87</sup> Among other things, the assembly deliberated over the sweeping powers granted to the supreme court through King's Bench.<sup>88</sup> While certain delegates argued the court can take away its own inherent powers, others stipulated that the legislature could remove the power according to its article II powers under the commonwealth's constitution, and allowing the court to exercise King's Bench encroached too far into legislative territory.<sup>89</sup> Article V of the Pennsylvania constitution authorizes the supreme court's superintendency power over all lower courts, but without the ability to rely on King's Bench, delegates questioned whether the court could still have the authority to execute its supervisory obligations.<sup>90</sup>

Even after debates and revisions to article V, King's Bench powers remained intact and available for the supreme court to use.<sup>91</sup> Delegates

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85. For an analysis of the evolution of King's Bench jurisprudence from the early nineteenth century into the middle of the twentieth century, see *supra* Section II.A.

86. For a discussion of some delegates' criticism of King's Bench jurisprudence, see *infra* Section II.B.

87. See Sherer, *supra* note 7, at 533.

88. See Makosky, *supra* note 6, at 674 ("At the 1968 Pennsylvania Constitutional Convention, some delegates questioned whether the [King's Bench] power should be removed."); Sherer, *supra* note 7, at 533–34 (discussing questions presented by legislatures about King's Bench powers at Convention).

89. See Ledewitz, *supra* note 20, at 411–12 (arguing rewriting of article V of Pennsylvania constitution did not effectively curtail King's Bench power and is not unconstitutional because article V is what initially defines supreme court's jurisdiction). Justice Roberts' concurrence in *Stander v. Kelley*, 250 A.2d 474 (Pa. 1969) opined on King's Bench powers and how they were not eliminated or more controlled after article V was revised. See *id.* (suggesting supreme court cannot claim constitutional powers unless explicitly provided by constitution itself, and disagreeing with Justice Roberts' argument in *Stander*).

90. See Sherer, *supra* note 7, at 534–35 (highlighting problems arising from reading article V, section 10(a) and article V, section 2(c) in conjunction with one another). If the supreme court is to follow section 10(a) of the constitution and perform its oversight duties but does not have a vehicle to do so pursuant to section 2(c), the court would be unable to act even if some justices believe it should. See *id.* at 534–35 (displaying struggle of commonwealth's legislature in articulating supreme court's jurisdiction and whether it can be considered "advise-and-consent jurisdiction").

91. See Makosky, *supra* note 6, at 674–75 (stating King's Bench jurisdiction remained even after debates because some delegates believed power to be inherent and unremovable).

suggested that the powers must remain because they are inherent regardless of the state's constitution.<sup>92</sup> The court showed no reservations using the power after the Convention, invoking them to decide issues ranging from gubernatorial power to appoint judges to suspension of judiciary members.<sup>93</sup> The court continued to use King's Bench powers to fulfill its judicial oversight role as prescribed by article V of the commonwealth's constitution.<sup>94</sup> It demonstrated flexibility exercising its powers absent prior decisions or recommendations, but it elaborated on the breadth of the powers after constitutional debate.<sup>95</sup>

### C. *King's Bench v. Extraordinary Jurisdiction*

In addition to King's Bench powers, the supreme court has the ability to exercise extraordinary jurisdiction over lower court proceedings.<sup>96</sup> Petitioners and lower tribunals can potentially confuse both forms of jurisdiction, but the terms are not synonymous.<sup>97</sup> Extraordinary jurisdiction

92. See Sherer, *supra* note 7, at 533–34 (stating legislature would need to obtain approval of supreme court in order to remove inherent jurisdiction it has already been granted).

93. See, e.g., *In re Franciscus*, 369 A.2d 1190, 1191 (Pa. 1977) (reviewing suspension by supreme court of Justice of the Peace for Magisterial District 05-2-44, Allegheny County, before receiving suspension recommendation by Judicial Inquiry and Review Board); *id.* at 1192–93 (highlighting supreme court's ability to exercise power over lower tribunals using King's Bench); *Creamer v. Twelve Common Pleas Judges*, 281 A.2d 57, 58 (Pa. 1971) (per curiam) (reviewing supreme court's prior decision to assume plenary jurisdiction of gubernatorial appointments without any other previous lower court decision).

94. See *Franciscus*, 369 A.2d at 1192 (demonstrating supreme court's obligation to oversee all courts and justices of peace); *id.* at 1193 (recognizing other state supreme courts' abilities to supervise lower court's conduct). The court concluded it had the ability to issue the temporary suspension until the Judicial Conduct Board submitted another recommendation to the court. See *id.* at 1194.

95. The supreme court continued to rely on section 2(c) of the commonwealth constitution when utilizing King's Bench powers—a provision that served as the point of contention for whether King's Bench should be revoked. See *Stander v. Kelley*, 250 A.2d 474, 486–87 (Pa. 1969) (Roberts, J., concurring) (opining King's Bench powers were in no way limited by post-1968 Convention).

96. See 42 PA. CONS. STAT. § 726 (1976) (amended 2004) (prescribing supreme court's ability to assume jurisdiction over any issue “involving an issue of immediate public importance”). The supreme court's extraordinary jurisdiction are detailed as follows:

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any part, in any matter pending before any court or magisterial district judge of this Commonwealth *involving an issue of immediate public importance*, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

*Id.* (emphasis added).

97. Compare § 726 (stating supreme court has ability through extraordinary jurisdiction to hear matters pending before lower court at any stage), with § 502 (1976) (granting supreme court King's Bench powers). See WEST'S PA. FORMS, CIVIL PROCEDURE § 1:5, *supra* note 8 (emphasizing similarities between supreme court's King's Bench powers and extraordinary jurisdiction powers); *In re Assign-*

grants the supreme court ability to assume plenary jurisdiction over a *pending* matter at any stage of the judicial process and to rule on the issue, while King's Bench does not require a matter to be pending.<sup>98</sup> Unlike extraordinary jurisdiction, King's Bench permits the court to hear *non-pending* cases, review sentencing decisions, or take up cases where losing parties have no option of appeal.<sup>99</sup>

Extraordinary jurisdiction requires the supreme court to cautiously select matters of immediate public importance requiring timely intervention.<sup>100</sup> The court has interjected in pressing public matters using both forms of jurisdiction while simultaneously explaining why it is proper.<sup>101</sup> For example, in *League of Women Voters v. Commonwealth*,<sup>102</sup> the court elected to use extraordinary jurisdiction and relied on the Free and Equal Elections Clause of the Pennsylvania constitution in declaring the Pennsylvania Congressional Redistricting Act of 2011 unconstitutional.<sup>103</sup> It is easy for other judicial bodies to confuse the two forms of jurisdiction be-

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ment of Avellino, 690 A.2d 1138, 1140 (Pa. 1997) (distinguishing between extraordinary jurisdiction and King's Bench powers, and discussing more limited applicability of extraordinary jurisdiction).

98. See § 726 (prescribing supreme court with extraordinary jurisdiction); § 502 (granting King's Bench jurisdiction in Judiciary Act of 1722).

99. See WEST'S PA. FORMS, CIVIL PROCEDURE § 1:5, *supra* note 8 (explaining how King's Bench gives court authority to hear matters where no appeals are pending).

100. See § 726 (requiring issues of "immediate public importance").

101. See *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766 (Pa. 2018) (reviewing petitioners' extraordinary jurisdiction request while commonwealth court waited for U.S. Supreme Court to decide *Gill v. Whitford*, 138 S. Ct. 1916 (2018)). The petitioners challenged the drawing of congressional districts and whether the Congressional Redistricting Act of 2011 violated the Pennsylvania constitution. *Id.* at 741–43. See generally *Bd. of Revision of Taxes, City of Phila. v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010) (explaining differences between King's Bench and extraordinary jurisdiction). In *Board of Revision of Taxes*, the petitioners, Board of Revision of Taxes (BRT) originally requested the supreme court to exercise either original jurisdiction or King's Bench powers. See *id.* at 614. After the May 2010 primary election, the issue concerning the Philadelphia BRT resurfaced—leading to the BRT's second King's Bench petition. See *id.* at 615 (reviewing supreme court's previous per curiam order denying BRT's request to exercise King's Bench). The supreme court believed it was urgent to examine the BRT's petition so the local system of taxation and revenue collection could properly function in Philadelphia. See *id.* at 620 (selecting extraordinary jurisdiction as proper avenue for hearing case).

102. 178 A.3d 737 (Pa. 2018).

103. See *id.* at 766–67 (reviewing court's decision exercising plenary jurisdiction but remanding matter back to commonwealth court for expedited discovery period); *id.* at 741 (concluding 2011 redistricting plan was unconstitutional gerrymandering). The court initially provided only a per curiam order concluding its unconstitutionality, but inaction from the general assembly prompted the court to choose a new district plan. See *id.* at 741–42 (explaining why opinion should be read in conjunction with prior court order). But see *id.* at 831 (Saylor, J., dissenting) (explaining why court's usage of extraordinary jurisdiction was "improvident").



cause they are used in similar high-stakes situations.<sup>104</sup> With extraordinary jurisdiction and King's Bench as available options to the court, seven elected justices are trusted with an immense amount of decision-making power.<sup>105</sup>

### III. THE SUPREME COURT OF PENNSYLVANIA'S CONTINUED INVOCATION OF KING'S BENCH

In the last several years, the Supreme Court of Pennsylvania has invoked King's Bench powers in a few notable instances, showing its continued receptivity to King's Bench petitions.<sup>106</sup> In hearing these cases, the court continually clarifies the powers' capabilities.<sup>107</sup> In most instances, the supreme court chooses situations posing a threat to the judiciary's integrity or criminal proceedings with significant societal implications.<sup>108</sup> These are the scenarios where the powers are needed most and should be used most.

#### A. *The Most Recent Invocations of King's Bench*

In 1997, the court used King's Bench powers to order a lower court judge to comply with a felony-waiver program.<sup>109</sup> After a fellow common

104. See, e.g., *FOCUS v. Allegheny Cty. Ct. of Common Pleas*, 75 F.3d 834, 842 (3d Cir. 1996) (comparing King's Bench authority to Third Circuit's extraordinary jurisdiction capabilities); *Yohn v. Love*, 76 F.3d 508, 518 (3d Cir. 1996) (conflating statute granting extraordinary jurisdiction to supreme court with King's Bench authority).

105. Compare § 726 (detailing supreme court's extraordinary jurisdiction powers), with § 502 (prescribing court with King's Bench powers). The powers of extraordinary jurisdiction and King's Bench have proven to be more flexible than other functions of government. See Aldisert, *supra* note 23, at 486 (stating supreme court's "unabashed power" does not have to rely on legislature to assert its predominance of important cases within commonwealth judicial system).

106. See, e.g., *Commonwealth v. Williams*, 129 A. 3d 1199, 1207 (Pa. 2015) (concluding King's Bench jurisdiction is proper when determining constitutionality of gubernatorial reprieve of death row sentence); *In re Bruno*, 101 A.3d 635, 687 (Pa. 2014) (rejecting petitioner's argument that Judicial Conduct Board and Court of Judicial Discipline has exclusive jurisdiction over judicial misconduct claims); *In re Assignment of Avellino*, 690 A.2d 1138, 1140–41 (Pa. 1997) (rejecting argument that supreme court could not hear case because it was not statutorily prescribed for the court).

107. For a discussion of the supreme court's rationale for using King's Bench in recent years, see *infra* Section III.A.

108. For an analysis of the supreme court's flexibility in exercising King's Bench to cure threats to the integrity of the judiciary, see *infra* Sections III.A–C.

109. See *Avellino*, 690 A.2d at 1140 (rejecting Judge Avellino's argument against supreme court using King's Bench powers in matter); see generally Robert Rhodes, *First Time Felony Waiver*, RHODES LEGAL GRP., PLLC, <https://rhodeslegalgroup.com/criminal-law/first-time-felony-waiver/> [https://perma.cc/2YNQ-NE9L] (last visited Apr. 7, 2020) (discussing alternatives to prison sentence for individuals facing first time felony conviction). A felony-waiver program generally allows an individual to qualify for a lighter sentence if he or she has never been previously convicted of a felony and never participated in a felony deferred prosecution program. See *id.*

pleas judge petitioned the supreme court to exercise King's Bench, the judge in question claimed the petition constituted retaliatory action from the district's president judge.<sup>110</sup> The judge in question argued against the court's compliance mandate and stated the supreme court lacked the capability for enforcement.<sup>111</sup> The supreme court promptly exercised its King's Bench powers because the court's ultimate decision of whether compliance was necessary was still pending.<sup>112</sup> The supreme court rejected all three of the non-complying judge's arguments, concluding its role in overseeing judicial assignments gave it the capability to review such disputes.<sup>113</sup> The court concluded it could review the matter because any decisions regarding judicial assignments stem from its oversight responsibilities.<sup>114</sup>

Even more recently, in *In re Bruno*,<sup>115</sup> a federal grand jury indicted Magisterial District Judge Mark A. Bruno for criminal conspiracy and wire fraud—prompting the Supreme Court of Pennsylvania to revoke his judicial responsibilities and to suspend him without pay.<sup>116</sup> The grand jury indicted Judge Bruno and nine other traffic court judges for involvement in a “ticket-fixing” scandal designed to favor the judge's own personal connections.<sup>117</sup> Petitioners tasked the supreme court with determining whether it had the power to suspend the jurists for disciplinary reasons.<sup>118</sup>

While the petitioning judges acknowledged the court had removed, suspended, or disciplined jurists before, they alleged the court did not have the ability to suspend Judge Bruno because of article V, section 18 of

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110. *See Avellino*, 690 A.2d at 1139 (detailing Judge Avellino's arguments for non-compliance leading to supreme court's challenge).

111. *Id.* at 1141 (arguing extraordinary jurisdiction did not apply because there was no matter pending, and the case did not fit into any extraordinary jurisdiction category).

112. *See id.* at 1140 (explaining Judge Avellino's contention that supreme court did not have authority to hear case because there was no matter pending in lower court); *id.* at 1143–44 (concluding Judge Avellino must abide by Judge Heron's decision and threatening to impose sanctions on Avellino for his actions). “We therefore reject Judge Avellino's argument that this Court cannot take cognizance of the dispute because the subject matter does not fall within our original statutory jurisdiction . . .” *Id.* at 1140.

113. *See id.* at 1141.

114. *See id.* (finding Judge Avellino's refusal to comply with presiding judge's order was an act of “unjustified defiance”); *id.* 1143–44 (relying on *In re Franciscus*, 369 A.2d 1190, 1191–92 (Pa. 1977) to show article V, section 18 of constitution did not eliminate court's supervisory power).

115. 101 A.3d 635 (Pa. 2014).

116. *See id.* at 640–41 n.1 (reviewing federal investigation of “ticket-fixing” scandal in Philadelphia for those who were “politically and socially connected”).

117. *Id.*

118. *See id.* at 642 (considering whether entering orders of suspensions for jurists falls primarily under purview of the Court of Judicial Discipline). Respondents argued the supreme court's use of King's Bench in the matter ensured the court would uphold its oversight responsibilities. *Id.* at 651 (explaining respondents' argument that article V section 18 of commonwealth constitution did not serve to strip power away from supreme court).

the constitution.<sup>119</sup> This part of the Pennsylvania constitution codifies the Judicial Conduct Board (JCB) and elaborates on the procedures, composition, and actions of the Board itself.<sup>120</sup> The petitioners argued that, because the general assembly eliminated the Judicial Inquiry and Review Board and formed the Court of Judicial Discipline (CJD) and JCB, the newly formed bodies had exclusive jurisdiction over judicial discipline matters.<sup>121</sup> Thus, the petitioners alleged that relieving former Judge Bruno of his responsibilities and suspending him without pay encroached upon the JCB's and CJD's jurisdiction.<sup>122</sup>

In reaching its conclusion, the court proffered a comprehensive analysis of its King's Bench powers.<sup>123</sup> The supreme court broadly construed its power and noted its recent flexibility using King's Bench for decisions threatening the judiciary's integrity.<sup>124</sup> The court reflected on its suggestive history, stating King's Bench was meant to "transcend forms of procedure" and help fulfill its supervisory obligation for lower courts.<sup>125</sup> The

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119. *Id.* at 644 (highlighting petitioners' argument that supreme court has never established extent of its disciplinary authority); *id.* at 688 (addressing hierarchy of supreme court over Court of Judicial Discipline proceedings); *id.* at 651 (reiterating petitioners' arguments that amendments producing Court of Judicial Discipline and JCB altered how Pennsylvania judiciary addresses problems of judicial misconduct).

120. See PA. CONST. art. V, § 18(b) ("The board shall be composed of [twelve] members, as follows: two judges, other than senior judges, one from the courts of common pleas and the other from either the [s]uperior [c]ourt or the [c]ommonwealth [c]ourt, one justice of the peace who need not be a member of the bar of the [s]upreme [c]ourt, three non-judge members of the bar of the [s]upreme [c]ourt and six non-lawyer electors.").

121. *In re Bruno*, 101 A.3d at 645 (arguing formation of CJD and JCB prevent supreme court from having ability to "commence proceedings independently").

122. *Id.* at 643–44 (addressing AOPC's argument that supreme court and CJD have concurrent jurisdiction, but supreme court's authority trumps CJD's authority); see also § 18 (articulating authority of JCB and CJD).

123. See *In re Bruno*, 101 A.3d at 642 (distinguishing CJD's decision to suspend Judge Bruno with pay from supreme court's decision to suspend without pay).

124. See *id.* at 681 n.25 (examining petitioners' argument that 1993 amendments of article V, section 18 reduced supreme court's ability to act in cases where Board or CJD might act). Petitioners attempted to distinguish between *Avellino* and the pending matter, stating it was a judicial discipline case and *Avellino* involved judicial misconduct. See *id.* at 646 (addressing petitioners' question of whether this constituted judicial misconduct or judicial discipline). Justice McCaffery's concurrence reminded petitioners the court placed suspensions on the jurists in each of those cases. See *id.* at 704 n.2 (McCaffery, J., concurring) (debunking petitioners' argument that case was distinguishable from *Avellino* or *Franciscus*). Justice McCaffery also believed that distinguishing this matter as "disciplinary" as opposed to previous matters would result in "endless haggling in future cases." *Id.* (McCaffery, J., concurring). The court rejected the petitioners' interpretation of the authority, opining it was its constitutional authority to use King's Bench as understood. See *id.* at 678–79 (concluding petitioners' argument creates "false dichotomy," and court's supervisory power is inevitable).

125. *In re Bruno*, 101 A.3d at 679 (holding King's Bench should be exercised when supreme court finds it necessary to do so). By using past examples of the court exercising King's Bench, the court exemplified its ability to use it for "rela-

court mentioned instances where King's Bench decisions were not published and noted this does not create the assumption that it cannot exercise its constitutional authority.<sup>126</sup> Tribunals like the CJD and JCB remained within the supreme court's oversight powers, although some justices believed the court should have been more cautious using King's Bench as justification for involvement.<sup>127</sup> The court reiterated its capability of assuming jurisdiction over any civil or criminal matter, even if the matter is not pending.<sup>128</sup>

Only a year after *In re Bruno*, the Commonwealth petitioned the court to determine whether it could review a decision by the Governor of Pennsylvania to issue a stay of execution for a death row inmates.<sup>129</sup> The Commonwealth's petition resulted from Governor Tom Wolf's reprieve of the defendant's sentence and his intention to place a statewide moratorium on the death penalty.<sup>130</sup> The defendant previously had his death sentence reinstated and fourth Post-Conviction Relief Act (PCRA) petition denied.<sup>131</sup> The Commonwealth argued Governor Wolf's order "violated the

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tively mundane tasks relating to temporary assignments of judges to fill vacancies on the bench, priority of commission, or judicial assignments to divisions within a trial court, and related adjudicatory obligations." *Id.* at 675 (detailing past instances where supreme court used King's Bench powers).

126. *See id.* at 679 n.23 (noting petitioners' argument that King's Bench was never used to suspend jurists before 1968 ratification of Pennsylvania's constitution). The court referred to its "own core duties" as sufficient rationale for stepping in despite a lack of judicial precedent. *Id.*

127. *See id.* at 686 (stating article V, section 18 addressing CJD did not lessen jurisdiction of supreme court's King's Bench powers). The court rejected the notion that the CJD and supreme court did not have concurrent jurisdiction and reiterated the CJD's ability to continue the sanctions process. *But see id.* at 697 (Saylor, J., concurring) (suggesting majority's argument may extend power of King's Bench too far but is proper in context of suspensions); *id.* at 699 (Baer, J., concurring) (deferring to CJD because it conducted fact finding and heard arguments relevant to the case—information that was not initially available to supreme court).

128. *See id.* at 686 (stating article V section 18 does not restrain supreme court's King's Bench powers because the CJD and supreme court's ability to adjudicate "are distinct and may comfortably operate separately").

129. *See Commonwealth v. Williams*, 129 A.3d 1199, 1202–03 (Pa. 2015) (introducing appeal brought by Commonwealth). The petition contended Governor Tom Wolf exceeded his constitutional authority and violated the separation of powers by attempting to erase existing death sentences. *Id.* at 1203. Governor Wolf conditioned the capital punishment reprieve on the type of recommendations he would receive from a task force assigned with studying Pennsylvania's capital punishment system. *Id.* at 1202 n.3 (defining "moratorium" and clarifying Governor Wolf's intention to introduce moratorium on death penalty).

130. *Id.* at 1201–02 (addressing Williams's petition and subsequent signing of his execution by former Governor Tom Corbett). Governor Wolf stated he would not implement a death penalty sentence until a task force conducted a study on the death penalty as applied in Pennsylvania. *Id.* at 1202.

131. *Id.* at 1201 (recounting defendant's conviction of first-degree murder after robbing and killing an individual as well as the subsequent sentence).

doctrine of separation of powers by seeking to nullify valid, final judgments of sentence.”<sup>132</sup>

The court recognized it could invoke King’s Bench in similar ways to its use of extraordinary jurisdiction and noted the importance of the issue at hand.<sup>133</sup> Governor Wolf encouraged the court to exercise extraordinary jurisdiction because the petition lacked a pending case in a lower court.<sup>134</sup> This strategy would, in effect, force the petitioner to file suit and go through normal procedural processes instead of using King’s Bench to bypass litigation. Even though the Commonwealth challenged an executive action, the supreme court elected to exercise King’s Bench.<sup>135</sup> The court declined to determine whether it should use extraordinary jurisdiction instead of King’s Bench because it found King’s Bench sufficient to adjudicate.<sup>136</sup> Even though the court granted the King’s Bench petition, it upheld the constitutionality of Governor Wolf’s reprieve—stating he did not intend to permanently abandon the death sentence, but merely issue a reprieve so a task force could conduct a capital punishment study.<sup>137</sup>

#### B. *The “Kids for Cash” Scandal*

The 2008 Pennsylvania “Kids for Cash” scandal is another recent instance where the court used King’s Bench after discovering an unprecedented threat to the judiciary’s integrity.<sup>138</sup> The scandal implicated two

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132. *Id.* at 1203 (explaining Commonwealth’s argument as well as Governor’s argument that reprieve was made in accordance with existing constitutional authority). Governor Wolf conceded the supreme court previously used King’s Bench to “address allegations that another branch of government has encroached upon its judicial power,” but suggested the court narrow its King’s Bench powers to supervision. *Id.* at 1205 (detailing Governor’s argument for why King’s Bench should not be exercised).

133. *See id.* at 1206 (acknowledging King’s Bench is used to review issues requiring swift action). In choosing to exercise King’s Bench, the court declined to narrowly construe its King’s Bench authority. *See id.* at 1207 (concluding the Commonwealth showed ample reasons why issue requires timely intervention and why King’s Bench needs to be invoked).

134. *Id.* at 1205 (explaining Governor’s argument for exercising extraordinary jurisdiction to avoid “technical maneuvering” of cases by lower courts).

135. *See id.* at 1206–07 (explaining neither Governor nor defendant has provided persuasive reasons for why King’s Bench powers should not be exercised). The court grounded its decision invoking King’s Bench using a similar argument as *In re Bruno*—that article V’s 1968 amendments did not intend to limit the inherent authority of the court. *See id.* at 1206 n.10.

136. *Id.* at 1207 n.11.

137. *See id.* at 1211–12 (asserting Governor Wolf has extensive executive reprieve power, including the ability to grant reprieve in criminal cases). The supreme court did not evaluate the validity of the reprieve, but affirmed only its constitutionality. *Id.* at 1218.

138. *See In re Bruno*, 101 A.3d 635, 671 (Pa. 2014) (recognizing supreme court’s appointment of special master to review judicial misconduct). The court not only appointed a special master to review prior decisions, but also required the President Judge of Luzerne County Court of Common Pleas to submit monthly reports outlining steps taken to cure the court system of prior injustices. *See id.* at

former Luzerne County Court of Common Pleas judges who denied thousands of juveniles fair criminal proceedings while on trial and, for doing so, received payments from a private juvenile detention facility.<sup>139</sup> The juveniles in question often lacked representation at trials in front of former Judges Michael Conahan and Mark Ciaverella Jr., depriving them of constitutional rights, unfairly sending them to juvenile placement facilities, all while the judges collected profit kickbacks.<sup>140</sup> The supreme court denied an initial King's Bench petition in the matter, but after former Judges Conahan and Ciaverella were federally indicted, the court appointed a special master using King's Bench to review the judges' previous juvenile court adjudications.<sup>141</sup> The supreme court characterized the corruption scandal as an instance exemplifying why King's Bench should exist.<sup>142</sup> The judiciary lacked a clear way of rectifying the situation and relied on King's Bench as a way to fact find and investigate.<sup>143</sup>

### C. *King's Bench and the Death Penalty*

Importantly, subsequent opinions by the supreme court have recognized the subjectivity of King's Bench powers and the option for the court not to adjudicate an issue of extraordinary importance.<sup>144</sup> In September 2019, the federal defender's office in Philadelphia issued a petition for the Supreme Court of Pennsylvania to exercise King's Bench to decide the constitutionality of the death penalty as applied in Pennsylvania.<sup>145</sup> The

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671. Exercising King's Bench in this particular situation allowed the court to act quickly, and the procedure itself was not prescribed by the constitution, rules, or any statutes. *See id.* at 672.

139. *See* Guggenheim & Hurtz, *supra* note 18, at 654 (detailing scheme behind "Kids for Cash" scandal).

140. *Id.* (explaining method that former Judges Ciaverella Jr. and Conahan used to accept kickback payments for matriculating unrepresented juveniles into placement facilities).

141. *See In re Bruno*, 101 A.3d at 672 n.21 (discussing supreme court's initial failure to address Judge Ciaverella Jr. and Judge Conahan's wrongdoing); *id.* at 673 (using special master on remand of defamation suit during "Kids for Cash" scandal fallout); Guggenheim & Hurtz, *supra* note 18, at 655–56 (discussing supreme court's initial unwillingness to exercise King's Bench).

142. *See In re Bruno*, 101 A.3d at 671. In the wake of the former judges' indictments, as well as information jeopardizing the legitimacy of juvenile adjudications, the supreme court retained plenary jurisdiction using King's Bench, but did not have a formulaic method of conducting future proceedings. *See id.*

143. *Id.* at 672 (arguing "the power of King's Bench allowed the Court to innovate a swift process and remedy appropriate to the exigencies of the event.")

144. *See id.* at 705 (McCaffery, J., concurring) (criticizing supreme court's initial response to "Kids for Cash" scandal and noting King's Bench is not guaranteed mechanism for curing injustices in courts). Justice McCaffery commented use of King's Bench in the scandal was not a "swift process" to cure injustice. *See id.* at 706.

145. An-Li Herring, *PA Supreme Court to Consider Putting End to Death Penalty*, PITTSBURGH'S NPR NEWS STATION (Dec. 4, 2018), <https://www.wesa.fm/post/pa-supreme-court-consider-putting-end-death-penalty#stream/0> [<https://perma.cc/UXC8-EMHS>] (discussing pending petition before supreme court over whether

supreme court justices had alluded to systemic flaws in the Commonwealth's application of the death penalty in previous cases.<sup>146</sup> Petitioners, respondents, and other parties of interest submitted briefs arguing both the merits of the issue and whether the court should exercise King's Bench in the first place.<sup>147</sup> On the issue of whether the court should exer-

King's Bench should be exercised). The justices instructed parties at oral argument to explain whether it should exercise King's Bench in addition to the merits of the issue. *Id.* The Philadelphia District Attorney's Office submitted its own study and brief to the supreme court in addition to the Joint State Government Commission's study on capital punishment as applied in Pennsylvania. Elizabeth Weill-Greenberg, *Philadelphia D.A. Asks Court to Declare Death Penalty System Unconstitutional*, APPEAL (July 15, 2019), <https://theappeal.org/philadelphia-d-a-asks-court-to-declare-death-penalty-system-unconstitutional/> [<https://perma.cc/P5YW-DE26>] (reviewing Philadelphia District Attorney Larry Krasner's argument that death penalty is disproportionately applied to minority defendants).

146. *See* Commonwealth v. Williams, 129 A.3d 1199, 1220 (Pa. 2015) (Stevens, J., concurring) (opining on role of Supreme Court of Pennsylvania in future death penalty proceedings). Justice Stevens separately noted issues the supreme court may be faced with in the future concerning the death penalty and predicted what recently happened to the commonwealth's capital punishment system. *See id.* (voicing concerns over redundancy of capital punishment system). Justice Stevens stated:

The Pennsylvania Supreme Court is in danger of becoming irrelevant in death penalty cases. Decades come and go after a defendant has had due process of law and appropriate review by this Court, yet the decisions of this Court affirming the convictions are ignored. The families of the victims are victimized again and again, this time by the failure of the criminal justice system to carry out the law.

*Id.* Further, current Chief Justice Thomas G. Saylor previously vocalized criticisms of the way the death penalty is applied in Pennsylvania. *See* Thomas G. Saylor, *Death-Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 WIDENER L.J. 1, 2 (2013) (highlighting impaired nature of how capital punishment is applied in Pennsylvania). His criticism served as a reason why some believed the Supreme Court of Pennsylvania would conclude capital punishment is cruel punishment as applied in Pennsylvania. Max Mitchell, *Krasner Says Pa.'s Death Penalty Is Unconstitutional. Here's What Pa.'s Chief Justice Has Said*, LEGAL INTELLIGENCER (July 18, 2019, 5:15 PM), <https://store.law.com/Registration/Login.aspx?mode=silent&source=https%3A%2F%2Fwww.law.com%2Fthelegalintelligencer%2F2019%2F07%2F18%2FKrasner-says-pa-s-death-penalty-is-unconstitutional-heres-what-pa-s-chief-justice-has-said%2F> [permalink unavailable] ("A review of the chief justice's writings shows that on several occasions Saylor has questioned the way the state's capital punishment system has been implemented, and has been critical of the quality of representation by court-appointed attorneys.").

147. *See* Dominique Mosbergen, *Death Penalty Is Racist, Classist and Unconstitutional, Philadelphia DA Argues*, HUFFINGTON POST, (Aug 22, 2019), [https://www.huffpost.com/entry/philadelphia-district-attorney-death-penalty\\_n\\_5d2d88bde4b085eda5a12305](https://www.huffpost.com/entry/philadelphia-district-attorney-death-penalty_n_5d2d88bde4b085eda5a12305) [<https://perma.cc/58BN-748J>] (explaining arguments made by Philadelphia District Attorney Larry Krasner in his brief opposing the death penalty as applied in Pennsylvania). As part of the brief, District Attorney Krasner conducted a study of 155 death row inmates to analyze disparities or flaws in the application of the death penalty in Philadelphia. *Id.* Another article cited to the legislative study conducted by a joint task force on the capital punishment system in Pennsylvania and analyzed the King's Bench petitions filed to "leapfrog the typical [legislative] process." Riley Yates, *Could the Supreme Court Kill Pennsylvania's Death Penalty?*, MORNING CALL (Mar. 5, 2019, 7:00 AM), <https://www.mcall.com/news/>

cise King's Bench, petitioners argued that the decision has sweeping effects on the integrity of the judiciary's capital punishment system and thus meets typical King's Bench criterion.<sup>148</sup> Conversely, respondents argued that the court should not invoke its King's Bench powers because there was no issue of immediate public importance given the existing moratorium on the death penalty.<sup>149</sup>

The court declined to exercise King's Bench powers to hear the appeal, stating in a per curiam order that the review of death penalty proceedings should continue accordingly in PCRA court.<sup>150</sup> The court's denial may serve as a signal to petitioners that there is no urgency in resolving the issue; it places even greater faith in the judiciary's present system of reviewing death penalty sentences.<sup>151</sup> The court's order exemplifies the caution justices exercise when deciding King's Bench petitions—even for an issue potentially warranting resolution.

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police/mc-nws-pennsylvania-death-penalty-supreme-court-20190304-story.html [https://perma.cc/A6TR-SNJP] (discussing potential for using King's Bench to abolish death penalty). Commentators were unsure whether the justices would be convinced by both the arguments for King's Bench and on the merits of the issue. See Mitchell, *supra* note 146.

148. See Cherri Gregg, *Advocates Argue Pennsylvania Supreme Court Should Toss Death Penalty*, KYW NEWSRADIO (Sept. 11, 2019, 2:33 PM), <https://kywnewsradio.com/articles/news/advocates-argue-pa-supreme-court-should-toss-death-penalty> [https://perma.cc/5P6M-MTRN] (detailing arguments both petitioners and respondents made during oral arguments for King's Bench). Several justices expressed concerns about the lack of factual record in the matter—and if the court decided on the merits of the death penalty—it would have to adopt the Pennsylvania Task Force and Advisory Committee's report on the death penalty as fact. See *id.*; see also *Pennsylvania Supreme Court Hears Argument on Constitutionality of Death Penalty*, DEATH PENALTY INFO. CTR. (Sept. 12, 2019), <https://deathpenaltyinfo.org/news/pennsylvania-supreme-court-hears-argument-on-constitutionality-of-death-penalty> [https://perma.cc/6ZYD-VJ9H] (highlighting respondents' argument that task force's report was only meant for advisory purposes and not to be accepted as fact).

149. See Logan Hullinger, *Hill-Evans and Others Wait as Pa. Supreme Court Hears Death Penalty Challenge*, YORK DISPATCH, <https://www.yorkdispatch.com/story/news/local/2019/09/04/hill-evans-and-others-wait-pa-supreme-court-hears-argument-over-death-penalty-constitutionality-next/2199162001/> [https://perma.cc/238W-N875] (last updated Sept. 8, 2019, 5:46 PM) (explaining how long moratorium has existed on death penalty).

150. *Cox v. Commonwealth*, 218 A.3d 384, 385 (Pa. 2019); see also Maryclaire Dale, *Pa. High Court Says It Won't Review State's Death Penalty*, ASSOCIATED PRESS, <https://www.pennlive.com/news/2019/09/pa-high-court-says-it-wont-review-states-death-penalty.html> [https://perma.cc/5ACD-MF4E] (last updated Sept. 28, 2019) (stating Supreme Court of Pennsylvania declined to exercise King's Bench to review constitutionality of death penalty).

151. See *Cox*, 218 A.3d at 385 (refusing to exercise jurisdiction). In its ruling, the court reiterated normal appeals of the death penalty should continue in lower tribunals. See Julie Shaw, *Pa. Supreme Court Rejects Petition to Find Death Penalty Unconstitutional*, PHILA. INQUIRER, <https://www.inquirer.com/news/pennsylvania-death-penalty-supreme-court-ruling-philadelphia-district-attorney-larry-krasner-20190927.html> [permalink unavailable] (last updated Sept. 27, 2019) (commenting on Pennsylvania District Attorneys Association's statement backing death penalty as applied in Pennsylvania).



D. *The Mumia Abu-Jamal Case*

In 1982, Mumia Abu-Jamal, a famous member of the Black Panther Party, was convicted for shooting and killing former Philadelphia police officer Daniel Faulkner.<sup>152</sup> A jury sentenced Abu-Jamal to death despite Abu-Jamal arguing there was racial bias in his judicial proceedings.<sup>153</sup> Abu-Jamal is a prominent figure in the “Free Mumia” movement, which advocates for racial justice in the judiciary.<sup>154</sup>

In 2011, former Philadelphia District Attorney Seth Williams decided to no longer pursue Abu-Jamal’s execution and stated that he would be imprisoned for life.<sup>155</sup> By that point, Abu-Jamal had spent nearly thirty years on death row, during which time he fought against racial injustice through his writing and advocacy.<sup>156</sup> It was not until the U.S. Supreme Court decided *Williams v. Pennsylvania*<sup>157</sup> that Abu-Jamal and his legal team had an opportunity to appeal his prison sentence.<sup>158</sup> The *Williams* decision stated that former Supreme Court of Pennsylvania Chief Justice Castille’s failure to recuse himself from a decision denying relief to a death row inmate violated the prisoner’s due process rights under the Fourteenth Amendment.<sup>159</sup> The former justice’s role in adjudicating the decision presented a risk of bias because he played a significant part in

152. *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 848 (Pa. 1989) (reviewing actions leading to Abu-Jamal’s imprisonment); *see also* Wesley Lowery, *How Mumia Abu-Jamal Doomed Debo Adegbile in the Senate*, WASH. POST (Mar. 5, 2014, 3:56 PM), <https://www.washingtonpost.com/news/the-fix/wp/2014/03/05/how-mumia-abu-jamal-doomed-dego-adegbile/> [<https://perma.cc/KM5W-J3C2>] (explaining how Mumia Abu-Jamal’s conviction and story has remained a political talking point for politicians as recently as 2012).

153. *See Abu-Jamal*, 555 A.2d at 848–49 (laying out Abu-Jamal’s argument that he presented sufficient evidence of racial animus in his judicial proceedings).

154. *See* Don Terry, *A Fight for Life Is Waged in an Angry Courtroom*, N.Y. TIMES: ARCHIVE (July 30, 1995), <https://www.nytimes.com/1995/07/30/us/a-fight-for-life-is-waged-in-an-angry-courtroom.html> [<https://perma.cc/CT2J-3JJ3>].

155. *The Abu-Jamal Case*, N.Y. TIMES (Dec. 12, 2011), <https://www.nytimes.com/2011/12/13/opinion/the-abu-jamal-case.html> [<https://perma.cc/L8YY-W9WE>] (showing district attorney’s decision to “put the case to rest”); *see also* Wash. Wire, *Explaining the Mumia Abu-Jamal Controversy*, WALL ST. J. (Mar. 5, 2014, 5:02 PM), <https://blogs.wsj.com/washwire/2014/03/05/explaining-the-mumia-abu-jamal-case/> [<https://perma.cc/S9YX-T929>] (noting Abu-Jamal is now serving life in prison without possibility of parole).

156. *See* Neil Genzlinger, *An Insistent Voice From Behind Bars*, N.Y. TIMES (Jan. 31, 2013), <https://www.nytimes.com/2013/02/01/movies/mumia-long-distance-revolutionary-about-mumia-abu-jamal.html> [<https://perma.cc/CQ2W-XSBA>] (highlighting Abu-Jamal’s writing from death row).

157. 136 S. Ct. 1899 (2016).

158. *See* Bobby Allyn, *Mumia Abu-Jamal Granted Right of Appeal After Decades in Prison*, NPR (Dec. 28, 2018, 5:29 PM), <https://www.npr.org/2018/12/28/680781150/mumia-abu-jamal-granted-right-of-appeal-after-decades-in-prison> [<https://perma.cc/HQ63-ZHCG>] (stating Abu-Jamal’s main argument in most recent appeal centered around potential bias of former Chief Justice Castille as revealed in *Williams*).

159. *Williams*, 136 S. Ct. at 1903.

Williams's prosecution when formerly working at the District Attorney's office.<sup>160</sup> This ruling prompted Abu-Jamal to appeal his conviction because the same former chief justice denied Abu-Jamal's final appeal in 2012.<sup>161</sup>

Philadelphia District Attorney Larry Krasner initially opposed Abu-Jamal's most recent appeal after it was allowed to proceed by Judge Leon Tucker in the Court of Common Pleas.<sup>162</sup> Krasner received substantial blowback for the move, and months later, he reversed his position and allowed the appeal to proceed.<sup>163</sup> This prompted Maureen Faulkner, the widow of Daniel Faulkner, to file a King's Bench petition asking the Supreme Court of Pennsylvania to review Abu-Jamal's appeal.<sup>164</sup> Faulkner claimed that District Attorney Krasner and several staffers in the District Attorney's office should no longer be involved with Abu-Jamal's case because they had conflicts of interest.<sup>165</sup>

On February 24, 2020, the Supreme Court of Pennsylvania granted Maureen Faulkner's King's Bench petition.<sup>166</sup> The court appointed McKean County Court of Common Pleas Senior Judge John Cleland as Special Master to investigate whether District Attorney Krasner and others have conflicts of interest with Abu-Jamal's case.<sup>167</sup> This aggressive step is

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160. *See id.* at 1908.

161. *See* Steve Tawa, *Philly DA Will Not Pursue Appeal in Mumia Abu-Jamal Legal Saga*, KYW NEWSRADIO (Apr. 17, 2019, 5:33 PM), <https://kywnewsradio.radio.com/articles/news/da-withdraws-appeal-judges-ruling-granting-mumia-abu-jamal-rehearing-state-supreme> [<https://perma.cc/ZJR5-UNUA>] (stating Abu-Jamal's appeal "centers on the [f]ormer Chief Justice['s]" involvement in the prosecution).

162. *See* Bobby Allyn, *Judge in Mumia Abu-Jamal's Case Blasts Krasner for Trying to Block Latest Appeal*, WHYY (Apr. 1, 2019), <https://whyy.org/articles/judge-in-mumia-abu-jamals-case-blasts-krasner-for-trying-to-block-latest-appeal/> [<https://perma.cc/M34E-FERM>] (examining lawyers from district attorney's office who initially opposed Abu-Jamal's argument that former Justice Castille was biased in case).

163. Bobby Allyn, *Krasner Reverses Position, No Longer Opposes New Hearing for Mumia Abu-Jamal*, WHYY (Apr. 17, 2019), <https://whyy.org/articles/krasner-reverses-position-no-longer-opposes-new-hearing-for-mumia-abu-jamal/> [<https://perma.cc/A7UX-MRSE>].

164. Julie Shaw, *Pa. Supreme Court Will Investigate Alleged Conflicts in DA Larry Krasner's Handling of Mumia Abu-Jamal's Appeals*, PHILA. INQUIRER, <https://www.inquirer.com/news/mumia-abu-jamal-maureen-faulkner-pennsylvania-supreme-court-conflict-larry-krasner-20200224.html> [permalink unavailable] (last updated Feb. 24, 2020) (claiming Faulkner asked court to remove Krasner and his office from Abu-Jamal matter due to conflicts of interest between Krasner and his staff).

165. *Id.* (explaining Krasner is associated with organization where Abu-Jamal is an active board member). Faulker alleged that Krasner, among other "movement attorneys," defended protestors outside the 2000 Republican National Convention in Philadelphia who showed support for Abu-Jamal. *Id.* (internal quotation marks omitted).

166. *Id.*

167. *See* Needles, *supra* note 19 (detailing Judge Cleland's past history as special master in "Kids for Cash" scandal and Penn State football sex abuse scandal).

another high-profile example of the court's willingness to insert itself to investigate potential injustices.

#### IV. THE SUPREME COURT OF PENNSYLVANIA SHOULD CONTINUE TO USE KING'S BENCH POWERS IN APPROPRIATE CIRCUMSTANCES

While commentators, delegates, and jurists have argued King's Bench powers are too powerful for the supreme court to wield, King's Bench should remain a mechanism that the court uses to ensure judicial integrity.<sup>168</sup> Recent oral arguments show how the legislature has cautioned the court against using King's Bench where they believe power is reserved for the legislature.<sup>169</sup> Legislators should be cognizant of the positive impact the powers continue to have in the commonwealth.

The Supreme Court of Pennsylvania has effectively used King's Bench to fulfill its judicial oversight obligation even when other outlets for review exist.<sup>170</sup> Even though there is no set criteria for using King's Bench, the court gives ample weight to precedent and exhibits caution when deciding whether to use King's Bench.<sup>171</sup> Therefore, under the proper circumstances—such as when the court feels the integrity of the judiciary is threatened—it should be empowered to invoke King's Bench powers. Legislatures and lower courts should honor the powers granted to the seven elected justices so long as the courts continue to selectively grant

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168. See *In re Bruno*, 101 A.3d 635, 701 (Pa. 2014) (Todd, J., concurring) (stating King's Bench should be reserved for “constitutionally complex and delicate area[s]”). The legislature created the 1993 amendments, including the CJD, due to public disapproval of the supreme court's powers. See *id.* (Todd, J., concurring). Justice McCaffery found the powers were not infallible and reminded the court of its failure to immediately interject in the “Kids for Cash” scandal when it denied an initial King's Bench petition. See *id.* at 705–06 (McCaffery, J., concurring) (arguing against supreme court's contention that King's Bench provides swift justice if invoked).

169. See Editorial Board, Opinion, *Death-Penalty Case at the State Supreme Court Is a Reminder That Harrisburg Lawmakers Not Doing Their Job*, PHILA. INQUIRER, <https://www.inquirer.com/opinion/editorials/death-penalty-pennsylvania-supreme-court-cox-philadelphia-joseph-scarnati-20190913.html> [permalink unavailable] (last updated Sept. 13, 2019, 2:16 PM) (explaining goal of Joint State Commission's report on capital punishment system). The Office of Pennsylvania State Senate President Pro Tempore Joe Scarnati argued the court's use of King's Bench to hear the case would disincentivize the legislature from creating these types of reports going forward. *Id.*

170. See *In re Bruno*, 101 A.3d at 681–82 (opining CJD did not curtail oversight authority of supreme court, thus, remained within supreme court's purview); *In re Franciscus*, 369 A.2d 1190, 1191–92 (Pa. 1977) (clarifying article V, section 18 of Pennsylvania constitution detailing removal of members of judiciary did not eliminate authority of supreme court in oversight matters).

171. For a discussion of the Supreme Court of Pennsylvania's latest decisions to exercise King's Bench, and its rationale for doing so, see *supra* Sections III.A–D.

petitions.<sup>172</sup> The Mumia Abu-Jamal appeal currently being reviewed by a King's Bench-appointed special master reflects this importance.<sup>173</sup>

A. *The Supreme Court of Pennsylvania Should Rely on Historical King's Bench Usage*

The Supreme Court of Pennsylvania should invoke King's Bench under the proper circumstances because it has shown caution in its previous uses. These circumstances include remedying judicial misconduct or decisions the supreme court needs to expedite.<sup>174</sup> One of the most valuable resources the court has when deciding whether to exercise King's Bench is its precedent.<sup>175</sup> The Judiciary Act of 1722 established many important functions of the Commonwealth of Pennsylvania, including King's Bench powers.<sup>176</sup> Without relying on its historically flexible interpretation of King's Bench, the court would not have been able to effectively craft a remedy for situations like the "Kids for Cash" scandal.<sup>177</sup>

172. See Aldisert, *supra* note 23, at 486 (elaborating on innate powers of King's Bench and importance of preserving it). In a tribute to former Chief Justice Ralph Cappy, the Honorable Ruggero J. Aldisert said how important King's Bench powers are for the supreme court. See *id.* (stating "unabashed power to make law" allows supreme court to move around typical statutory legislation and enact law); see also Makosky, *supra* note 6, at 700 (opining Pennsylvania should not try to eliminate or limit King's Bench because of its value).

173. See Shaw, *supra* note 164 (illustrating the importance of investigating threats to justice including conflicts of interest).

174. See, e.g., *In re Bruno*, 101 A.3d at 682–83 (arguing that King's Bench usage is "essential and continuing"); Sean P. Mahoney & Ciaran B. Way, *PA Supreme Court Denies "King's Bench" Petition to Consolidate All COVID-19 Business Interruption Cases Pending in State Court*, WHITE & WILLIAMS LLP (May 14, 2020), <https://www.whiteandwilliams.com/resources-alerts-PA-Supreme-Court-Denies-Kings-Bench-Petition-to-Consolidate-All-COVID-19-Business-Interruption-Cases-Pending-in-State-Court.html> [<https://perma.cc/ZA87-723G>] (discussing court's denial of King's Bench petition challenging COVID-19 business interruptions).

175. See, e.g., *In re Bruno*, 101 A.3d at 674–77 (collecting cases where supreme court has used King's Bench); *In re Assignment of Avellino*, 690 A.2d 1138, 1140–41 (Pa. 1997) (rejecting argument supreme court could not assume jurisdiction even without a matter pending in lower court); *Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426, 429 (citing *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886)) (utilizing holding from *Balph* to conclude writ of prohibition does not have to be issued using original jurisdiction); Makosky, *supra* note 6, at 686–93 (listing several instances where court has relied on its King's Bench).

176. See Sherer, *supra* note 7, at 528 (explaining creation and powers of supreme court in Pennsylvania); *id.* at 528 n.19 (showing England's possession over right to appeal from Supreme Court of Pennsylvania). For further discussion of the origins of King's Bench, the original intent of the King's Bench in Pennsylvania, and its subsequent changes, see *supra* Section II.A.

177. See *In re Bruno*, 101 A.3d at 670–71 (explaining how court has made use of King's Bench in past). The court detailed when King's Bench powers usually come into play—in situations where the court must "supplement existing procedural processes that have proven inadequate." *Id.* at 670. With this flexible framework, the court almost described King's Bench as a last resort remedy, and with that, remedied the "Kids for Cash" scandal. See *id.* at 671, 675 (explaining why past examples of King's Bench usage are important to consider).

Notably, any time the court has previously invoked King's Bench, it has been careful to explain why an issue, case, or decision requires use of the powers.<sup>178</sup> Conversely, if the court declines a King's Bench petition, it does not need to justify its decision.<sup>179</sup> A simple denial would likely serve as a signal the court already recognizes that it should not use King's Bench without a compelling justification.<sup>180</sup> This is evidenced from its decision in *Cox* to deny a King's Bench petition in the capital punishment controversy.

Further, the court should avoid serving as the fact finder when exercising King's Bench powers.<sup>181</sup> As evidenced in the *Mumia Abu-Jamal* case, the court is more willing to appoint a special master to conduct fact finding.<sup>182</sup> The justices have delegated this responsibility before choosing to hear the case on appeal.<sup>183</sup> Although the current King's Bench function is not identical to its original function in English law, it serves a useful role when the court is willing to rely on other judicial functions in the process.<sup>184</sup>

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178. See *id.* at 674–77 (reviewing situations where King's Bench was utilized and why); see also Mitchell, *supra* note 5 (explaining how King's Bench powers are limited to use in urgent circumstances). When asked about what situations qualify for King's Bench, former Chief Justice Castille stated, “the court should not take publicity of a case into consideration when deciding whether to exercise [the] powers.” Mitchell, *supra* note 5.

179. See *Cox v. Commonwealth*, 218 A.3d 384, 385 (Pa. 2019) (declining to exercise King's Bench without explanation). Because a moratorium existed on the death penalty in Pennsylvania, some justices signaled during oral arguments there may not exist the pressing issue of immediate importance the court typically saves King's Bench for. See Maryclaire Dale, *Pennsylvania High Court Asked to Throw Out Death Penalty*, MORNING CALL (Sept. 11, 2019, 5:33 PM), <https://www.mcall.com/news/breaking/mc-nws-pa-supreme-court-asked-to-throw-out-death-penalty-20190911-uudtb6qxsbh6bpfdzvtklaswti-story.html> [<https://perma.cc/3Y3M-PL6S>] (recalling Justice Todd's line of questioning of whether particular case met urgency requirement because of moratorium on death penalty).

180. Compare *Cox*, 218 A.3d at 385 (denying King's Bench jurisdiction without explanation), with *In re Bruno*, 101 A.3d at 674–77 (providing details for its reasons to invoke King's Bench jurisdiction).

181. See Makosky, *supra* note 6, at 697 (recommending supreme court not act as fact finder in King's Bench cases). Acting as an individual fact finder could devalue the intent behind King's Bench unless the supreme court is forced to decide an emergency matter. See Benjamin Pontz, *A Ruling Can Come As Soon As This Week in Legal Standoff Between Wolf and Pa. Legislature*, PA. POST (June 22, 2020, 12:12 PM), <https://papost.org/2020/06/22/a-ruling-could-come-as-soon-as-this-week-in-legal-standoff-between-wolf-and-pa-legislature/> [<https://perma.cc/CL22-7L5X>] (explaining how the court must adjudicate COVID-19 dispute in emergency fashion). Even then, the court still has elected to use any tools available to it in the judiciary to conduct expedited and efficient fact-finding. See *supra* Section III.B (discussing court's choice to appoint Special Master in “Kids for Cash” scandal).

182. See *supra* notes 166–67 and accompanying text (highlighting court's choice to appoint special master in *Abu-Jamal* case).

183. See, e.g., *supra* Section III.B (discussing special master in “Kids for Cash” scandal).

184. See Sherer, *supra* note 7, at 535–37 (asserting King's Bench functions in Pennsylvania far beyond what early eighteenth-century Pennsylvania legislators in-

Through careful selection of cases, the Supreme Court of Pennsylvania has utilized King's Bench in ways that have been valuable.<sup>185</sup> The court has not used the powers as a weapon to overrule cases it disagrees with, but has furthered its own obligations under article V.<sup>186</sup> This is evidenced by the court's recent denial of King's Bench to determine the constitutionality of the death penalty in the commonwealth.<sup>187</sup> The Pennsylvania legislature should be aware of the positive impact—an impact that the legislature would not be able to provide using its article II powers—King's Bench decisions have had in the judicial system.<sup>188</sup> The court also has explained how other judicial bodies can coexist with King's Bench.<sup>189</sup> In addition to the other judicial bodies, other avenues remain besides King's Bench for the supreme court to use to cure injustice.<sup>190</sup> Therefore, removal of King's Bench is unnecessary and would alter the historical balance of power for the supreme court.<sup>191</sup>

### B. *The Court Maintains Deference to Other Judicial Bodies*

While critics have argued King's Bench serves as a mechanism for judicial overreach, reliance on the powers is called for only in extreme circumstances.<sup>192</sup> This is why the Supreme Court of Pennsylvania puts faith

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tended); *id.* (stating King's Bench function has transformed into one not originally intended by those enacting it).

185. For further discussion of recent examples of how the Supreme Court of Pennsylvania has used King's Bench, see *supra* Part III.

186. See *In re Bruno*, 101 A.3d 635, 675 (Pa. 2014) (explaining how King's Bench allows court to fulfill its article V responsibilities). To ensure King's Bench powers are not used as a weapon, the supreme court reiterates the powers are to be "exercised with extreme caution." *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (explaining process court must engage in to properly exercise King's Bench powers).

187. For further discussion of the court's decision to decline King's Bench jurisdiction to hear the capital punishment challenge, see *supra* Section III.C.

188. See *Makosky*, *supra* note 6, at 686–87 (commenting on multitude of instances where supreme court has used its King's Bench abilities to protect public). King's Bench could serve as a mechanism for bypassing the lengthy procedural or litigation process to make instant change, but the court must not encroach too far on the ability of the elected representatives. See *id.* at 679, 686. Further, the supreme court has utilized King's Bench in areas where the legislature has enacted laws subject to variable interpretation by lower courts. *Id.* at 689–90 (listing three examples of cases court clarified using King's Bench).

189. See *In re Bruno*, 101 A.3d at 685–88 (explaining how lower disciplinary courts exist alongside supreme court's appellate authority).

190. For further discussion on the similarities and differences of King's Bench and extraordinary jurisdiction, see *supra* Section II.C.

191. See *Makosky*, *supra* note 6, at 700 ("The Legislature . . . should not attempt to fix what is not broken.").

192. See *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (stating King's Bench is typically relied on in situations of time-sensitive public importance where procedural delay would be harmful).

in other judicial and legislative bodies to resolve issues.<sup>193</sup> Even though the court's King's Bench powers supersede any judicial discipline committee, groups like the CJD and JCB oversee issues similar to those that the supreme court has decided using King's Bench.<sup>194</sup>

The supreme court has clarified it still has power over other bodies when reviewing cases involving judicial misconduct.<sup>195</sup> The supreme court deserves to hold its prescribed King's Bench authority, but it does not need to be the only court tasked with maintaining integrity in the judiciary because other courts address disciplinary issues.<sup>196</sup> Recently, the supreme court has relied on the lower courts to adjudicate PCRA appeals instead of immediately deciding them using King's Bench.<sup>197</sup> One justice on the court believes more power should be placed in lower courts, such

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193. See, e.g., *Cox v. Commonwealth*, 218 A.3d 384, 385 (Pa. 2019) (declining to exercise King's Bench jurisdiction and allowing individual claims to proceed within limitations of other tribunals). Denial of King's Bench effectively showed the supreme court trusted other judicial bodies to properly adjudicate death penalty appeals. See George Ferko, Opinion, *Pennsylvania Supreme Court Is Right to Reject Petition Against Death Penalty*, PHILA. INQUIRER, <https://www.inquirer.com/opinion/commentary/pennsylvania-death-penalty-supreme-court-petition-jurisdiction-20190927.html> [permalink unavailable] (last updated Sept. 27, 2019, 1:19 PM) (explaining why people of Pennsylvania should decide through legislature whether death penalty should exist, and not seven supreme court justices).

194. See PA. CONST. art. V. §§ 18(a) (outlining independent board of judicial branch, the JCB, and composition of members); 18(b) (detailing requirements and members of CJD). The Judicial Conduct Board is responsible for filing charges against members of the judiciary, while the CJD adjudicates the dispute. See *id.* §§ 18(a)–(b).

195. See *In re Bruno*, 101 A.3d 635, 679 (Pa. 2014) (opining supervisory authority over courts extends past forms of procedure). The court challenged petitioners' reliance on legislative debate concerning article V section 18 and whether it stripped the supreme court of the ability to act where the Board of Judicial Discipline or CJD might act. See *id.* at 681 n.25. According to the court, the CJD can take action, but the supreme court had a far broad ability to act using King's Bench. *Id.* at 683 n.26.

196. See Jonathan P. Nase, *Pennsylvania's Evolving Judicial Discipline System: The Development and Content of the 1993 Constitutional Amendments*, 98 DICK. L. REV. 429, 449 (1994) (explaining how 1993 amendments to Pennsylvania constitution allowed other judicial bodies to operate more independently from supreme court). The amendments called the supreme court's disciplinary authority into question with newer available courts being implemented. See *id.* at 449 n.140.

197. See 20 WEST'S PA. PRACTICE, APPELLATE PRACTICE § 10:23, Westlaw (database updated 2020) (noting supreme court has already declared it unnecessary in certain instances to bypass statutory jurisdiction of traditional PCRA court appeal); *Commonwealth v. Porter*, 728 A.2d 890, 893–94 (Pa. 1999) (declining petitioner's request for King's Bench relief because court had previously assumed jurisdiction of matter through post-conviction relief procedure). Although limited in analysis, the supreme court issued a per curiam statement in *Cox* suggesting normal death penalty convictions should be appealed through PCRA courts instead of being directly challenged using King's Bench. See *Cox*, 218 A.3d at 385 (Pa. 2019) (declining to exercising King's Bench powers to hear merits of challenge to death penalty).

as the CJD, to draw conclusions.<sup>198</sup> Through careful deliberation, the legislature formed these judicial bodies to address misconduct or unfairness in the judicial system.<sup>199</sup> The court should trust these judiciary bodies to preserve the people's trust in the judiciary, but at the same time, it should not override the inherent authority of King's Bench.<sup>200</sup> But when the court feels the need to insert itself, it has the supervisory power to do so.

### C. *The Danger of Removing King's Bench Powers*

Despite the positive impact of King's Bench, the legislature still has the ability to eliminate it altogether.<sup>201</sup> Some commentators have argued King's Bench powers are not inherent, and the legislature is able to eliminate parts or all of King's Bench through constitutional ratification.<sup>202</sup> Others suggest that, because article V of the commonwealth's constitution enumerates the supreme court's powers, the court cannot possess powers beyond those in the text.<sup>203</sup> On the other hand, some believe the historical interpretation of King's Bench shows the powers transcend even those

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198. See *In re Bruno*, 101 A.3d at 696 (Saylor, J., concurring) (recommending in cases similar to suspension of Judge Bruno that CJD's decision should be given more authority). Chief Justice Saylor currently sits on the supreme court, and in his concurrence, he argued the CJD is "better equipped" to fact find, draw conclusions, and create consistent orders between the court and other tribunals. *Id.* (believing majority's decision would leave public questioning whether JCB serves a valid purpose).

199. See Nase, *supra* note 196, at 446–49 (discussing legislature's eventual decision to form judicial bodies in article V section 18).

200. See *id.* at 449 (showing 1993 amendments provide avenues for judicial bodies to alleviate some responsibility of supreme court and act independently from it).

201. See Sherer, *supra* note 7, at 533–34 (describing Convention's debate over scope and existence of King's Bench). For discussion of the 1968 Pennsylvania Constitutional Convention and its debate over whether to remove the powers of King's Bench, see *supra* Section II.B.

202. Compare *In re Bruno*, 101 A.3d at 676 (Pa. 2014) (citing *Stander v. Kelley*, 250 A.2d 474, 487 (Pa. 1969) (Roberts, J., concurring)) (indicating even the Legislature does not possess the power to remove, impair, or interfere with the supreme court's King's Bench authority), and Makosky, *supra* note 6, at 700 ("The interference by the Legislature . . . likely will be considered unconstitutional by the supreme court . . ."), with Ledewitz, *supra* note 20, at 411–12 (arguing King's Bench powers are not inherent and can be removed).

203. See *Commonwealth v. Williams*, 129 A. 3d 1199, 1219–20 (Pa. 2015) (Stevens, J., concurring) (emphasizing legislature's ability and duty to make law, and other two branch's inability to nullify it); see also *In re Bruno*, 101 A.3d at 681 (stating elimination of King's Bench must be "expressed or necessarily implied" from commonwealth constitution in order for supreme court to not give it effect). Justice Stevens' concurrence in *Williams* highlighted the importance of separation of powers, why the legislature is responsible for the law, and why the legislature should not be "nullifi[ed] . . . by fiat by the [j]udiciary." *Williams*, 129 A.3d at 1220.



enumerated in the constitution.<sup>204</sup> Regardless, the only way King's Bench powers should be changed is through legislation that ratifies the law. The legislature's ability to do this is rooted in article II of the constitution.<sup>205</sup> But the legislature should recognize that King's Bench allows the commonwealth to address issues that often cannot be resolved efficiently by any other branch of government. Its unique function helps bring resolution some of the most difficult matters the government faces.<sup>206</sup>

Commentators and former justices have argued the powers are inherent and too transcendent to be altered. If the supreme court is entrusted with jurisdiction in article V "as provided by law," it should be subject to the bounds set forth by law.<sup>207</sup> If the legislature made changes to King's Bench powers, the court would be limited in its ability to protect its own authority.<sup>208</sup> But any decision by the legislature to restrict or eliminate King's Bench would be against the history and tradition of the commonwealth.<sup>209</sup> The supreme court has used King's Bench powers cautiously to clarify issues, rectify systemic problems, or remedy injustice that extends beyond one ruling.<sup>210</sup>

D. *The Supreme Court of Pennsylvania Correctly Exercised King's Bench in the Mumia Abu-Jamal Case*

The exercise of King's Bench authority will remain in the legal spotlight in the short term. For instance, the current COVID-19 pandemic has forced the court to decide whether Governor Tom Wolf's executive orders violate the constitutional rights of various businesses.<sup>211</sup> Also, the supreme court's decision in *League of Women Voters* to use closely related extraordinary jurisdiction could offer other states guidance in deciding

204. See *Stander*, 250 A.2d at 426–27 (Roberts, J., concurring) (stating interpretation of "law" should be beyond law of the constitution, and prevent supreme court's powers from being limited by legislature).

205. See PA. CONST. art. II, § 1 (granting lawmaking power to general assembly of Pennsylvania); *In re Bruno*, 101 A.3d at 681 (explaining that only way to effectively remove King's Bench powers is through constitutional amendment).

206. See *Mahoney & Way*, *supra* note 3 (giving the court the expedited opportunity to determine the validity and constitutionality of Governor Wolf's COVID-19 executive orders).

207. PA. CONST. art. V, § 2(c). *But see In re Bruno*, 101 A.3d at 669 ("[T]he Court may employ any type of process or procedure necessary for the circumstances.").

208. Compare *Ledewitz*, *supra* note 20, at 411–12 (combating statements made by former supreme court justices that any revocation of inherent power by limiting or manipulating article V could be declared unconstitutional), with *Makosky*, *supra* note 6, at 678 (arguing supreme court would declare any constitutional amendment limiting or abolishing King's Bench powers to be unconstitutional).

209. For further discussion of the history of King's Bench in Pennsylvania, see *supra* Sections II.A–B.

210. For examples of when the supreme court has decided King's Bench powers are necessary to use, see *supra* Section III.C.

211. See *Mahoney & Way*, *supra* note 3.

political gerrymandering issues.<sup>212</sup> Even further, the famous rapper Meek Mill's legal proceedings sparked a King's Bench discussion among his fans following his ongoing criminal justice battle.<sup>213</sup> King's Bench powers allowed the court to step in and grant the rapper's bail after a Court of Common Pleas judge resentenced him for a probation violation, sparking national controversy.<sup>214</sup> A broad interpretation of King's Bench allows the court to efficiently rectify complex cases like Meek Mill's.<sup>215</sup>

The ongoing legal battle for Mumia Abu-Jamal is another example where the supreme court correctly exercised King's Bench powers.<sup>216</sup> The issue has drawn national media attention to a high-profile figure respected among racial equality advocates.<sup>217</sup> It has also drawn attention to Maureen Faulker, who has emerged as an advocate for crime victims' families.<sup>218</sup> The supreme court has been willing to exercise jurisdiction any time it believes the judiciary's integrity has come into question, and these circumstances reflect the need to intervene.<sup>219</sup> The court mimicked its approach from the "Kids for Cash" scandal by appointing a special

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212. See Editorial Board, Opinion, *Eric Holder's Gerrymander Doctrine*, WALL ST. J. (Nov. 19, 2019, 7:13 PM), <https://www.wsj.com/articles/eric-holders-gerrymander-doctrine-11574122412> [permalink unavailable] (acknowledging supreme court's decision in *League of Women Voters* could provide a blueprint for future state appellate courts to address political gerrymandering problems in country). For a further discussion extraordinary jurisdiction and its similarities to invoking King's Bench, see *supra* Section II.C.

213. See Mitchell, *supra* note 5 (discussing disagreement among legal profession as to exercise of King's Bench in Meek Mill's case).

214. See Elahe Izado & Sonia Rao, *Meek Mill to Be Released From Prison After Pennsylvania Supreme Court Orders That He Be Granted Bail*, WASH. POST (Apr. 24, 2018, 5:46 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/04/24/pennsylvania-supreme-court-orders-meek-mill-immediately-be-granted-bail/> [<https://perma.cc/PG64-9EUR>] (explaining situation causing rapper's legal battle to enter national spotlight).

215. For discussion of why the supreme court should lean on the broad historical interpretation of King's Bench, see *supra* Section IV.A.

216. For background on the Abu-Jamal appeal, see *supra* Section III.D.

217. See Lowery, *supra* note 152 (noting how Abu-Jamal became an internationally recognized figure following his arrest); see also Allyn, *supra* note 158 ("The movement to 'Free Mumia' reverberated around the world over the decades, with thousands donating to his legal defense fund. Buttons and posters bearing his face became the symbols of a criminal justice system that critics view as being rigged and treating African-American with indifference.").

218. See George Parry, Opinion, *Removing DA Krasner From Mumia Abu-Jamal Case Would Be a Step Forward for Victims and Their Families*, PHILA. INQUIRER, <https://www.inquirer.com/opinion/commentary/maureen-faulkner-mumia-linda-schellen-ger-larry-krasner-20191114.html> [permalink unavailable] (last updated Nov. 14, 2019, 1:51 PM) (arguing Faulkner's ability to highlight Krasner's agenda shows Krasner "depriv[es] crime victims, their loved ones, and the public at large" of justice under law).

219. See, e.g., FREE MUMIA, <http://www.freemumia.com> [<https://perma.cc/R3T9-7Q9V>] (last visited Mar. 18, 2020) (alleging problem of racial bias in judicial proceedings).

master.<sup>220</sup> The decision to appoint a fact finder is not uncommon, as the court appointed a fact finder who has had prior experience as a special master.<sup>221</sup>

The court uses King's Bench subjectively and is responsible for how far its powers extend. Nevertheless, the Abu-Jamal case meets every requirement the supreme court traditionally considers when deciding whether King's Bench powers are needed.<sup>222</sup> Like *In re Bruno*, the controversy surrounds someone tasked with fairly upholding the rule of law.<sup>223</sup> Like *In re Petitions of Bell*, Abu-Jamal's case raises questions of misconduct within the judicial system.<sup>224</sup> The supreme court would not effectively fulfill its judicial oversight obligation if it did not investigate District Attorney Krasner's alleged conflict of interest.

Further, the Abu-Jamal case surrounds one of the most controversial issues in the Pennsylvania judiciary—the death penalty.<sup>225</sup> Last year, the court declined a King's Bench petition concerning the constitutionality of the death penalty in the commonwealth.<sup>226</sup> Abu-Jamal's appeal could cause a rise in the number of capital punishment appeals claiming racial bias.<sup>227</sup> This has been acknowledged by District Attorney Krasner's team, who stated that the reason they dropped their challenge to Abu-Jamal's appeal was their belief that “long-settled convictions in other cases will not be disturbed.”<sup>228</sup>

Abu-Jamal's case illustrates why King's Bench powers are necessary in the presence of potential wrongdoing. It exemplifies how the court takes special care to allow only limited use of King's Bench and how it tradition-

220. See Needles, *supra* note 19 (discussing how special master appointed in Abu-Jamal case had significant role in “Kids for Cash” scandal).

221. See *id.*

222. See *In re Bruno*, 101 A.3d 635, 674–77 (Pa. 2014) (detailing reasons court might exercise King's Bench jurisdiction); see also Shaw, *supra* note 164 (highlighting court's invocation of King's Bench to investigate conflicts of interest in Abu-Jamal case).

223. For further discussion of the controversy in *In re Bruno*, see *supra* Section III.A. Additionally, for a further discussion of District Attorney Krasner's alleged conflict of interest in the Abu-Jamal case, see *supra* Section III.D.

224. For a further discussion of the *In re Petitions of Bell* decision to exercise King's Bench, see *supra* Section II.A.

225. For further discussion of other capital punishment cases where the court exercised King's Bench, specifically, the *Williams* opinion, see *supra* Section III.A.

226. For further discussion on the court's decision to decline King's Bench jurisdiction to assess death penalty, see *supra* Section III.C.

227. See Michael D'Onofrio, *D.A. Krasner Drops Appeal in Mumia Abu-Jamal Case*, PHILA. TRIBUNE (Apr. 17, 2019), [https://www.phillytrib.com/news/local\\_news/d-a-krasner-drops-appeal-in-mumia-abu-jamal-case/article\\_65fce931-8ab2-5aad-8749-657b631d3cd6.html](https://www.phillytrib.com/news/local_news/d-a-krasner-drops-appeal-in-mumia-abu-jamal-case/article_65fce931-8ab2-5aad-8749-657b631d3cd6.html) [<https://perma.cc/PJP2-AHZ7>] (noting District Attorney's office feared hundreds of capital appeals claiming racial bias).

228. *Id.* (showing District Attorney Krasner reversed original position after clarification from Judge Leon Tucker's original opinion).

ally avoids acting as a fact finder.<sup>229</sup> Regardless of whether the court decides to prevent District Attorney Krasner from being involved in Abu-Jamal's appeal, it took a necessary step by granting King's Bench to resolve an issue important to many people.

#### V. LOOKING AHEAD: THE FUTURE IMPACT OF THE KING'S BENCH

As king of the commonwealth's judiciary, the supreme court will likely have numerous future petitions seeking King's Bench review. The court will likely hear from the special master appointed in the Mumia Abu-Jamal appeal this year.<sup>230</sup> The decision will not only have implications on Abu-Jamal's chances of future appeal, but also will have implications on District Attorney Krasner's record as an impartial prosecutor.<sup>231</sup>

The supreme court has supplied lower tribunals and legal commentators with many reasons why King's Bench should be used in some circumstances.<sup>232</sup> The court has also emphasized its cautious approach to using King's Bench and why certain instances do not require it.<sup>233</sup> The debate surrounding King's Bench and whether it is a valid function of the supreme court will continue to be discussed.

Supreme court justices are chosen in partisan elections and serve ten-year terms.<sup>234</sup> Therefore, it is up to the people to decide who will have King's Bench power. Courts are generally subject to scrutiny of engaging in judicial overreach in instances where individuals of a particular political ideology do not agree with the outcome, so King's Bench decisions made by elected judges must be particularly.<sup>235</sup> To combat this, the supreme

229. For a further discussion of how the court has avoided acting as a fact finder in King's Bench proceedings, see *supra* Section IV.A.

230. See Needles, *supra* note 19 (stating special master has until June to complete his investigation and until August to submit findings and make recommendations to supreme court).

231. Shaw, *supra* note 164 (explaining District Attorney Krasner's potential conflict of interest as prosecutor).

232. See *Commonwealth v. Fahy*, 737 A.2d 214, 224 (Pa. 1999) (declining to exercise King's Bench and deferring to PCRA court authority); *Commonwealth v. Porter*, 728 A.2d 890, 893–94 (Pa. 1999) (choosing not to exercise King's Bench because matter was already before supreme court and was unnecessary to do so again); *Commonwealth v. Appel*, 689 A.2d 891, 909 (Pa. 1997) (rejecting King's Bench because petitioners already brought forth issue before supreme court).

233. For an analysis of the supreme court's reasoning behind exercising King's Bench jurisdiction, even with lower tribunals' capabilities to adjudicate the matters, see *supra* Section III.A.

234. See 42 PA. CONS. STAT. §§ 3131(a) (1976) (amended 2004) (stating judges are elected through municipal elections); 3152(a)(3) (stating tenure of all other Pennsylvania judges, including supreme court justices, is ten years).

235. See Jess Bravin, *Chief Justice Roberts Rebuts Trump's Attacks on Judges, and President Tweets Back*, WALL ST. J., <https://www.wsj.com/articles/chief-justice-rob-erts-rebuts-trumps-attacks-on-judges-1542827385> [permalink unavailable] (last updated Nov. 22, 2018, 11:10 PM) (highlighting dispute between President Trump and Chief Justice Roberts of United States Supreme Court concerning federal judges' decisions criticized by President Trump's ideology).

court should continue to use historical analysis of King's Bench to bolster why it is warranted in certain situations.<sup>236</sup>

Notably, there is no structured or routine way for the court to invoke King's Bench.<sup>237</sup> Decisions granting King's Bench petitions serve as reminders of how compelled the court is to fulfill its oversight obligations.<sup>238</sup> The Supreme Court of Pennsylvania should continue to use King's Bench under proper circumstances if it is to maintain its status as king of the commonwealth's judiciary.

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236. For further discussion of how the supreme court could utilize King's Bench, see *supra* Section IV.A.

237. See *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (stating King's Bench needs no standardized form of procedure and is applicable when supreme court finds appropriate circumstances). For a general discussion of past situations that caused the supreme court's invocation of King's Bench, see *supra* Part III.

238. See *In re Bruno*, 101 A.3d 635, 675, 682–83 (Pa. 2014) (reiterating supreme court's principal objectives in its oversight role and referring to list of examples supreme court used for justifying its King's Bench powers). After listing examples of situations resulting in the court exercising King's Bench, the court reaffirmed its use of King's Bench serves to “guard the fairness and probity of the judicial process.” *Id.*; see also *Williams*, 129 A.3d at 1206 (Pa. 2015) (submitting King's Bench is necessary to an efficient and effective judiciary system); *Carpentertown Coal and Coke Co. v. Laird*, 61 A.2d 426, 428 (Pa. 1948) (asserting one principal purpose for King's Bench jurisdiction is to prevent inferior tribunals from assuming unlawful jurisdiction).